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BAEHRR MYSTERIES, RETROACTIVITY, AND THE
CONCEPT OF LAW

Mark Strasser*

I. INTRODUCTION

In Baehr v. Lewin,1 a plurality of the Hawaii Supreme Court held that the state statute reserving marriage for different-sex couples implicate equal protection guarantees, and then remanded the case to give the state an opportunity to defend the statute's constitutionality. On remand, the lower court found that the state had failed to meet its constitutional burden,2 although that court stayed its own decision pending state supreme court review. In the meantime, the Hawaii electorate amended the state constitution via referendum to permit the legislature to reserve marriage for different-sex couples.

The Hawaii amendment raises a variety of constitutional issues. For example, if indeed the pre-amended constitution guaranteed the right to marry a same-sex partner, then arguably there was a violation of federal constitutional guarantees when state constitutional protections were withdrawn and the marriage rights of a disfavored group were made subject to the will of the state legislature.3 However, when examining the amendment in Baehr v. Miike,4

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* J.D., Stanford Law School; M.A. and Ph.D., University of Chicago; B.A., Harvard College. The author is Professor of Law, Capital University Law School. The author wishes to thank Vincent Samar for his insightful comments on an earlier version of this article.

the Hawaii Supreme Court ostensibly addressed a very narrow issue, namely, whether the amendment retroactively validated a law reserving marriage for different-sex couples, and actually addressed a different narrow issue, namely, how the court might reconcile potentially conflicting constitutional provisions.

The court implicitly held that the amendment retroactively validated a portion of the Hawaii marriage statute, although the opinion was remarkably terse, making its exposition and analysis somewhat difficult. Nonetheless, it is possible to reconstruct some of the possible positions of the court and some of the difficulties inherent therein.

Part II of this Article addresses the existing jurisprudence concerning the conditions under which amendments can retroactively validate statutes or portions thereof, and concludes that the Hawaii constitutional amendment should not have been construed to retroactively validate the same-sex marriage prohibition. Part III addresses a specific provision in the Hawaii Constitution that might be thought to modify the existing jurisprudence. However, both the language of the provision itself and the relevant case law suggest that this constitutional provision reflects the accepted retroactivity jurisprudence and thus cannot justify a departure from that settled approach. Part IV addresses some of the positive aspects or implications of the Baehr decision, e.g., its reaffirmation that same-sex marriage prohibitions classify on the basis of sex and its suggestion that the Hawaii Constitution prohibits discrimination on the basis of orientation. The Article concludes that neither the existing retroactivity jurisprudence nor the unusual Hawaii constitutional provision warrants the Hawaii Supreme Court’s holding that the recent state constitutional amendment retroactively validated a portion of the marriage statute—indeed, the court’s construction of the amendment casts doubt on the amendment’s validity. Nonetheless, the court’s equal protection holding and analysis are positive developments in the movement to secure equal rights for lesbians and gays, and may eventually be seen as the most significant part of the opinion, both locally and nationally.
II. ON AMENDMENTS AND THE RETROACTIVE VALIDATION OF STATUTES

In response to two court decisions suggesting that the state constitution might protect the right to marry a same-sex partner, the Hawaii electorate voted to amend their state constitution to empower the state legislature to reserve marriage for different-sex couples. By doing so, the electorate made it possible for the legislature to pass such a statute without having to worry that the courts might invalidate it on state constitutional grounds. Assuming that the referendum itself violated no constitutional guarantees and that states as a general matter have the power to reserve marriage for different-sex couples, the amendment clearly empowered the Hawaii Legislature to enact a statute precluding same-sex couples from marrying. A separate issue is whether the amendment retroactively validated a portion of the marriage statute thereby limiting marriage to different-sex couples or whether, instead, the amendment merely empowered the legislature to enact a new statute incorporating that restriction.

A. Retroactivity Doctrine

Whenever a court or legislature modifies existing law, those potentially affected by the change need to know when it will go into effect. The general rule is that statutes apply


7. See Philip L. Bartlett II, Recent Legislation, Same-Sex Marriage, 36 HARV. J. on LEGIS. 581, 581 (1999) ("On November 3, 1998, Hawaii voters overwhelmingly passed a referendum amending the state's constitution to give the legislature the power to reserve marriage to opposite-sex couples.").

8. This assumes both that the referendum did not itself offend constitutional guarantees and that federal constitutional protections do not preclude states from reserving marriage for different-sex couples.

prospectively and judicial decisions apply retroactively,\textsuperscript{10} although this general rule, like many others, has exceptions.\textsuperscript{11}

Retroactive application of statutes is not favored in the law\textsuperscript{12} because of unfairness concerns.\textsuperscript{13} Prospective application "prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed."\textsuperscript{14} As the Supreme Court explained in \textit{General Motors Corp. v. Romein},\textsuperscript{15} "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."\textsuperscript{16}

The Court's concern that a retroactive application of the law might undermine legitimate expectations would also support the prospective application of judicial decisions, since individuals' reasonable expectations might be based on case law rather than on statutes, and in either case, individuals might have made plans and commitments based on those reasonable expectations.\textsuperscript{17} Those concerns notwithstanding,

\begin{itemize}
  \item \textsuperscript{10} See Jill E. Fisch, \textit{Retroactivity and Legal Change: An Equilibrium Approach}, 110 HARV. L. REV. 1055, 1057 (1997) ("The general principle that statutes operate prospectively and judicial decisions apply retroactively is a matter of black letter law . . . ."); see also Nelson Lund, \textit{Retroactivity, Institutional Incentives, and the Politics of Civil Rights}, 1995 PUB. INT. L. REV. 87, 87 ("Legislatures declare in general terms what the law shall henceforth be, while courts resolve disputes by declaring the specific effects of preexisting general laws.").
  \item \textsuperscript{11} See William N. Eskridge Jr., \textit{Reneging on History? Playing the Court/Congress/President Civil Rights Game}, 79 CAL. L. REV. 613, 666 (1991) ("The traditional, but not iron-clad, rule has been that legislation only applies prospectively, whereas judicial interpretation of legislation applies retroactively.").
  \item \textsuperscript{12} See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").
  \item \textsuperscript{13} See Brian Neff, \textit{Comment, Retroactivity and the Civil Rights Act of 1991: An Opportunity for Reform}, 1993 UTAH L. REV. 475, 476 ("Retroactive legislation has long been recognized as carrying special potential for unfairness.").
  \item \textsuperscript{14} Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913).
  \item \textsuperscript{15} 503 U.S. 181 (1992).
  \item \textsuperscript{16} \textit{Id.} at 191.
  \item \textsuperscript{17} See State v. Ikezawa, 857 P.2d 593, 598 (Haw. 1993) ("[W]here substantial prejudice results from the retrospective application of new legal principles to a given set of facts, the inequity may be avoided by giving the guiding principles prospective application only.").
\end{itemize}
however, judicial decisions are often applied retroactively, and thus the desire to prevent unfairness cannot alone explain the different presumptions concerning the retroactivity of judicial and legislative acts.

In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, the Court discussed the "ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which even the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning." Thus, if the Court declared a statute unconstitutional but then subsequently overruled itself, the Court's initial ruling of unconstitutionality might be viewed as if it had never occurred and the statute might be viewed as if it had been good law from the beginning. According to this theory, judges report what the law is rather than create the law, and a "misstatement" by a court about the law would not change the character of the law itself but, instead, would only be an inaccurate reporting of that law. Once the court corrects its inaccurate reporting, the law (which had always existed even if it had been mis-described) could even be applied to events that had occurred before the mis-description had been corrected.

18. See Mark Strasser, Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice, 29 RUTGERS L.J. 271, 304 (1998) ("[T]he Court's position now seems to be that it will retroactively apply its most recent interpretation of federal law, justified expectations or reliance interests of the parties notwithstanding.").


20. *Id.* at 365.

21. *Id.* at 365.

22. *Id.* at 201.


The concept is that judges discover the law; they do not create it. As such, judicial decisions "are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation." Because a decision that holds a statute unconstitutional does not abolish or repeal the act, the
Certainly, it might be suggested that the above theory inappropriately reifies the law and, further, imposes unfair burdens on individuals who might be acting in light of the court's past "misstatement" of the relevant law. States have the option of saying that individuals will be bound by the "misstated law" until the court has corrected its own misstatement, although states do not have to do so as long as no other constitutional provisions would thereby be violated.

The analysis above distinguishing between the law on the one hand and how it is reported on the other is not helpful in a situation in which a legislature has modified an existing law. In that situation, the modified law came into being in its current form when the legislature changed the former law. Because the law is new (insofar as it has been modified), it subsequent overruling decision merely reaffirms the statute's validity, permitting its enforcement without reenactment.

*Id.* at 112.

23. See Jerome A. Hoffman, *Thinking About Presumptions: The "Presumption" of Agency from Ownership as Study Specimen*, 48 ALA. L. REV. 885, 950 n.243 (1997) ("One reifies 'law,' of course, when one responds to the idea of law as if it were a thing—or more accurately, an essence, a spirit, a brooding omnipresence in the sky. Symptoms of this mindset abound. One hears talk of The Law.").

24. The Alabama Supreme Court reversed itself with respect to whether the state's anti-miscegenation law violated equal protection guarantees, overruling its former finding that such a law was unconstitutional. *See* *Green v. State*, 1877 WL 1291 (Ala.). The question before the court was whether the defendant had committed a crime by marrying someone of a different race, and the court held that she had, notwithstanding that the court had previously suggested that the state statute violated the Fourteenth Amendment to the Federal Constitution. *See* *Burns v. State*, 1872 WL 895 *1-2. Because she had married in 1876, *see* *Green*, 1877 WL at *1, which had occurred after *Burns* but before *Green* had been decided, the court recognized that it would be unfair to punish her for this "crime." The court wrote, "In view of the decision made by our predecessors in ... [Burns], which is hereby overruled, we trust that the Executive of the State will find just reasons in this case, why appellant should receive a pardon." *Id.* at *6. The court did not hold that this prosecution was a denial of due process or involved an ex post facto law—on the contrary, the conviction was upheld, but the court suggested that a pardon should be issued. *See id.*

25. The Court also discussed the possibility that a state might choose to say that the decision was good law until it was overruled. *See* Great N. Ry. Co., 287 U.S. at 364 ("A state ... may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions."); *see also* State v. Ikezawa, 857 P.2d 593, 597 (Haw. 1993) ("Although judicial decisions are assumed to apply retroactively, such application is not automatic.").

26. This way of speaking also seems to reify the law. The point here is not to engage in ontological debate but merely to distinguish between laws that have been changed by the courts versus those changed by legislatures.
cannot be claimed that the law has always existed in its current form and thus would appropriately be applied retrospectively.\textsuperscript{27}

To make clear how the above theory treats legislative modifications on the one hand and judicial modifications on the other, consider a legislature that has passed a statute, repealed it, and then reenacted it. Each legislative enactment would be prospective\textsuperscript{28} because the existing law would have changed after each enactment. Thus, absent specific language to the contrary,\textsuperscript{29} only events occurring after enactment would be subject to the newly adopted rule.

Consider a different scenario: The legislature passes a law and opponents challenge it. The state supreme court holds that it is unconstitutional, but then, subsequently, overrules the opinion striking down that law. According to the theory described here, the law would have existed the entire time, even though the court had mistakenly held that the law was unconstitutional.\textsuperscript{30} Further, the law could be

\textsuperscript{27} See supra notes 19-22 and accompanying text.

\textsuperscript{28} This would be true unless the legislature explicitly made clear that the statute was to have retroactive effect. See infra note 35 and accompanying text.

\textsuperscript{29} See infra note 35 and accompanying text.

\textsuperscript{30} See McCollum v. McConaughy, 119 N.W. 539, 541 (Iowa 1909) (“That a statute which has been held unconstitutional, either \textit{in toto} or as applied to a particular class of cases, is valid and enforceable after the supposed constitutional objection has been removed, or in cases in which the objection is not applicable, is well settled.”) (citing \textit{In re Rahrer}, 140 U.S. 545 (1891));

It was not the overruling of those cases which gave validity to the statutes; but the cases having been overruled, the statutes must be regarded as having all the time been the law of the State. This court has no power to repeal or “abolish” statutes. If it shall hold an act of the legislature unconstitutional, while its decision remains, the act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of parties must be determined accordingly.

\textsuperscript{Pierce v. Pierce, 46 Ind. 86, 95-96 (1874); Jawish v. Morlet, 86 A.2d 96, 97 (D.C. App. 1952) (“There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require re-enactment by the legislature in order to restore its operative force.”); see also Earl T. Crawford, The Legislative Status of an Unconstitutional Statute, 49 MICH. L. REV. 645, 651 (1951) (“It can probably be stated as a general rule, applicable even in those jurisdictions which regard an unconstitutional statute as void, that re-enactment is not necessary to make the statute effective as a law again where the decision declaring it unconstitutional has been subsequently overruled.”).
applied to events that had occurred even before the court had overruled itself because the law would have existed then even if the court had not recognized that fact.

The above theory regarding which changes to statutes should be applied retroactively does not entirely reflect current retroactivity practices. Considerations of fairness or public policy might militate against applying a law to particular parties when the court has once declared the law unconstitutional and subsequently declared it constitutional, notwithstanding that, in theory, the law had always existed and the court had simply been mistaken about its constitutionality.

There is another respect in which the above theory of retroactivity does not account for current practices. Statutes can be applied retroactively as long as two conditions are met: (1) the Legislature clearly intended the statute to be retroactive, and (2) no constitutional guarantees would be violated by applying the statute retroactively.

The Court has made clear that the "first rule of construction is that legislation must be considered as


The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Id. at 374.

32. See Lemon v. Kurtzman, 411 U.S. 192, 199 (1973) ("However appealing the logic of Norton may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct."); cf. Norton v. Shelby Co., 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.").

33. In re Marriage of Buol, 218 Cal. Rptr. 31 (1985) (en banc).

Legislative intent, however, is only one prerequisite to retroactive application of a statute. Having identified such intent, it remains for us to determine whether retroactivity is barred by constitutional constraints. We have long held that the retrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract.

Id. at 34.
addressed to the future, not to the past." As the Supreme Court of Alabama explained, "statutes generally will be held to operate prospectively unless the purpose and intention of the legislature to give them a retrospective effect clearly appears." Especially where the statute regulates conduct or interferes with previously existing rights, "a retrospective operation will not be given to a statute . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" Further, courts will decline to give a statute retroactive effect if doing so "would result in manifest injustice."

A legislature that clearly expresses its intention to make a statute retroactive will not guarantee the constitutionality of that statute, even if its constitutionality would not be in question were it to apply prospectively only. As the United States Supreme Court has explained, "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."

Retroactive legislation may be struck down if it "abrogates 'vested rights'" or "deprives a person of a vested..."
right without due process of law." Some courts and commentators reject the vested rights analysis in favor of a consideration of:

such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.\textsuperscript{42}

In any event, the Court has made quite clear that not all retroactive statutes violate constitutional guarantees.\textsuperscript{43}

The general rule is that modifications to the law made by legislatures are prospective only and that modifications made by judges are retrospective. However, some court-made changes are prospective and, more importantly for purposes here, some legislative changes are retroactive. Nonetheless, although legislative changes to the law can be retroactive, they are still disfavored, both in that the retroactive application must be clearly expressed and in that the retroactive application itself must survive constitutional analysis.

\textbf{B. On Amendments and Retroactive Validation}

Courts have taken a number of approaches with respect to whether a state constitutional amendment can retroactively validate a statute enacted prior to the

\textsuperscript{41} In re\textsuperscript{Marriage of Buol, 218 Cal. Rptr. 31, 34 (1985) (en banc).}

\textsuperscript{42} In re\textsuperscript{Marriage of Bouquet, 128 Cal. Rptr. 427, 433 (1976) (en banc); see also James L. Kainen, The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights, 79 CORNELL L. REV. 87, 114 (1993) ( "[U]nder the modern analysis a right's vulnerability to subsequent legislative interference does not depend upon whether the right has 'vested.' Substantive due process provides the test. Courts consider the rationality, reasonableness or arbitrariness of legislation-factors which attach no independent significance to a statute's being vested rights-retroactive." ) (footnotes omitted).}

\textsuperscript{43} See Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 HARV. L. REV. 692, 694-95 (1960) ( "[T]he Court has consistently held that not all retrospective statutes are unconstitutional, but only those which, upon a balance of the considerations on both sides, are felt to be unreasonable." ); see also In re\textsuperscript{Marriage of Bouquet, 128 Cal. Rptr. at 432 ("Retroactive legislation, though frequently disfavored, is not absolutely proscribed.").
amendment's adoption. For example, the Supreme Court of Michigan suggested that if a legislature is prohibited from passing a particular law and nonetheless does so, "such enactment is of no more force or validity than a piece of blank paper, and is utterly void, and power subsequently conferred upon the legislature by an amendment of the constitution does not have a retroactive effect, and give validity to such void law." The Nevada Supreme Court offered a similar analysis. "An act of the legislature which is not authorized by the state constitution at the time of its passage is absolutely null and void." Indeed, the Nevada court suggested, "It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence. It is as if it had never been enacted, and it is to be regarded as never having been possessed of any legal force or effect." Basically, the supreme courts of both Michigan and Nevada suggest that an unconstitutional act should be treated as if it had never been passed and thus, "no subsequent adoption of an amendment to the constitution, authorizing the legislature to [pass such an act] ... would have the effect to infuse life into a thing that never had any existence."

If, indeed, "the statute was in conflict with the constitution as it stood at the time of the passage of the law, the subsequent change in the constitution, authorizing such legislation, would not validate it." As the United States Supreme Court has explained, "An after-acquired power cannot ex proprio vigore validate a statute void when enacted." Thus, if in fact the Hawaii Legislature had been precluded from reserving marriage for different-sex couples before the adoption of the recent amendment, then any such marital exclusion would have been void and would have required reenactment after the amendment's adoption to have the force of law.

Suppose that the situation described above is a little different. A state legislature enacts a law that does not violate the state constitution but, instead, violates the Commerce Clause and, thus, is void. However, Congress subsequently

44. Seneca Mining Co. v. Secretary of State, 47 N.W. 25, 26 (Mich. 1890) (emphasis added).
46. Id.
47. Id.
acts to remove the bar to such legislation. The question would be whether the legislation would have to be re-enacted once that bar had been removed or whether, instead, the legislation would have been retroactively validated when Congress acted to permit such legislation. The West Virginia Supreme Court suggested that the "removal of the [Commerce Clause] limitation by the act of Congress ... [would] not convert it [the statute which, when enacted, violated that clause] into a valid statute, nor put life or efficacy into it."\(^50\) The court explained that a "void statute can be made effective only by re-enactment"\(^51\) and, unless this had occurred, the statute would not be valid.\(^52\)

The position above might seem to suggest that statutes

51. Id.

Prior to the act of Congress known as the "Wilson Act," passed August 8, 1890 (chapter 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), section 1 of chapter 32, of the Code of 1899 (Code 1906, § 913), did not inhibit soliciting orders for liquors in this state, as the basis of sales to be consummated in, and shipments to be made from, places in other states. If the legislature intended the statute to have such scope and effect, it was, to that extent, in conflict with federal interstate commerce law, and therefore, void for want of power in the state legislature to enforce it. This limitation upon the power of the state was removed by the "Wilson Act," but the state statute had been previously passed, at a time when, by reason of the limitation, it could not take effect, and was void in so far as it contemplated such transactions. As to them it was a dead, worthless thing. The removal of the limitation by the act of Congress did not convert it into a valid statute nor put life or efficacy into it. That could be done only by re-enactment and, unless this had occurred, the statute would not be valid.

52. See id.; see also Grayson-Robinson Stores, Inc. v. Oneida, 75 S.E.2d 161 (Ga. 1953).

Since Georgia's Fair Trade Act was contrary to and inconsistent with the terms of the Sherman Act before it was amended by the Miller-Tydings Act and the McGuire Act, it offended the supremacy clause as well as the commerce clause of the Federal Constitution, and our Constitution of 1945 by article 1, section 4, paragraph 1, declares that legislative acts which violate the Constitution of the United States are void and the judiciary shall so declare them. Code (Ann.) § 2-402. The time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body [citing Jones v. McCaskill, 37 S.E. 724 (1900)]; and if it is unconstitutional then, it is forever void.

Id. at 163 (citing Christian v. Moreland, 45 S.E.2d 201 (1947)).
cannot be retroactively validated by constitutional amendment, since at the time of their passage they were void and of no legal effect.\textsuperscript{53} Yet, courts have rejected the approach that amendments cannot validate an invalid statute, instead merely insisting that certain steps must be taken if the amendment is to have that effect.\textsuperscript{54} The Supreme Court of Alabama explained that "there is no reason why a constitutional amendment cannot by the use of express and clear terms validate and confirm an act of the legislature previously enacted but invalid on account of a failure to observe provisions of the State Constitution."\textsuperscript{55} Thus, a constitutional amendment can validate a previously void law as long as that desired effect is clearly and expressly stated.\textsuperscript{56}

The requirement that the desired effect be clearly and expressly stated is not taken lightly. An amendment that grants a legislature new powers but does not also expressly validate and confirm a previously existing law will not resurrect that law.\textsuperscript{57} As the California Supreme Court explained, to construe a power-conferring amendment\textsuperscript{58} as validating a previously invalid law would make the amendment have "the effect of enacting [a] law[ ] instead of merely authorizing the legislature to do so."\textsuperscript{59} The California court noted that there is a strong presumption against

\begin{itemize}
\item \textsuperscript{53} See Plave, \textit{supra} note 22, at 114 ("Under this [void ab initio] theory, a statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence from the time of its enactment.").
\item \textsuperscript{55} When a constitutional amendment is passed that permits the legislature to adopt a statute that it could not previously adopt, the case law has consistently indicated that-unless the amendment is intended to be retroactive-a statute that was unconstitutional prior to the amendment will be enforceable only if it is repassed after the amendment is ratified.
\item \textsuperscript{56} See supra note 54, at 1918 ("[C]onstitutional amendments have been held not to validate statutes passed prior to the amendment's ratification (unless they were intended to do so).").
\item \textsuperscript{57} See, e.g., Yothers, 659 A.2d at 520 (N.J. 1995) ("The purpose of placing the amendment before the voters was to remove the constitutional impediment, it did not in itself amount to legislative action amending the existing statute.").
\item \textsuperscript{58} See infra notes 63-69 and accompanying text (discussing power-conferring laws).
\item \textsuperscript{59} Banaz v. Smith, 133 Cal. 102, 104 (1901).
\end{itemize}
construing a power-conferring amendment as validating a previously invalid statute, "and such effect will not be given to [the amendment] unless [that effect] is expressly so provided."\(^{60}\) Thus, while it is possible to validate laws via constitutional amendment, there is a strong presumption against retroactive validation which, at least as a general matter, can only be overcome by express language to that effect.\(^{61}\)

C. The Hawaii Constitutional Amendment

To determine whether the Hawaii amendment incorporated language which was sufficiently clear to justify overcoming the presumption against retroactive application, it will be necessary to examine the text of the amendment itself, which reads, "The legislature shall have the power to reserve marriage to opposite-sex couples."\(^{62}\) It should be clear that none of the language in the amendment expressly and unambiguously validates any statute that had been enacted prior to the amendment's passage. Indeed, none of the language in the amendment even addresses a prior statute. A plain reading of the amendment suggests that it is power-conferring rather than statute-validating and, thus, one should not construe it as doing the latter.

In *The Concept of Law*,\(^{63}\) H. L. A. Hart distinguishes between two types of rules: those that impose duties and those that confer powers.\(^{64}\) He explains, "Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not."\(^{65}\) In contrast, rules of the other type "provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operation."\(^{66}\) Rules of the former type impose duties, whereas rules of the latter type confer powers, public or private.\(^{67}\)

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60. *Id.*
61. *But see infra* notes 77-93 and accompanying text (discussing different section of the Hawaii Constitution).
64. *See id.* at 79.
65. *Id.* at 78-79.
66. *Id.* at 79.
67. *See id.*
The power-conferring rules are divided into those that "confer[] legal powers to adjudicate or legislate (public powers)" and those which "create or vary legal relations (private powers)." Consider a state statute that regulates who may marry whom. The statute would have been passed pursuant to the legislature's power to enact marital regulations and would affect the power of private citizens to enter into the marriage relation.

The Hawaii amendment on its face is power-conferring—the legislature has been given the power to reserve marriage for different-sex couples. Were the legislature to choose to exercise its power acquired by virtue of that amendment, it would thereby restrict the power of private citizens to create a particular legal relation (marriage) with a same-sex partner. However, precisely because power-conferring laws are of a different type than substantive laws, granting a legislature a power would not even speak to whether that power would be exercised.

It might be thought that it would not make any difference whether the Hawaii constitutional amendment is power-conferring or, in addition, retroactively validating, since the legislature would simply reenact the relevant legislation should the court hold that the reenactment is necessary. One should note, however, that subsequent to the passage of the amendment, the legislature failed to pass legislation reserving marriage for different-sex couples, notwithstanding the introduction of bills to that effect in the appropriate committees.

As a general matter there is good reason, both theoretically and practically, to require the reenactment of

68. *Id.* at 77.
69. *Hart, supra* note 63, at 77.
70. *See Bartlett II, supra* note 7, at 587 ("By granting the legislature the 'power' to regulate marriage in a particular way, it seems to call upon the legislature to take action. The amendment does not insist that the legislature limit marriage to opposite-sex couples, it merely grants them the power to do so. The amendment, thus, contemplates legislative action.").
71. Cf. *infra* notes 172-73 and accompanying text (suggesting that even more unwelcome laws might have been passed had the legislature been forced to reenact the statute in order for it to become law).
statutes once the legislature has been given the power to pass particular legislation. For example, the political alliances might have shifted since the passage of the previous statute, and the statute might not be reenacted. Or, even if it were, other concessions might have been made to secure passage of the legislation. Thus, as a matter of the settled law and of general public policy, amendments will not retroactively validate statutes passed prior to the amendment's passage unless there is explicit language to that effect.

III. THE SPECIAL HAWAII CONSTITUTIONAL PROVISION

While the general jurisprudence regarding retroactive validation of statutes is clear, it might be argued that there is something special about the Hawaii Constitution that makes the general jurisprudence inapplicable to how this amendment in particular should be interpreted. Article 18, section 9, of the Hawaii Constitution reads, “All laws in force at the time amendments to this constitution take effect that

73. See Plave, supra note 22, at 112-13 (pointing out that constitutional protections of abortion are becoming less robust but that if “states with restrictive abortion statutes must reenact those statutes in order to enforce them, . . . many state legislatures today would face unprecedented battles if they attempted to gather enough constituent support to reenact statutes restricting the availability of abortion.”).

74. Compare Haw. Rev. Stat. Ann. 572C-6 (“Unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage under chapter 572.”) with the bill that has passed the Vermont House of Representatives and Senate that was eventually signed into law. See 1999 VT H.B. 847. According to that bill, same-sex couples who meet the relevant definition, see 1999 VT H.B. 847 §§ 1202, 1203, “shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.” See id. § 1204(a).


[It is difficult to see how the ratification of a purely permissive constitutional amendment can give the prior invalid statute effect if its invalidity was due to a lack of constitutional authority on the part of the legislature to enact such a law in the first instance. Statutes obviously owe their existence to legislative action. Without the authority to enact a particular law, how can it come into being? The subsequent grant of the constitutional power to pass the particular statute previously prohibited would seem incapable of giving a statute, enacted without authority, effect without legislative re-enactment.]

76. See Defendant-Appellant's Supplemental Brief at Part II, § A, Baehr v. Miike, 1999 Haw. LEXIS 391 (No. 20371) (suggesting that art. 18, section 9 of the Hawaii Constitution requires that the statute be held constitutional).
are not inconsistent with the constitution as amended shall remain in force, mutatis mutandis, until they expire by their own limitation or are amended or repealed by the legislature.”

This section might be thought to alter the standard retroactivity presumptions in Hawaii.

A. Two Different Provision Interpretations

Article 18, section 9 is not clear on its face and so must be construed. One interpretation is that the provision simply says that whichever statutes are consistent with the amended constitution will be enforceable until they either expire or are repealed. However, if that was the legislature’s intention, the section could easily have read, “All laws that are not inconsistent with the constitution as amended shall be in force until they expire by their own limitation or are amended or repealed by the legislature.” Thus, were the section meant to be a retroactive validation provision, there would have been no need to have limited the laws to which the section would be applied to those that were “in force at the time amendments to the constitution take effect.”

Indeed, by suggesting that those already in effect shall remain in force, the provision is saying that those laws that were valid would remain valid rather than that even those that had been invalid would now become valid.

An interpretation that better accounts for all of the provision’s language is the following: a statute will remain good law if it was constitutional before the adoption of the amendment (i.e., was in force prior to the amendment’s adoption) and, in addition, is consistent with the constitution even after the amendment’s adoption. The reference to those laws in force at the time of the amendment’s adoption limits the laws that will be viewed as affected by this section. Basically, this section suggests that the laws that will be valid after an amendment’s adoption must have been valid before the amendment’s adoption and must be consistent with the constitution as newly amended.

Article 18, section 9 of the current Hawaii Constitution

77. HAW. CONST. art. XVIII, § 9.
78. See supra note 76 (suggesting this interpretation).
79. There are other reasons to think that even if so interpreted this would not be an effective retroactive validation provision. See infra notes 80-93 and accompanying text.
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was based on section 15 of the Admission Act,\(^\text{80}\) which reads,

> All Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the constitution of the State, and shall be subject to repeal or amendment by the Legislature of the State of Hawaii.\(^\text{81}\)

The latter act was passed to secure the continuity of laws. The difficulty that the Admission Act was intended to solve was described by the Hawaii Supreme Court in *In re Island Airlines, Inc.*,\(^\text{82}\) namely, that "upon admission of a State, all of the Territorial laws are abrogated except as continued in force by competent authority."\(^\text{83}\) The Admission Act guaranteed consistency and continuity—those laws in effect before Hawaii became a state would continue after Hawaii became a state as long as those laws did not violate constitutional guarantees.

Article 18, section 9 is also intended to preserve consistency—its title is "Continuity of Laws."\(^\text{84}\) However, consistency and continuity are double-edged—they include the laws that would continue to exist and also exclude those that might otherwise have been thought to spring into existence. Thus, on the interpretation offered here, the section was not intended to retroactively validate those statutes in accord with new constitutional amendments; rather, it was merely intended to make clear that statutes valid prior to the amendment which were not invalidated by that amendment would remain good law.

Case law supports the interpretation offered here. In 1960, in *G.E.M. Sundries Co., Inc. v. Johnson and Johnson, Inc.*,\(^\text{85}\) the Ninth Circuit Court of Appeals had to interpret whether a Hawaii statute precluded by an Act of Congress could be construed as "in force"\(^\text{86}\) at the time Hawaii became a state in 1959\(^\text{87}\) and thus, should be included within those laws covered

\(^{80}\) See *HAW. CONST.* art. XVIII, § 9.

\(^{81}\) *HAW. Admission Act* § 15 (1959).

\(^{82}\) 361 P.2d 390 (Haw. 1961).

\(^{83}\) *Id.* at 395 (citing *Benner v. Porter*, 50 U.S. 235 (1850)).

\(^{84}\) See *HAW. CONST.* art. XVIII, § 9.

\(^{85}\) 283 F.2d 86 (9th Cir. 1960).

\(^{86}\) See *HAW. Admission Act* § 15 (1959).

by the Admissions Act. The court made clear that the statute was not "in effect" as a result of its initial passage because the enactment at that time was in violation of federal law. 88

The court's analysis is important to consider. The Hawaii statute was held not to be in effect because it had violated federal law, not because it had already been declared invalid by a court. Thus, an act that cannot be enacted because of federal or, perhaps, state constitutional guarantees should not be considered "in effect," even if it has not yet been struck down by a court. The only reason that the statute at issue in G.E.M. Sundries was considered good law was that it had been reenacted after the bar to its passage had been lifted. 89

It might be thought that G.E.M. Sundries was an obscure case that might have escaped the notice of those writing article 18, section 9. Yet, this is not a plausible claim, since article 18, section 9 lists the Admissions Act, section 15, as a cross reference, and the case notes list G.E.M. Sundries in the discussion of the Admission Act, section 15. 90

The Admissions Act uses the same "in force" language as article 18, section 9, and, thus, one might plausibly interpret both to include and exclude the same kinds of cases. Indeed, precisely because the notes refer to G.E.M. Sundries, it is plausible to believe that the intention of the drafters was that the "in effect" language be construed as it was in G.E.M. Sundries. As that case illustrates, 91 however, a statute should not be described as "in force" if it was unconstitutional and void, 92 even if a court had not yet recognized that it was void. 93

Thus, the portion of the statute restricting marriage to different-sex couples could not be described as "in force" if it violated constitutional guarantees and thus would not be

88. See G.E.M. Sundries, 283 F.2d at 89 n.2.
89. See id. at 89-90.
90. The first case note suggested that a statute invalid under the Sherman Act at the time of statehood would not have been continued in force by this section. See Admissions Act § 15 case notes (1999).
91. See supra notes 85-89 and accompanying text.
92. The claim here is not that the entire marriage statute was void before the passage of the amendment but that a particular part of it was unconstitutional and hence void. For a discussion of the effect on the general statute of a particular section that is unconstitutional and void, see discussion infra Parts III.E., IV.A.
93. There was no suggestion in G.E.M. Sundries that the statute had been found by a court to have been void between the time that it was first enacted and the time that it was reenacted. Nonetheless, the court suggested that the statute was not in force until reenacted.
protected by article 18, section 9.

Suppose the legislature had not reenacted the statute at issue in *G.E.M. Sundries*. The Ninth Circuit Court of Appeals made clear that the Act would then not have been in effect, i.e., would not have been "in force." By the same token, a statute that is unconstitutional when passed should be viewed as not "in effect" or "in force," and thus should not be included within those statutes protected by article 18, section 9, unless the legislature enacted that statute after the bar to its passage had been lifted. Article 18, section 9 of the Hawaiian Constitution was designed to preserve *continuity* rather than to cause laws that had been void and of no legal effect to suddenly spring into being. Thus, although the section under discussion here is open to different interpretations, the explanation that best accounts for its language and the relevant case law suggests that this provision does not make the Hawaii retroactivity jurisprudence any different from the generally accepted retroactivity jurisprudence. Thus, a void statute or portion thereof should not be held retroactively validated absent an express declaration to that effect.

B. Construing Intent

Hawaii jurisprudence follows the general retroactivity jurisprudence both in that retroactive legislation is permissible "unless it contravenes some constitutional inhibition" and in that "retrospective laws are not favored and all laws will be construed as prospective unless the language employed imperatively requires a contrary construction." The Hawaii Supreme Court has recognized a "well-established rule of construction forbidding the retrospective operation of statutes in the absence of clearly expressed contrary legislative intent." Indeed, there is reason to think that Hawaii has an especially strong public policy disfavoring retroactive

94. See discussion *supra* Parts III, III.A (suggesting that HAW. CONST. art. XVIII, § 9 should not be read to the contrary).

95. *Oleson* v. *Borthwick*, 33 Haw. 766, 774 (1936). *See also* Gardens at W. Maui Vacation Club v. County of Maui, 978 P.2d 772, 783 (Haw. 1999) (retroactive application of statute constitutionally permissible because it "did not infringe upon appellant's due process rights.").

96. *Oleson*, 33 Haw. at 774 (citing Auff'm'ordt v. Rasin, 102 U.S. 620, 622 (1880); *see also* Robinson v. Bailey, 28 Haw. 462, 467 (1925)).

application, since "Hawaii law provides, by statute, that 'no law has any retrospective operation, unless otherwise expressed or obviously intended.'" While that law regarding retrospective operation "is only a rule of statutory construction and where the legislative intent may be ascertained, it is no longer determinative," the existence of the statute nonetheless indicates that there is a strong policy against a construction of retrospective operation, and that a substantial burden must be overcome when seeking to establish that a statute should be retroactively applied.

The Hawaii Supreme Court has made clear that where its task "is to ascertain whether there is an expression or obvious intendment that the [legislative] amendment was to have 'any retrospective operation," the court must begin "by examining the language." It was established long ago in Hawaii that "no law will be construed to act retrospectively unless its language imperatively requires such a construction." Yet, the language of the amendment—"The legislature shall have the power to reserve marriage to opposite-sex couples"—does not even mention retroactive application much less require that the amendment be given that construction.

At issue here is the construction of an amendment to the state constitution rather than a statute passed by the legislature. Yet, at least two points must be made. First, the same kinds of tools used in construing statutes may be used in construing amendments. Second, it is especially important in this kind of case to use the language of the amendment itself to determine its meaning, precisely because different

101. Id.; see also Oleson, 33 Haw. at 775 ("In the final analysis it is the intention of the legislature as manifested by the language employed in the Act itself that leads to the solution of the question involved.").
102. Robinson v. Bailey, 28 Haw. 462, 467 (1925) (quoting Auffm'ordt, 102 U.S. at 622 (1880)).
103. See Baehr v. Miike, 1999 Haw. LEXIS 391, at *10 n.4 (Ramil, J., concurring).
104. See McCarney v. Meier, 286 N.W.2d 780, 783 (N.D. 1979) ("Principles of construction applicable to statutes are generally available to construction of the Constitution.").
105. See Pelkey v. City of Fargo, 453 N.W.2d 801, 804 (N.D. 1990) ("The sole object in construing a constitutional provision is to ascertain and give effect to
interpretations of what it says will have been offered, and it will be impossible to tell which interpretations were heard or accepted by the voters.

To determine what the voters had in mind when they voted for the amendment, it simply will not do to consult the legislative history to see what the legislators believed they were doing when they passed a bill proposing that a bill be placed on the ballot. In the voting booth, the voter sees the text of the amendment itself—the voter does not, for example, see the differing opinions about whether the amendment, if approved, would have retroactive effect.

Perhaps it would be thought too severe a restriction to require that the amendment expressly incorporate retroactive intent. After all, if everyone received explanatory materials in the mail making clear that the amendment would retroactively validate a statute, then perhaps the relevant intention could thereby be established.

Even if the intention to retroactively validate a statute could be constructively inferred when a mass mailing has made that effect of the amendment clear, however, this would not help establish that the Hawaii amendment should be construed to have retroactively validated the portion of the statute at issue here. The materials that Hawaiians received

the intention and purpose of the framers and the people who adopted it, and such intention and purpose are to be found in and deduced from the language of the constitution itself. (citing Dawson v. Tobin, 24 N.W.2d 737, 738 (N.D. 1946)).

106. See, e.g., Gay Marriage Battle Isn't Over Yet, ASSOCIATED PRESS NEWSWIRES, Jan. 24, 1999 ("Attorney General Margery Bronster and attorney Dan Foley are at odds over whether the Legislature needs to pass a statute that would define marriage as a union between a man and a woman.").


108. But see Crawford, supra note 75, at 653 (suggesting that the amendment must be legislative in scope if it is to affect the statute previously adjudged unconstitutional).

This seems evident from the cases which hold that no additional legislative action is required, for the constitutional amendment will be found so worded that it will by virtue of its own language embody the prior unconstitutional act and also be self-executing, or else it will specifically ratify, validate or confirm the prior unconstitutional statute or be at least curative or confirmatory in nature, so that the statute is actually, or in effect, made a part of the constitutional amendment.

109. Even this might not suffice, since one still would have to assume, for example, that the materials would actually have been both received in the household and read.
in the mail suggested that the amendment was to have *prospective* rather than retrospective application. Voting "yes" on the proposed constitutional amendment was explained in the following way:

A "yes" vote would add a new provision to the Constitution that would give the Legislature the *power* to reserve marriage to opposite-sex couples only. The Legislature *could then* pass a rule that would limit marriage to a man and a woman, overruling the recent Supreme Court decision regarding same-sex couples.¹¹⁰

This explanation suggests that the amendment would confer a power on the Hawaii Legislature that it then could exercise. It suggests in addition that the amendment would not retroactively validate a previous statute, since there would be no need to *then* pass a rule restricting marriage if the amendment's adoption would have retroactively validated that rule.

By the same token, the explanation of the effect of a "yes" vote suggested that it was prospective rather than retrospective. That explanation was:

People who want the proposed amendment to pass believe the Legislature, and not the Supreme Court, should decide who is eligible to marry in the State. If the proposed amendment is adopted, then it will be clear that the Legislature *can* legally reserve marriage for opposite-sex couples. People in support of the proposed amendment believe passing this amendment is *an important step* to prohibit same-sex marriage in the State.¹¹¹

Were the amendment to retroactively validate a statute, the amendment's adoption would not merely be an important *step* in prohibiting same-sex marriage—it would be all that would be necessary. Thus, whether one considers the language of the amendment itself, the official explanation of the amendment, or even the explanation of its effect that had been offered by its supporters, the amendment should be construed as prospective only. When one considers in addition that there is a presumption of prospectivity, it is difficult to see how the Hawaii Supreme Court could have held otherwise.


¹¹¹ Id. (emphasis added).
C. Separation of Powers

Suppose that one took seriously what the legislators believed they were doing when they proposed the amendment, as reflected by what they approved and by what they said when testifying about the bill. The bill that was approved was "an amendment to article I of the Constitution of the State of Hawaii to clarify that the legislature has the power to reserve marriage to opposite-sex couples." By offering a clarification of the constitution, the legislature was offering its own interpretation of the state constitution. Yet, passing such a bill to establish the correct interpretation of the state constitution is itself problematic—as the Hawaii Supreme Court has made clear, "the courts, not the legislature, are the ultimate interpreters of the Constitution." Insofar as this was a clarification, i.e., an attempt to establish the meaning of the constitution, it should have been struck down on separation of powers grounds. As the Supreme Court of Hawaii explained, "Under the separation of powers so provided, each branch is coordinate with the other, and neither may exercise the power vested in the other."

As Justice Cassidy stated in his De Mello dissent, "No one can dispute that the cardinal tenet respecting the separation of powers requires that the independence of the judicial branch of the government in the exercise of its exclusive powers must be kept inviolate from invasion by the legislative branch." While separation of powers would not preclude, for example, "the right and power of the legislature to hold hearings for the purpose of eliciting facts so as to make a determination of appropriate legislative action," separation of powers would preclude the legislature's making what amounted to a judicial determination of the meaning of the state constitution.

Certainly, the legislature's describing the amendment as a

112. See supra note 107 (discussing the comments made be legislators about the proposed bill).
117. Kioke v. Board of Water Supply, City and County of Honolulu, 352 P.2d 835, 843 (Haw. 1960) (rejecting De Mello to the extent that it might be thought to hold otherwise).
clarification need not be an interpretation of the state constitution, since it might instead be a rhetorical move to persuade voters that adopting the amendment would not radically change the existing constitution. Because rhetorical persuasion is not equivalent to constitutional interpretation, the former would neither be viewed as a usurpation of the court's role nor as a violation of separation of powers. In any event, just as "the legislature's mere labeling of a criminal offense as 'petty' does not necessarily make it so" because it is "the judicial branch that independently determines whether such a label is justified," the legislature's labeling the amendment as a "clarification" of the state constitution would hardly make it so, since that would be something for the state supreme court to decide.

The claim here of course is not that the legislature was violating separation of powers by proposing an amendment to the state constitution. On the contrary, proposing an amendment involved the exercise of a prescribed power to change the constitution. Yet, precisely because the legislature has the power to propose changes to the constitution but does not have the power to establish its meaning, the "clarification" language is best understood as an attempt to persuade the populace to support a change rather than as a definitive interpretation of the pre-amended constitution.

D. Other Laws Militating Against Retroactive Application

Two other Hawaii laws should have helped convince the court that the amendment should not have been construed as retroactively validating a portion of the marriage statute. Hawaii law states that the "repeal of any law shall not revive any other law which has been repealed, unless it is clearly expressed." This law clearly expresses the public policy against revival of statutes, absent clear language mandating such a revival.

Suppose that Hawaii had a law reserving marriage for

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119. Id.
120. See HAW. CONST. art. 17, § 1 ("Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.").
121. HAW. REV. STAT. § 1-8 (1993).
different-sex couples. Suppose further that this law was repealed and a different law was passed prohibiting the legislature from passing a statute reserving marriage for different-sex couples. However, because of a change in the composition of the legislature, the law prohibiting a same-sex marriage ban was repealed. According to current Hawaii law, the repeal of the law prohibiting a same-sex marriage ban would not revive the former law reserving marriage for different-sex couples. The new legislature would have to reenact that law for it to be given effect.

Admittedly, the issue under discussion here is somewhat different from the hypothetical posed above. Here, there was no repeal of a law barring the legislature from reserving marriage for different-sex couples. Rather, assuming for the sake of argument that the constitution precluded the legislature from reserving marriage for different-sex couples, at issue here is a constitutional amendment that repealed the previous constitutional bar prohibiting the legislature from reserving marriage for different-sex couples. Yet, presumably, just as the repeal of a statute does not revive a different statute absent language to that effect, the repeal of a constitutional provision does not revive a statute absent express language to that effect.122

Another difference between the hypothetical posed above and the situation in Hawaii is that the law reserving marriage for different-sex couples was never repealed—rather, that section of the law never existed because the constitution precluded its passage.123 Yet, if a repealed statute cannot be revived absent express language to that effect, then certainly a section that had been unconstitutional and void and, hence, had never existed should not be considered "revived" absent specific language to that effect.124

A different Hawaii law makes even clearer that the Hawaii court's ruling about retroactivity was in error. Hawaii law regarding state constitutional amendments requires that the "language and meaning of a constitutional amendment

122. See supra notes 44-61 and accompanying text (discussing amendments and retroactive validation of statutes).

123. This assumes that the statute was unconstitutional according to the pre-amended constitution.

124. For a discussion of whether unconstitutional provisions can be revived, see supra notes 44-56 and accompanying text.
shall be clear and it shall be neither misleading nor deceptive."

Given the official explanation of the amendment sent to the voters, (that a "Yes" vote would mean that the "Legislature could then pass a law that would limit marriage to a man and a woman") an individual who wished the legislature to have the power to reserve marriage for different-sex couples but did not wish the amendment to retroactively validate a portion of the statute enacted prior to the amendment’s adoption would have been deceived into voting for the amendment. The Hawaii court’s construction of the amendment makes the explanation of the amendment sent to the voters a violation of state law. Thus, not only did such a construction ignore the standard interpretation presumptions, but it cast the validity of the ballot into question because voters had been misled about the effects of their votes.

E. What Happens When a Portion of a Statute is Void?

The discussion here is predicated upon an assumption made by the *Baehr* court, namely, that the Hawaii Legislature did not have the power to pass a statute reserving marriage for different-sex couples prior to the passage of the recent amendment. If the legislature did not have that power, then the provision reserving marriage for different-sex couples was void. However, the legislature’s not having had the power to enact that particular provision would not void the entire marriage statute.

The United States Supreme Court has long recognized that marriage is "subject to the control of the legislature," although the Court has also recognized that legislative powers in this area are not unlimited since federal or

126. See supra text accompanying note 110.
127. See supra notes 54-61 and accompanying text.
128. See Kahalekai v. Doi, 590 P.2d 543 (Haw. 1979) (holding that when the electorate is not adequately informed of the substantive nature and effect of an amendment, the amendment will be deemed to have failed ratification).
129. See Baehr, 1999 Haw. LEXIS 391, at *6 (the marriages statute was validated, "whether or not in the past it was violative of the equal protection clause").
131. See Loving v. Virginia, 388 U.S. 1, 7 (1967).
132. See id. (arguing that states are subject to the limitations imposed by the Fourteenth Amendment).
state constitutional guarantees might prohibit the legislature’s enactment of a particular marital regulation. Consider a state that has enacted a marital statute that is unconstitutional only in part, e.g., a statute that precludes interracial marriage but does not otherwise offend constitutional guarantees. The question at hand is whether the marital statute would have to be reenacted with the unconstitutional provision excised or whether the statute (minus the unconstitutional part) would be effective without reenactment.

Several courts have addressed how a statute with one unconstitutional provision should be construed. For example, the Supreme Court of Indiana explained:

Where only a part of a legislative act violates the Constitution and is judicially declared void, and the remainder of the act is complete in itself and capable of execution according to the legislative intent, and wholly independent of that which is judicially determined to be unconstitutional, the remaining part of the act will be sustained. Thus, the marital statute would not need to be reenacted with the unconstitutional part excised in order to be in effect.

In another case, the Supreme Court of Montana explained that:

[W]here the lawmaking body has solemnly declared its intention as to what shall be the law upon a subject clearly within its constitutional power and authority, which enactment would have become valid except for some defect in the body of the act which could originally have

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133. See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), reconsideration granted in part, 875 P.2d 225 (Haw. 1993). A plurality of the Hawaii Supreme Court held that the Hawaii marriage statute reserving marriage for different-sex couples implicated equal protection guarantees of the state constitution. See id. at 64. The court remanded the case to determine whether the statute was unconstitutional. See id. at 68.


135. Keane v. Remy, 168 N.E. 10, 14 (Ind. 1929) (citing State v. Barrett 87 N.E. 7 (Ind. 1909)).

136. See Crawford, supra note 30, at 656

Frequently, only a part of the legislative act will conflict with the constitution and that part is clearly separable from the remainder of the act. Where this is the situation, there is ample authority for amending the act and making it effective by removing the offending provision without re-enactment of the law in its entirety.
been cured, the roots and the "main stock" are still alive and are grounded in fertile constitutional soil, and all that is necessary to cause the tree to flourish is scientific pruning or grafting, dependent upon whether the Legislature has said too much or too little.\textsuperscript{137}

Here, all that would be necessary would be to "prune" the marital statute of its offending provision—the remainder would be good law and would not require reenactment to be in effect.

Finally, the Supreme Judicial Court of Massachusetts explained that:

\textit{[I]n the consideration of a statute where one part is unconstitutional, which is in its nature separable from other parts so that they well may stand independently of it, and there is no such connection between the valid and the invalid parts that the general court would not be expected to enact the valid part without the other, the parts of the statute not in conflict with the Constitution will be held good.}\textsuperscript{138}

Thus, where the offending part is easily separable from the remainder, the court will view the rest of the statute as valid. Of course, if this were a different case where there were "so many far reaching unconstitutional provisions that it could not be reasonably inferred that the Legislature would have passed the act with those provisions omitted,"\textsuperscript{139} then there might be a different result.

Here, were the offending provision "pruned," the court would presumably hold the Hawaii marriage statute to be in effect. In other words, the Hawaii Revised Statutes Section 572-1 would be in force except insofar as it specified that "the marriage contract... shall be only between a man and a woman."\textsuperscript{140} Thus, while Hawaii still would have had a marriage statute in effect even assuming that the provision reserving marriage for different-sex couples was unconstitutional, the constitutionally offensive provision would be deemed to be void and to have no legal effect.

Once the Hawaii Legislature had the power to pass a statute reserving marriage for different-sex couples, the

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139. Clay v. Buchanan, 36 S.W.2d 91, 92 (Tenn. 1931).
140. HAW. REV. STAT. § 572-1 (Supp. 1999).
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legislature could then amend the existing statute to include that provision. However, because the previous statute would have existed as pruned, the legislature would need to reenact the provision restricting marriage if that restriction was to have the force of law.

Suppose that the Hawaii electorate had wanted to give the legislature the power to reserve marriage for different-sex couples but had not wanted to retroactively validate the marriage statute. What would the amendment have said? It might have said, "The legislature shall have the power to reserve marriage to opposite-sex couples, but this amendment shall not be construed to retroactively validate any statutes passed prior to the effective date of this amendment." Certainly, this would have made it even clearer to the electorate that the amendment was not to have any retroactive effect.

Yet, the issue before the court was not how the amendment could have been worded to make very clear to the electorate that the amendment would not retroactively validate a previous statute. Rather, the issue before the court was how to construe the amendment, given the standard presumption of non-retroactivity. The court’s holding turned the presumption on its head. It would be as if the court had said that the amendment retroactively validated the statute reserving marriage for different-sex couples because the amendment did not include this extra provision expressly denying that the amendment was retroactive, whereas the established jurisprudence requires that the amendment not have a retroactive validating effect absent express language to the contrary.

The Hawaii Supreme Court’s holding that the amendment retroactively validated the statute was especially surprising in light of the recognized test of construction in this context. The amendment states, "The legislature shall have the power to reserve marriage to opposite-sex couples." The recognized test for retroactive validation is that the language must clearly require that result. Yet, here, to argue that the amendment retroactively validates the statute requires that non-textual elements (e.g., legislators’ claims about whether it would have that effect) be allowed to trump the plain language of the

141. HAW. CONST. art. I, § 23.
amendment. To suggest that “[t]he legislature shall have the power” imperatively requires or even suggests a construction of retroactive validation is, at the very least, “a creative reading of the plain language.”

The Hawaii Constitution, related statutes, and the established case law suggest that the court’s construction of the amendment as retroactively validating the Hawaii marriage statute had no basis in the jurisprudence. The statutory requirements that the constitutional question be clear and that the electorate not be deceived, coupled with the complete failure to even mention retroactivity in the amendment, suggest that either the ballot question was itself defective or that the court’s holding was in error.

IV. **BAEHr SILVER LININGS**

The Hawaii Supreme Court’s *Baehr* decision disappointed many people. However, there are some positive aspects of the decision that should not be overlooked. Indeed, these aspects may have more far-reaching consequences than the court’s decision that the amendment retroactively validated the marriage statute.

A. **Reconciling Constitutional Provisions**

When examining the Hawaii constitutional amendment, a court might have been interested in a number of issues: (1) whether the amendment retroactively validated a statute passed prior to the amendment’s adoption; (2) whether the amendment’s validating such a statute would violate constitutional guarantees; or (3) how the amendment should be interpreted if it seemed to contradict a different part of the state constitution. The *Baehr* court purportedly addressed the first issue, although its analysis really addressed the third issue.

A court interested in whether an amendment retroactively validated a statute would carefully examine the amendment at issue to see whether its language clearly

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143. *See, e.g.*, Jean Christensen, *Hawaii Supreme Court Says Gay-Marriage Challenge is Moot*, ASSOCIATED PRESS NEWSWIRES, Dec. 10, 1999 (describing some adverse reactions to the decision).
required retroactive validation.\textsuperscript{144} Had the \textit{Baehr} court performed this careful examination, it would have decided that the amendment did not retroactively validate the statute—not only did the language of the amendment not \textit{require} retroactive application, but it also could not plausibly even \textit{support} such an interpretation.\textsuperscript{146}

While ostensibly addressing retrospective validation, the \textit{Baehr} court actually addressed a different issue, namely, how it should read potentially conflicting provisions of a constitution. To see why the \textit{Baehr} court was in fact addressing this issue, a little background is required.

The language of the Hawaii marriage statute reads, “In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that . . . .”\textsuperscript{146} The question for the \textit{Baehr} court was how to reconcile the existence of this statute, which clearly classifies on the basis of sex since it defines who may marry on that basis,\textsuperscript{147} with the constitutional provision barring discrimination on the basis of sex. The court looked at the amendment specifically giving the legislature the power to reserve marriage for different-sex couples and concluded that the:

marriage amendment validated H.R.S. § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the forgoing respect, H.R.S. § 572-1 no longer is.\textsuperscript{148}

Basically, the court looked at the amendment, which specifically permitted the legislature to reserve marriage for different-sex couples, and the state constitution, which explicitly prohibits discrimination on the basis of sex,\textsuperscript{149} and

\textsuperscript{144} See supra notes 54-61 and accompanying text.
\textsuperscript{145} See supra note 142 and accompanying text (suggesting that this is a very “creative” reading).
\textsuperscript{146} HAW. REV. STAT. § 572-1 (Supp. 1999).
\textsuperscript{147} See \textit{Baehr v. Miike}, 1999 Haw. LEXIS 391, at *6 n.1 (“[R]udimentary principles of statutory construction renders manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female.”) (citing \textit{Baehr v. Lewin}, 852 P.2d 44, 60 (1993)).
\textsuperscript{148} Id.
\textsuperscript{149} See HAW. CONST. art. I, § 3 (“Equality of rights under the law shall not
offered a way to reconcile the two provisions.

Consider how a court might handle two conflicting provisions of a constitution. It might say that one of the contradictory provisions is null and void because it contravenes certain basic principles. Or, it might suggest that the provisions must be interpreted to be consistent if at all possible. As the Pennsylvania Supreme Court pointed out, "because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible." The North Dakota Supreme Court has made a similar point.

The Hawaii Supreme Court in its Baehr opinion followed the generally accepted jurisprudence with respect to how to interpret apparently conflicting constitutional provisions, namely, reconcile them if at all possible. The only difficulty with that approach was that it had very little to do with the issue that the court was allegedly deciding, namely, whether the Hawaii amendment retroactively validated a portion of the Hawaii marriage statute.

Suppose that events had occurred much differently. The amendment was adopted and the legislature then enacted legislation reserving marriage for different-sex couples. If that legislation was then challenged, the court would have to decide whether the provision authorizing the legislature to reserve marriage for different-sex couples could be reconciled with the provision prohibiting discrimination on the basis of sex. The court might in that case have construed the two provisions as consistent and issued the ruling that in fact was offered in Baehr.

Certainly, if the Baehr court had held that the two provisions were inconsistent and, further, that the provision authorizing the legislature to reserve marriage for different-

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150. See Walter F. Murphy, Slaughter-House, Civil Rights, and Limits on Constitutional Change, 32 Am. J. Juris. 1, 13-14 (1987) (discussing an opinion issued by the West German Constitutional Court—The Southwest Case, 1 BVerfGE 14 (1951)).


152. See Pelkey v. City of Fargo, 453 N.W.2d 801, 804 (N.D. 1990) ("In construing constitutional provisions we generally apply principles of statutory construction, giving effect and meaning to every provision and reconciling, if possible, apparently inconsistent provisions." (citing McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979)).
sex couples was somehow unconstitutional, then the court would not have needed to address whether the constitutional amendment retroactively validated a portion of the marriage statute, since the amendment itself would then have been void. However, because the court found that the constitutional provisions were consistent, it still had to address whether the amendment retroactively validated part of the statute.

The Baehr court never explicitly stated that the amendment retroactively validated the portion of the statute reserving marriage for different-sex couples. However, if indeed the equal protection guarantees of the pre-amended constitution precluded the legislature from restricting marriage in that way, and if indeed that would mean that the Hawaii marriage statute pruned of the offending provision would be in effect, then the provision would have to have been retroactively validated in order for it to have existed so that it could be taken “out of the ambit of the equal protection clause.” If that voided provision had not been retroactively validated and thus had been nonexistent, there would not yet have been anything that needed to be taken out of the clause’s ambit.

It is simply unclear whether the Baehr court understood the implications of its own decision, because the court simply refused to address retroactivity or even the proper construction of article 18, section 9. At some future point, however, the court may have to explain whether Hawaii’s retroactivity jurisprudence is non-standard or, perhaps, whether the court must invalidate the amendment ballot because it deceived the voters with respect to whether the amendment would retroactively validate Hawaii’s marriage statute.

153. See supra note 150 and accompanying text (discussing the nullification of one constitutional provision in light of another).

154. A separate question would be whether the court would address the broader question of the provision’s constitutionality rather than the narrow question of its retroactivity, especially if a holding that it was prospective only would have allowed the court to avoid the more thorny question of whether a constitutional provision could be held unconstitutional because, for example, it violated the spirit of the whole. Needless to say, however, this is all speculative since the court found that the provisions could be reconciled.


156. See supra note 148 and accompanying text (offering the court’s brief analysis).
B. Equal Protection

A different way to reconcile the Equal Protection Clause of the Hawaii Constitution and the specific provision permitting the legislature to reserve marriage for different-sex couples would be to deny that the Equal Protection Clause precluded reserving marriage for different-sex couples, either by asserting that such a classification involved an orientation rather than a sex-based classification or by holding that even if such a classification was sex-based, it nonetheless did not offend constitutional guarantees. The Hawaii Supreme Court chose neither, and instead opted to reconcile the provisions, suggesting that by removing the marriage statute from the Equal Protection Clause's ambit, the amendment created a narrow exception in the equal protection jurisprudence.

In his Baehr concurrence, Justice Ramil urged the court to overrule its previous Baehr decision. He objected to the Baehr plurality's use of "the plain meaning rule of statutory construction," arguing that "the trait on which H.R.S. section 572-1 distinguishes applicants for marriage licenses is not gender, but rather sexual orientation." Justice Ramil offered the following hypothetical to illustrate his point:

[If a male plaintiff in this case somehow changed his gender to become a woman, but remained homosexual (i.e., lesbian), she would still be disadvantaged by the prohibition on same-sex marriage inasmuch as she would not be permitted to marry another woman. However, if that same male plaintiff somehow changed his homosexual orientation, he would not be disadvantaged by H.R.S. § 572-1 inasmuch as he would be able to marry a female.]

Justice Ramil concluded that the statute therefore "disadvantages homosexuals, whether male or female, on account of their desire to enter into a marriage relationship

157. See Baehr, 1999 Haw. LEXIS 391, at *6 n.1.
158. See id. at *8 (Ramil, J., concurring) (for an online copy of the concurrence see <http://www.Hawaii.gov/jud/20371con.htm> (visited Nov. 16, 2000)).
159. See id.
160. Id.
161. Id. n.1.
162. Id.
Justice Ramil's hypothetical is unpersuasive because he so severely limits the possibilities. Suppose, for example, that the male plaintiff changed his orientation but not his sex. Suppose further that he nonetheless wanted to marry another male so that he could receive particular benefits from the state. The state would deny the marriage license, heterosexual orientation notwithstanding. Or, suppose that the plaintiff neither changed his sex nor his orientation but nonetheless wanted to marry a female so that he could receive the state benefits referred to above. In this case, he would be able to marry, same-sex orientation notwithstanding. Thus, the statute discriminates on the basis of sex, not orientation.

Justice Ramil's example obscures the effect of the statute because the individual in his hypothetical somehow changed both his sex (from male to female) and his orientation (from male to female). Yet, the way to determine whether the basis of the classification at issue is sex rather than orientation would be to hold one of those factors constant or, perhaps, to consider what would happen if the individual sought to marry someone to whom he or she was not sexually attracted. When these possibilities are considered, the meaning and effect of the statute are clarified.

The *Baehr* court reaffirmed that "rudimentary principles of statutory construction renders manifest the fact that, by its plain language, H.R.S. section 572-1 restricts the marital relation to a male and a female." The separate question of whether that facial classification violated equal protection guarantees, no longer had to be addressed because the new amendment took "the statute out of the ambit of the equal protection clause of the Hawaii Constitution." Thus, the court suggested that the marriage statute now occupied a safe haven which rendered state equal protection guarantees inapplicable (at least with respect to the restriction at issue). Of course, that says nothing about *federal* equal protection guarantees, and if rudimentary principles of statutory construction establish that the marriage statute classifies on

164. See id. at *6 n.1 (noting "the fact that HRS 572-1 obviously does not forbid a person from marrying a person of the opposite sex.").
165. Id. (citing Baehr v. Lewin, 852 P.2d 44, 60 (1993)).
166. Id. at *6.
the basis of sex, statutes reserving marriage for different-sex couples would seem vulnerable on federal constitutional grounds.\textsuperscript{167}

Not only did the court reaffirm that rudimentary principles of statutory construction reveal that same-sex marriage bans classify on the basis of sex but the court also explained that "the framers of the 1978 Hawaii Constitution, sitting as a committee of the whole, expressly declared their intention that a proscription against discrimination based on sexual orientation be subsumed within the clause’s prohibition against discrimination on the basis of sex."\textsuperscript{168} Thus, even if Justice Ramil was correct that the statute discriminated on the basis of orientation rather than sex, the statute still would have been subject to equal protection scrutiny but for the adoption of the constitutional amendment.

In one footnote,\textsuperscript{169} the court did several things. First, it reinforced its previous holding that a statute allowing a man to marry a woman but not a man and allowing a woman to marry a man but not a woman classifies on the basis of sex.\textsuperscript{170} Second, the court made clear that, at least in Hawaii, discrimination on the basis of orientation is subject to the same kind of scrutiny as is discrimination on the basis of sex and, indeed, is subsumed within the latter kind of discrimination.\textsuperscript{171} Thus, other legislative classifications based on orientation will be subjected to strict scrutiny in Hawaii.\textsuperscript{172} The court’s having made these points in its decision is worthy of note and praise.

C. Recognition of Same-Sex Marriages Validly Celebrated Elsewhere

Currently, no state recognizes same-sex marriages, so it is unclear what Hawaii would do were such marriages recognized elsewhere and (1) a Hawaiian same-sex couple were

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\item \textsuperscript{167} See Mark Strasser, The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protection 37 (1999).
\item \textsuperscript{169} The court discussed the different weaknesses in Justice Ramil’s analysis in a footnote. See id.
\item \textsuperscript{170} See id.
\item \textsuperscript{171} See id.
\item \textsuperscript{172} In Hawaii, classifications on the basis of sex are subjected to strict scrutiny. See Baehr I, 852 P.2d at 67.
\end{enumerate}
to go there to marry and then return home, or (2) a same-sex couple validly married in that state were to move to Hawaii. However, existing case law coupled with the legislature’s failure to make clear that such marriages will not be recognized offer a basis for arguing that such marriages should be recognized.  

The current statute reserves marriage for different-sex couples but does not specify whether same-sex marriages validly celebrated elsewhere will be recognized. Various states have made clear their intention to refuse to recognize same-sex marriages validly celebrated in other jurisdictions. Given Hawaii’s failure to pass a similar

173. See generally Mark Strasser, Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due, 28 Rutgers L.J. 313 (1997) (arguing that same-sex marriages should be recognized after explicit legislative declaration to the contrary).


175. See, e.g., Ariz. Rev. Stat. § 25-112(A) (1999) (“Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by section 25-101.”); Ariz. Rev. Stat. § 25-101(C) (1999) (“Marriage between persons of the same sex is void and prohibited.”); Ark. Code Ann. § 9-11-107(a) (Michie 1997) (“All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts in this state.”); Ark. Code Ann. § 9-11-107(b) (Michie 1997) (“This section shall not apply to a marriage between persons of the same sex.”); Fla. Stat. § 741.212(1) (2000):

Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.


No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such marriage.

Idaho Code § 32-209 (1996) (“All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not
statute and given Hawaii's case law suggesting that non-polygamous, non-incestuous marriages validly celebrated elsewhere will be recognized in Hawaii as long as those unions were contracted voluntarily, there is reason to believe that same-sex marriages if validly celebrated elsewhere will be recognized locally.

By not requiring the reenactment of the marriage restriction, the Baehr court may have been helpful in that, otherwise, the legislature might not only have restricted marriage but might also have made clear that same-sex marriages validly celebrated elsewhere would not be recognized in Hawaii. Of course, the legislature can still do that if it so desires and, in any event, it is unclear how such a marriage would be treated were another state to recognize such marriages and were a Hawaiian same-sex couple to travel to that state to marry and then return home. Nonetheless, it is at least more likely that such a marriage would be recognized if validly celebrated elsewhere than would have been the case if a statute expressly denying such

limited to, same-sex marriages.

176. See, e.g., Republic v. Li Shee, 12 Haw. 329 (1900).

The general rule is that marriages legal where entered into are legal everywhere unless odious by the common consent of civilized nations. See Civ. L. Sec. 1872. The exceptions usually instanced are polygamous and incestuous marriages. To these may be added marriages where the requisite element of consent is lacking, as, for instance, if one of the parties is insane or is forced to go through the ceremony and there is no cohabitation afterwards.

Id. at 330.
recognition had been enacted. Thus, it may be that the *Baehr* court’s method of addressing and deciding the relevant issues should be viewed more positively.

V. CONCLUSION

The recent Hawaii constitutional amendment gave the legislature the power to reserve marriage for different-sex couples. However, precisely because this amendment was power-conferring rather than substantive, the court should not have construed it to have retroactively validated a portion of the Hawaii marriage statute. Indeed, if the amendment is so construed, then the literature sent to the voters describing that amendment was misleading in violation of local law and, further, may have undermined the legitimacy of the amendment itself.

As H.L.A. Hart has made clear, statutes conferring powers and statutes establishing rights or disabilities are different in kind and thus an amendment doing the former should not be construed as doing the latter, absent express language to that effect. The Hawaii amendment clearly conferred a power but said nothing about validating a disability to marry, and, thus, should not have been construed to have done so. By the same token, the established retroactivity jurisprudence in Hawaii and elsewhere makes clear that statutes or portions thereof will not be retroactively validated by amendment, absent express declaration to that effect. Because the amendment said nothing about retroactively validating a portion of the Hawaii marriage statute and, indeed, the explanation of the amendment mailed to the voters suggested that it would have no such retroactive validation effect, the amendment should not have been so construed, even implicitly.

The *Baehr* court’s opinion is somewhat mysterious. Because it is so terse and opaque, one can only guess about whether the court understood the implications of its holding regarding retroactivity or the possible invalidity of the ballot itself. Nonetheless, some parts of the opinion were very clear. For example, it reaffirms what other courts are beginning to recognize, namely, that bans on same-sex marriages classify

177. See *BLACK'S LAW DICTIONARY* 712 (6th ed. 1990) (disability is defined as “The want of legal capability to perform an act.”).
on the basis of sex. Indeed, appearances to the contrary notwithstanding, the opinion may eventually help to secure the recognition of same-sex marriage in Hawaii or elsewhere since the opinion suggests both that same-sex marriage bans are vulnerable on federal constitutional grounds and that the validity of the Hawaii amendment itself is open to question.

A separate issue is how the Hawaii Supreme Court should decide the next retroactive validation question brought before it, since the court has either implicitly reversed the standard presumptions regarding retroactivity or has adopted an interpretation of the Hawaii Constitution that rejects those standard presumptions. The most likely resolution is that the court will implicitly overrule itself so that it can restore the jurisprudence that has always existed without having to revisit an issue which the court clearly finds too onerous to continue to address.

The most disappointing aspect of the *Baehr* decision was not the result per se, since it seems likely that the legislature would in fact have reenacted the legislation had the court held that doing so was necessary. Rather, it is that recognizing the personhood of lesbians and gays is still so controversial that courts must sometimes obscure the relevant legal issues, whether consciously or unconsciously, so that they can both recognize the basic human dignity of lesbians and gays and, at the same time, placate those committed to refusing to recognize that inherent human worth.

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179. This is especially true since the state supreme court has construed the relevant statute as classifying on the basis of sex and federal courts are supposed to defer to that interpretation. See *Strasser*, supra note 167, at 63 (discussing federal deference to state courts' statutory construction).

180. It is hard to say whether other benefits might have been accorded as part of a deal to secure an easy reenactment. See *supra* note 74 and accompanying text (discussing this possibility).