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Same-Sex Marriage:
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By Philip Davis and Robert Farwell

After obtaining a warrant on suspicion of Mafia connections, police officers stormed the New York City gay club, the Stonewall Inn. After police cleared the club, outraged patrons and a growing outside crowd became violent, and a two-hour riot ensued. At the riot's conclusion, there were four injured officers and thirteen arrests made. The warrant was served and the establishment closed on the grounds that it was an illegal membership club without a license and without a license to serve liquor (Lisker 1996).

Experts on homosexuality point to the Stonewall incident as the beginning of wide-spread militant gay activism in the United States (Amsel 1987). Since 1970, over a dozen significant same-sex marriage cases have been reported at the appellate level. Although, none of the cases have resulted in state legalization of same-sex marriage, in many instances state regulations granting some benefits to same-sex or "domestic" partners have been gained (Wardle 1996, 9-11). The Lambda Legal Defense and Education Fund reported that by mid-1995, thirty-six municipalities, eight counties, three states, five state agencies, and two federal agencies extended some benefits to (although very limited in nature), or registered for some official purposes, same-sex domestic partnerships (8). Today corporations such as Xerox, Dupont, Disney, and IBM, recognize and offer benefits to domestic partners.

The most significant same-sex marriage case to date, Baehr v. Miike, is taking place in Hawaii. We will use interest-group theory in conjunction with moral-policy theory to describe and predict the public policy outcome in the same-sex marriage controversy that is being waged both in Hawaii and on the national level. This paper will analyze the Baehr v. Miike case and the resulting public policy decisions. Interest-group theory, in conjunction with moral-policy theory, will be used to explain the development and transition stages of same-sex marriage policy. Finally, these two theories will also be used to predict the same-sex marriage public policy outcomes, both on the micro- and macro-levels.

Case Study
In December of 1990, three homosexual couples—Ninia Baehr and Genora Dancel, Tammy Rodrigues and Antoinette Pregil, and Joe Melillo and Patrick Lagon—applied for and were denied marriage licenses by the Hawaii Department of Health. On December 17, 1990, the three homosexual couples filed a lawsuit in Hawaii Circuit Court against the director of the Hawaii Health Department, John C. Lewin. Hawaii law requires a couple to obtain a marriage license before they are married. The marriage license law also specifies that a marriage license can only be granted to couples of the opposite sex. The plaintiffs argued that the state violated

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1Appellate: "A court having jurisdiction of appeal and review... not a 'trial court' or court of first instance" (Black 1991).

2The case was originally named Baehr v. Lewin. John C. Lewin was the acting Director of the Hawaii Department of Health during the period 1990-93. In 1993 the Supreme Court remanded the case back to the Circuit, at which time Lawrence H. Miike was the acting Director of the Hawaii Department of Health.
Same-Sex Marriage: Interest Group to Moral Policy Theory

their rights to equal protection in the Hawaii Constitution, which forbids discrimination based on sex. In addition, they sought both a judicial declaration that the Hawaii marriage license law is unconstitutional insofar as it prohibits same-sex marriage and an injunction prohibiting state officials from denying marriage licenses to same-sex couples on account of the heterosexuality requirement (Wardle, 9-11).

Over the years, Hawaii has developed a reputation as a socially progressive state. In 1970, Hawaii became the first state to legalize abortion; in 1972, it became the first state to ratify the Equal Rights Amendment; in 1991, it was the fifth state to offer special employment protections to homosexuals. With a progressive social history and its geographic isolation from the other 49 states, Hawaii seemed a favorable location to attempt to begin the legalization of same-sex marriage. It is interesting to note that the three couples applied for marriage licenses at roughly the same time; their collaboration in the ensuing lawsuit was not a matter of chance, but rather was the orchestrated plan of gay rights activist William E. Woods, who was looking for a test case3 to attempt to legalize same-sex marriage in Hawaii. Mr. Woods planned to have the couples try to marry legally, get turned down by the state, and then file a lawsuit (Fern 1996, A1). In a strategic move:

The plaintiffs . . . made a tactical decision to seek their objectives entirely through the state law, not only by filing in state rather than Federal Court, but also by alleging exclusively violations of state law, (i.e., the) Hawaii Constitution (Wardle, 11-12).

Hawaii constitutional claims were made so that if the courts ultimately ruled in their favor, only a constitutional amendment4 could supersede the court’s ruling.

The state moved to have the complaint dismissed for failure to state a claim. On October 1, 1991, the Circuit Court dismissed the suit, declaring that the plaintiffs had failed to state a claim. Immediately, the case was appealed to the Hawaii Supreme Court. On May 5, 1993, the Hawaii Supreme Court overturned the Circuit Court’s dismissal and ruled that the rights of the couples appeared to have been violated. The Supreme Court remanded5 the case back to the Circuit Court.

Justice Steven H. Levinson, writing the majority opinion said:

The applicant couples do not have a fundamental constitutional right to same-sex marriage because such a relationship is not “rooted in [our] traditions” nor is it “at the base of all our civil and political institutions.”

Justice Levinson ruled that forbidding the couples to marry “deprives them of access to a multiplicity of rights and benefits that are contingent upon that status.” Thus, he directed the Hawaii Circuit Court to examine the state’s marriage statute, applying “strict-scrutiny.” This requirement forces the state to meet the most rigorous legal standard to justify its restriction on same-sex marriage. The trial was set for September 1995 (Wardle, 12; Wetzstein 1996, A23).

Upon remand by the Supreme Court, Baehr v. Lewin assumed national prominence. In June 1993 Evan Wolfson, senior staff attorney of the Lambda Legal Defense and Education Fund, joined the case as co-counsel. In addition, The Hawaii Equal Rights Marriage Project (HERMP) was created to help raise the funds necessary to pay for legal costs in Baehr v. Lewin and actively work to secure the rights of marriage for lesbian and gay couples residing in Hawaii through an all-volunteer organization that informs the public, media, and legislature about the court case and about the civil rights issues involved in same-sex marriage by providing experts, resources, and articles on same-sex marriage (Friends of HERMP 1996). After the Supreme Court’s decision, opponents of the case feared, and

3 Test Cases are often used by interest groups seeking judicial activism. For a case to be selected it must meet certain criteria, i.e., be an ideal or egregious example of inequity or injustice in society which has a high probability of receiving judicial activism in favor of the goal of the interest group.

4 An amendment to Hawaii’s Constitution can only be made by either a two thirds vote of the legislature and ratification by a popular vote, or by a constitutional convention.

5 To send back. “The act of an Appellate Court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some other further action” (Black 1991, 1293).
proponents proclaimed, that if the case was won, the Full Faith and Credit Clause in Article Four of the Constitution would require all states to recognize same-sex marriages performed in Hawaii and other states. Because Baehr v. Lewin was likely the first case not only to legalize same-sex marriage in an individual state but also nationally, it immediately gained national attention and scrutiny.

In June 1994, Hawaii Governor Jon Waihee signed a bill which states that marriage licenses can only be granted to heterosexual couples, and that the policy could only be changed by the Hawaii legislature and not by the courts. The bill also set up an eleven-member Commission on Sexual Orientation to study how same-sex couples' legal concerns could be addressed. At this point, vigorous public debate began taking place. The issue was debated in hearings before committees in the state legislature, public rallies and demonstrations were held, churches chose sides, and a brisk discussion of the issue took place in local newspapers. The Commission on Sexual Orientation became a target for scrutiny. Gay activists filed a lawsuit to remove the two Roman Catholics and two members of the Church of Jesus Christ of Latter-day Saints from the commission on grounds that having them on the commission violated the separation of church and state. They were dismissed from the panel early in 1995 (Friends of HERMP 1996).

As a result, accusations were made that the commission had been stacked with members who favored same-sex marriage to the exclusion of opponents of the issue. In December 1995, the commission, by a vote of 5-2, recommended that Hawaii legalize same-sex marriage or set up a more comprehensive domestic partnership law, stating that "denying such a right would be to deny equal protection of the law" (Halloran 1996, G1; Wetzstein 1996, A-23). Pursuant to the commission's decision, the Church of Jesus Christ of Latter-day Saints filed an Application for Intervention in the case. The LDS Church asserted that:

In late 1994 they became aware, for the first time, that the Attorney General, acting on behalf of [the State of Hawaii], might not be willing to assert at the upcoming trial all of the known compelling state interests. (The Church of Jesus Christ of Latter-day Saints 1996)

The LDS Church's Application for Intervention was denied by the Circuit Court. The denial was appealed to Hawaii's Supreme Court which upheld the Circuit Court's denial.

In the Baehr v. Miike case the state argued that:

(1) All things being equal, children do best with their biological mother and father; (2) a male-female married couple is the best setting to have and raise children; (3) the state may promote this for the sake of children; so (4) limiting marriage to male-female couples is justified. (Hawaii Catholic Conference 1996)

The plaintiffs argued that:

(1) Children do best when they have nurturing adults; (2) it helps to have more than one parent, but the parents' gender is irrelevant; (3) the state has no basis for preferring that children be raised by male-female couples; so (4) marriage should not be limited to male-female couples. (Hawaii Catholic Conference 1996)

In 1996, the Circuit Court ruled in favor of the plaintiffs making same-sex marriage legal in Hawaii. The only way to overturn the court's ruling on a constitutional matter is with an amendment to Hawaii's constitution.

In the 1996 election, Hawaii voters elected to hold a constitutional convention, and interest groups opposing the case campaigned for the convention, citing an amendment as the only way to...
Same-Sex Marriage: Interest Group to Moral Policy Theory

Veto a court ruling in favor of same-sex marriage. Sympathetic groups to the plaintiffs i.e., the ACLU, campaigned heavily against holding the convention. In 1996, several bills were advanced in the Hawaii House, both to allow same-sex marriage and to call for a constitutional amendment to prohibit same-sex marriage. By the close of the legislature on April 26, no legislation concerning same-sex marriage had been enacted. However, in 1997 by overwhelming majorities in both the House (44-6, with 1 absence) and Senate (24-0, with 1 absence), Hawaii legislator’s voted to give the people of Hawaii the opportunity to vote on the following constitutional amendment in November 1998: Whether or not “the legislature shall have the power to reserve marriage to opposite-sex couples” (Hawaii Catholic Conference 1998).

On the state and national level, joining Utah and South Dakota, twenty-six states and the U.S. Congress introduced anti-same-sex marriage bills in November 1998, As of July 1996, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, and Utah had passed bills. During the 1996 Republican presidential primary, several conservative groups united with many of the Republican candidates for president, to launch the “National Campaign to Protect Marriage” in order to oppose same-sex marriage. Presidential hopefuls Pat Buchanan, Alan Keyes, and Phil Gramm spoke, while letters of support from Bob Dole and Steve Forbes were also read (Only Richard Lugar failed to support the rally). Also speaking were Don Wildmon of the American Family Association and Mike Gabbard of Stop Promoting Homosexuality Hawaii, among others (Forum on the Right to Marriage 1996).

On May 7, 1996, the Defense of Marriage Act was introduced with bipartisan support in the U.S. House by Bob Barr (R-GA) and in the U.S. Senate by Don Nickles (R-OK) as a preemptive measure against the possible legalization of same-sex marriage in Hawaii. The Defense of Marriage Act does not outlaw same-sex marriages in individual states, but defines marriage for federal purposes as a “legal union between one man and one woman.” The bill keeps homosexuals ineligible from collecting federal benefits accorded to spouses. The bill also stipulates that a state does not have to recognize gay marriages performed in other states. On May 23, President Clinton said he would sign the legislation as it was currently written. On July 12, the House passed the Defense of Marriage Act by a vote of 342-67. On the September 10, the Senate passed the bill by a vote of 85 to 14, and voted 50-49 against Senator Kennedy’s Anti-workforce Discrimination Bill, which would extend the protection of the 1964 Civil Rights Act to homosexuals. On September 21, President Clinton signed the Defense of Marriage Act into law (Wetzstein 1996, A-23).

Interest Group and Moral Policy Theory

Two similar and closely associated theories prove useful in explaining the evolution of the conflict concerning same-sex marriage and the resulting political reaction to this issue.

The first theory, commonly referred to as interest-group theory, is based on the assumption that individuals within a society have intensely held preferences, values, and interests. These individuals with the same preferences, values, and interests will unite into various interest groups, in order to gain enough power to promote their common good. The organized interest groups will then attempt to influence government policies to benefit their own individual members. These similar preferences, interests, and values can then be seen through the group’s association to policy-making arenas, by virtue of their lobbying activities.

In order to more clearly understand the role that interest groups play in policy making, we need to look at several important aspects of interest

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10 See Appendix on page 12.

11 Senator Kennedy threatened to attach an amendment to the bill that would have extended the Civil Rights Act of 1964 to homosexuals. When Clinton agreed to sign the bill as it was currently written, Republicans were able to refuse to add Kennedy’s amendment. The amendment included provision which would have mandated homosexual scout masters and set minimum quotas for homosexuals in the workplace. Kennedy later introduced his amendment as the Anti-workforce Discrimination Bill.

Pi Sigma Alpha Review 1998
groups by exploring further the historical development of interest-group theory.

In Federalist 10, James Madison addresses factions or interest groups, defining them as “a number of citizens whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of the citizens, or to the permanent and aggregate interests of the community” (Madison 1961, 78).

Madison’s view of factions was an early, normative look at the role that interest groups would play in the governing of our country and the formation of public policy. He viewed factions as a natural outgrowth of mankind’s nature. Madison’s model portrayed the development of factions within society as simply a reflection of the selfish side of human nature.

Eventually, as political science gained firm academic footing in our country, a sociologist named Arthur F. Bentley took note of the interplay that existed between groups in American politics. To Bentley, “Government and policy were merely the result of the interactions of groups within and outside of government” (Ornstein and Elder 1978). The economic aspect of this interaction was very important to Bentley. He felt that wealth was the main source of group division in society. Bentley considered groups synonymous with interests. He even went as far as to say in his book The Process of Government that “there is no group without its interests” (Bentley 1976, 211). He also thought that no “interest” really existed unless it actively manifested itself through group action.

Bentley extended this relationship between interests and groups even further when he discussed the role of individuals in society. To him, individual interests did not exist. What really mattered, according to Bentley, were the common interests of groups of people, not the benefits and losses of individuals (211). Bentley was also important in the development of general interest group theory by defining groups in terms of their conflict with one another. To him “no interest group [had] meaning except in reference to one another” (217).

Another ground-breaking interest-group theorist, David B. Truman, expanded on the ideas of Bentley by describing the effects of organized interests. Truman begins by defining interest groups as:

Any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes. (Truman 1955, 33)

Truman saw individual citizens within society only in terms of their group identification and membership. Truman also took note of the power of “potential groups” that existed in society. Drawing upon Bentley’s idea of competing group interests, Truman theorized that potential groups would arise and organize if special interests gained too much power.

To Truman, the very existence of these potential groups, and the fear that they will organize, works to keep the already organized interests from making excessive demands on society or government. “The unacknowledged power of such unorganized interest,” according to Truman, “lies in the possibility that, if these wide, weak interests are too flagrantly ignored, they may be stimulated to organize for aggressive counteraction” (114). Once a group organizes, therefore, in order to reassert a satisfactory equilibrium it may inspire, if its issues are salient and complex, counter organizations among rival groups in a kind of dialectical process.

David Truman also felt that organizing a formal association is one important way to improve the bargaining power of the group. Formal associations and organizations become helpful in stabilizing and strengthening the relationships that exist within the group. This is done by increasing the mutually supportive interaction among members, and, thereby, the range and salience of their shared values. Truman also notes that “organizations [are] a consequence, and therefore an index, of a fairly high frequency of interaction within a group” (112). This interaction depends heavily upon the salience of the issues concerning different group interests. Some interests tend to be specific, and therefore the groups that arise in response to specific, narrow interests tend to be smaller, highly organized, and

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12Earl Latham, in his book The Group Basis of Politics, further separates interest groups into three senses or phases of development: “incipient, conscious, and organized. The indispensable ingredient of “groupness; is consciousness of common interest and active assistance, mutually sustained, to advance and promote this interest. Where the interest exists but is not recognized by the members of the putative association, the group may be said to be incipient . . . A conscious group is one in which the community sense exists but which has not become organized. An organized group is a conscious group which has established an objective and formal apparatus to promote the common interest” (14-15).
stable. Groups that arise in response to more general interests, however, tend to be larger, less organized, and transient.

Drawing upon Madison’s view that groups tend to be highly self-interested, an economist named Mancur Olson developed his theory of collective action. According to Olson, interest groups exist in order to better promote the concerns and interests of the members of their particular group. This purpose of interest groups is supported by the principle of rational ignorance. Individuals will tend to be interested in policy decisions and policy action that will directly affect them. Therefore, when there is a policy that will affect a special group, in either a positive or a negative way, then that group will organize and attempt to influence policy makers in a way that will benefit the individual members of the group.

Mancur Olson, in his book The Logic of Collective Action, also tries to separate the economic and political benefits that groups receive into two categories. The first group of politically gained benefits, which he calls collective benefits, are those which accrue to people in a particular situation or category regardless of their organizational affiliations. The second, which Olson calls selective benefits, are those which accrue only to members of the association.

According to Olson, people will not normally join organizations in order to seek collective benefits. This has to do with the incentives that come from joining a group. If a person does not need to be a member of the group in order to gain from action taken by the group, which would be the case with collective benefits, then the individual has little incentive to join. This behavior is commonly referred to in economics as free riding. Free riders are able to gain benefits of someone else’s action without assuming any of the associated costs.

Olson also used this model of benefits to explain the relationship that exists between the size of a group and the “individual incentives to contribute toward the achievement of group goals” (Olson 1965, 126). Olson suggests that individuals rationally have no real incentive to participate in large interest groups. According to Olson, individuals join groups only when the group provides selective benefits to its members, or is small enough that the individual feels that she is necessary to the group’s success. One obvious benefit, however, of larger interest groups is, according to Olson, that “the larger, more nearly general, interest would usually tend to defeat the smaller narrower, specific interest” (12).

Robert H. Salisbury, in his article “An Exchange Theory of Interest Groups,” examines the selective benefits that members of groups receive through their association with the group. The first type of incentive, according to Salisbury, is a material benefit. This type of incentive encourages an individual to join or remain a member of an association or group because she receives material rewards for participation. This compensation can take the form of work, money, or tax breaks.

The second type of selective incentive is a solidarity benefit. This is an incentive where an individual will join or remain a member of a group or organization based upon the socialization benefits that she gets from contributing or participating in a group. The final incentive, based on selective incentives, that Salisbury discusses is called purposive or expressive benefits. This incentive relates to the ideological satisfaction that individual members of interest groups gain from belonging to the group (Salisbury 1969, 1-32).

Thus, for a small interest group to successfully support the interests of its members, it will need to keep the salience of its issue as small as possible in order to avoid counter organization and conflict that could keep it from achieving its goals. Even interest groups themselves are aware, according to Cochran, “that it may be best not to press legislators in causes to which the unorganized voters are hostile” (Cochran and Malone 1995, 81). If the special-interest group, therefore, is successful in keeping its issue out of the public eye, then it will, by not antagonizing unorganized voters, encourage them to remain unorganized.

Moral Policy Theory

The second theory that proves useful in understanding the same-sex marriage controversy is Meier’s moral-policy theory. This theory asserts that policies dealing with moral issues such as gambling, drugs, and gay marriage, will follow Lowi’s basic typology for redistributive policy, except instead of a redistribution of wealth or government programs, there is a redistribution of values from one group to another (Haider and Meier 1996, 352-59).

Moral-policy theory seeks to combine interest-group theory with traditional morality politics by establishing a relationship between the two theories based on the salience of the policy issues. When a moral policy issue is kept narrow, and the involved interest groups are able to discretely interact with sympathetic elites and policy makers, then moral-policy theory closely resembles interest-group theory. In his book The Politics of Sin.
Kenneth Meier describes some common characteristics of morality issues. “In general [morality issues] tend to be salient and easy to understand” and “as [the] salience increases, [the] citizens have a greater influence on public policy” (Meier 1994, 245-6).

When, however, the scope of the conflict is expanded, due primarily to political entrepreneurs, and the issue becomes highly salient, then it becomes an issue in which the individual interest groups become less important in the formulation of policy, while the values of individual citizens, the competitiveness of parties, and the party affiliations of politicians, become more important. The role, therefore, of political entrepreneurs in moral policy issues becomes crucial. Political actors in moral policy issues, whether they be legislators, chief executives, or bureaucrats, have, according to Meier, “their own policy preferences on morality issues and exercise discretion in quest of these preferences” (244). It is these political actors and entrepreneurs who often will, either for their own self-interest, or for the interest of their political party or interest group, bring the issue to the attention of the public or, inversely, try and keep the issue away from the attention of the public.

Finally, one important aspect of moral-policy theory is that, for most morality issues, implementation is the real policy. According to Meier, because of the symbolic nature of many moral policy laws, “implementation often [becomes] the policy” (247). This is because, in the case of most morality policies, implementation cannot be separated from policy adoption. This is ironic because while the bureaucracy is left out of morality policy adoption, it has almost total control over the implementation of morality policies.

THEORIES’ APPLICATION TO SAME-SEX MARRIAGE POLICY

Interest-group theory predicts that if an interest group’s agenda is at odds with the consensus of the majority of a population, an interest group must maintain a low salience or prominence regarding its agenda and target sympathetic power elites. Since polling data shows that same-sex marriage is not supported by a majority of Americans including Hawaiians, interest-group theory explains why in\n
Baher v. Lewin, special interest groups for the plaintiffs sought judicial activism as opposed to legislative means, since the courts are affected less by popular opinion than is the legislature.

Interest-group theory also predicts that if the interest groups in favor of same-sex marriage maintain low prominence, they would have a much greater chance of gaining a political victory and a change in policy regarding same-sex marriage. According to interest-group theory, interest groups will generally fair better when they are able to limit the scope of the conflict and discretely lobby policy makers for favorable public policy. In Hawaii, Lambda and the ACLU should have, according to interest-group theory, tried to keep the salience of their issue low while discretely and incrementally trying to change the laws regarding gay marriage.

This may have been the motivation that Lambda and the ACLU initially had in trying to win their case at the state level instead of at the national level. This would keep the conflict surrounding the case at a state level and, therefore, at a lower level of salience by minimizing national coverage and debate concerning same-sex marriage.

It might also be viewed that by trying to get gay marriage accepted at the state level first before trying to get the policy changed at the national level, the ACLU and Lambda were also following the interest-group theory’s prediction that incremental changes in policy (i.e., first changing state policy, then attempting to change national policy) would be strategically more successful in changing the overall policy regarding same-sex marriage in the United States.

Interest-group theory also predicts that special-interest groups will tend to be relatively small (in relation to the general population), organized and stable. This holds true concerning the groups involved in the case in Hawaii. Lambda, the Hawaii Equal Rights Project, and the ACLU, all appeared as special-interest groups in favor of the legalization of same-sex marriage.

Although the ACLU itself is an interest group with a relatively large population of members, its involvement in the Hawaii conflict was limited to a supporting role. The ACLU is tightly organized and very focused on achieving its goals. It has a specific agenda that it desires to achieve in supporting the right of homosexuals to marry. This has to do with the group’s desire to defend rights that it feels should be guaranteed and protected through our legal system.

Lambda is a relatively small, stable, well-organized interest group. Founded in 1973, the Lambda Legal Defense and Education Fund is the nation’s oldest and largest legal organization for gay rights. In 1984, Lambda won the country’s first HIV-related discrimination law suit. With nearly 50 cases across the country, Lambda’s work involves virtually every area of concern regarding...
Same-Sex Marriage: Interest Group to Moral Policy Theory

gay rights and people with HIV. This includes discrimination in employment, housing, and the military; AIDS and HIV-related policy and health care reform; parenting and relationship issues; challenging anti-gay ballot initiatives and sodomy laws; and immigration.

In 1993, the Hawaii Supreme Court remanded the case to the lower court with the stipulation of strict scrutiny. Under the burden of strict scrutiny, same-sex marriage would be legal in Hawaii unless the state is able to show it has a "compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose." At this point, the case takes on a dual nature, one whose ramifications vary greatly from the micro- to macro-level.

Locally, or on the micro-level, the fate of the case remained in the hands of power elites, or Hawaii's judges who declared same-sex marriage legal, but nationally, or on the macro-level, policy dealing with the issue of same-sex marriage became that of electoral politics. Just after the Supreme Court remanded the case back to the Circuit Court, the Lambda Legal Defense and Education Fund assumed co-legal defense in the case and attempted to gain more national attention. On a macro-level, Baehr v. Lewin became the case with the strongest likelihood of legalizing same-sex marriage, not only in Hawaii, but because of the Full Faith and Credit Clause in the Constitution, nationwide. Just as the case shifts from power elites to electoral politics, as it goes from the micro- to macro-level, the causal and predictive aspects of our theory explain how the case also shifts from interest-group theory to moral-policy theory.

Once the Baehr v. Miike case reached the national stage as a result of the Supreme Court's decision to remand, national interest groups such as the Lambda Legal Defense and Education Fund and the ACLU become involved. They viewed the case as a way to redistribute their values by court order nationwide. Not viewing it in their long term best interests to attempt to take the issue out of the public eye, Lambda and the ACLU started a campaign to change the public perception of same-sex marriage. Lambda and the ACLU organized the creation of the National Freedom to Marry Council (NFMC) whose goal was to raise national public attention, support, and legal fees for same-sex marriage cases. In targeting the national audience, they sought incremental changes in public opinion which would lead to a enough support in the general populace that the principles of the moral policy theory would start working for them.

Once the ACLU and Lambda decided that it was in their best interest, and in the best interest of their policy goals, to heighten the public's awareness and thereby increase the salience of the same-sex controversy, they fostered a political environment that practically demanded counteractions from other interest groups. It also guaranteed that previously unorganized interests would band together in a formal association in order to oppose the adoption or implementation of same-sex marriage. Once a moral issue becomes salient, the larger general interests, which normally remain unorganized due to the low level of benefits that come with formal group associations for general interests, become more organized. Suddenly, when the general interests of the unorganized citizens became threatened by the morality issue of same-sex marriage, the benefits of belonging to a group opposed to same-sex marriage increased and, therefore, the number and size of counter groups also increased. As a result of the case's prominence, moral-policy theory came into play at the micro-level. The Hawaii legislature voted to allow a public vote on an amendment that would allow the legislature to restrict same-sex marriage.

Finally, Salisbury's exchange theory of interest groups is able to explain the motivation for membership in groups such as the ACLU and Lambda. According to Salisbury, a member of an association must gain some type of selective benefit from their membership in an interest group. Why would a gay man, or woman, become a member of Lambda or the ACLU if he or she benefits equally from same-sex policy changes if he or she is not a

13 Definition of state's burden under strict scrutiny test (Black 1991, 1422).

14 National membership includes but is not limited to: Lambda Legal Defense and Education Fund (national); ACLU (national); Hollywood Supports (California); Human Rights Campaign Fund (Washington); Japanese American Citizens League; Freedom to Marry Coalition (California); The Equal Marriage Rights Fund (Washington DC Chapter); Hawaii Equal Rights Marriage project (Hawaii); FAIR (Indiana); Same-Sex Marriage Advocates Coalition (Maryland); Forum on the Right to Marriage (Massachusetts); Dallas Gay and Lesbian Alliance Marriage Project (Texas); The Equal Marriage Rights Fund (Houston Texas Chapter); The Legal Marriage Alliance of Washington (Washington); and Partners Task Force for Gay & Lesbian Couples (Washington).
member? Why not just free ride and gain the benefits while letting others accrue the costs of membership?

Salisbury answers these questions by refuting the idea that the collective benefits (in this case, a change in same-sex marriage policy) are what motivates a person to join a particular interest group. In the case of Lambda, there must be certain selective benefits involved in order to explain the reasons why a person would rationally become or stay a member of this special-interest group.

Of the three types of selective benefits described by Salisbury, Lambda seems to offer at least two. First, Lambda offers members a chance to participate in the realization of suprapersonal goals. For Lambda, this would include helping to bring about a positive change in the acceptance or public treatment of homosexuals. This type of benefit is called purposive or expressive. The second type of benefit that a group like Lambda would offer to its members solidary benefits. Members of Lambda are almost all homosexual, or concerned with homosexual issues. This creates an environment that gives members a sense of identity, a place to socialize and be accepted. These benefits cannot be dismissed easily, especially when one realizes that the homosexual community is very much a morally stigmatized minority group within American society. Lambda offers homosexuals an atmosphere where they are not only accepted, but needed as well.

Moral-policy theory "predicts that the most important variables in explaining public policy are the distribution of citizen values, the competitiveness of parties, and the party affiliations of politicians . . . . Policy is a function of religious forces, party competition, partisanship, high salience" (Haider and Meier 1996, 332-49). Since the national legalization of same-sex marriage is at odds with views of 70 percent of the American public (Salholz 1993, 69), moral-policy theory predicts that since a favorable ruling on the case in Hawaii could have national implications, some action would be taken by Congress, and this action would be taken along party lines.

This gives an opportunity for political entrepreneurs to put the issue on the public policy agenda. The theory also predicts that groups opposing HERMP would form and become active. The Church of Jesus Christ of Latter-day Saints, the Roman Catholic church, other Christian groups, and concerned citizens (holding similar views regarding same-sex marriage as the majority of Americans) united in opposition to the Hawaii case. In addition, conservative political groups united to oppose the Hawaii case. Republican presidential candidates helped form the National Campaign to Protect Marriage and Republicans introduced and garnered enough support for the Defense of Marriage Act to be signed into law.

The fact that 1996 was an election year created a favorable political atmosphere for opponents of same-sex marriage. The legalization of same-sex marriage would be viewed as a major blow to traditional American values and an attack on the family. President Clinton, a visible political participant, went on record saying that he was opposed to gay marriages, incorporating this theme into his "Family Values" platform. Brokering entrepreneurs were able to take advantage of his campaign pledge. With the case in Hawaii likely to legalize same-sex marriage, policy entrepreneurs took advantage of the election-year environment and got a Democratic President to go against the ideological core of his party. If President Clinton had refused to sign the legislation, Republicans could have used it as a social wedge issue to defeat him in the election. Not only would Clinton's refusal have gone against the grain of the majority of Americans, but it also would have been self-contradictory. In the end, as a show of defiance, President Clinton waited until just before midnight on September 21, 1996 to sign the bill into law.

So, it is in the dual micro- (interest-group theory) and macro- (moral-policy theory) levels that the interest groups in favor of legalizing same-sex marriage sought to change public policy. On the macro-level, in changing public opinion in their favor and on the micro-level, in working with sympathetic political elites. The moral-policy theory also explains the actions taken by opponents of same-sex marriage; in moving the issue to the national agenda and tapping the moral sentiments of the national population, they attempted to place the issue on the national agenda in the hands of legislators who are accountable to a majority of the public and thereby gain a ruling in their favor.

CONCLUSION

Initially, at the micro- or state level, the issue of same-sex marriage represented by the case of Baehr v. Miike resembled interest-group politics. While HERMP was able to confine the scope of interest in the case to the local level, maintain a low level of salience, and target sympathetic power elites, their chances of success in having same-sex marriage at the local level remained high. They were especially successful in light of three facts: those members of the Supreme Court who were not
same-sex marriage sympathetic to same-sex marriage removed themselves from ruling in the case; those members of the panel that was setup to study the issue of same-sex marriage in Hawaii who may have had religious grounds for opposing same-sex marriage were dismissed; and the Hawaii Supreme Court imposed strict scrutiny when it remanded the case to the Circuit Court.

After the Supreme Court remanded the case to the Circuit Court, the scope of conflict was expanded to the macro- or national level because of the likelihood that same-sex marriages performed in Hawaii would require national recognition. At the macro-level, morality politics replaced interest group politics as the theory that described the public policy outcomes. As predicted by morality politics, many state governments adopted legislation prohibiting same-sex marriage and at the national level, the Defense of Marriage Act was passed as a preemptive measure against the possible national implications of the legalization of same-sex marriage in Hawaii. With the broad-based increase in public attention the case received, moral-policy theory began playing a larger role at the local level.

Although interest-group politics predicted the likelihood of a favorable decision by sympathetic power elites, such as the Supreme Court judges, the legislature put the ultimate fate of the issue in the public arena when it voted to allow the people to vote on an amendment to the Hawaii Constitution that would give the Hawaii legislature the power to ban same-sex marriage. Although the final outcome of the issue will not be decided until November 1998, moral-policy theory predicts that the citizens of Hawaii will pass the constitutional amendment that will allow their legislatures to outlaw same-sex marriage.

ABOUT THE AUTHORS

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WORKS CITED


APPENDIX: Defense of Marriage Act

104TH CONGRESS; 2ND SESSION
IN THE 104TH CONGRESS
AS ENROLLED

H. R. 3396
1996 H.R. 3396; 104 H.R. 3396

SYNOPSIS: An Act To define and protect the institution of marriage.
DATE OF INTRODUCTION: MAY 7, 1996
DATE OF VERSION: SEPTEMBER 11, 1996 VERSION: 5
SPONSOR(S): Sponsors not included in this printed version.

Be it enacted by the Senate and House of Representatives of the United Stateses of America in Congress assembled,

SECTION 1. SHORT TITLE. This Act may be cited as the "Defense of Marriage Act".

SECTION 2. POWERS RESERVED TO THE STATES.

(a) IN GENERAL. CHAPTER 115 OF TITLE 28, UNITED STATES CODE, IS AMENDED BY ADDING AFTER SECTION 1738B THE FOLLOWING:
"1738C. Certain acts, records, and proceedings and the effect thereof "No State, territory, or possession of the united States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

(b) CLERICAL AMENDMENT. THE TABLE OF SECTIONS AT THE BEGINNING OF CHAPTER 115 OF TITLE 28, UNITED STATES CODE, IS AMENDED BY INSERTING AFTER THE ITEM RELATING TO SECTION 1738B THE FOLLOWING NEW ITEM: "1738C. Certain acts, records, and proceedings and the effect thereof."

SECTION 3. DEFINITION OF MARRIAGE.
(a) IN GENERAL. CHAPTER 1 OF TITLE 1, UNITED STATES CODE, IS AMENDED BY ADDING AT THE END THE FOLLOWING: "7. Definition of 'marriage' and 'spouse' "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

AMENDMENT. THE TABLE OF SECTIONS AT THE BEGINNING OF CHAPTER 1 OF TITLE 1, UNITED STATES CODE, IS AMENDED BY INSERTING AFTER THE ITEM RELATING TO SECTION 6 THE FOLLOWING NEW ITEM: "7. Definition of 'marriage' and 'spouse'."

Speaker of the House of Representatives
Vice President of the United States and
President of the Senate