> There is another . . . reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. *The Equal Rights Amendment, which if adopted will resolve the substance of this precise question,* has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, . . . the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems . . . that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Id. at 692, 93 S.Ct. at 1773 (emphasis added).

The Powell group's concurring opinion therefore permits but one inference: had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the *Frontiero* court would have subjected statutory sex-based classifications to "strict" judicial scrutiny.

In light of the interrelationship between the reasoning of the Brennan plurality and the Powell
580 group in *580 *Frontiero,* on the one hand, and the presence of article I, section 3 — the Equal Rights Amendment — in the Hawaii Constitution, on the other, it is time to resolve once and for all the question left dangling in *Holdman.* Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution[33] and that HRS § 572-1 is subject to the "strict scrutiny" test. It therefore follows, and we so hold, that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.

[33] Our holding in this regard is *not,* as the dissent suggests, "[t]hat Appellants are a `suspect class.'" Dissenting opinion at 592.

4. The dissenting opinion misconstrues the holdings and reasoning of the plurality.

We would be remiss if we did not address certain basic misconstructions of this opinion appearing in Judge Heen's dissent. First, we have *not* held, as Judge Heen seems to imply, that (1) the appellants "have a `civil right' to a same sex marriage[,]" (2) "the civil right to marriage must be accorded to same sex couples[,]" and (3) the applicant couples "have a right to a same sex marriage[.]" Dissenting opinion at 588-89. These conclusions would be premature. We have, however, noted that the United States Supreme Court has recognized for over fifty years that marriage is a basic civil right. *See supra* at 562-64. That proposition is relevant to the prohibition set forth in article I,
581 section 5 of the Hawaii Constitution against *581 discrimination in the exercise of a person's civil rights, *inter alia,* on the basis of sex. *See id.* at 562.

Second, we have *not* held, as Judge Heen also seems to imply, that HRS § 572-1 "unconstitutionally discriminates against [the applicant couples] who seek a license to enter into a same sex marriage[.]" Dissenting opinion at 588. Such a holding would likewise be premature at this time. What we *have* held is that, on its face and as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5. *See supra* at 564.