

# The Struggle for Same-Sex Marriage Continues

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On November 3, 1998, Alaskan and Hawaiian voters passed, by margins of more than two to one, constitutional amendments limiting marriage to opposite-sex unions.<sup>1</sup> Although the two initiatives were not identical, as will be discussed below, both have the effect of foreclosing the opportunity for lesbians and gay men to have our relationships legally recognized through marriage in those states. The question this piece will attempt to answer is whether the same-sex marriage movement is effectively stalled or whether we are on the verge of a tremendous change that ultimately will provide legal protections for same-sex relationships equal to those given to opposite-sex couples.

## WHY MARRIAGE

One might begin by asking why same-sex couples want to marry and why we need to call it marriage.<sup>2</sup> First, marriage is made up of an extensive bundle of "rights, benefits and obligations"<sup>3</sup> that would provide pow-

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1. See Elaine Herscher, *Same-Sex Marriage Suffers Setback*, S.F. CHRON., Nov. 5, 1998, at A2 [hereinafter Herscher, *Same-Sex Marriage*].

2. The arguments from within the lesbian and gay community that we should not seek marriage rights are outside the scope of this piece. See generally SAME-SEX MARRIAGE: PRO AND CON A READER (Andrew Sullivan ed., 1997); SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); Sheila Cronan, *Marriage*, in RADICAL FEMINISM 213, 219 (Anne Koedt et al. eds., 1973); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-1995).

3. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 70 (1996) (emphasis omitted). These rights include economic and legal benefits such as:

state income tax advantages . . . public assistance . . . control, division, acquisition, and disposition of community property . . . rights relating to dower, curtesy, and inheritance . . . rights to notice, protection, benefits and inheritance under the Uniform Probate Code . . . award of child custody and support payments in divorce proceedings . . . the right to spousal support . . . the right to enter into premarital agreements . . . the right to change of name . . . the right to file a nonsupport action . . . post-divorce rights relating to support and property division . . . the benefit of the spousal privilege and confidential marital communications . . . exemption of real property from attachment or execution . . . [and] the right to bring a wrongful death action.

Baehr v. Lewin, 852 P.2d 44, 59, *clarified on grant of reconsideration in part, rev'd sub nom* Baehr v. Miike, 852 P.2d 74 (Haw. 1993). For additional information about marriage benefits, see generally Richard D. Mohr, *The Case for Gay Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, *supra* note 2, at 84; ESKRIDGE, *supra* at 68. Marriage also brings with it seri-

erful protections for same-sex relationships. Winning these rights one at a time through legislative channels is an almost impossible endeavor. Second, even if all economic and political benefits of marriage were provided to same-sex relationships without the name, the idea is suspiciously reminiscent of "separate but equal," which is never truly equal. The attempts of lesbian and gay couples to win protection for our relationships through domestic partnerships illustrate the limitations of this approach.<sup>4</sup> The courts have realized the importance of marriage and have called it a fundamental right.<sup>5</sup>

### THE RIGHT TO MARRY: SOME HISTORICAL BACKGROUND

While same-sex marriage is currently a hotly debated topic, this is not the first time the nation has struggled with the issue of who should have the right to marry. Since the 1800s, the Supreme Court has considered a variety of cases in which people have challenged state laws limiting marriage rights.<sup>6</sup> Though the Court has recognized that the right to marry is a basic right subject to state control,<sup>7</sup> the states do not have unlimited power to restrict the right to marry.<sup>8</sup>

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ous obligations such as sexual fidelity and the duty to provide spousal support and alimony. See *id.* at 70. Such responsibilities support a couple's commitment to each other and so marriage helps to hold relationships together during difficult times. See *id.* at 72. Furthermore, marriage provides numerous social benefits, such as recognition and greater social support for our relationships. See James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 97 (1993).

4. When marriage was not forthcoming, lesbian and gay activists began, in the 1980s, to push for domestic partnership benefits. See HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 1-1 (8th ed. 1994). The city of Berkeley, California was the first to adopt a functional domestic partnership policy. See ESKRIDGE, *supra* note 3, at 59. Approximately thirty municipalities and counties offer some type of domestic partnership benefits. See CURRY ET AL., *supra* at 1-10. Many private employers and schools also provide benefits to domestic partners. See *id.* at 1-12, 1-13. While the requirements for who qualifies for domestic partnership benefits vary, the partners usually must "live together in an exclusive relationship and share the basic necessities of life." *Id.* at 1-10. Domestic partnership laws, however, usually provide very little in the way of benefits compared to the benefits provided by marriage as discussed above. For a discussion of the limitations of domestic partnerships, see Cindy Tobisman, Note, *Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians' Families?*, 12 BERKELEY WOMEN'S L.J. 112 (1997).
5. See *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978). The Court has also called marriage "one of the basic civil rights," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and has recognized that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki*, 434 U.S. at 384.
6. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (refusing to uphold a ban on inmate marriages); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (refusing to allow a ban on marriage for those who failed to pay child support; *Loving v. Virginia*, 388 U.S. 1 (1967) (refusing to uphold a ban on interracial marriages).
7. In *Maynard v. Hill*, the Supreme Court held that "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." 125 U.S. 190, 205 (1888).
8. In *Turner v. Safley*, the Supreme Court overturned a Missouri law which banned inmate marriages. The court held that even "after taking into account the limitations imposed by prison life," many important aspects of marriage remained, such as public expressions of emotional support and commitment, spiritual considerations, and government benefits. See *Turner*, 482 U.S. at 95. In *Zablocki v. Redhail*, the Supreme Court declared unconstitutional a Wisconsin state law pro-

In the early 1970s, lesbians and gay men began challenging laws that prevented same-sex couples from marrying.<sup>9</sup> In every case until *Baehr v. Miike*,<sup>10</sup> courts held that same-sex marriage was definitionally impossible.<sup>11</sup> Courts also uniformly held same-sex marriage bans to be constitutional<sup>12</sup> and left any change in marriage laws to the legislative process.<sup>13</sup> Despite the unanimous refusal of the courts to recognize same-sex couples' right to marry, lesbians and gay men continued to challenge the ban on same-sex marriage.<sup>14</sup> Finally, in Hawai'i, such a challenge to same-sex marriage bans was successful.

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hibiting people who did not pay child support from obtaining a marriage license since the state's interests could be realized without restricting marriage rights. 434 U.S. at 389. The Court held that if a statute interfered with a "fundamental right" such as marriage, it would be upheld only if it was "closely tailored" to further an important state interest. *See id.* at 388. In *Loving v. Virginia*, the Supreme Court held that a Virginia law which prohibited inter-racial marriage violated the Fourteenth Amendment to the Constitution, despite the fact that both parties to an interracial marriage received the same punishment. 388 U.S. at 8. The Court did not believe that interracial marriage bans could survive the "most rigid scrutiny" by achieving any permitted state objective, saying to the contrary that they were "designed to maintain White Supremacy." *Id.* at 11. The court also found that the law violated the Fourteenth Amendment's Due Process Clause, saying "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12.

9. Despite the fact that the majority culture was hostile towards lesbians and gays, after the 1969 Stonewall riots lesbians and gay men became more active in fighting for civil rights. The Stonewall was a gay bar in New York City. When the police raided the bar, the lesbian and gay patrons fought back, sparking the gay rights movement. *See* ESKRIDGE, *supra* note 3 at 44. For more information about the history of challenges to denials of marriage licenses to same-sex couples see generally ESKRIDGE, *supra* note 3, at 54-57 and Partners Task Force for Gay & Lesbian Couples (visited Nov. 20, 1998) <<http://www.buddybuddy.com/t-line-1.html>>.
10. *Baehr v. Lewin*, 852 P.2d 44, *clarified on grant of reconsideration in part, rev'd sub nom Baehr v. Miike*, 852 P.2d 74 (Haw. 1993).
11. In what is considered to be the first case to challenge the opposite-sex only marriage rule, *Baker v. Nelson*, the court held that the marriage statute "employs that term as one of common usage, meaning the state of union between persons of the opposite sex." 191 N.W.2d 185, 186 (Minn. 1971). When two lesbians who were denied a marriage license in Kentucky sued, the court concluded that "[i]n substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage." *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973). In *Singer v. Hara*, the court said of marriage that the "recognized definition of that relationship [is] one which may be entered into only by two persons who are members of the opposite sex." 522 P.2d 1187, 1192 (Wash. Ct. App. 1974).
12. In *Baker*, the Supreme Court of Minnesota held that "in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." 191 N.W.2d at 187. Even states whose constitutions prohibited sex discrimination through equal rights amendments refused to overturn same-sex marriage bans. The Washington Court of Appeals agreed with the state's argument that "there is no violation of the ERA so long as marriage licenses are denied equally to both male and female pairs." *Singer*, 522 P.2d at 1191. A detailed analysis of the unconstitutionality of limiting marriage to opposite sex couples is outside the scope of this paper. For information on this issue, see MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997).
13. *See, e.g., Singer*, 522 P.2d at 1196.
14. In *Dean v. District of Columbia*, the Court of Appeals affirmed *per curiam* the trial court's determination that same-sex marriage was definitionally impossible. 653 A.2d 307, 308 (D.C. Cir. 1995). Judge Terry's concurrence states that "if it is impossible for two persons of the same-sex to 'marry,' then surely no court can say that a refusal to allow a same sex couple to 'marry' could ever be a denial of equal protection." *Id.* at 361. Judge Terry would also leave a solution in the hands of the legislature. *See id.*

## HAWAI'I

In 1990, three same-sex couples attempted to obtain marriage licenses in Hawai'i.<sup>15</sup> When those licenses were denied, the couples filed suit alleging that the Hawai'i Marriage Law<sup>16</sup> was unconstitutional as applied to prevent same-sex couples from obtaining marriage licenses.<sup>17</sup> After the Hawai'i Circuit Court dismissed plaintiffs' complaint, plaintiffs appealed to the state supreme court.<sup>18</sup> The Hawai'i Supreme Court explicitly stated that any conclusions about whether there was a "civil right" to same-sex marriage were "premature,"<sup>19</sup> and held that the applicant couples did not have a "fundamental constitutional right to same-sex marriage arising out of the right to privacy."<sup>20</sup> Nevertheless, the court rejected the argument that because women and men were both denied the right to same-sex marriage the prohibition was not discriminatory. After quoting from *Loving v. Virginia* where the U.S. Supreme Court stated, "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications,"<sup>21</sup> the *Baehr* court concluded that "[s]ubstitution of 'sex' for 'race' . . . yields the precise case before us together with the conclusion that we have reached."<sup>22</sup>

The court further held that the marriage law implicated the equal protection clause because the state constitution bars sex discrimination, making sex a "suspect category" subject to a "strict scrutiny" test.<sup>23</sup> The court then remanded the case for trial, stating that in order to limit marriage to opposite-sex couples, the state would have to demonstrate a "compelling state interest" in limiting marriage to opposite-sex couples and show that the statute was "narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."<sup>24</sup> Thus *Baehr* opened up the possibility that states might recognize same-sex marriage.

Since this was the first time any state had even considered that same-sex marriage was possible, the reaction across the nation was incredible. State leaders across the country began to worry that they would have to recognize in their own states same-sex marriages performed in other states.<sup>25</sup> This fear was enough to create a series of legislative re-

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

16. HAW. REV. STAT. § 572-1 (1985).

17. See *Baehr*, 852 P.2d at 48-49. The Hawai'i constitution provides protection against sex discrimination. See HAW. CONST. art. I, § 5.

18. See *Baehr*, 852 P.2d at 52.

19. *Id.* at 67.

20. *Id.* at 57.

21. *Loving*, 388 U.S. at 8.

22. *Baehr*, 852 P.2d at 68.

23. *Id.* at 67.

24. *Id.*

25. The Full Faith and Credit Clause of the U.S. Constitution provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. CONST. art. IV, § 1. One author noted that "[a]lthough the Supreme Court . . . has not deter-

sponses that will be discussed below. State leaders in Hawai'i also responded to the decision with legislation to restrict marriage to opposite-sex couples.

In 1994, the Hawai'i legislature attempted to preempt the circuit court by stating that marriage was limited to opposite-sex couples.<sup>26</sup> The legislature also established a commission to study the issue and make recommendations to the legislature.<sup>27</sup> In December 1995, the commission recommended by a five to two margin that the state legalize same-sex marriage.<sup>28</sup>

The circuit court, which had postponed its hearing pending the commission's recommendation,<sup>29</sup> then began a trial at which the state attempted to show that it had a compelling interest in opposite-sex marriage because, it claimed, same-sex marriage would adversely affect the health and welfare of children, the public fisc (treasury), and the ability of Hawaiians to have their marriages recognized in other states.<sup>30</sup> The state further said that it wanted to "foster procreation in a marital setting."<sup>31</sup>

The court, in an opinion by Circuit Judge Kevin S. C. Chang, held that the state failed to present sufficient evidence to meet its burden<sup>32</sup> and that the opposite-sex marriage restriction was unconstitutional. Specifically, with regard to the health and welfare of children, Judge Chang stated "[t]here is diversity in the structure and configuration of families" and there are childless families in the state and elsewhere.<sup>33</sup> He further found that "[d]efendant has failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of

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mined to what extent marriages are entitled to full faith and credit (marriages should be granted at least the level of faith and credit accorded to judgments), it is clear that certain proceedings related to marriage are judgments entitled to full faith and credit. For example, divorce is a judgment that is already granted full faith and credit." Evan Wolfson & Michael Melcher, *DOMA's House Divided: An Argument Against the Defense of Marriage Act*, THE FEDERAL LAWYER, Sept. 1997, at 32. There is some debate about whether states actually would have to recognize same-sex marriages performed in other states. Some states will not recognize marriages if the resident couple traveled out of state to marry to avoid in-state marriage laws. See Rebecca S. Paige, Comment, *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices*, 47 AM. U. L. REV. 165, 177 (1997). States also may be able to invoke a public policy exception to refuse to recognize same-sex marriages. See *id.*

26. See Robert M. Baird & Stuart E. Rosenbaum, *Introduction to SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE*, *supra* note 2, at 10.

27. See *id.*

28. See *id.*

29. See *id.*, *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*2 (Haw. Cir. Ct. Dec. 3, 1996).

30. See *Baehr*, 1996 WL 694235, at \*3.

31. *Id.* The Hawai'i Supreme Court was unconvinced by the procreation argument since the state had eliminated the requirement that people who obtain marriage licenses provide evidence that they were physically capable of procreation. See *Baehr v. Lewin*, 852 P.2d 44, 49 n.1, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

32. Though the burden of proof was on the defendant, the plaintiffs also presented testimony at the trial. See *Baehr*, 1996 WL 694235, at \*10.

33. See *id.* at \*17.

children.”<sup>34</sup> Even the defendant’s expert said that children raised by lesbian and gay parents are “turning out just fine” and lesbian and gay parents are “doing a good job.”<sup>35</sup> Judge Chang held that “[d]efendant presented insufficient evidence and failed to establish or prove any adverse consequences to the public fisc resulting from same-sex marriage.”<sup>36</sup> With regard to recognition of state marriages in other states, he again found that “[d]efendant presented insufficient evidence and failed to establish or prove any adverse impacts to the [s]tate . . . or its citizens” if other states would not recognize Hawai‘i’s same-sex marriages.<sup>37</sup>

Chang concluded by quoting from Judge Ferren’s opinion in *Dean v. District of Columbia* that “a mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm, cannot justify inherently discriminatory legislation against members of a constitutionally protected class.”<sup>38</sup> Judge Chang held that the sex-based classification was unconstitutional and violated the equal protection clause of the state constitution.<sup>39</sup> He stayed his decision pending appeal to the Hawai‘i Supreme Court.

That delay allowed the legislature to place an initiative on the November 3, 1998, ballot to amend the state constitution to allow the legislature to restrict marriage to opposite-sex couples.<sup>40</sup> The initiative asked “[s]hall the constitution of the State of Hawaii be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?”<sup>41</sup> The battle over the initiative will be discussed below.

When the Hawai‘i legislature put the same-sex marriage ban on the ballot, it passed a law allowing same-sex couples to register as “reciprocal beneficiaries.”<sup>42</sup> Such registration would then provide about sixty specific benefits,<sup>43</sup> far short of the benefits conferred by marriage. Furthermore, although the state estimated 20,000-30,000 people would apply, as of December 1997, five months after the benefits became available, only 296 couples had signed up.<sup>44</sup> The courts declared void the provision of

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34. *Id.* at \*18.

35. *See id.*

36. *Id.* at \*16.

37. *Id.*

38. *Id.* at \*21 (quoting *Dean v. District of Columbia*, 653 A.2d 307, 355 (D.C. Cir. 1995)) (concurring in part and dissenting in part)).

39. *See id.*

40. *See* Herscher, *Same-Sex Marriage*, *supra* note 1, at A2.

41. David O. Coolidge, *Voters Finally Get a Say on Same-Sex Marriage*, WALL ST. J., Nov. 2, 1998, at A34.

42. Any two adults who could not legally marry could become reciprocal beneficiaries. *See* Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples*, L.A. TIMES, Apr. 30, 1997, at A3.

43. The benefits would include: survivorship rights such as inheritance, workers’ compensation survivorship and state employee retirement benefits; health benefits, hospital visitation, private and public medical insurance, car insurance, mental health commitment approval, family and funeral leave; property rights such as tenancy in the entirety; and legal standing for wrongful death and victims’ rights. *See id.*

44. *See* Susan Essoyan, *Hawaii’s Domestic-Partner Law a Bust*, L.A. TIMES, Dec. 23, 1997, at A5.

health coverage for partners of private employees, and there was simply too much ambiguity for people to utilize benefits.<sup>45</sup> In addition, the reciprocal beneficiary relationship could be terminated by one partner without the knowledge or consent of the other. As one lesbian couple stated, the legislature's provision of these limited benefits had merely transformed them from "third class" to "second class" citizens.<sup>46</sup>

The state ballot initiative was hotly contested. Polls showed fifty-two percent in favor of the initiative.<sup>47</sup> While lesbian and gay rights groups raised about \$1.4 million to counter the constitutional amendment, they were opposed by the religious right who poured about \$2.2 million into the state to support the measure.<sup>48</sup> The Mormon church alone provided \$600,000 at the last minute.<sup>49</sup> A senior strategist for lesbian and gay activists, David Smith, said that this was the first time the church had been so actively involved in affecting public policy on this issue.<sup>50</sup> Smith noted that the ads opposing same-sex marriage suggested that Hawai'i would be the lesbian and gay "honeymoon capital of the world" with a consequent drop in Japanese tourism.<sup>51</sup> Other ads equated same-sex relationships with bestiality.<sup>52</sup> Opponents of the ballot initiative tried to frame the issue as one of legalization of discrimination that denies rights to one specific group, and suggested that abortion rights could be the next target.<sup>53</sup> State leaders, however, almost universally supported the initiative<sup>54</sup> and, on November 3, 1998, the measure passed by sixty-nine percent.<sup>55</sup> Only thirty percent opposed the measure.<sup>56</sup>

The Hawai'i Supreme Court has been waiting to issue its ruling for almost two years. After the election, the court asked both sides in *Baehr* to submit briefs explaining how the newly passed initiative affected the case.<sup>57</sup> This briefing will be complete around February 1999.<sup>58</sup> It does seem, however, that any state supreme court decision allowing same-sex marriage can be countered or preempted by the legislature. Even if the legislature acts to restrict marriage to opposite-sex couples, there are two possibilities which would provide greater rights and recognition for same-

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45. *See id.*

46. *See id.*

47. *See* Cheryl Wetzstein, "Gays Can't Marry" 2 States Say, WASH. TIMES, Nov. 5, 1998, at A16.

48. *See* Bill Ghent, *For Bitter or for Worse: Have Voters in Hawaii and Alaska Killed Any Chance to Legalize Same-Sex Marriage?* THE ADVOCATE, Dec. 8, 1998, at 39.

49. *See* Herscher, *Same-Sex Marriage*, *supra* note 1.

50. *See* Ghent, *supra* note 48.

51. *See id.*

52. *See id.*

53. *See*, Lynda Gorov, *2 Sides Fuel Hawaii Vote on Same-Sex Marriages*, BOSTON GLOBE, Nov. 2, 1998, at A1.

54. *See* Ghent, *supra* note 48.

55. *See* Wetzstein, *supra* note 47.

56. *See id.*

57. *See* Ann Rostow, *Marriage Fight Very Much Alive*, S.F. BAY TIMES, Nov. 26, 1998, at 13.

58. *See id.*

sex relationships. The supreme court might provide same-sex couples all the benefits of marriage without the name,<sup>59</sup> or the legislature could provide some recognition for same-sex relationships.<sup>60</sup>

### ALASKA

What took years in Hawai'i only took eight months in Alaska.<sup>61</sup> Two gay men who were denied a marriage license challenged the statutory ban on same-sex marriage, arguing that the state constitution does not allow discrimination based on sex.<sup>62</sup> In February 1998, Superior Court Judge Peter Michalski ruled that to justify limiting marriage to opposite sex couples the state would have to show that the limitation served a compelling state interest.<sup>63</sup> This judge was not willing to accept the argument that the definition of marriage itself prohibits same-sex marriage, saying instead that the court needed to "do more than merely assume that marriage is only, and must only be, what most are familiar with."<sup>64</sup> He noted that if we merely accepted the familiar, then segregation would have been left in place, and thus, he was not willing to merely defer to the legislature to define marriage.<sup>65</sup>

Judge Michalski differed with the Hawai'i Supreme Court which was not willing to recognize a fundamental right to same-sex marriage. Michalski stated that the Hawai'i court failed to ask the right question, saying that "[t]he relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions."<sup>66</sup> He stated that the privacy clause of the state constitution gave people the right to choose a life partner.<sup>67</sup>

When the Alaska Supreme Court declined to review Michalski's decision,<sup>68</sup> the state legislature passed a constitutional amendment banning gay marriage.<sup>69</sup> The amendment, which read "[t]o be valid or recognized in

59. See Herscher, *Same-Sex Marriage*, *supra* note 1.

60. See *After the Election. What's Next for Marriage?*, S.F. BAY TIMES, Nov. 12, 1998, at 12.

61. See Coolidge, *supra* note 41.

62. See Jim Clarke, *Anchorage Men Want Court to Throw Out Same-Sex Marriage Ban*, ANCHORAGE DAILY NEWS, Nov. 15, 1997, at 1D.

63. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*1 (Ala. Super. Ct. Feb. 27, 1998).

64. *Id.* at \*2.

65. See *id.*

66. *Id.* at \*4.

67. See *id.*

68. See *High Court Declines Same-Sex Case*, ANCHORAGE DAILY NEWS, June 6, 1998, at 1D.

69. See Elaine Herscher, *Ballot Test for Gay Marriage in Alaska, Hawaii*, S.F. CHRON., Oct. 26, 1998, at A1 [hereinafter Herscher, *Ballot Test*] (discussing pending statewide election to ratify the amendment). Unlike Hawai'i which attempted to provide some extra benefits to same-sex couples when approving its own ballot initiative, Alaska took some benefits away. When the Alaska state legislature passed the constitutional amendment prohibiting same-sex marriage, it also took



this State, a marriage may exist only between one man and one woman,"<sup>70</sup> was ratified on November 3, 1998.<sup>71</sup> Sixty-eight percent of Alaskan voters voted in favor of the amendment, while thirty-two percent opposed it.<sup>72</sup> As in Hawai'i, Mormon leaders gave substantial funding, \$500,000, to support the amendment.<sup>73</sup>

### OTHER STATES

In Vermont, several same-sex couples were denied marriage licenses in 1997. Their case challenging the denial, *Baker v. Vermont*,<sup>74</sup> was dismissed, and their appeal was heard before the state supreme court on November 18, 1998.<sup>75</sup> The state argued that the definition of marriage excludes same-sex unions as marriage was designed to promote procreation.<sup>76</sup> Since the Vermont Constitution contains a provision stating that the government is for the benefit of all the people, the plaintiffs argued that a ban on same-sex marriage violates this equal benefit clause.<sup>77</sup> One possibility is that the Vermont Supreme Court may, rather than remanding the case for trial as was done in Hawai'i, rule on the merits of the case and legalize same-sex marriage in Vermont.<sup>78</sup>

Proponents of same-sex marriage are hopeful about the possibility of victory in Vermont.<sup>79</sup> The state's constitution was the first to bar slavery and the state has provided various benefits to lesbian and gay men such as protection in a hate crimes bill, inclusion in an anti-discrimination law, domestic partnership benefits for state employees, and second-parent adoptions (a measure that allows two same-sex parents to have a legal relationship with their child).<sup>80</sup> Furthermore, a bill to ban same-sex marriage has languished in the state legislature.<sup>81</sup>

New York is the site of another challenge to a same-sex marriage ban. A gay-male couple from Ithaca was denied a marriage license in

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the opportunity to ban mandatory health benefits for partners of public employees. This action followed a court decision that the state University's health care policy discriminated based on marital status. See Clarke, *supra* note 60 (discussing *University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997)).

70. See Coolidge, *supra* note 41 (describing the amendment).

71. See Herscher, *Same-Sex Marriage*, *supra* note 1.

72. See Wetzstein, *supra* note 47.

73. See Cheryl Wetzstein, *Two States to Define "Marriage": Alaska, Hawaii Votes on Gay Unions Look to be Toss Ups*, WASH. TIMES, Nov. 1, 1998, at A4.

74. No. S1009-97 (Chittenden Sup. Ct. Dec. 19, 1997).

75. *Baker v. Vermont*, No. 98-32 (Vt. argued Nov. 18, 1998).

76. See *Vermont Court Weighs Gay Marriage: Attorney urges justice to make 'courageous' decision*, S.F. CHRON., Nov. 19, 1998, at A4.

77. See *After the Election: What's Next for Marriage*, *supra* note 60.

78. See *id.*

79. See E.J. Graff, *In & Out in Vermont*, THE NATION, Oct. 20, 1997, at 19.

80. See *id.*

81. See *id.*

1995.<sup>82</sup> Their case, *Storrs v. Holcomb*, is proceeding in that state.<sup>83</sup> Since both the New York and Vermont constitutions are difficult to amend, voters in the two states may not be as quick to overturn potential judicial victories.<sup>84</sup>

### REACTIONS TO THE POSSIBILITY OF SAME-SEX MARRIAGE

The backlash against even the possibility of same-sex marriage has been tremendous. Once it seemed as if Hawai'i might legalize same-sex marriage, the U.S. Congress enacted the Defense of Marriage Act (DOMA).<sup>85</sup> DOMA provides that no state would have to recognize a same-sex marriage performed in another state, and defines marriage as a "legal union between one man and one woman."<sup>86</sup> With the enactment of DOMA, Congress for the first time limited states' obligation to give full faith and credit to "public acts, records and judicial proceedings" of other states.<sup>87</sup> Some commentators have argued that DOMA is unconstitutional since it "exceeds Congress's powers and violates equal protection."<sup>88</sup> The constitutionality of DOMA cannot be challenged, however, until a same-sex couple's marriage, valid in one state, is denied recognition in another. Individual states also were concerned about developments in Hawai'i and, at the time of this writing, twenty-nine states have expressly limited marriage to opposite-sex couples.<sup>89</sup>

California will be one of the future battlegrounds for the issue of same-sex marriage. Although the state legislature has considered and rejected a ban on same-sex marriage three times,<sup>90</sup> opponents of same-sex marriage have gathered 675,000 signatures—more than enough to place the California Defense of Marriage Act (CDOMA) on the March 7, 2000, ballot.<sup>91</sup> This initiative states that marriage is limited to opposite-sex couples.<sup>92</sup> Supporters of CDOMA say that fifty-eight percent of California voters oppose same-sex marriage.<sup>93</sup> Given the fact that in recent years

82. See *Storrs v. Holcomb*, 666 N.Y.S.2d 835 (1997).

83. See *id.*; see also Coolidge, *supra* note 41.

84. See Coolidge, *supra* note 41.

85. The Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7).

86. *Id.*

87. See Wolfson & Melcher, *supra* note 25, at 31.

88. See *id.*

89. See Herscher, *Same-Sex Marriage*, *supra* note 1.

90. See Herscher, *Ballot Test*, *supra* note 69.

91. See Elaine Herscher, *Initiative Petitions Seek Vote on Banning Gay Marriages*, S.F. CHRON., Sept. 22, 1998, at A15 [hereinafter, *Initiative Petitions*]. The Secretary of State has announced that the initiative qualified for the March 2000 ballot. See Carl Ingram, *Measure To Ban Gay Marriages Ok'd For Ballot*, L.A. TIMES, Nov. 18, 1998, at A3.

92. See Herscher, *Initiative Petitions*, *supra* note 91.

93. See Carol Ness, *Gay-Marriage Foes Have Eyes on 2000 Ballot*, S.F. EXAMINER, Nov. 5, 1998, at A26.

initiatives like Proposition 187<sup>94</sup> and Proposition 209,<sup>95</sup> which limit the rights of women and racially oppressed people, have passed by large margins in California, it is likely that CDOMA also will pass, narrowing the possible places where same-sex couples could marry.<sup>96</sup>

### CONCLUSION

Although it is unfair to say that the movement for same-sex marriage is stalled since there is the possibility of victory in Vermont and New York, winning the right to marry will not come easily for same-sex couples. Historically, when an oppressed minority has been denied rights by the legislature, the courts have often stepped in to protect them. In the case of same-sex marriage, courts have been reluctant to do so, and when they have, the courts have been preempted by the legislature. While some have argued that extending marriage benefits to same-sex couples ought to be left up to the will of the majority as demonstrated by legislative actions and elections,<sup>97</sup> leaving protection of oppressed minority groups in the hands of the majority is a very risky proposition.<sup>98</sup> As one author noted, the referendum process that is allowed in half the states is fraught with serious problems:

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94. Proposition 187, the so called "Save Our State" initiative, passed in 1994 but so far blocked from being implemented by the courts, was an "anti-immigrant measure aimed at abolishing public benefits, such as education and medical care, for undocumented immigrants." Akilah Monifa, *Nothing Succeeds Like Secession*, S.F. EXAM, July 14, 1998, at A17.
95. Proposition 209, the "California Civil Rights Initiative," passed in 1996, banning affirmative action in college admissions, state and local employment, and the award of state contracts. See Audrey Magnusen & Katherine Naff, *Proposition 209: The Death Knell For Affirmative Action?*, PUB. MANAGER: NEW BUREAUCRAT, June 22, 1998 at 37. The effects of Proposition 209, especially in the area of education have been devastating. At Boalt Hall, in 1997, "the number of African Americans admitted dropped from seventy-five in 1996 to fifteen in 1997, none of whom chose to enroll. The only entering African American student was a deferral from the previous year." Nelson Tebbe, *Rethinking Referenda*, TIKKUN, Sept./Oct. 1998, at 23. At UC Berkeley's undergraduate school, "the combined number of African Americans, Hispanics, and Native Americans admitted to Berkeley this year dropped 57 percent, to only 10.4 percent of the entering class." *Id.*
96. See Ness, *supra* note 93.
97. See, e.g., *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. Cir. 1995).
98. It is interesting to note that another type of constitutional ban on marriage was at issue in South Carolina on Nov. 3, 1998. Thirty-one years after *Loving* overturned bans on interracial marriage, about 40% of South Carolinians voted *against* removing an old amendment to their constitution which prohibited interracial marriage. See *Affirmative Action Suffers Setback*, S.F. CHRON., Nov. 4, 1998, at A2. A 1991 Gallup Poll found that 45% of white people in the U.S. still disapprove of interracial marriages, while only 44% approve. See Trosino, *supra* note 3, at 93 n.2 (1993). A Newsweek poll found 58% of people surveyed disapproved of same-sex marriage, 35% approve. See *id.* at 93 n.6.

The referendum generates apparent legitimacy without any guarantee of the underlying public participation that has traditionally powered American democracy. And even more troubling, ballot initiatives provide society's most powerful members with new opportunities to assert their agendas over groups who lack the power or money to fight back.<sup>99</sup>

The bans on interracial marriage were not overturned state-by-state, rather the Supreme Court acted to prevent discrimination against an oppressed minority. Perhaps the best hope for same-sex couples who wish to marry is that one state will legalize same-sex marriage and if another state refuses to recognize the marriage, the couple can bring suit under the Full Faith and Credit Clause, challenging the constitutionality of DOMA. Although winning the right of same-sex marriage may take time, it is important to continue our attempts so that eventually, lesbians and gay men may share in all the civil rights given to citizens of the United States.

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99. Tebbe, *supra* note 95, at 23.