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SYMPOSIUM: SAME-SEX MARRIAGE: THE DEBATE IN HAWAI'I AND THE NATION

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Foreword

Although most of the articles in the same-sex symposium issue were written over three years ago, the debate waged herein could not be more timely or relevant. The media and legal spotlights now burn even brighter upon the topic of same-sex marriage than when this symposium was first conceived in the fall of 1997. At that time, Hawai'i's citizens were still grappling with the meaning and impact of the Hawai'i Supreme Court's 1993 decision in *Baehr v. Lewin*.[1] Legislators were attempting to construct a referendum question which, if approved, would quash the possibility of gay marriage in Hawai'i and would spell the end of the *Baehr* regime.

Since then, the state of the law surrounding this controversial issue has seen remarkable development. While Hawai'i voters overwhelmingly approved the constitutional amendment allowing the legislature to restrict the definition of marriage, other jurisdictions have expanded their concept of the marital relationship. The Supreme Court of Canada recently ruled that laws denying same-sex couples the benefits and protections accorded to married couples are violative of that nation's Charter of Rights and Freedoms. Soon thereafter, the Vermont Supreme Court held that the state must guarantee gay couples the same benefits as those enjoyed by heterosexual spouses; as a result, the Vermont legislature enacted a "civil union" statute. Colorado, on the other hand, recently became the thirty-third state to explicitly ban same-sex marriage.

At the time that these articles were written, the question on the minds of most commentators was the future of *Baehr*. That issue has been decided, but the subject of same-sex marriage is now debated more vigorously and in more jurisdictions than ever before. As citizens across the United States contemplate the impact of the discussion upon their own lives, this symposium takes on added importance.

Because the legal backdrop to the issue of same-sex marriage has changed so dramatically in the months since the articles presented here were completed, this preface will briefly outline the recent developments in law and policy. Perhaps the most significant event was the November 1998 vote on the "marriage amendment" to the Hawai'i Constitution. After an acrimonious campaign, Hawai'i voters chose by a two-to-one margin to approve the

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[1] 74 Haw. 530, 852 P.2d 44 (1993). Three gay couples were denied marriage licenses under Hawai'i Revised Statutes ("HRS") section 572-1 which defined marriage as a relationship between one man and one woman. *See* HAW. REV. STAT. § 572-1 (1997). The Hawai'i Supreme Court held HRS section 572-1 to be unconstitutional, as the law denied same-sex couples equal protection based on their sex. On remand, the state failed to overcome the presumption that HRS section 572-1 was unconstitutional, and Judge Chang entered an order enjoining the state from denying marriage licenses to same-sex couples. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *16-*18, *21 (Haw. Cir. Ct. Dec. 3, 1996).

amendment, which empowered the Legislature to restrict marriage to members of the opposite sex.[2] Although the Legislature failed to act on the popular mandate, the referendum vote had its desired effect; in December 1999, the Hawai'i Supreme Court decided the appeal of *Baehr v. Miike*.[3] In its opinion, the court held that the passage of the marriage amendment had given retroactive effect to Hawai'i Revised Statutes ("HRS") section 572-1 (the law invalidated by the court's initial decision in *Baehr*).[4] Marriage between members of the same sex was finally and definitively prohibited by Hawai'i law.[5]

Hawai'i was not alone in turning away from same-sex marriage. On the very day that Hawai'i citizens approved the marriage amendment, Alaskans also chose to define marriage as a relationship between one man and one woman.[6] A total of thirty-three states, some perhaps spurred on in part by the events which took place in Hawai'i, have banned same-sex marriage or passed legislation similar to the federal Defense of Marriage Act ("DOMA").[7] At first glance, it appears that Hawai'i's experience with same-sex marriage may have served simply to galvanize the "traditional marriage" forces. Other developments, however, indicate that the *Baehr* decision may have helped to usher in a new jurisprudence of equality.

In May 1999, the Supreme Court of Canada issued an opinion in *Attorney General v. M. & H.*[8] The case has its origins in a dispute between separated lesbian partners.[9] One of the estranged partners sought alimony, and in doing so challenged the validity of the definition of "spouse" in Ontario's Family

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[2] *See* Sam Howe Verhovek, *The 1998 Elections: The States — Initiatives; From Same-Sex Marriages to Gambling, Voters Speak*, N.Y. TIMES, June 15, 1990, at B1. *See also* Ellen Goodman, *For Gays Seeking Marriage, A Long Wait Before 'I Do'*, BOSTON GLOBE, Jan. 3, 1999, at E7 (interview with *Baehr* plaintiffs Joe Melillo and Patrick Lagon).

[3] No. 20371, 1999 Haw. LEXIS 391 (Dec. 9, 1999) [hereinafter *Baehr II*].

[4] *See Baehr II*, 1999 Haw. LEXIS 391, at *5-*6. In a brief opinion, the court held that the validity of HRS section 572-1 mooted the plaintiffs' complaint, and rendered the court's equal protection rationale in *Baehr* irrelevant. *See id.* at *6-*8. *See also Hawaii Court Lets Gay Marriage Ban Stand*, N.Y. TIMES, Dec. 9, 1999, at A28.

[5] The question of whether *Baehr* continues to mandate that same-sex couples receive the benefits afforded to married couples is still in doubt, however, and may be litigated in the future. *See* Debra Barayuga, *Gays' Fight May Turn to Rights and Benefits*, HONOLULU STAR-BULL., Dec. 10, 1999, at A1.

[6] *See* Verhovek, *supra* note 2, at B1.

[7] *See Hawaii Court Lets Gay Marriage Stand*, N.Y. TIMES, Dec. 10, 1999, at A28. *See also* Stuart Taylor Jr., *A Vote For Gay Marriage — But Not By Judicial Fiat*, NAT'L J., Feb. 19, 2000 (exploring the impact of the situation in Hawai'i on other states); Lynn Bartels, *Owens Signs Marriage, Gun Laws; Same-sex Unions Banned in Colorado*, ROCKY MTN. NEWS, May 27, 2000, at A1 (discussing number of states to ban same-sex marriage).

[8] [1999] 2 S.C.R. 3.

[9] *See* No. 25838, 1999 S.C.C.D.J. LEXIS 44, at *17-*18 (Can. May 20, 1999).

Law Act.[10] The plaintiff argued that the Canadian Charter of Rights and Freedoms mandated that same-sex partners be afforded the same benefits as married couples.[11] In a lengthy lead opinion, the Supreme Court of Canada held that the exclusion of gay couples from the Family Law Act did indeed violate section 15(1) of the Charter.[12] Because the omission of same-sex partnerships from the Family Law Act denied substantial benefits on the basis of sexual orientation, the court deemed the Act to be unconstitutional.[13] In doing so, the court essentially conferred common-law marriage status on gay couples.

The reaction to *M. & H.* was swift. Ontario has updated the Family Law Act in accordance with *M. & H.*[14] and Canadian parliament has also moved to amend nearly fifty pertinent statutes to include same-sex partnerships.[15] The Ontario Superior Court of Justice recently declared that "same-sex partnership status" must be given equivalence to marriage in the Ontario Human Rights Code.[16]

The Canadian experience is obviously not directly applicable to the United States. The Supreme Court of Canada had held that discrimination on the basis of sexual orientation is akin to discrimination based on race.[17] No such determination has been made by the United States Supreme Court. But the Canadian court has been joined by an American state supreme court in mandating that gay couples be extended the benefits "that flow from marriage

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[10] *See id.* at *18-*19.

[11] *See id.*

[12] *See id.* at *103-*04, *112-*14. Section 15(1) of the Charter reads in part, "Every individual is equal under the law and has the right to the equal protection and equal benefit of the law without discrimination[.]" Canadian Charter of Rights, Part I Constitution Act, 1982; Canada Act, 1982, ch. 11, § 15(1), sched. B (Eng.). Although the Charter does not enumerate sexual orientation as a protected class, in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the court ruled that sexual orientation was analogous to the enumerated classes (including race, gender, and religion), and that discrimination against homosexuals was therefore prohibited by the Charter. *See Vriend*, No. 25285, 1998 ACWSJ 139823, at *119-*20 (Can. Apr. 2, 1998). The only question, then, in *M. & H.* was whether the omission of gay couples in the Family Law Act constituted *discrimination*.

[13] *See M. & H.*, 1999 S.C.C.D.J. LEXIS, at *112-*14.

[14] *See* Richard Mackie, *Ontario Bill Called "Sexual Apartheid"*, THE GLOBE AND MAIL, Nov. 25, 1999, at A3. Although Ontario has taken action in an attempt to comply with *M. & H.*, some gay groups are unhappy with the province's efforts. Because the new law sets up a separate regime for same-sex couples, some argue that Ontario has not yet achieved full compliance with *M. & H. See id.*

[15] *See* Brian Laghi, *Liberals to Consult Caucus on Extending Same-Sex Benefits*, THE GLOBE AND MAIL, Nov. 3, 1999, at A1. There is still not a consensus on the form which federal amendments might take. *See id.*

[16] *See* Vincent v. Attorney General, No. 99-CV-171134, 1999 Ont. Sup. C.J. LEXIS 1610, at *6-*7 (Ont. Dec. 20, 1999).

[17] *See M. & H.*,1999 S.C.C.D.J. LEXIS, at *112-*14.

under . . . the law."[18] Only eleven days after the Hawai'i Supreme Court put an end to the *Baehr* saga, the Supreme Court of Vermont issued its opinion in *Baker v. Vermont.*[19]

As in *Baehr*, *Baker*'s plaintiffs were gay couples who failed in their attempts to obtain marriage licenses.[20] In appealing the summary judgment entered against them, the plaintiffs argued, inter alia, that the Vermont marriage law violated "their right to the common benefit and protection of the law guaranteed by Chapter I, Article 7" of the Vermont Constitution.[21] The court agreed, stating "that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."[22] In holding that the marriage law was unconstitutional, the court instructed the legislature to ensure that same-sex partners receive the same benefits and protections under the law as those enjoyed by married couples.[23] In the wake of *Baker*, Vermont's citizens and legislators considered a number of different ways in which to respond to the court's decision. While the Governor publicly supported the passage of a domestic partnership law, a plurality of citizens favored a constitutional amendment which would overturn *Baker*.[24] In the end, the Vermont legislature chose to follow Canada's example over that of Hawai'i; it enacted a "civil union" law guaranteeing gay couples the same rights as married men and women.[25]

It is the midst of this maelstrom that we publish our symposium issue on same-sex marriage. While the three articles and two comments published in the same-sex symposium focus on *Baehr* and same-sex marriage in Hawai'i, most are extremely relevant to the recent developments elsewhere. Probably the most Hawai'i-specific article is Robert J. Morris's examination of the roots of same-sex marriage in the 1950 Hawai'i Constitution. Mr. Morris contends that *Baehr* was the natural consequence of what he terms the "exotic" constitution. In arguing that the framers of the document intended Hawai'i to be governed in a distinctly Hawaiian manner, Mr. Morris discusses the unique

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[18] Baker v. Vermont, No. 98-032, 1999 WL 1211709, at *17 (Vt. Dec. 20, 1999).

[19] No. 98-032, 1999 WL 1211709 (Vt. Dec. 20, 1999).

[20] *See id.* at *1.

[21] *Id.* at *3.

[22] *Id.* at *16. The court cited *Baehr* as support for the proposition that marriage carries with it many substantial and real benefits. *See id.* at *14.

[23] *See id.* at *17.

[24] *See generally* Carey Goldberg, *Forced Into Action On Gay Marriage, Vermont Finds Itself Deeply Split*, N.Y. TIMES, Feb. 3, 2000, at A16; Carey Goldberg, *A Kaleidoscopic look at Attitudes on Gay Marriage*, N.Y. TIMES, Feb. 6, 2000, at A18 (exploring the visceral reaction to *Baker* shared by many members of the public).

[25] *See* Pamela Ferdinand, *Vermont Legislature Clears Bill Allowing Civil Unions*, WASH. POST, Apr. 26, 2000, at A1.

commitment to egalitarianism found in the constitution, especially in its marriage provision.

David O. Coolidge's investigation into the origins and constitutionality of the Hawai'i marriage amendment is also concerned primarily with Hawai'i, but his analysis of the underpinnings of same-sex marriage is universally applicable. Mr. Coolidge relates the fascinating tale of the legislative and judicial processes which spawned the amendment, often taking us inside the committee rooms and cloakrooms of the State Capitol. After summarizing the history of the law, Mr. Coolidge concludes that the marriage amendment was a triumph of the democratic process.

Mark Strasser's article analyses the constitutional flaws of the marriage amendment. Professor Strasser argues that the marriage amendment is a clear violation of the U.S. Constitution's Fourteenth Amendment, as it abridges a fundamental right on the grounds of sex. Like Judge Chang in *Baehr v. Miike*, Professor Strasser can find no state interest persuasive enough to overcome the presumption that the marriage amendment in unconstitutional.

The two student pieces published here reflect the diverse viewpoints embodied in the same-sex marriage debate. Brad K. Gushiken rejects the equal protection theory posited by Professor Strasser, pointing out that the Fourteenth Amendment does not demand strict scrutiny of discrimination based on sex. Unlike Professor Strasser, Mr. Gushiken believes that the state can articulate an interest in banning gay marriage which would meet the "exceedingly persuasive" standard. Like many of our other writers, Brett Ryan provides the reader with some background information; he begins his comment by telling the story of *Baehr*'s plaintiffs. The bulk of his article, however, is dedicated to an exploration of the constitutionality of the federal Defense of Marriage Act ("DOMA"). Mr. Ryan argues that the DOMA violates the Full Faith and Credit Clause of the Constitution, and that all states would therefore be compelled to honor a gay marriage performed in a state which had legalized the practice.

The state of Hawai'i is no longer on the cutting edge of the same-sex marriage debate, but this symposium still serves an important purpose. As gay couples in every jurisdiction continue their quest for legal recognition of their partnerships, the questions explored in this issue will continue to engender both thoughtful and visceral reactions. We hope that the articles that follow will provide a lasting contribution to the perplexing and emotional discussion.

John R. McIntyre[26]

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Re-Identifying American State Democracy: Implications for Same-Sex Marriage and the Nonfungibility of Hawai'i in the Exotic 1950 Statehood Constitution

Robert J. Morris*

[A] denial of the right to marry on account of sex, in the light of conditions as they have existed and now exist in this jurisdiction, would be a violation [of civil rights.][1]

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* J.D., University of Utah College of Law, 1980; Shenzhen Cyberway Global Consultant & Education United, Shenzhen City, People's Republic of China; former Staff Attorney, Office of Hawaiian Affairs ("OHA"), Honolulu. The author's most recent research is *"What Though Our Rights Have Been Assailed?" Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Islands* (Hawai'i), 18 WOMEN'S RIGHTS L. REP. 130 (1997) [hereinafter Morris, *Assailed*]. Previous relevant publications include Robert J. Morris, Book Review, 6 J. CONTEMP. L. 115 (1979); Robert J. Morris, *Aikane: Accounts of Hawaiian Same-Sex Relationships in the Journals of Captain Cook's Third Voyage (1776-80)*, 19 J. HOMOSEXUALITY 21 (1990); Robert J. Morris, *Trade*, 1 TRIBE: AN AM. GAY J. 51 (No. 4, Spring-Summer 1991); Robert J. Morris, *Same-Sex Friendships in Hawaiian Lore: Constructing the Canon*, *in* OCEANIC HOMOSEXUALITIES 71 (Stephen O. Murray ed., 1992); Robert J. Morris, *Same-sex unions were accepted in Hawaii*, HONOLULU ADVERTISER, June 13, 1993, at B3; Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture and Values for the Debate About Homogamy*, 8 YALE J. LAW & HUM. 105 (1996); Robert J. Morris, *Court Bashing in the Legislature: A Modern Lesson in Civics from the Federalist*, HONOLULU WKLY. 5 (April 27, 1994); *reprinted in* 6 LAW REP.: J. HAW. TRIAL LAWYERS ASS'N 5 (June 1994); Robert J. Morris, *The Crossroads of the Pacific: The Development of Multicultural Families in Hawai'i*, Paper Presented at the World Conference on Records ("Preserving Our Heritage") (August 12-15, 1980) (reprinted as Series 815 by the same) [hereinafter Morris, *Crossroads*].

This article relies in part on NORMAN MELLER, WITH AN UNDERSTANDING HEART: CONSTITUTION MAKING IN HAWAII (1971) (summarizing the work of the 1950 and 1968 Conventions); ANNE FEDER LEE, THE HAWAI'I STATE CONSTITUTION: A REFERENCE GUIDE (1993) (summarizing the work of all three Conventions: 1950, 1968, and 1978); and Jon M. Van Dyke, et al., *The Protection of Individual Rights Under Hawaii's Constitution*, 14 U. HAW. L. REV. 311 (1992). [Editor's note: As noted in the foreword to this same-sex marriage symposium, the articles and comments in the symposium were written over three years ago, during the peak of the same-sex marriage debate in Hawai'i. Selected updates have been made to this piece, however, this article also contains statements that reflect the same-sex marriage debate and surrounding events as they were three years ago. The foreword contains a synopsis of the developments in this debate since that time. The *University of Hawai'i Law Review* believes that this article adds an insightful and thoughtful perspective to the growing literature on this country's same-sex marriage discourse.]

[1] 1 PROCEEDINGS OF THE HAWAII CONSTITUTIONAL CONVENTION OF 1950 (1960) at 304 (citing COMM. WHOLE. REP. NO. 5). The two-volume PROCEEDINGS OF THE HAWAII

INTRODUCTION

Baehr v. Lewin,[2] the 1993 Hawai'i same-sex marriage case, was the ineluctable outcome of a constitutional and social process that began at least nine years before Hawai'i achieved statehood in 1959. The Hawai'i Supreme Court's 1993 decision would not have come as the shock that it did to so many had the promises and ideals of the 1950 Constitutional Convention been kept clearly in remembrance during the intervening forty-three years. *Baehr v. Lewin* and its aftermath brought Hawai'i to the crossroads of either losing or reifying the moorings of 1950.

I. THE EXPECTATIONS AND ACHIEVEMENTS OF THE 1950 CONSTITUTIONAL CONVENTION DELEGATES

The Statehood Constitution was framed by a Constitutional Convention in 1950 pursuant to Act 334 of the Territorial Legislature with the express purpose of getting Hawai'i admitted to the Union while at the same time preserving Hawaiian uniqueness.[3] The new constitution was the vehicle which

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CONSTITUTIONAL CONVENTION OF 1950 will be cited hereinafter in short form as 1 PROCEEDINGS and 2 PROCEEDINGS.

[2] 74 Haw. 530, 852 P.2d 44 (1993). The state's denial of marriage licenses to three same-sex couples violated the state constitution's guarantee of equal protection unless the state could show a compelling state interest for the denial, on the ground that the Hawai'i counterpart of the federal Equal Protection Clause is more elaborate. *See Baehr*, 74 Haw. at 562, 852 P.2d at 60. Subsequent to the original decision, the Hawai'i Supreme Court has spoken three times in the *Baehr* case. The court reaffirmed, clarified, and strengthened its opinion in response to the state's motion for reconsideration. *See* Baehr v. Lewin, 74 Haw. 650, 875 P.2d 225 (Table Op.) (1993). Then again, the court affirmed the lower court's denial of the Mormon Church's motion to intervene prior to trial. *See* Baehr v. Miike, 80 Hawai'i 341, 910 P.2d 112 (1996). At this writing, the main case is now on appeal again from the trial of the "compelling state interest" question, in which the lower court ruled in favor of the same-sex couples. Trial in the case commenced on September 10, 1996, in the First Circuit Court (Honolulu). The court's Findings of Fact and Conclusions of Law, from which the state's appeal was taken, were entered on December 3, 1996. [Editor's note: As noted in the foreword to this symposium, The Hawai'i Supreme Court decided the appeal in *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Dec. 9, 1999).]

Article I, section 5 of the Hawai'i State Constitution provides as follows:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

HAW. CONST. art. I, § 5.

[3] *See* Act 334, 25th Leg., Reg. Sess. (1949), *reprinted in* 1949 Haw. Sess. Laws 661 (An Act to Provide for a Constitutional Convention, the Adoption of a State Constitution, and the

would help the proponents of statehood sell the idea in Washington, D.C. As a later Constitutional Convention would note, because of Hawai'i's "unique political background," the principle that informed the 1950 Convention was "[t]o dramatize Hawai'i's cause and to demonstrate its capability . . . ."[4] The issue was worthiness, and the burden of proof was upon the would-be state.

Because of the perceived "foreignness" of Hawai'i and her many peoples and cultures when compared with the United States mainland, the adoption of a wholly American-style constitution by an American-style convention in Honolulu would provide a high level of comfort to those in Congress who felt uneasy about the statehood question on such grounds.[5] Despite this American style, however, the 1950 framers constructed a constitution which ensured that Hawai'i would not become wholly fungible with the other states – a Hawai'i whose exotic uniqueness would be preserved. The Convention perceived this as the re-identifying of what state government was all about in the modern era.[6]

The balance they achieved between the need to appear less foreign and the need to preserve the exotic nature of Hawai'i was perhaps the 1950 Convention's single most notable feat.[7] This balance was grounded in a liberal vision of constitutional law, especially with regard to the role of the courts in fashioning that law, and in the rights of the people. Yet, the 1950 constitution was at once both liberal and conservative.[8] On these subjects the 1950 Convention was far ahead of its time. It was the culmination of a long period

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Forwarding of the Same to the Congress of the United States, and Appropriating Money Therefor); Act 365, 25th Leg., Reg. Sess. (1949), *reprinted in* 1949 Haw. Sess. Laws 667 (An Act to Amend Act 115 of the Session Laws of Hawaii 1947, Relating to Statehood for Hawaii).

[4] 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at vii (1973).

[5] The constitution enacted was an amended version of the one approved at the November 7, 1950 election due to the addition of three propositions (not relevant here) as part of the Admission Act. The constitution was deemed amended when the three propositions were submitted to the people in accordance with the Admission Act and adopted by the people of Hawai'i at an election held on July 27, 1959, the year in which Hawai'i's Statehood occurred. The final product of the Convention plus the amendment process was then adopted by the people of Hawai'i during an election held on November 7, 1950. The new constitution was accepted, ratified, and confirmed by Congress and went into effect on August 21, 1959, upon the issuance of a presidential proclamation admitting the State of Hawai'i into the Union.

[6] *See infra* notes 74 and 75 and accompanying text.

[7] *See* 1 PROCEEDINGS at 141 (quoting Acting Governor Long's address to the Convention, where he acknowledges the balance struck between American and Hawaiian traditions). To this must be added a state judiciary that has always been independent and forward-looking — a concept generally lauded *except* when it comes to same-sex marriage. *See* Robert J. Morris, *Products Liability in Hawai'i*, 14 HAW. B. J. 127 (1979). The Hawai'i federal district court praised the Hawai'i Supreme Court for its independence. *See* Chapman v. Brown, 198 F. Supp. 78, 105, 111 (D. Haw. 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962).

[8] 1 PROCEEDINGS at 143 (calling the newly adopted constitution "fairly conservative").

in which Hawai'i had been the "proving ground of [a] great experiment in democracy."[9]

Certainly the delegates of 1950 knew and expected that their constitution would undergo change in the subsequent years. They made repeated references to the amendability of their constitution with the possibility of a new convention every ten years, as well as by amendments proposed annually by the Legislature.[10] Even when they returned to the "original understanding" of the federal Constitution, they couched it in terms of a "philosophy that has changed and *broadened* as we have come down through the years."[11]

These references to amendability were always made in the context of "advances,"[12] the "expanding future,"[13] and "growth"[14] of rights, obligations, and opportunities.[15] One searches the records in vain for any idea that the future would bring any *diminishment* of these things.

To these ends, the 1950 delegates were wary of including many definitions of words within the new constitution.[16] Defining words was a job best left to the courts,[17] as was curbing the Legislature's excesses.[18] Many other definitions should be left to home, school, and church.[19] In fact, the Council of the National Municipal League praised the 1950 constitution as demonstrating "that it is perfectly possible in the 20th century as it was in the 18th to write a Constitution that is confined to fundamentals."[20]

The delegates specifically avoided any constitutional definition of "marriage" because of its entanglement with miscegenation in other jurisdictions.[21] So certain were they of the judiciary's right to define legal terms that one delegate began a statement with this "Freudian slip":

> Now, if it is the desire of the delegates here to change the wording in the Supreme Court, in our – the wording in the Federal Constitution . . . .[22]

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[9] *Id.* at 138.

[10] 2 PROCEEDINGS at 748.

[11] *Id.* at 5 (emphasis added).

[12] *Id.* at 555.

[13] 1 PROCEEDINGS at 160.

[14] *Id.* at 142.

[15] *See id.* at 238-39.

[16] For example, the word "felony." *See* 1 PROCEEDINGS at 100; 2 PROCEEDINGS at 15.

[17] This was especially true with regard to the preservation of the wall of separation between church and state. *See* 2 PROCEEDINGS at 4-7.

[18] *See id.* at 18-19 (regarding excess condemnation); *id.* at 28-29 (regarding unlawful search and seizure); *id.* at 36 (regarding mental incompetency); and *id.* at 800 (regarding deletion of language).

[19] *See id.* at 21.

[20] 1 PROCEEDINGS at x.

[21] *See* 1 PROCEEDINGS at 304; 2 PROCEEDINGS at 17.

[22] 2 PROCEEDINGS at 7.

Another referred to the Hawai'i Supreme Court as "the most trusted agency in the whole government."[23] Yet another openly recognized how "liberal" that court was.[24] In reading the whole record of the 1950 Convention, one is impressed with the favorable and incessant referral to judicial review and precedent.

Curbing "legislative excesses" weighed heavily on the minds of many delegates. In attempting to dodge difficult issues, the Legislature, they feared, might tend to "punt" by saying, "Let the people decide."[25] They knew that "[i]f the legislature were deemed to be trusted in all circumstances for all things, there would be little need of writing a constitution."[26] They had already experienced a Territorial Legislature that had knowingly passed unconstitutional laws[27] and had arrogated to itself powers reserved for the courts,[28] by becoming "judge, jury and prosecutor" in resolving claims.[29]

The Hawai'i State Constitution's bill of rights has never at any time been amended to reduce either the quantum or the number of any civil rights, whether those rights are perceived as having been created for the new State in 1950, or as having already existed in the U.S. Constitution.[30] Today, however, the same-sex marriage issue has led to the novel placing of a definition of "marriage" in the constitution that gives to the Legislature the power to limit that definition to opposite-sex only. In this maneuver, the "advances" of the "expanding future" envisioned by the delegates in 1950 have been betrayed.

The history of the Hawai'i State Constitution provides a textual basis for a number of rights, privileges, and immunities thought to be only inherent in or implied in the U.S. Constitution, or to have been invented out of whole cloth by activist liberal federal judges. In 1950, federal courts were under fire as having adopted an "activist" view of the U.S. Constitution. That "activist" understanding was acknowledged and adopted as the "original understanding" of the first Hawai'i Constitution in 1950.[31] The Hawai'i State Constitution

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[23] *Id.* at 63-64 (statement of Delegate Anthony).

[24] *See id.* at 409 (statement of Delegate Tavares).

[25] *See id.* at 767 (statements of Delegates Holroyde and Mau).

[26] *Id.* at 626 (statement of Delegate Kellerman).

[27] *See id.* at 618 (statement of Delegate Phillips).

[28] *See* 1 PROCEEDINGS at 334. *See also* 2 PROCEEDINGS at 524.

[29] *See* 2 PROCEEDINGS at 515 (statement of Delegate Tavares).

[30] It is important to emphasize that these amendments to the state bill of rights were *additions* of rights and protections. The state Constitutional Convention of 1978 reaffirmed the Equal Rights Amendment that had been adopted in 1972. *See* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF HAWAII OF 1978 (1980) at 46, 520-21 (Resolution No. 4 "Reaffirming Support of the Equal Rights Amendment").

[31] As but one example, Standing Committee Report No. 51 included as its Exhibit No. 1 a letter extolling the virtues of the "wall of separation between church and state." 1 PROCEEDINGS at 200 (STAND. COMM. REP. NO. 51 citing Letter from Walter O. Ackerman, Jr., Attorney

affords greater rights and protections to citizens than those given by the U.S. Constitution.[32]

Hence, in arguing that the Hawai'i State Constitution should be interpreted only as a mirror of the U.S. Constitution, today's opponents of same-sex marriage seek a dumbing-down of the Hawai'i State Constitution to a level far below the possibilities its 1950 framers intended.

The Hawai'i State Constitution unequivocally protects *privacies*, not just privacy; *equalities*, not just equality; as well as similar plural concepts of sex and gender.[33] It is significant that the term "equal rights" became the heading of a section of the 1950 constitution that de-sexed its language and the language of all Hawai'i statutes.[34] The delegates thought that this section would take into account bisexuals and transsexuals.[35]

General of the Territory of Hawai'i). The letter relied upon the U.S. Supreme Court cases of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *McCollum v. Board of Education*, 333 U.S. 203 (1947). *See* 1 PROCEEDINGS at 200.

Interestingly, in *Spears v. Honda*, 51 Haw. 1, 449 P.2d 130 (1968), the Hawai'i Supreme Court expressly disallowed public transportation for nonpublic school children (including those in sectarian schools). In doing so, the court rejected the U.S. Supreme Court's 1947 ruling in *Everson*, which allowed such transportation as a "benefit" to the school children. *See Spears*, 51 Haw. at 13-19, 449 P.2d at 138-40. It did so in order to provide a *greater* wall of separation than the federal case mandated. *See id.*

The Hawai'i Supreme Court continues to declare that in constitutional interpretation, the fundamental principle is to give effect to the intention of the framers and the people adopting it. *See* Pray v. Judicial Selection Comm., 75 Haw. 333, 861 P.2d 723 (1993). Useful examinations of original intent may be read in H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), and Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BOSTON U. L. REV. 204 (1980) (the view of the framers may not be the same as the adopters).

J. Russell Cades completely misunderstood these points in his *Judicial Legislation in the Supreme Court of Hawaii: A Brief Introduction to the "Knowne Uncertaintie" of the Law*, 7 HAW. BAR J. 58 (1970) ("The court in 1961 opened a tremendous wellspring of uncertainty by extending into present time the great freedom of judgment and action that had been permitted the Hawaiian judiciary from 1859 to 1893."). A more nuanced presentation occurs in W. Frear, *The Evolution of the Hawaiian Judiciary*, HAWN. HIST. SOC. PAPERS No. 7 (1894).

[32] *See* State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971) (the Hawai'i Supreme Court is the final arbiter of the meaning of the provisions of the Hawai'i State Constitution, and as such it may fashion *greater* constitutional protections than those provided under the United States Constitution).

[33] *See* Mary Anne Case, *Disaggregating Gender from Sex and Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1 (1995).

[34] *See* 1 PROCEEDINGS at 214 (STAND. COMM. REP. NO. 65).

[35] The following exchange took place in the Committee of the Whole on Miscellaneous Matters:

NIELSEN: How can a person be of both sexes?

CHAIRMAN: Delegate Larsen, will you answer Delegate Nielsen's question, please?

The repetition of a word in the text is not to be taken as a mere redundancy or surplusage.[36] Hawai'i law declares, for example, that the two privacy clauses of the constitution are not identical in meaning.[37] This is logical since the first privacy clause essentially imported the text and the jurisprudence of the federal Fourth Amendment,[38] while the second privacy clause was added at a subsequent constitutional convention.[39] Thus, the Hawai'i rights of privacy are much greater than the federal Fourth Amendment right. In addition, the Hawai'i rights are textual, while the federal rights are only implied in the "penumbra" of the U.S. Constitution.

The same must therefore hold true with regard to the clauses dealing with sex, equality, and related topics. The Hawai'i ERA's protection against classifications based on "sex" is not redundant of other provisions that also mention "sex" and "equality."

Finally, the 1950 constitution contained the following crucial statement in article XVI, section 11:

LARSEN: *There are people who have both sexes.*

CHAIRMAN: Thank you very much. *I thought so all along.*

2 PROCEEDINGS at 697 (emphasis added).

[36] In *State v. Ganal*, 81 Hawai'i 358, 917 P.2d 370 (1996), the Hawai'i Supreme Court held that taking nothing as surplusage is a "cardinal rule" of construction and interpretation. *See Ganal*, 81 Hawai'i at 372, 917 P.2d at 384.

[37] *See* State v. Okubo, 3 Haw. App. 396, 651 P.2d 494 (1982), *aff'd* 67 Haw. 197, 682 P.2d 79 (1984). This case cited at length the record of the 1978 Constitutional Convention that the two privacy provisions "are distinct." *Okubo*, 3 Haw. App. at 403, 651 P.2d at 500. The original counterpart of the fourth amendment in the Hawai'i State Constitution, which is now article I, section 7, reads in pertinent part as follows: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures *and invasions of privacy* shall not be violated; and no warrants shall issue but upon probable cause . . . ." HAW. CONST. art. I, § 7 (emphasis added).

[38] It was intended thus to incorporate the federal Fourth Amendment and the federal decisions interpreting its meaning into the law of Hawai'i. In *State v. Pokini*, 45 Haw. 295, 367 P.2d 499 (1961), the Hawai'i Supreme Court noted the 1950 Committee of the Whole Report No. 5, which spelled out the delegates' intention to incorporate the federal Fourth Amendment because doing so "will give to this State the benefit of Federal decisions construing the same." 1 PROCEEDINGS at 301. The court therefore concluded that following a federal precedent, *Mapp v. Ohio*, 367 U.S. 643 (1961), "signifies no change in this state, for we were committed to that course from the date this State was admitted." *Pokini*, 45 Haw. at 308, 367 P.2d at 506.

However, the federal Fourth Amendment does not contain the word "privacy" as does the Hawai'i counterpart. Hence, the Hawai'i State Constitution codified an express privacy content that obviated the need to resort to the "penumbra" construct of *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, Justice Douglas stated that the "First Amendment has a penumbra where privacy is protected from governmental intrusion." *Griswold*, 381 U.S. at 483.

[39] Article I, section 6 of the present Hawai'i State Constitution, which was added by the 1978 Constitutional Convention, reads as follows: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6.

> All those provisions of the act or resolution admitting this State to the Union, or providing for such admission, which reserve to the United States *judicial rights or powers* are consented to fully by the State and its people; and those provisions of such act or resolution which preserve *judicial rights and powers* for the State are hereby accepted and adopted, and *such rights and powers are hereby assumed*, to be exercised and discharged pursuant to this constitution and the laws of the State.[40]

Hence, the people of Hawai'i were not impressed with arguments about the illegitimacy of rights created or found by an "activist" federal judiciary without textual support in the U.S. Constitution. They freely and willingly adopted such rights as part of their fundamental law. The records of the 1950 Hawai'i Constitutional Convention reveal the acceptance of a number of principles and ideas that many commentators had already, or have since, criticized as anti-constitutional, anti-family, or anti-"values." This is particularly clear with regard to the framing of the 1950 constitution's preamble. The ideals and sentiments expressed in 1950 prefigured what the *Baehr* court did in 1993.

II. PREVAILING PRINCIPLES OF 1950

The 1950 Convention met at a time when the aftermath of World War II – General Douglas MacArthur,[41] the Korean war,[42] and the atomic bomb[43] – were part of the ambient political atmosphere. Harry Truman was President. It was an era of fear – fear of communism, fear of Senator Joseph McCarthy's fear of communism, and fear of the hearings on "un-American activities" going on in the nation's capital.[44] It was not a good time to be queer or radical.

The delegates of 1950 were exquisitely aware that the eyes of the nation and the world were upon them, and that they were drafting the first new state constitution in nearly forty years.[45] Moreover, the delegates were very aware

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[40] HAW. CONST. art. XVI, § 11 (emphasis added). The reference is to the Admission Act, Pub. L. No. 86-3, §§ 12, 13, 73 Stat. 4 (1959).

[41] *See* 1 PROCEEDINGS at 45.

[42] *See id.* at 111.

[43] *See id.* at 60.

[44] *See generally* DAVID HALBERSTAM, THE FIFTIES (1994).

[45] *See* 1 PROCEEDINGS at 11. The 1950 Convention was concerned with several overriding themes that set the background for all its deliberations. These included: 1) the fear of Communism; 2) the right of labor to organize; 3) the Status of the federal Hawaiian Homes Commission Act ("HHCA") and the Organic Act of the Territory of Hawai'i, particularly with regard to "class legislation;" 4) the federal Statehood Act for Hawai'i (H.R. Res. No. 49) then pending in Congress; 5) the continuity of laws and rights from the Territory to the new State; 6) the protection of civil rights and equal rights in the new constitution; 7) intergovernmental relations (state-federal, state-state, and intrastate); 8) the inclusion of women on juries; 9) the

that they were making a record, a "legislative history," that would be preserved, read, and used by Hawai'i courts in the future in order to determine "original" constitutional meanings and "intent."[46] The Convention accepted as standard practice the notion that the courts of Hawai'i would construe the new constitution by, inter alia, referring to the records of the Convention itself, as well as to the spirit and principles of the laws because therein lay the determination of vested rights.[47]

Saturday, July 22, 1950, was the final day of the Convention, the day on which the delegates voted to approve their finished work product and send it to the people for ratification. The prevailing viewpoint summarizing the intent of the Convention was that the principles and statements expounded were part of a directional trend;[48] more specifically, that the rights stated in the Constitution were not fixed, but were concepts embodied in a changing and dynamic society.[49] For example, Convention President Samuel Wilder King

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"home rule" of counties and cities; 10) the "right to marry," particularly with regard to miscegenation; 11) the election versus the appointment of state judges; 12) the precise wording of the preamble to the new constitution, and the "direct democracy" issues of initiative, referendum, and recall. The best capsule summary of these issues can be seen in the speeches of Oren E. Long, Secretary of Hawai'i and then Acting Governor, to the delegates. *See* 1 PROCEEDINGS at 1-2, 141-43. *See also id.* at 17, 21, 385. The delegates were wary of such electoral tools as initiative, referendum, and recall: "[R]ecall can well be used, not as an instrument to serve the will of the people, but as a weapon in the hands of a loud, well organized minority to bludgeon a public official into submission to their will or face the agony of a recall election." 1 PROCEEDINGS at 186 (STAND. COMM. REP. NO. 47).

[46] *See* 2 PROCEEDINGS at 173 . Recently, the Hawai'i Supreme Court has reiterated its commitment to the use of legislative history as a viable means of interpretation. *See* Hawaii State AFL-CIO v. Yoshina, 84 Hawai'i 374, 935 P.2d 89, 91 (1997).

[47] *See* 2 PROCEEDINGS at 91-92, 100, 129. This usage of both the "spirit" and the "principles," in addition to the letter of the constitution, is crucial in limiting the modern bounds of judicial review.

[48] The viewpoint that prevailed throughout the Convention was that expressed in the following words:

> [A]ny section [of the federal Constitution] which has already stood the test of time *as far as interpretation and construction are concerned* certainly should have some bearing on this Constitutional Convention here. I don't believe that we should have in our Constitution merely a statement of principles. We're talking about *directional trend and principle.*

2 PROCEEDINGS at 560 (emphasis added).

[49] In a discussion that began on the subject of the right of labor to organize, the issue was whether the "right" was already stated in the bill of rights or elsewhere in the new constitution. Committee Proposition No. 28 stated:

> The right is not fixed or well defined . . . . One has but to read recent decisions of the Supreme Court of the United States *which is still adjudicating questions and the meaning and application of the rights of free speech, religious freedom, etc., in our changing times to recognize that many concepts in our Bill of Rights are not fixed. There are no fixed or unchanging concepts in a dynamic and changing society.*

praised the new constitution because it provided "sufficient elasticity" so as not to "bind the future irrevocably."[50] He noted that "[t]hose who administer the government we are founding may be trusted to apply the principles we have laid down *in the light of their own times, just as the Federal Constitution has been interpreted to fit the needs of a great and growing nation.*"[51]

Perhaps the most important proposal before the Convention, which differentiated the Hawai'i State Constitution from the United States Constitution, and which now provides the fundamental basis for supporting same-sex marriage, was Proposal No. 47. Under this proposal, the Convention recognized the "right to marry" and declared it could not be abridged because of "race, nationality, creed or religion."[52] The Committee of the Whole that considered the new constitution's bill of rights extended this list explicitly to include "sex,"[53] i.e., gender. Thus, when the *Baehr* court held in 1993 that the State's denial of marriage licenses to three same-sex couples violated equal protection on the basis of gender, this holding was not a radical departure from constitutional law nor an invention out of whole cloth. Instead, it was an echo of ideas expressed at the Constitutional Convention of 1950.

Additionally, it is important to consider three proposals that *failed* in the 1950 Convention: 1) Proposal 23 (board of censors);[54] 2) Proposal 89 (licentiousness);[55] and 3) Proposal 144 (legislative divorce).[56] These three rejected proposals are important because they embodied values that are urged today as necessary for the preservation of family values and the American way

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1 PROCEEDINGS at 238 (emphasis added).

[50] *Id.* at 136.

[51] *Id.* (emphasis added).

[52] *See id.* at 29, 401.

[53] *See id.* at 304.

[54] *See* 1 PROCEEDINGS at 400. Standing Committee Report No. 95 recommended that the idea be rejected because "this was a legislative matter and that the legislature needed no specific authorization to have the power to create such a board if it so desired. The proposal was therefore rejected . . . ." 1 PROCEEDINGS at 258.

[55] *See* 1 PROCEEDINGS at 402. Standing Committee Report No. 34 recommended modification of the proposal, but it was subsequently deleted by Standing Committee Report No. 20, Standing Committee Report No. 24, Standing Committee Report No. 88, and Committee Whole Report No. 5. *See* 1 PROCEEDINGS at 165, 172, 243-45, 299-305.

[56] Standing Committee Report No. 95 noted that this idea was absurd. "Concerning the provision regarding legislative divorces, a majority of the members of your committee felt that such a specific limitation was entirely unnecessary. It was, to those members, inconceivable that any legislature of the State of Hawaii would ever consider granting a divorce by statute." 1 PROCEEDINGS at 259. By parity of reasoning, the 1997 proposed constitutional amendment, to the effect that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples," H.R. 117, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 1246-47, relegates to the Legislature the special kind of power that the 1950 delegates considered to be "inconceivable."

of life, arguments ironically heard in attacks against same-sex marriage and homosexuals.[57]

Proposal No. 23 would have authorized the new state legislature to create a "board of censors empowered to prohibit showing of improper motion pictures."[58] Proposal No. 89 would have prohibited the new constitution's Bill of Rights "from being used to excuse 'licentiousness' or justification of practices inconsistent with peace or safety of the state."[59] Proposal No. 144 would have deprived the legislature of the "power to grant divorce," i.e., by special statute rather than by the usual procedure of obtaining a divorce through the courts.[60]

The fact that the 1950 Convention intentionally declined to include censorship, licentiousness, and marriage law as *constitutional* principles is especially significant in relation to the modern debate regarding same-sex marriage. The opponents of same-sex marriage seek the power of censorship against anything homosexual because they define it as "licentious." The 1997 Hawai'i Legislature voted to place this proposed constitutional amendment on the ballot in 1998 to modify the state bill of rights: "The legislature shall have the power to reserve marriage to opposite-sex couples."[61]

In outlawing discrimination based on race and sex, particularly in regard to miscegenation, the 1950 Convention laid down its unmistakable view that "a denial of the *right to marry on account of sex*, in the light of conditions as they have existed and now exist in this jurisdiction, would be a violation of both

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[57] The continuity of tradition and the existing order are discussed vis-a-vis same-sex marriage in Otis R. Damslet, *Note: Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RIGHTS 555 (1993).

[58] 1 PROCEEDINGS at 400.

[59] *Id.* at 402.

[60] *See id.* at 404.

[61] H.R. 117, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 Haw. Sess. Laws 1246-47 (also known as "A Bill for an Act Proposing a Constitutional Amendment Relating to Marriage") proposed to amend article I of the Hawai'i State Constitution, which contains the Hawai'i bill of rights. The policy statement for the proposal is as follows:

> The legislature finds that the unique social institution of marriage involving the legal relationship of matrimony between a man and a woman is a protected relationship of fundamental and unequaled importance to the State, the nation, and society. The legislature further finds that the question of whether or not the State should issue marriage licenses to couples of the same sex is a fundamental policy to be decided by the elected representatives of the people. This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes.

Id.

[due process and equal protection]."[62] The Hawai'i Supreme Court in 1993 would reach the same conclusion as to equal protection in *Baehr v. Lewin*.[63]

The close analogy between miscegenation, sexism, racism, and especially same-sex marriage has gained the attention of a number of legal analysts.[64] As the delegates of 1950 noted, interracial marriages had been a way of life in Hawai'i for at least a century, and it was time to protect them constitutionally. Analytically, that protection must necessarily extend to same-sex marriages.

III. THE PREAMBLE

Of all the parts of the 1950 Constitution, the preamble received some of the lengthiest and most sophisticated jurisprudential debate. Even though the preamble is only hortatory, an "expression of sentiment," as one of the 1950 delegates put it,[65] the delegates knew that it would summarize who "we" are – and are not – constitutionally.[66]

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[62] 1 PROCEEDINGS at 304 (emphasis added).

[63] 74 Haw. 530, 852 P.2d 44 (1993).

[64] One of the earliest articles to recognize this analogy was Susan R. Estrich & Virginia Kerr, *Sexual Justice*, *in* OUR ENDANGERED RIGHTS 98-133 (Norman Dorsen ed., 1984). Other examples include Bonnie Thorton Dill, *Race, Class, and Gender: Prospects for an All-Inclusive Sisterhood*, 9 FEMINIST STUDIES 131 (1983); Nancy M. Henley & Fred Pincus, *Interrelationship of Sexist, Racist, and Antihomosexual Attitudes*, 42 PSYCHOLOGICAL REPORTS 83 (1978); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L. J. 145 (1988); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK UNIV. L. REV. 981 (1991); James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 BOSTON UNIV. L. REV. 93 (1993); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977). *See also* Mary Coombs, *Comment: Between Women/Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male) Sex Sexual Activities*, 8 YALE J. L. HUM. 241 (1996); and Jordan Herman, *The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After* Baehr v. Lewin, 56 OHIO STATE L. J. 985 (1995).

On the benefits of miscegenation in Hawai'i, see ROMANZO ADAMS, INTERRACIAL MARRIAGE IN HAWAI'I (1937) and Morris, *Crossroads*, *supra* note *.

The ways in which these attitudes translate into social evils is detailed in Robert J. Bidwell, A REPORT ON HAWAI'I'S GAY AND LESBIAN YOUTH PREPARED FOR THE HAWAII STATE LEGISLATURE BY THE HAWAII GAY AND LESBIAN TEEN TASK FORCE (1992).

[65] *See* 2 PROCEEDINGS at 725 (statement of Delegate King).

[66] *See* HAW. CONST. preamble. Delegate J. Garner Anthony said:

> I think there are a number of delegates here who don't like the glorification of one single human being. I know of no other constitution, American constitution, that does that. I think that's why some of us who are Jeffersonian Democrats don't like the idea of one single person being singled out.

2 PROCEEDINGS at 725.

The 1950 drafters were careful to include what they viewed as the best traditions of the U.S. Supreme Court and the federal courts.[67] As an example of this mind set, the delegates clearly intended the two-way "wall of separation" between church and state, a doctrine invented by the U.S. Supreme Court,[68] to apply in Hawai'i.[69] They accepted the "wall" metaphor without hesitation. Not only was this clear in their adoption of the language of the First Amendment and the U.S. Supreme Court cases interpreting it, but also from their building into the State Constitution provisions operating on both sides of the wall. The 1950 Hawai'i State Constitution prohibited the appropriation of public funds for the support of any sectarian school *and* provided that the statewide system of public schools be "free from sectarian control."[70]

The delegates were especially concerned about the future; they wanted no legislative blocks against change that would hinder government in the future.[71] Such, they thought, would constitute a fear of the future and would nullify the Hawaiian spirit of tolerance. The new constitution was to have flexibility and the invitation to growth, so that it was at once both fairly conservative[72] and in keeping with liberal trends. The preamble was the vehicle to reveal the 1950 Convention's attitude: "American democracy has shifted and developed; this offers the convention a golden opportunity to re-identify American State democracy *as it is rather than as it was*."[73]

The framers of the new preamble chose three special ideas which would go beyond the federal Constitution and help to express "our unique *and exotic* background in history and make some reference to the traditions that make

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[67] *See* 1 PROCEEDINGS at 173. *See* Christopher L. Eisgruber, *Is the Supreme Court An Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992) (by appealing to identity, the Supreme Court inspires Americans to honor their values). Prior to achieving statehood, the territorial courts of Hawai'i, including the Hawai'i Supreme Court, were federal courts. *See* Robinson v. Ariyoshi, 65 Haw. 641, 667-68 n.25; 658 P.2d 287, 306 n.25 (1982).

[68] *See* HAW. CONST. preamble. Ironically, the U.S. Supreme Court first used the "wall" metaphor in the Mormon anti-polygamy case of *Reynolds v. United States*, 98 U.S. 145 (1878). I have discussed this irony in Morris, *Assailed*, *supra* note *. *See also* Jeremy M. Miller, *A Critique of the* Reynolds *Decision*, 11 WESTERN STATE UNIV. L. REV. 165 (1984) (the Court erred because the Free Exercise Clause was created for the sole purpose of protecting minority religions). The Mormon view is presented, and Jefferson's philosophy reviewed, in Joel F. Hansen, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 BRIGHAM YOUNG UNIV. L. REV. 645 (1978).

[69] *See* 1 PROCEEDINGS at 200.

[70] *Id.* 182-90.

[71] Oren E. Long, Secretary of Hawai'i, and then Acting Governor, in a keynote address to the delegates. *See id.* at 142.

[72] *See id.* at 143.

[73] *Id.* at 213 (emphasis added).

Hawai'i a little different from any one of the other 48 states."[74] These ideas were embodied in the phrases: 1) Divine Guidance; 2) our Hawaiian Heritage; and 3) an understanding heart toward all the people of the Earth.[75]

In considering the term "Divine Guidance," it is tempting to read the phrase as embracing the idea of "a Christian nation" or suggesting a divinity such as either Jehovah or God of the Old Testament or Jesus of the New. It is striking, therefore, to realize that the delegates explicitly rejected such allusions. In one early draft, the preamble used the phrase "our Creator" as well as other suggested phrases such as "our reverence to God."[76] Many of the delegates objected, however, noting that the U.S. Constitution contains no reference to "God" or any similar word for deity.[77]

The delegate who proposed the use of "God" inaccurately attributed its use to Kamehameha the Great (Kamehameha I) and to his "Law of the Splintered Paddle" (*Ke Kānāwai 'o Mamala Hoe*),[78] arguing:

> The amazing thing in reading the story of old Hawai'i is that Kamehameha as a youngster grew up at the heiau [temple]. Every morning he got up on this heiau and prayed to the great Spirit that rules over all. Call that Divine Guidance, call it God, call it the Great Spirit that rules over all. *As we are evolving, we are not trying to specify which God and what God. . . . The concept, "God," covers everyone's concept of something above man's laws.*[79]

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[74] 2 PROCEEDINGS at 723 (emphasis added).

[75] *See* 1 PROCEEDINGS at 141.

[76] 2 PROCEEDINGS at 706.

[77] *See id.* at 706-08. One delegate noted the absence of any reference to any such terms in the U.S. Constitution and argued further: "It depends on the *men themselves* to make their government function and to devise those devices of government which will make it function." *Id.* at 710 (emphasis added).

[78] *See id.* at 704-14, 722-29 *passim*. All competent histories of Hawai'i contain materials on the Law of the Splintered Paddle. The best Hawaiian explanations in context are given in the Hawaiian-language narratives by Joseph M. Poepoe and Stephen Desha. *See* Edith Kawelohea McKinzie, "An Original Narrative of Kamehameha the Great Written in *Ka Nūpepa Ka Na`i Aupuni* [The National Conqueror Newspaper]," (1905-1906) by Joseph M. Poepoe: Hawaiian Text With English Translation and Brief Comparative Reviews of Earlier Historical Biographies of Kamehameha I," Masters Thesis, Univ. of Hawai'i (1982); Rev. Stephen Langherne Desha, Sr., *A Tale of Kekūhaupi'o, the Famous Warrior of the Era of Kamehameha the Great* (Frances N. Frazier trans., 1992). A capsule summary may be found in N.B. Emerson, *Mamala-Hoe, in* HAWN. HIST. SOC. 10TH ANN. REP. at 15 (1903).

These sources are rich in materials demonstrating some of the same-sex interests and relationships of Kamehameha the Great with other men. The most prolific source of Hawaiian same-sex information, however, is located in the vast body of literature known as the Pele stories. *See, e.g.*, John Charlot, *Pele and Hi`iaka: The Hawaiian Language Newspaper Series*, 93 ANTHROPOS 55 (1998).

[79] 2 PROCEEDINGS at 708 (emphasis added).

Another delegate challenged this position by asking its proponent whether he was "inferring and implying that I should believe the way you do as far as God is concerned," and stating that he preferred another term such a "Divine Guidance" or "our Divine Creator."[80] "Divine Guidance" was the term eventually adopted. Hence, the needed balance: to recognize the essential equality of all people, while at the same time stressing that each person is entitled to his or her uniqueness. In other words, "equality" did not equate to "sameness," whether speaking of individuals or the new State.[81]

"Our Hawaiian Heritage" is a phrase that embraced the Hawaiian language, which the new constitution named as one of the official languages of the new State. The phrase also applies to traditional Hawaiian usages, customs, and practices, including same-sex relationships, King Kamehameha's among them. Hence follows this configuration of *aloha* by and through the law: "*Pōlena pa'a 'ia iho ke aloha, i kuleana like ai kāua* [In aloha tightly knotted together, you and I have equal rights]."[82] As the Hawaiian proverb has it: "*He manu ke aloha, 'a'ohe lālā kau 'ole* [Love is a bird, and there is no branch upon which it does not perch]."[83]

In 1994, the Hawai'i Legislature enacted a new marriage statute that attempted by legislation to argue with the court's original 1993 decision. The statute, Act 217, attempted to redefine marriage as opposite-sex only.[84] Section 1 of Act 217 launched into a prolix rehearsal of the *Baehr* case, alleging that the Hawai'i Supreme Court had impermissibly violated the separation-of-powers doctrine by "judicial legislation." Thus, the case has been viewed as a political tug-of-war between the two branches. In fact, Act 217 admitted that "[p]olicy determinations of this nature are clearly left to the legislature *or the people of the State through a constitutional convention*."[85] As if to respond to this history and to look to the future, the court, in another case,[86] reaffirmed the following seven points:

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[80] *Id.*

[81] Sameness "is certainly not a fact," as one delegate put it. 2 PROCEEDINGS at 726-27. "That is not a fact consistent with the program that we intend to launch." *Id.* He continued:

> It is our uniqueness. There is only one Hawaii. We are the most isolated community in all the world. We are separated uniquely, thousands of miles from any civilized community, and in Hawaii we have built a civilization that is unique. The word "aloha" can be claimed by no other people but that of Hawaii.

Id. at 726-27 (*okina* omitted in original).

[82] MARY KAWENA PŪKU'I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 338 (1986).

[83] 'Olelo No'eau: Hawaiian Proverbs and Poetical Sayings 88 (Mary Kawena Pūku'i ed., 1983) (proverb #804).

[84] Act 217, 17th Leg., Reg. Sess. (1994), *reprinted in* 1994 Haw. Sess. Laws 526.

[85] *Id.* (emphasis added).

[86] *See* Del Rio v. Crake, 87 Hawai'i 297, 955 P.2d 90 (1998) (citing Marbury v. Madison, 5 U.S. 137 (1 Cranch 137) (1803), for the proposition that it is the province of the judiciary to

The Hawai'i Supreme Court is the final arbiter of the meaning of the Hawai'i Constitution;[87]

The fact that the Legislature intended to enact an unconstitutional statute does not cause that statute to pass constitutional muster;[88]

The constitutionality of a statute is reserved for determination by the Judiciary, and the statute cannot survive constitutional challenge based on legislative declaration alone;[89]

The Legislature cannot force the Judiciary to construe a statute in accordance with legislative interpretation;[90]

The Legislature cannot effect a change in the construction of a statute by a later declaration of what it had originally intended;[91]

If the Judiciary determines that a statute is unconstitutional, such a determination can be changed only by constitutional amendment or by the Court's power to overrule its prior decision;[92] and

The Legislature's reenactment of a statute in substantially the same form does not alter the judicial decision holding the earlier version of the statute unconstitutional because the earlier decision retains its *stare decisis* effect.[93]

CONCLUSION

The actions and intentions of the 1950 delegates tell us that civil rights and constitutional protections are not a zero-sum game where there is only so much to go around, where somehow if one side increases the other must decrease.[94]

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say what the law is). *See also* City of Boerne v. Flores, 521 U.S. 507 (1997) (overruling the Religious Freedom Restoration Act as unconstitutional on *stare decisis* and separation-of-powers principles).

[87] *See Del Rio*, 87 Hawai'i at 304, 955 P.2d at 97.

[88] *See id.*

[89] *See id.* (citations omitted).

[90] *See id.* (citations omitted).

[91] *See id.* (citations omitted).

[92] *See id.*

[93] *See id.* 87 Hawai'i at 304, 955 P.2d at 97.

[94] With reference to the zero-sum fallacy of constitutional rights, especially when it comes to equality, see CHRIS BULL & JOHN GALLAGHER, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S 113 (1996). Zero-sum includes the argument that granting marriage to same-sex couples somehow ineluctably diminishes or dilutes the "concept" or "definition" of marriage for opposite-sex couples. This argument was set forth in the joint amicus curiae brief filed by the Catholic and Mormon churches in a pending Vermont same-sex marriage case, *Baker v. State*, Docket No. 98-32 (Vt. 1998) ("the protection of marriage and the traditional family unit it generates constitutes a compelling governmental interest."). The brief however, failed to explain how a legalized same-sex marriage would threaten the traditional family unit of any opposite-sex couple. [Editor's note: As discussed in the foreword to this symposium, the Vermont Supreme Court found the state's marriage law

They speak also to the fallacy that same-sex marriages would somehow impact or dilute opposite-sex marriages,[95] and they argue that American-style rights should only expand, never shrink.

It is not easy these days to remain true to the intention of the statesmen of 1950 Hawai'i, who "re-identified American state democracy." The spirit of their preamble, their "exotic" concepts of equality and freedom, and the "unique and exotic" nature of Hawai'i are under enormous pressure. Assaults from all directions would like to erase these exotic things so that Hawai'i would be altogether fungible with the other forty-nine states. Delegate Arthur Trask said in 1950:

> I cannot subscribe to the thought . . . that we are or should be just like the other states in our preamble. That is certainly not a fact. That is not a fact consistent with the program that we intend to launch.[96]

The coming of such fungibility is an irreparable loss for Hawai'i.

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unconstitutional, paving the way for legislation allowing same-sex couples to receive the same rights as married couples. *See* Baker v. Vermont, No. 98-032, 1999 WL 1211709, at *17 (Vt. Dec. 20, 1999)].

[95] In this debate over the definition of "marriage," it is useful to consult Sherry Broder & Beverly Wee, *Hawai'i's Equal Rights Amendment: Its Impact on Athletic Opportunities and Competition for Women*, 2 U. HAW. L. REV. 97 (1979). The instructive analogy is to the game of football, which was "redefined" when teams and schools were required to admit female players to what had always been a male sport. The players on the field, or rather the pool of potential players, changed, but the game itself did not.

[96] 2 PROCEEDINGS at 726. The same delegate argued an interesting position on Christian doctrine in support of the notion of being both free and equal. *See id.*

The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate

David Orgon Coolidge*

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I. INTRODUCTION

The marriage debate in Hawai'i has been a drama with many unexpected twists and turns. The decision of the Hawai'i Supreme Court in 1993[1] was an extraordinary moment. Judge Chang's trial court decision in 1996[2] appeared to seal the fate of the Hawai'i marriage statute. Yet the story was not over. Perhaps the most dramatic moment in the saga occurred in the spring of 1997, when the Hawai'i Legislature agreed to put a proposed state constitutional amendment onto the ballot.[3] That saga continued when on November 3, 1998, sixty-nine percent of the citizens of Hawai'i voted to ratify what is now article I, section 23 of the Hawai'i Constitution: "The legislature shall have the power to reserve marriage to opposite-sex couples."[4] On December 9, 1999, the Hawai'i Supreme Court dismissed the case which had driven the debate, thus effectively ending the attempt to legalize same-sex marriage in Hawai'i.[5] These twelve relatively simple words stopped the Hawai'i Supreme Court in its tracks.

That the passage and ratification of the Marriage Amendment would be a watershed event was clearly recognized in advance by those on both sides of the debate. Reflecting one point of view, *Detroit News* syndicated columnist

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[1] *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

[2] *See* Baehr v. Miike, No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996). This decision was reversed in an unpublished dispositional order by the Hawai'i Supreme Court. *See* Baehr v. Miike, 92 Hawai'i 634, 994 P.2d 566 (1999) (Table No. 20371).

[3] *See* H.R. 117, S.D. 1, C.D. 1, CONF. COMM. REP. No. 1 (1997). On April 29, 1997, the proposed Marriage Amendment was approved in the Senate with 25 Ayes and 0 Nays, and in the House with 44 Ayes, 6 Nays, and 1 Excused. *See* 1997 HAW. SENATE J. 766; 1997 HAW. HOUSE J. 922.

[4] HAW. CONST. art. I, § 23. The final tally showed 69% of voters supported the Amendment, 29% opposed, and 2% of the ballots were left blank. *See* Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR-BULL., Nov. 4, 1998, at A1; *Complete, Uncertified Results of Hawai'i's General Election: State Constitution*, HONOLULU ADVERTISER, Nov. 5, 1998, at B3.

[5] *See* Baehr v. Miike, 92 Hawai'i 634, 994 P.2d 566 (1999) (Table No. 20371) (summary dispositional order reversing and remanding in favor of Miike).

Deb Price, who is openly lesbian, wrote: "If the court doesn't rule soon, the November 1998 vote on amending the constitution could be devastating."[6] Others, such as syndicated columnist Maggie Gallagher, saw it differently: "Hawai'i's graceful, commonsense solution represents both a rebuke to power-hungry judges and an object lesson in how much better off we are when difficult political issues are left to the political process."[7]

Given the 1993 plurality opinion of the Hawai'i Supreme Court, and the outcome of the *Baehr v. Miike* trial in 1996, all involved seemed to agree: whether they supported or opposed it, the passage of the Marriage Amendment was probably the only way that the people of Hawai'i could block the judicially-mandated issuance of marriage licenses to same-sex couples.[8] The Amendment, in short, might make or break this issue for the entire world. Indeed, its success shattered the elite myth that "same-sex marriage" was inevitable.[9]

This article addresses three questions: What are the origins of the Marriage Amendment? What might the Amendment mean? What has been its fate? Section II reconstructs the origins of the Marriage Amendment through an extensive narrative. Section III argues that the purpose of the Marriage Amendment is to correct an erroneous decision of the Hawai'i Supreme Court, and to reaffirm that the question of marriage belongs to the people of Hawai'i and their elected representatives. The section also argues that Marriage Amendment overrules the Hawai'i Supreme Court's decisions in *Baehr v. Miike* and requires no further legislation for its implementation. Finally, Section IV looks at the ratification of the Amendment, its evaluation by the Hawai'i Supreme Court, and what the future may hold as the Amendment is evaluated and applied.

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[6] Deb Price, Editorial, *Same-Sex Union Coming*, HONOLULU ADVERTISER, Sept. 8, 1997, at A8. See also her more recent syndicated column, Deb Price, *A Major Issue of Equality is Still Waiting on Hawai'i's Highest Court*, DETROIT NEWS, June 19, 1998, at E8.

[7] Maggie Gallagher, *Aloha Chorus for the Gay Marriage Debate*, WASH. TIMES, Apr. 22, 1997, at A15.

[8] The other possible way was through a constitutional convention, but this was never convened. *See* discussion *infra* section IV.A.2.

[9] The reader will notice that I have put the term "same-sex marriage" in quotation marks, although I will discontinue the practice to avoid undue irritation. This reflects my belief that same-sex unions are not marriages, a belief which I realize some readers will not share. Those interested in my views are welcome to see David Orgon Coolidge, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997) [hereinafter Coolidge, *Same Sex Marriage?*], and David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998) [hereinafter Coolidge, *Playing the* Loving *Card*].

II. THE ORIGINS OF THE MARRIAGE AMENDMENT

In responding to the question of the origins of the Marriage Amendment, one can answer with reasons, a story, or some combination of the two. The reasons why some citizens and officials perceived the *need* for the Amendment is not the same as telling the story of the *process* of how the Amendment passed through the Legislature. Before telling the story, it is important to put it into context by addressing the question of the rationale for pursuing the Amendment at all.

A. Why Was the Marriage Amendment Needed?

Amending a constitution is neither a simple nor a necessarily desirable task to undertake. Insofar as a constitution serves as the people's charter for the institutions that govern them, it is generally in the best interest of all that it be a stable document within which a diversity of citizens can function. It represents the people's fundamental judgment about government's proper structure and role, both in itself and in relationship to individual persons and social institutions.[10]

The proceedings of constitutional conventions in Hawai'i make it abundantly clear that a constitution is a complex product.[11] It is a negotiated settlement between citizens of often deeply differing viewpoints. Together the people of a geographic region strive to agree upon a charter for the political community that will govern them. The hope is then that, from this baseline, political issues can be adequately resolved *within* that constitutional framework. In this way, citizens and institutions can proceed with their lives both inside and outside of government, and not be consumed with constant debate and uncertainty about the legitimate or illegitimate powers of their rulers.

At times, however, the meaning of a constitutional order is itself called into question. For various reasons, first principles become a matter of explicit

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[10] *See, e.g.*, DONALD LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 13 (1988) ("Every constitution uses principles of design for achieving the kind of life envisioned by its authors, and the principles will vary according to that vision"); RICHARD D. PARKER, HERE THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO 109 (1994) ("at the heart of constitutional argument is political controversy about democracy, about what it can be and what it should be").

[11] The people of Hawai'i have held three constitutional conventions. *See* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1950 (1960-1961); PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1968; PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978. *See also* ANNE FEDER LEE, THE HAWAI'I STATE CONSTITUTION: A REFERENCE GUIDE, 1-21, 219-24 (1993) (on the constitutional history of Hawai'i; and a bibliographical essay).

debate in the political arena. At such moments, proposals are often set forward to amend the basic charter of a government.

The occasions for these debates vary. Looking at the history of the United States, many different issues have spawned constitutional crises: slavery, the separation of powers, religious freedom, polygamy, suffrage, segregation, and the right to life. In Hawai'i, the issues have also varied. The Statehood Constitution dealt not only with the structure of the future State of Hawai'i and its relationship to the United States Government, but also with questions about racial segregation, sex discrimination, and the rights of individual persons.[12]

While the issues that drove the 1968 Constitutional Convention were primarily government-related, the passage of the Equal Rights Amendment in 1972 reflected a commitment to social equality.[13] The 1978 Constitutional Convention focused upon labor, environmental and cultural issues, including the concerns of Native Hawaiians.[14] The people evidently lacked any need for such a debate in the 1980s, and did not convene at all.[15] In the 1990s, the voters appeared to have voted to call a constitutional convention while the question of marriage was being addressed. This vote was overturned by the courts. A second attempt to call a convention failed in November 1998.[16]

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[12] *See, e.g.*, HAW. CONST. art. I, § 5 (amended 1978) (equal protection clause), and HAW. CONST. art. I, § 9 (amended 1978) (no racial segregation in the military). The delegates also considered a provision relating specifically to race and the right to marry, but concluded that, given the history of interracial marriage in Hawai'i, it was unnecessary. *See* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1950, at 304 (1960). *See also* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1950, at 17-18, 35 (1961), Defendant-Appellant's Opening Brief at 22-25, Baehr v. Miike, 87 Hawai'i 34, 950 P.2d 1234 (1997) (No. 91-1394-05) (discussing the significance of the right to marry).

[13] *See generally* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1968 (1973) (addressing many structural questions of government, including reapportionment). *See also* FEDER LEE, *supra* note 11, at 11-15 (discussing controversies at the 1968 Convention). The equal rights amendment, now article I, section 3 of the Hawai'i Constitution, was not addressed in a constitutional convention; instead, it passed in the 1972 legislative session as S.B. No. 1408 and was approved by an 87 percent affirmative vote in the 1972 general election. *See* FEDER LEE, *supra* note 11, at 36-37 (on adoption of ERA).

[14] *See* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 (1980); *see also* FEDER LEE, *supra* note 11, at 15-20 (discussing controversies at the 1978 Convention). The amendments related to Hawaiian affairs were perhaps the most important product of the Convention. *See generally* HAW. CONST. art. XII (addressing Hawaiian Affairs such as the Hawaiian Homes Commission Act and the Office of Hawaiian Affairs).

[15] "[E]ditorials in both of the state's major newspapers opposed the holding of a convention . . . . No issues needing convention attention surfaced, and there was no visible effort to encourage a 'yes' vote. By a substantial margin, the voters expressed their disapproval of another periodic convention." FEDER LEE, *supra* note 11, at 21.

[16] The voters of Hawai'i have an opportunity to call a constitutional convention once every ten years. *See* HAW CONST. art. XVII, § 2; *see also* FEDER LEE, *supra* note 11, at 198-205. On

Often, constitutional crises have centered upon the courts. On the one hand, these crises have occurred when a court *upholds* a law, such as in *Plessy v. Ferguson*.[17] On the other hand, fundamental debates are triggered when a court overturns laws, as in *Roe v. Wade*,[18] where the Court struck down state legislation restricting the abortion license, or in *Brown v. Board of Education*,[19] when the Court overturned the "separate but equal" doctrine.[20] Then again, it is possible for a court to trigger a widespread crisis *without* reaching a majority decision. That is one way of describing what happened when the Hawai'i Supreme Court issued its 1993 plurality opinion in *Baehr v. Lewin*.[21] Technically, that opinion did not officially decide the fate of

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November 5, 1996, the citizens of Hawai'i narrowly voted, 163,869 to 160,153, to approve the convening of a constitutional convention – or so it initially appeared. *See* Robbie Dingeman, *Unions Sue to Block Convention*, HONOLULU ADVERTISER, Nov. 26, 1996, at A1. However, there were also 45,245 blank or spoiled ballots cast on the question. *See id.* Conflicting interpretations of article XVII erupted into a controversy over whether the blank votes should be counted as "no" votes. *See* Robbie Dingeman, *Constitution to Undergo New Scrutiny; Convention Vote Ruled a 'Yes'*, HONOLULU ADVERTISER, Nov. 21, 1996, at A1. On November 20, 1996, Attorney General Margery Bronster ruled that the voters had approved the calling of a convention. *See id.*

On November 25, 1996, the Hawai'i State AFL-CIO, representing state employee unions, filed suit directly with the Hawai'i Supreme Court, challenging the Attorney General's ruling. *See* Hawai'i State AFL-CIO v. Yoshina, 84 Hawai'i 374, 935 P.2d 89 (1997); Robbie Dingeman, *Unions Sue to Block Convention*, HONOLULU ADVERTISER, Nov. 26, 1996, at A1. The State answered the complaint, and amicae briefs supporting the vote were filed early in 1997 by Citizens for a Constitutional Convention, Let the People Decide, the Republican Party of Hawai'i, and the Pacific Legal Foundation.

On March 24, 1997, in the middle of intensive legislative negotiations surrounding the proposed Marriage Amendment, the supreme court issued a unanimous decision: Blank and spoiled ballots were to be counted as "no" votes and, since those ballots tipped the balance, the "yes" vote was invalid and the constitutional convention was thereby cancelled. *See* Angela Miller, *State Convention Rejected: Court Finds Blanks Outweigh 'Yes' Vote*, HONOLULU ADVERTISER, Mar. 25, 1997, at A1. For further remarks on the constitutional convention case, removed to and adjudicated in federal court, *see infra* notes 466-76 and corresponding text.

[17] 163 U.S. 537 (1896).

[18] 410 U.S. 113 (1973).

[19] 347 U.S. 483 (1954).

[20] *See id.* at 495. *See also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion).

[21] 74 Haw. 530, 852 P.2d 44 (1993). For a brief profile of Justice Steven Levinson, author of the plurality opinion, see Ken Kobayashi, *"New Generation" Court Makes Waves Nationwide*, HONOLULU ADVERTISER, May 7, 1993, at A7. The Hawai'i Supreme Court, as any local reader knows, is no stranger to controversy. In a series of widely discussed decisions, it has taken Hawai'i law into uncharted territory. *See, e.g.*, In re Application of Ashford, 50 Haw. 314, 440 P.2d 76 (1968) (extending public ownership of beachfront land); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973) (announcing a new doctrine of water rights); Public Access Shoreline Hawai'i ("PASH") v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 903 P.2d 1246 (1995) (limiting concepts of fee title on the basis of native rights). For a

history of the court, see *Judicial Independence: The Hawai'i Experience: William S. Richardson*, 2 U. HAW. L. REV. 1 (1979); on the Richardson court, specifically, including the stories of the most controversial decisions, see Carol Santoki Dodd, *The Richardson Court:* Ho'oponopono, 6 U. HAW. L. REV. 9 (1984); Carol Santoki Dodd, THE RICHARDSON YEARS: 1966-1982 (1985). For review of the Lum court, see Symposium, *The Hawai'i Supreme Court Since 1982*, 14 U. HAW. L. REV. 1 (1982); *see also* Jon Van Dyke, et al., *The Protection of Individual Rights under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311 (1982); Williamson B.C. Chang, *Reversal of Fortune: The Hawai'i Supreme Court, the Memorandum Opinion, and the Realignment of Power in Post-statehood Hawai'i*, 14 U. HAW. L. REV. 17 (1982).

The cultural, political and legal context of Hawai'i is unique. The Hawai'i Constitution recognizes the value of both Western and Native Hawaiian legal systems. *See* In re Application of Ashford, 50 Haw. 314, 440 P.2d 76 (1968). Moreover, the separation between spirituality and law often presupposed on the mainland is not uncritically accepted in Hawai'i. Here are two examples, which will be striking only to mainlanders. The William S. Richardson School of Law opened on September 4, 1973. As part of the ceremony there was a blessing of the School of Law through a Hawaiian chant performed by Ka'upena Wong. Hanging on the wall today in the front lobby of the School of Law, the English translation of the blessing is:

> The gods dwell in the forest
> Hidden away in the mists
> Under the low-lying rainbow
> O beings sheltered under the heavens,
> Clear our paths (of all things that may hinder or trouble us)
> Let us be inspired.
> O Ku, O Kane, O Lono [traditional Hawaiian gods],
> Let down the gift of life,
> And all of the blessings with it,
> Till the heavens and earth be heaped high,
> Let them be raised up by Kane-of-the-living waters
> May there be life from one boundary to the other,
> From above to below,
> From roof to foundation.
> May there be life, everlasting life.
> The taboo is lifted!
> There is freedom!

Similarly, then-Chief Justice Richardson offered the following dedication of the first issue of the *University of Hawai'i Law Review* in 1979:

> In early Hawai'i, when a skillful piece of work was completed, a feast was held at which the finished product was blessed. The blessing was essential, not for every product of the artisan, but for the first such work – the first mat, quilt, fish-net. The blessing accrued not only to the completed work but also to all future works by the artisan. The prayer given was composed to fit the occasion and addressed to the guardian spirit identified with the material used in the work. Traditionally, the prayer would contain the phrase: *Ho mai ka 'ike nui, ka 'ike iki.* Grant knowledge of the great things, and of the little things. . . . On behalf of the legal community, I welcome this first issue of the *University of Hawai'i Law Review* and give the traditional blessing, so that those who have contributed to this first issue, those who will contribute to future issues, and those of us who will benefit by the existence of the law review, may be granted knowledge of the great things, and of the little things.

William S. Richardson, *Ka 'ike nui, ka 'ike iki*, 1 U. HAW. L. REV. ix (1979).

Hawai'i's marriage law, but only set a novel standard to be used by the trial court in its consideration of the marriage statute.[22]

From a strictly legal point of view, the need for the Marriage Amendment has been clear since 1993. In May of that year, the Hawai'i Supreme Court not only issued its plurality opinion in *Baehr v. Lewin*, but also reaffirmed its

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[22] *See* Baehr v. Lewin, 74 Haw. 530, 580, 583, 852 P.2d 44, 67-68 (1993). The court's plurality opinion has been described by a prominent legal scholar as one of the ten worst state supreme court decisions in American history. *See* Bernard Schwartz, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW, 182-84 (1997).

In my opinion, the plurality opinion contradicts itself. *See* Coolidge, *Same-Sex Marriage?*, *supra* note 9, at 18-28, 78-87. In the first half of the opinion, during its "due process" analysis, the plurality operates from the historic view of marriage, and finds the existing male-female marriage statute constitutional. In the second half, engaged in its "equal protection" analysis, the plurality switches the unit of analysis from that of an individual entering a social institution, to that of "couples" entering a formal partnership status created by the State. The difference between these two views of marriage is *not* based, however, on the difference between due process and equal protection as forms of constitutional analysis. Instead, it is based on an unacknowledged switch from one model of marriage to another. Having redefined marriage as a "partnership," it then asks why some (opposite-sex) couples are included, but other (same-sex) couples are not. The answer: John can marry Jill but not Tom, because Jill is a woman and Tom is a man. Thus – so the logic goes – the marriage law is *sex* discrimination. Schwartz calls the reasoning in the second half of the plurality opinion "an affront to both law and language that well deserves its place on the list of worst decisions," Schwartz, *supra* at 184.

The literature on *Baehr* is already vast. A list of some of the earlier articles can be found in William N. Eskridge, Jr., THE CASE FOR SAME-SEX MARRIAGE (1996); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION (1997); Coolidge, *Same Sex Marriage?*, *supra* note 9, at n.77, n.82. In addition to this issue of the *University of Hawai'i Law Review*, some more recent articles with extended discussions of *Baehr* (as opposed to general discussions of "same-sex marriage," *Romer*, or both) include Raymond C. O'Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMPLE POL. & CIV. R. L. REV. 1301 (1998); Ann Laquer Estin, *Gay Rights and the Courts: The Amendment 2 Controversy: When* Baehr *Meets* Romer*: Family Law Issues After Amendment 2*, 68 U. COLO. L. REV. 349 (1997); Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L.J. 271 (1998), Mark Strasser, *Statutory Construction, Equal Protection, and the Amendment Process: On* Romer, Hunter, *and Efforts to Tame* Baehr, 45 BUFF. L. REV. 739 (1997); Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawai'i Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227 (1998); and three *"Baehr*-focused" articles published in the Brigham Young University Journal of Public Law. Two of these were originally presented at the conference, "Law and the Politics of Marriage: *Loving v. Virginia* After Thirty Years," held in November, 1997 at the Columbus School of Law at The Catholic University of America: Coolidge, *Playing the* Loving *Card*, *supra* note 9; and Lynn Marie Kohm, *Liberty and Marriage* – Baehr *and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253 (1998). The third, not presented at the conference, is Jay Alan Sekulow and John Tuskey, *Sex and Sodomy and Apples and Oranges - Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. PUB. L. 309 (1998).

opinion in response to the State's motion for reconsideration.[23] Arguably, the third vote in support of the strict scrutiny standard, cast by newly-appointed Justice Paula Nakayama, made it clear that the court would be prepared, once a trial had been held in circuit court, to mandate marriage licenses for same-sex couples.[24]

From the point of view of supporters of the supreme court's plurality opinion, the court had taken the meaning of "equal protection" and expanded it to address a key social issue. The court was boldly and legitimately exercising its role as the supreme interpreter of the constitution.[25] To those who questioned this decision, however, it seemed equally clear that the court, whose role was to interpret the Hawai'i Constitution *inside* the constitutional order, had now gone *outside* of that order.[26]

To head off what they saw as the court's misguided and illegitimate effort to impose this unprecedented social experiment, the opponents of *Baehr v. Lewin* set out to clarify what they believed to be the genuine meaning of the Hawai'i State Constitution. By doing so, they would thereby reassert themselves as the authors of their constitutional order,[27] what Professor Mary

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[23] *See Baehr*, 74 Haw. at 645-46, 852 P.2d at 74-75.

[24] *See id.* (Associate Justice Nakayama joining Chief Justice Moon and Associate Justice Levinson). Justice Nakayama had joined the supreme court only weeks before casting this vote. She did not participate in the oral argument or the initial opinion. Since then the trial court, applying the supreme court's strict scrutiny standard, found the marriage law unconstitutional, but the supreme court ruled the case moot after the marriage amendment passed. *See* Baehr v. Miike 87 Hawai'i 34, 950 P.2d 1234 (1997).

[25] *See* Press Release from Dan Foley and Carl Varady, *Hawai'i Supreme Court Turns Down Request to Reconsider: Historic Same-Sex Marriage Ruling Stands* (June 3, 1993).

> Hawai'i's highest court made plain what many state courts and the U.S. Supreme Court have only implied under the state and federal constitutional guarantee to equal protection: gender discrimination by government will no longer be tolerated. Thus, *Baehr v. Lewin* also marks a huge victory for the women of Hawai'i, as it says that the state court will now view gender-based distinctions with more skepticism that [sic] do our federal courts.

Id.

[26] The *Honolulu Advertiser* quoted Tom Dinell, former head of the Legislative Reference Bureau, professor at the University of Hawai'i, Manoa, and current Director of Social Ministry for the Roman Catholic Diocese of Honolulu: "The majority of the (Hawai'i) Supreme Court is telling the people of Hawai'i what marriage is and what it is not . . . . That is not a decision the court should be making." Walter Wright & Kris Tanahara, *State Will Fight Gay Marriage Ruling; The Reaction in Hawai'i Ranges From Delight, to Shock and Outrage*, HONOLULU ADVERTISER, May 7, 1993, at A2. According to the *Honolulu Advertiser*, "Dinell said the Roman Catholic Church has been a strong supporter of civil rights for gay men and women, 'but it will not accept subversion of the institution of marriage by three members of the state [s]upreme [c]ourt.'" *Id.*

[27] *See* HAW. CONST. art I, § 1 ("All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.") "[T]he section is distinctive in also emphasizing that concurrent with this inherent political power is the responsibility for its exercise." FEDER LEE, *supra* note 11, at 35.

Ann Glendon of Harvard has described as "the habits and attitudes of judges with grandiose visions of judicial authority, practitioners eager to blaze new trails to the nation's crowded courthouses, and legal scholars yearning to be philosopher-kings and -queens."[28] Framed in this context, the debate over same-sex marriage and the Marriage Amendment became a debate not only about *what* marriage is, but also a debate about *who* should decide the answer to the question of marriage: the people of Hawai'i or their courts? Over time, as we shall see, the second issue became as important as the first.

B. How Did the Amendment Come About?

The debate over the possible passage of a Marriage Amendment began almost immediately in May 1993, after Justice Levinson and Chief Justice Moon issued the plurality opinion in *Baehr*. Initially considered a farfetched proposal, the Amendment moved to the center of the political stage over a period of four tumultuous years.

This period can arguably be divided into three stages: (1) from the 1993 *Baehr* opinion through the 1995 report of the second Commission on Sexual Orientation and the Law, during which there was talk of an Amendment, but no progress; (2) the 1996 legislative session, when a Marriage Amendment made serious progress but was ultimately defeated; and (3) the 1997 legislative session, when a revised version of a Marriage Amendment was passed and put onto the ballot. For various reasons, those who were initially hesitant about the Marriage Amendment eventually became its strongest supporters, and those who most bitterly opposed it found themselves signing on as well.

A full history of the Marriage Amendment deserves to be written. This article, however, will focus primarily on the 1997 legislative session, and only briefly review prior and subsequent events.[29]

1. Avoidance: 1993-1995

The reaction to the plurality opinion of May 5, 1993, was a complete shock on all sides. While the gay and lesbian community and its progressive allies rejoiced, other political leaders expressed profound concern. Governor

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[28] MARY ANN GLENDON, A NATION UNDER LAWYERS 282-83 (1994). In Professor Glendon's words, "an important segment of the profession has become a counterforce, not to democracy's excesses, but to popular government itself. That self-appointed vanguard of an aspiring oligarchy is united, not by any ancient attachment to order and formality, but by knowledge-class disdain for bourgeois values and ordinary politics." *Id.* at 283.

[29] This narrative is partially borrowed from the discussion of *Baehr* in Coolidge, *Same-Sex Marriage?*, *supra* note 9, at 10-18.

Waihee opposed the ruling, and instructed Attorney General Robert Marks to file a motion for reconsideration.[30] Both major newspapers supported the decision.[31] The *Advertiser*, however, was flooded with calls;[32] and even the *Star-Bulletin*, in its otherwise sympathetic editorial, opined that "it would be desirable to thrash it out in the Legislature."[33] Because of this uncertainty and the high emotional content of the issue, the Legislature convened a series of hearings on the twin subjects of same-sex marriage and euthanasia in the fall of 1993. These hearings began on the neighbor islands and culminated with a day-long hearing in the Smyth Auditorium in Honolulu.[34]

Legislation was subsequently passed in the 1994 legislative session which criticized the Hawai'i Supreme Court's decision and reaffirmed the legislature's understanding of the proper definition of marriage.[35] Although a statute was clearly insufficient to overturn a decision of the Hawai'i Supreme Court, its passage offered an opportunity for the legislature to go on record in several respects.[36] The bill included a lengthy preface expressing its displeasure with

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[30] *See* Richard Borreca, *Waihee Opposes Same-Sex Marriage*, HONOLULU STAR-BULL., May 11, 1993, at A3.

[31] *See* Editorial, *Same-Sex Marriages*, HONOLULU STAR-BULL., May 8, 1993, at A6; Editorial, *Gay Marriage: Moving Beyond Tolerance*, HONOLULU ADVERTISER, May 9, 1993, at B2.

[32] *See* Editorial, *Same-Sex Marriages*, HONOLULU STAR-BULL., May 8, 1993, at A6.

[33] *Id.*; *see also Gay Ruling Stirs Lively Reaction: Advertiser Fields Over 200 Calls*, HONOLULU ADVERTISER, May 8, 1993, at A2.

[34] *See* Editorial, *Mighty Public Opinion*, HONOLULU STAR-BULL., Sept. 2, 1993, at A16; Lester Chang, *Kauai Looks at Euthanasia, Gay Marriage*, HONOLULU STAR-BULL., Sept. 17, 1993, at A4; Gary T. Kubota, *Maui Forum Features 2 Tough Issues*, HONOLULU STAR-BULL., Oct. 1, 1993, at A5; Hugh Clark, *Hilo Forum on Same-Sex Marriages Draws Heated Debate*, HONOLULU ADVERTISER, Oct. 16, 1993, at A3; Shannon Tangonan, *Passions Run High as Backers and Foes Clash*, HONOLULU ADVERTISER, Oct. 30, 1993, at A1, A2 (covering the hearing in the Smyth auditorium).

[35] *See* HAW. REV. STAT. ANN. § 572-1 (Michie 1993 & Supp. 1994). Originally introduced as H.R. No. 2312, it was amended by the Senate as H.R. No. 2312, S.D. 1. STAND. COMM. REP. NO. 2777, (1994). It was approved by the Senate on a 21-4 vote. 1994 HAW. SENATE J. 452 (Apr. 12, 1997) (Senators B. Kobayashi, Matsunaga, Kanno and Levin voting against). Subsequently it was approved by the House on a 36-12 vote, with 3 excused. *See* 1994 HAW. HOUSE J. 657 (Apr. 25, 1997) (Representatives Amaral, Bainum, Chun, Hagino, Hiraki, Hirono, Nekoba, Pepper, Takamine, Takumi, Tam and Taniguchi voting no, and Representatives Shon, Tanimoto and Young being excused). The bill was signed into law by Governor Waihee as Act of June 22, 1994, ch. 217, 1994 Haw. Sess. Laws 526-32. *See* HAW. REV. STAT. ANN. § 572-1 (Michie 1993 & Supp. 1994).

[36] It is possible that the Legislature hoped that if they clarified their own intent with regard to the marriage statute, the *Baehr* plurality might take the initiative and reconsider its decision. After all, this had happened recently on another issue with article I dimensions. In *State v. Jordan*, 72 Haw. 597, 825 P.2d 1065 (1992), the court had held that first-time DUI offenders were entitled to trial by jury under the Hawai'i State Constitution. *See id.* at 601, 825 P.2d at 1068. As a result, the lower courts were clogged with DUI jury cases. In 1993, the Legislature

the supreme court's ruling.[37] It also made explicit what the supreme court had already held: that the clear intent of the Hawai'i marriage law was to define marriage as the union of one man and one woman.[38] It also clarified that it would recognize out-of-state marriages "between a man and a woman."[39] In addition, it stated that private solemnizations "of same-sex relationships by religious organizations" were not unlawful.[40] Finally, it created an eleven-member Commission on Sexual Orientation and the Law.[41]

The year of 1994 also featured a contentious gubernatorial campaign which included debate between the candidates over how to respond to the Hawai'i Supreme Court.[42] Polls at the time showed the public divided, roughly sixty percent against same-sex marriages, ten percent unsure or leaning against same-sex marriages, and thirty percent in favor of same-sex marriages, depending on how the question was framed.[43] In the midst of the campaign, the Commission on Sexual Orientation and the Law began to meet. Before it could complete its deliberations, however, four of its members were removed by a federal judge who concluded that because they represented religious

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passed a statute "to emphasize the Legislature's intent that no right to jury trial attaches to the [DUI] offense as to first offenders." Act 128, 1993 Haw. Sess. Laws 179. Shortly thereafter, in *State v. Wilson*, 75 Haw. 68, 856 P.2d 1240 (1993), the court took into account the Legislature's actions and held that the penalties for first-time DUI offenders were "constitutionally 'petty,'" and therefore not entitled to a trial by jury. *Id.* at 77-78, 856 P. 2d at 1245. Perhaps the Legislature hoped that their response would offer the supreme court a graceful opportunity to alter their opinion, and thereby avoid triggering a constitutional crisis.

[37] *See* H.B. No. 2312, S.D. 1., STAND. COMM. REP. NO. 2777 (1994).

[38] *See id.* § 2-3, pp. 13-15. *See Baehr v. Lewin*, 74 Haw. 530, 563, 852 P.2d at 44, 60 (1993) ("Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female.").

[39] *See* H.R. 2312, S.D. 1. STAND. COMM. REP. NO. 2777, (1994) Sec. 4, p. 15, lines 17-21.

[40] *Id.* § 5, p. 16, lines 1-8.

[41] *See id.* § 6, pp. 16-17. The purpose of the Commission was to:

> (1) Examine the precise legal and economic benefits extended to opposite-sex couples, but not to same-sex couples; (2) Examine whether substantial public policy reasons exist to extend such benefits to same-sex couples and the reasons therefor; and (3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples.

Id. at 17, lines 9-17.

[42] Each of the candidates were asked, "Do you believe the state should legally permit same-sex couples to marry?" Frank Fasi answered no, Patricia Saiki answered no, but Benjamin Cayetano offered the following: "The state should leave the sanctioning of marriage to religious organizations and consider establishing domestic partnerships." *The Race for Governor*, HONOLULU ADVERTISER, Sept. 12, 1994, at A9.

[43] *See Poll: Unions for Gays Won't Hurt Isle Image*, HONOLULU STAR-BULL., Feb. 3, 1994, at A6. *Cf. Same-Sex Marriages Not Popular*, HONOLULU STAR-BULL., May 11, 1993, at A1 (finding similar results).

organizations, this was a violation of the First Amendment.[44] The report issued by that Commission, in February 1995, did not address the question of a constitutional amendment.[45]

Early in 1995, due to the controversy surrounding the first Commission, the legislature created a second Commission on Sexual Orientation and the Law, this time appointed by the Governor.[46] Governor Cayetano chose Thomas Gill, a well-known liberal politician and former lieutenant governor, as its chairman. Chairman Gill and four other commissioners were supportive of legalizing same-sex marriage. Two commissioners opposed such an idea.[47] Unlike the first Commission, which reportedly had functioned quite smoothly, the second Commission was a contentious process from start to finish. Given the deep difference of views between the two factions of commissioners, conflict was likely. Added to this were constant disputes about the fairness of the process between Commissioner Hochberg and Chairman Gill.[48] The

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[44] *See* McGivern v. Waihee, No. 94-00843 (D. Haw. 1995). The lawsuit was launched by Daniel McGivern, a Catholic *and* an outspoken critic of the Diocese of Honolulu. McGivern now serves as Chair of the Board of Hawai'i Christian Coalition. Act 217 had literally required the appointment of two members of the Roman Catholic Church, and two members of the Church of Jesus Christ of Latter-day Saints (Mormons), among others, as commissioners. Act 217, § 6, p. 16. As their representatives on the Commission, the Catholics designated Thomas Dinell, then-Director of Catholic Charities, and the Reverend Marc Alexander, Director of the Hawai'i Catholic Conference, and the Mormons designated V. Napua Baker, Vice-President of Brigham Young University-Hawai'i, and Frederick W. Rohlfing, III, a local attorney. The American Friends Service Committee ("AFSC"), an organization historically tied to the religious Society of Friends ("Quakers"), was also allocated two members, L. Ku'umeaaloha Gomes and Dr. Robert H. Stauffer, but after a hearing the Judge found the AFSC nonreligious and therefore constitutionally permissible.

The other members of the Commission were The Honorable Shunichi Kimura, a retired judge, who served as chair; two representatives from the Hawai'i Equal Rights Marriage Project ("HERMP"), Reinette Cooper, an attorney, and Valerie R. Tavai; and representatives of the Hawai'i Civil Rights Commission, Dr. Amefil Agbayani, Commission Chair, and John H. Ishihara, Commission staff attorney. *See Interim Report from the Commission on Sexual Orientation and the Law*, Legislative Reference Bureau, State of Hawai'i (Feb. 1995), at 1.

[45] *See Interim Report from the Commission on Sexual Orientation and the Law*, Legislative Reference Bureau, State of Hawai'i (Feb. 1995) at 1. This report consisted primarily of an initial listing of statutes that were thought to be relevant to the Commission's task.

[46] Introduced as S.B. No. 888, it was enacted as Chapter 5 of the 1995 Hawai'i Session Laws.

[47] *See Report of the Commission on Sexual Orientation and the Law*, Legislative Reference Bureau, State of Hawai'i (Dec. 8, 1995) [hereinafter *Sexual Orientation and the Law*]. In addition to Chairman Gill, supporters of legalizing same-sex marriage who endorsed this majority report included Commissioners Morgan Britt, L. Ku'umea'aloha Gomes, Nanci Kreidman, and Bob Stauffer. *See id.* at 1-44, 97-102. A minority report, opposing the legalization of same-sex marriage, was written by Commissioners Lloyd James Hochberg, Jr., and Marie A. "Toni" Sheldon. *See id.* at 45-95.

[48] One gets a feeling for the deliberations by reading Appendix H of *Sexual Orientation and*

majority, as expected, recommended that same-sex marriage be legalized, and appended a proposed bill to that effect.[49] The minority, also as expected, recommended the adoption of a constitutional amendment.[50] The text, which was similar to bills which had been introduced but rejected in the 1994 legislative session, proposed adding the following to article I, section 5:

> Nothing in this section or any other section of this Constitution shall be interpreted to create a constitutional right to same-sex marriages in order to reserve marriage as a legal relationship between a man and a woman as husband and wife which has been sanctioned by the State. Marriage and its requisites may be subject to reasonable regulation by the State.[51]

Public hearings were held to solicit response to the draft report of the Commission. When the final report was released on December 8, 1995, it received national attention.[52] It also received a vigorous local response.[53]

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the Law, *supra* note 47, "Written Communications Between Commissioners," which fills over thirty pages of the final report of the Commission. With Gill, the ACLU board member, pitted against Hochberg, the Rutherford Institute board member, the meetings were lively.

[49] *See id.* PROPOSED MARRIAGE AMENDMENT, PROPOSAL D-1-A ("ALLOW MARRIAGE"), H.B. NO. 117, S.D. 1, C.D. 1, at 135-137. The majority also offered, as a fallback, Proposal D-1-B, "Universal Comprehensive Domestic Partnership," *Id.* at 139-44.

[50] *See id.* PROPOSAL D-2-A ("CONSTITUTIONAL AMENDMENT TO PROHIBIT MARRIAGE"), at 145-46. It should be noted that this title for the proposal *seems* tendentious, and was likely created by the majority. It would be fairer to call it an amendment "to Define Marriage," or even "to Prohibit the Redefinition of Marriage." From its perspective, the minority sought not "to prohibit marriage," but "to reserve marriage and marital rights to unions between one man and one woman," based on its view that this is what marriage means. *See id.* at 46, 95.

The minority also appended Proposal D-2-B, "Expansion of Definition of Family," *id.* at 147-77, which recommended that "'Family' shall include those people who share a house or apartment and the economic expenses of life." *Id.* at 147. "In evaluating which, if any, statutes should be changed in this regard," the minority explained, "the minority also strongly recommends that the legislature evaluate the cost to the state from such a change." *Id.*

[51] *Id.* at 145-146.

[52] *See* David W. Dunlap, *Panel in Hawai'i Recommends Legalizing Same-Sex Marriage*, N.Y. TIMES, Dec. 11, 1995, at A8. This was followed shortly thereafter by one of the first major national stories to bring the marriage debate to a wider public. *See Legal Gay Marriage on Hawai'i's Horizon*, USA TODAY, Jan. 2, 1996, at 2.

[53] *See* Pat Omandam, *100 Testify at Same-Sex Marriage Hearing*, HONOLULU STAR-BULL., Dec. 7, 1995, at A13. *See also* Editorial, *Same-Sex Marriages*, HONOLULU STAR-BULL., Dec. 11, 1995, at A12; David Shapiro, *Same-Sex Marriage Issue Should be Shelved*, HONOLULU STAR-BULL., Dec. 16, 1995, at B2. The Hawai'i Catholic Conference responded with a strongly-worded statement:

> On Pearl Harbor Day, 1995, the State of Hawai'i was attacked. This time the target was not a military base, but the State itself. Five unelected individuals, sitting on a commission, decided that government should forcibly redefine the institution of marriage. No government on planet earth has done this, and none should. These five individuals think it would be a great idea. As citizens, as neighbors, and as Catholics, we strongly disagree.

With the report complete, the Legislature was back on the hot seat. Both sides began to prepare for the 1996 legislative session. Some potential actors were silent or internally divided.[54] Among the activists, however, the players had become clear. On one side, stood the newly-renamed Marriage Project-Hawai'i (formerly the Hawai'i Equal Rights Marriage Project), Alliance for Equal Rights, Gay and Lesbian Education and Advocacy ("GLEA")

A Statement of the Hawai'i Catholic Conference on the Report of the Commission on Sexual Orientation and the Law (Dec. 13, 1995), *reprinted as Neither Religion nor State Can Redefine Marriage*, HAWAI'I CATH. HERALD, Dec. 15, 1995, at 29.

[54] "Mainline" Protestants (Episcopalians, Congregationalists, Presbyterians, Methodists) have been both divided and silent in their response to the Amendment. The Hawai'i Council of Churches was unable to adopt an official position on the Amendment, so it issued a study paper including the views of different member churches. *See* Hawai'i Council of Churches, *An Interfaith Perspective on Same-Gender Marriage* (Sep. 25, 1996), at <http://www.religioustolerance.org/haw_coc.htm>. Recently, however, a group called the Hawai'i Ecumenical Coalition has declared that it opposes the Amendment. Various mainline clergy have testified in support of "same-sex marriage" and oppose the Amendment, but to date, only one social action committee of a UCC church (next to the Manoa campus of the University of Hawai'i) has publicly come out against the Amendment. There have been numerous reports, some official, some unofficial, of deeply divided churches. *See Church Divided Over Gay Issue*, WEST HAWAI'I TODAY (June 17, 1996).

There is a similar mixture of division and silence among "Eastern" religious communities. There is no "official" Hindu or Muslim public policy lobby, but adherents of both religions would ordinarily tend to be socially conservative. Buddhism is more complicated, not only because it has many branches, but also some are primarily Asian, where others have a significant number of *haole* members. [Editor's note: Although the Hawaiian word "*haole*" can be broadly defined to mean any "foreigner," it is generally understood, as it is used here, to mean "white person" or someone of caucasian ancestry.] No Buddhist *congregation* has taken a position on the Marriage Amendment, but the retired Bishop of the Honpa Hongwanji Mission, Yoshiaki Fujitani, strongly opposes it. The "Hawai'i Association of International Buddhists" has also come out against the Amendment. For a list of personal and organizational endorsements of Protect our Constitution's opposition to the Marriage Amendment, see <http://www.poc-Hawai'i.org>.

For more on the rainbow demographics of religion in Hawai'i, see SONIA P. JUVIK & JAMES O. JUVICK, ATLAS OF HAWAI'I (3rd. ed. 1998). In light of all of this, it is striking that some popular histories and guides to Hawai'i have virtually no reference to religion. Reading them, one would think there was not a single living religious community anywhere on the Islands. *See, e.g.*, ANTHONY MICHAEL OLIVER, HAWAI'I FACT AND REFERENCE BOOK (1995) (274 pages listing facts, people & health, education, government & public affairs, the environment, culture, sports, business, labor and the economy, transportation, rankings and miscellany, with no section on religion, no listing of religion in the index, and only mentioning religion in names of schools listed, and in miscellaneous items in the chronology at the end of the book); ANN RAYSON, MODERN HAWAIIAN HISTORY 89 (1994) (only one mention of religion in the entire 20th century, in 1919). This is extremely ironic for a state with tremendous religious activity, and in which a statue of a Roman Catholic priest – the famous Father Damien who cared for sufferers of Hansen's Disease (leprosy) – sits in front of the State Capitol.

Foundation, and their allies, such as the ACLU and its Clergy Coalition for Equality and Diversity.[55] On the other side, were two citizen organizations, Hawai'i's Future Today ("HFT"), and the Alliance for Traditional Marriage ("ATM"),[56] with their allies in Roman Catholic, Latter-day Saints, evangelical, and other communities.[57]

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[55] The activities of local organizations are routinely covered in *Island Lifestyle*, the monthly magazine of the gay and lesbian community in Hawai'i.

In addition to the Clergy Coalition, which is affiliated with the ACLU, support for "same-sex marriage" has been strong among the liberal religious congregations. The Friends in Hawai'i descend from the radical "Beanite" branch of Quakerism, and have long supported "progressive" social causes such as "same-sex marriage." The mother of Ninia Baehr, the name plaintiff in the case, is a member of this community. *See* Interview with Dr. Robert H. Stauffer, Oct. 1994. The local Unitarian and Reformed Jewish congregations, along with their pastor and rabbi, publicly oppose the Marriage Amendment.

Some practitioners of Native Hawaiian spirituality also oppose the Marriage Amendment. One of the key activists for "same-sex marriage" is L. Ku'umea'aloha Gomes, who served on both Commissions on Sexual Orientation and the Law for the American Friends Service Committee, and who grew up on the Big Island. The founder of *Na Mamo O Hawai'i*, a local gay (she does not use the term "lesbian") support organization which has also filed amicus briefs in the *Baehr* case, Ms. Gomes takes inspiration from her grandfather, who was a traditional priest. *See* Interview with L. Ku'umea'aloha Gomes, in Honolulu, Haw. (Oct. 1994). Whether or not Native Hawaiian spirituality truly fits "same-sex marriage" is a question for Hawaiian studies scholars to answer, but there are clearly those who would argue that it does. For a vivid perspective on the life of ordinary Native Hawaiians, see JAY HARTWELL, NA MAMO: HAWAIIAN PEOPLE TODAY (1996). For a more polemical presentation of Native Hawaiian identity and destiny, see HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I (rev. ed. 1998).

[56] ATM is the successor organization to a group called Common Sense Now, organized by Mike Gabbard and Leon Siu. Gabbard is also involved in ATM-PAC, which works directly on election campaigns, and Stop Promoting Homosexuality International ("SPHI"), which does education on issues related to homosexuality. *See* <http://www.sphi.com>.

[57] It should be remembered that Roman Catholics, Latter-Day Saints, and Protestants have different histories in Hawai'i. For general commentary on religions in the history of Hawai'i, see GAVAN DAWS, SHOAL OF TIME (1968); ARRELL MORGAN GIBSON, ET AL., YANKEES IN PARADISE: THE PACIFIC BASIN FRONTIER 263-312 (1993); LAWRENCE FUCHS, HAWAI'I PONO (1961). These include discussions of the original missionary congregations, which are now the established "mainline" churches (Congregational, Presbyterian, Methodist, Episcopal).

On Catholics in Hawai'i, see MAGGIE BUNSON, FAITH IN PARADISE: A CENTURY AND A HALF OF THE ROMAN CATHOLIC CHURCH IN HAWAI'I (1977); on the Catholic role in the abortion debate in the late 1960s and early 1970s, see PATRICIA G. STEINHOFF & MILTON DIAMOND, ABORTION POLITICS: THE HAWAI'I EXPERIENCE (1977). Both SPHI Director Mike Gabbard and *Baehr* case attorney Dan Foley grew up Catholic, interestingly; Gabbard has become Hindu and opposes "same-sex marriage," while Foley has become Buddhist and supports it. *See* Interview with Mike Gabbard, in Honolulu, Haw. (Oct. 1994). On the Latter-Day Saints, see R. LANIER BRITSCH, MORAMONA: THE MORMONS IN HAWAI'I (1986); for a polemic against Mormons and their involvement in the current debate, see Robert J. Morris, *"What Though Our Rights Have Been Assailed?" Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Islands (Hawai'i)*, 18 WOMEN'S RIGHTS L. REP. 129 (1997).

Hawai'i's Future Today was a new coalition, formed initially by opponents of same-sex marriage who had been left out of the second Commission. It was an independent citizen organization, unaffiliated with any religious denomination, and separate from evangelical groups. HFT chose gambling, prostitution and same-sex marriage as its top three issues. Its top leaders were moderate Democrats: Debi Hartmann, a political science professor at Brigham Young University's Hawai'i campus, a former chair of the State Board of Education, Jack Hoag, retired from First Hawaiian Bank, and the Reverend Marc Alexander from the Hawai'i Catholic Conference. HFT hired Linda K. Rosehill, a prominent lobbyist and member of the Democratic National Committee and Clinton re-election campaign, to advocate the passage of a Marriage Amendment in the upcoming 1996 session.[58]

2. Deadlock: The 1996 legislative session

The 1996 legislative session saw a pitched battle. When the smoke cleared, the result was a stalemate.

Supporters of the existing marriage law, led by Hawai'i's Future Today and the Alliance for Traditional Marriage, pushed for the passage of a state constitutional amendment to define marriage as the union of one man and one woman. On January 17, Speaker of the House, Joe Souki introduced House Bill ("H.B.") No. 2366, proposing an amendment without offering a specific constitutional location: "Marriage shall be defined in the State of Hawai'i as the legal association reserved for the lawful union of a man and a woman."[59] On January 23, the House Judiciary Committee voted to defer the proposed

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I know of no general scholarly source on the newer evangelical and charismatic churches, which are indigenous and flourishing, but for a first-hand perspective, see Daniel Kikawa, PERPETUATED IN RIGHTEOUSNESS: THE JOURNEY OF THE HAWAIIAN PEOPLE FROM EDEN (KALANA I HAUOLA) TO THE PRESENT TIME (Leon Siu and Tomas Watere Rosser eds., 1994). Politically speaking, they are the new kids on the block.

[58] *See* Mike Yuen, *Trio Says Coalition Represents 'Silent Majority'*, HONOLULU STAR-BULL., Jan. 15, 1996, A3. For a profile of the leadership of Hawai'i's Future Today ("HFT"), see Dan Boylan, *A Denial of Gay-Bashing*, MID-WEEK (Oahu), Aug. 6, 1997, at A4. After taking on the work with HFT, Rosehill resigned under pressure from the Clinton re-election campaign, lost her seat on the DNC to a supporter of "same-sex marriage," and was dropped by other clients. For coverage of the controversy, see *Rosehill Quits Post With Clinton '96 Campaign*, HONOLULU STAR-BULL., Jan. 25, 1996, A3; Richard Borreca, *Same-Sex Marriage Battle to Rage for Years*, HONOLULU STAR-BULL., May 15, 1996, A6; Mike Yuen, *Same-Sex Marriage Debate May Erupt at Dems Assembly*, HONOLULU STAR-BULL., May 15, 1996, at A3; Robbie Dingeman, *Party Picks Gay-Rights Backer*, HONOLULU ADVERTISER, May 27, 1996, at A3.

[59] H.R. 2366, 18th Leg., Reg. Sess. (1996).

amendment. It also voted to kill bills that would have legalized same-sex marriage or domestic partnerships.[60]

At this point, the dance began. On February 25, the Senate Judiciary Committee reported out a comprehensive domestic partnership bill.[61] On March 1, the House Judiciary Committee responded by reporting out the proposed amendment in this form: "Marriage shall be defined in the State of Hawai'i as the legal association reserved exclusively for the lawful union of a man and a woman."[62] On March 5, with strong support from Senate President Norman Mizuguchi and Senate Judiciary Chair Rey Graulty, the Senate responded by passing the domestic partnership bill by a fourteen to eleven vote and sending it over to the House. Within hours, with strong support from House Speaker Souki and House Judiciary Chair Terrance Tom, the House passed the proposed constitutional amendment by a thirty-seven to fourteen vote and sent it over to the Senate.[63]

Senate President Mizugichi and Senate Judiciary Chair Graulty, however, were adamantly opposed to the proposed amendment. Despite statements by prominent public figures in support of the amendment,[64] Senators Mizuguchi

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[60] *See* William Kresnak, *Same-Sex Bill Dies in House Committee; Partners' Rights Turned Down, Too*, HONOLULU ADVERTISER, Jan. 24, 1997, at A1, A2.

[61] *See* S.B. No. 3113, S.D. 1, 18th Leg., Reg. Sess. (1996). *See* Alan Matsuota, *Same-Sex Bill Approved by Senate Panel*, HONOLULU ADVERTISER, Feb. 26, 1996, at A1, A6. The bill was supported by Senators Graulty, McCartney, Chumbley, Tam and Matsunaga (with reservations), and opposed by Senators Matsuura and Anderson. In addition, the Committee voted four to three to hold the proposed amendment in committee (Senator McCartney joined the opposition on this vote), and voted six to one to hold a proposed bill that would legalize same-sex marriage (Senator Matsunaga cast the only No vote on this issue). *Id.* at A6.

[62] H.R. 2366, 18th Leg., Reg. Sess. (1996). *See* STAND. COM. REP. No. 799-96 (1996). The vote in committee was ten "ayes" (two with reservations) four "nays," and one "excused." *See* Record of Votes of the Committee on Judiciary at 1 (Mar. 1, 1996). *See also* William Kresnak, *Referendum on Same-Sex is Resurrected; House Panel Wants Hawai'i Vote on Ban*, HONOLULU ADVERTISER, Mar. 2, 1996, at A1.

[63] *See* Mike Yuen and Rick Daysog, *House Oks Same-Sex Referendum*, HONOLULU STAR-BULL., Mar. 6, 1996, at A1 (reporting on House and Senate actions). The eleven opponents of the Senate domestic partnership bill were Senators Aki, Anderson, Bunda, Holt, Ikeda, Iwase, Kawamoto, Liu, Matsuura, Solomon, and Tanaka. *See id.* The fourteen opponents of the House proposed constitutional amendment were Representatives E. Anderson, Case, Chun Oakland, Garcia, Hamakawa, Hiraki, Nekoba, Pepper, Saiki, Shon, Takai, Takamine, Takumi, and Tarnas. *See id.*

[64] Support included public statements by three former governors, *see* Statements by Governors Ariyoshi, Quinn, and Waihee, (Apr. 2, 1996), and a statement by Frank D. Padgett, recently retired justice of the Hawai'i Supreme Court, *see* Statement of Padgett, (Mar. 29, 1996). In addition, a group of mainland legal scholars issued a statement in support of the constitutionality of the amendment. *See* Statement of Eleven Law Professors on the Constitutionality of Adopting H.R. 2366 (Apr. 25, 1996) (These scholars were: Eric G. Anderson, University of Iowa College of Law, Margaret Brinig, George Mason University School of Law, Richard F. Duncan, University of Nebraska College of Law, Douglas W. Kmiec,

and Graulty allowed it to languish in the Senate Judiciary Committee.[65] In desperation, supporters of the amendment in the Senate, led by Senator Milton Holt, amended an unrelated House bill, "Relating to Interpretation of Statutes," which had been passed and sent over by the House.[66] As reported out by the Consumer Affairs Committee, it was only a statute, not an amendment, but it garnered enough votes to pass the Senate and keep alive the possibility of an amendment.[67] Conferees were appointed from each chamber, including House Judiciary Chair Tom and Senate Judiciary Chair Graulty. Different proposed versions flew back and forth, but the effort ran aground.[68] Meanwhile, efforts to lift the amendment out of the Senate Judiciary Committee, while embarrassing the Democratic leadership, continued to fail.[69]

Notre Dame Law School, Donald P. Kommers, Notre Dame Law School, Raymond B. Marcin, Catholic University of America, Columbus School of Law, Michael W. McConnell, University of Chicago Law School, Daniel D. Polsby, Northwestern University School of Law, John J. Potts, Valparaiso University School of Law, Lynn D. Wardle, Brigham Young University Law School, and Richard G. Wilkins, Brigham Young University Law School). The professors argued that H.B. No. 2366 was constitutional because under *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982), a state may amend its constitution to bring it into line with the terms of the United States Constitution. *See id.* (citing *Crawford*, 458 U.S. at 535).

[65] *See* William Kresnak, *Same-Sex Bill Dead This Year; Voters Won't Get Chance to Decide on Constitutional Amendment*, HONOLULU ADVERTISER, Mar. 16, 1996, at A6 ("Senate President Norman Mizuguchi yesterday said he is bottling up the House-approved measure, effectively killing any hope the Legislature will decide the issue of same-sex marriages this year.")

[66] *See* H.R. 3347, S.D. 1, 18th Leg., Reg. Sess. (1996).

[67] *See id. See also*; Robbie Dingeman, *Surprise Bill Bars Same-Sex Marriage*, HONOLULU ADVERTISER, Apr. 5, 1996, at A1, A6. "It looks like an end run around the process," Senator Graulty said. *Id.* at A1. When the bill was brought to the Senate floor, it passed unanimously. *See* Robbie Dingeman, *State Senate Defines Marriage as Created by Man and Woman*, HONOLULU ADVERTISER, Apr. 12, 1997, at A7.

[68] *See, e.g.*, H.R. 3347, S.D. 1, 18th Leg., Reg. Sess. (1996) C.D. 1 Proposed (Senate Judiciary Chair Graulty's first proposal); H.R. 3347, C.D. 1 (House Judiciary Chair Tom's first proposal); H.R. 3347, S.D. 1, 18 Leg., Reg. Sess. C.D. 1, Prop-2 (Senate Judiciary Chair Graulty's second proposal); H.R. 3347, C.D. 1, Prop-2 (House Judiciary Chair Tom's second proposal); and H.R. 3347, S.D. 1, 18 Leg., Reg. Sess. (1996) C.D. 1, Prop-3 (Senate Judiciary Chair Graulty's final proposal).

[69] Senate President Mizuguchi announced that he would also refer H.B. No. 2366, H.D. 1 to the Health Committee, thereby making it impossible to revive the bill within the available time. *See* Robbie Dingeman, *Same-Sex Bill 'Dead' in Senate This Year*, HONOLULU ADVERTISER, Apr. 11, 1996, at A3. On April 15, when Senator Michael Liu tried to pull the bill out of Senate Judiciary, Senate President Mizuguchi ruled the motion out of order. Senators Liu and Whitney Anderson walked off the floor in protest. Democratic Senator Richard Matsuura (now deceased) "scolded his Democratic colleagues, saying, 'I can understand why the minority leader walked out. We look like hell,' [Senator] Matsuura said. 'We're digging our graves deeper and deeper.'" Robbie Dingeman, *Senate GOP Fails to Revive Same-Sex Bill*, HONOLULU ADVERTISER, Apr. 16, 1996, at A1. This set off a firestorm of protest, and on April 16, Senate President Mizuguchi reversed his decision, and sent the bill back solely to the Senate

On the last night of the legislative session, nine Senators defied Senate President Mizuguchi and Senate Judiciary Chair Graulty and voted to lift the original proposed amendment out of the Senate Judiciary Committee for immediate consideration on the Senate floor.[70] Once brought to a vote, however, Senate President Mizuguchi and his supporters succeeded in defeating the bill.[71]

The failure of the proposed amendment was seen widely as presaging an almost certain victory for supporters of same-sex marriage.[72] Alarm bells went off across the country, and within two weeks the Defense of Marriage Act[73] was introduced in the United States Congress. Before May ended, President Clinton announced his support for the bill.[74] By the end of summer, Congress passed the Defense of Marriage Act, and the President signed it into law.[75] Yet even Congress was only bringing to a head, at the federal level, a debate already raging in the states.[76] Meanwhile, in Hawai'i, two events

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Judiciary Committee. *See* Robbie Dingeman, *Senate Same-Sex Measure Receives Another Reprieve*, HONOLULU ADVERTISER, Apr. 17, 1996, at A26.

[70] *See* Angela Miller & Robbie Dingeman, *No-fault, Same-Sex Bills Dead*, HONOLULU ADVERTISER, Apr. 29, 1996, at A1. Nine senators voted to pull the bill out of the Senate Judiciary Committee: Senators Aki, Anderson, Bunda, Holt, Ikeda, Iwase, Liu, Solomon, and Tanaka. When the amendment itself was voted on, Senator Kawamoto joined them. *See id.*

[71] *See id.*

[72] *See, e.g.*, William Safire, Editorial, *Same-Sex Marriage Nears*, N.Y. TIMES, Apr. 29, 1996, at A27. This column drew a swift and critical reply from Elizabeth Birch, Executive Director of the Human Rights Campaign. *See* Elizabeth Birch, Editorial, *Gay Marriage as a Basic Human Right*, N.Y. TIMES, May 3, 1996, at A30.

[73] Pub. L. No. 104-199, 110 Stat. 4219 (1996).

[74] *See* William P. Strobel, *Clinton Signals He'd Support Curb on Same-Sex 'Marriage'*, WASH. TIMES, May 23, 1996, at A9.

[75] The Act passed the U.S. House of Representatives on July 12, 1996 by a vote of 342-67, and the U.S. Senate on September 10, 1996, by a vote of 85-14. *See* John E. Yang, *Senate Passes Bill Against Same-Sex Marriage*, WASH. POST Sept. 11, 1997 at A1, A4. President Clinton signed it into law at 12:50 a.m. on September 21, 1996. *See* Todd S. Purdum, *Gay Groups Attack Clinton for Signing of Bill*, N.Y. TIMES, Sept. 22, 1997 at 22. Lively excerpts from the hearings and floor debate can be found in ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON, A READER 200-39 (1997), and ROBERT M. BAIRD & STUART E. ROSENBAUM, SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 17-23 (1997).

[76] As of mid-1998, bills clarifying rules of marriage recognition had been introduced in 48 states, and of these, 30 have been enacted. *See* H.B. 152 (Ala. 1998); ALASKA STAT. ANN. § 25.05.013 (1996); S.J.R. 42 (Alaska 1998); ARIZ. REV. STAT. § 25-101 (1996); H.R. 1004 (Ark. 1997); S.B. 5 (Ark. 1997); DEL. CODE ANN. tit. 13, § 101 (1996); H.R. 147 (Fla. 1997); GA. CODE ANN. § 19-3-30 (1996); GA. CODE ANN. § 19-3-3.1 (1996); HAW. REV. STAT. § 572-1 (1994); IDAHO CODE § 32-209 (1996); 750 ILL. COMP. STAT. ANN. 5/212, 213.1 (West 1996); 1997 Ind. House Enrolled Act 1265 (enacted May 13, 1997); H.F. 382 (Iowa 1998); KAN. STAT. ANN. § 23-101 (1996); H.R. 13 (Ky. 1998); 1997 Me. Laws 65 (enacted Mar. 28, 1997); H.B. 5662 (Mich. 1996); S.B. 937 (Mich. 1996); S.B. 2053 (Miss. 1997); MO. REV. STAT. § 451.022 (1996); H.B. 323 (Mont. 1997); N.C. GEN STAT. § 51-1.2 (1996); S.B. 2230 (N.D. 1997);

converged: the long-awaited trial in *Baehr v. Miike*, and the primary elections for the 1997-1998 Legislature. After three years of delays, Hawai'i's marriage law finally went on trial from September 10 to September 20, 1996, in the First Circuit Court, in Honolulu. Attorneys for the State and the Plaintiffs spent two weeks grilling various social scientists before the Honorable Kevin S.C. Chang.[77] In addition to the State and plaintiffs, thirteen different groups submitted amici briefs to Judge Chang.[78]

OKLA. STAT. tit. 43, § 3.1 (1996); 23 PA. CONS. STAT. ANN. § 1704 (1996); S.C. CODE ANN. § 20-1-10 (Law. Co-op. 1996); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 1996); S.D. CODIFIED LAWS § 25-1-1 (1996); TENN. CODE ANN. § 36-3-113 (1996); UTAH CODE ANN. 30-1-4 (1995); 1997 Va. Acts 354 (enacted Mar. 15, 1997); 1997 Va. Acts 365 (enacted Mar. 15, 1997); H.B. 1130 (Wash. 1998).

Missouri's statute has been overturned, on procedural grounds unrelated to the subject-matter. *See* St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998). Alaska's statute has been challenged and found subject to strict scrutiny by a superior court judge in Alaska, *see* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CL, 1998 WL 88743 (Alaska Feb. 27, 1998), but the Legislature of Alaska has responded by placing a marriage amendment on the November 3, 1998 ballot. The amendment amends article I of the Alaska Constitution by inserting a new section 25 which reads as follows: "To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex." S.J.R. 42 (Alaska 1998).

For further details on bills and statutes, see Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 Q.L.R. 105 (1996), which includes an appendix listing these statutes, *see id.* at 134 ("State Anti-Same-Sex Marriage Statutes"); Coolidge, *Same Sex Marriage?*, *supra* note 9, which includes a similar appendix, *see id.* at 97 ("State Responses to Same-Sex Marriage"); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, (1998); David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? The Role of Marriage Recognition Statutes in the "Same-Sex Marriage Debate,"* 32 CREIGHTON L. REV. (1998); and Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?*, 2 NAT'L J. SEX. ORIENTATION L. 194 (1996). As of this date, Massachusetts and Nevada are the only states in which no marriage recognition bills have been introduced. For regular updates on state legislation, see <http://www.pono.net> ("In Defense of Marriage" page of the Hawai'i Catholic Conference), and <http://www.ftm.org> (website of the Freedom to Marry Coalition).

[77] First-hand observations on the trial can be found in two articles by the author. *See* David Orgon Coolidge, *Marriage on Trial: Leaving it to the Experts?*, HAW. CATH. HERALD, Sept. 20, 1996, at 1, 6; David Orgon Coolidge, *Marriage on Trial: Who is the Judge?*, HAW. CATH. HERALD, Oct. 4, 1996, at 22.

[78] Eight briefs supported overturning the existing marriage law. These were submitted by the ACLU of Hawai'i Foundation, *see* Brief for Amicus Curiae American Civil Liberties Union of Hawai'i Found., Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); the Honolulu Chapter of the Japanese-American Citizens League, *see* Brief for Amicus Curiae Japanese Am. Citizens League – Honolulu Chapter, Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); the Madison Society of Hawai'i, *see* Brief for Amicus Curiae Madison Society of Hawai'i in Support of Plaintiffs, Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); *Na Mamo O Hawai'i*, *see*

Meanwhile, supporters and opponents of the existing marriage law were also concentrating their efforts on the upcoming primary elections. The day after the *Baehr v. Miike* trial ended, primary elections were held. The first and central casualty of the elections was Senate Judiciary Chair Rey Graulty, who was soundly defeated by a newcomer, Norman Sakamoto, who pledged his support for a marriage-related amendment. Senate President Mizuguchi was also challenged by a newcomer, Diane Ho Kurtz, in what was considered an entirely safe district, and barely won his own re-election. On the other hand, supporters of same-sex marriage and their allies succeeded in defeating Senator Milton Holt. They also fought hard to defeat Chairman Tom, but he was narrowly re-elected. These results were compounded on November 5, when some important supporters of same-sex marriage and domestic partnerships were defeated in House races, some as a complete surprise.[79]

Not unexpectedly, there were rumblings against Senator Mizuguchi; however, Senator Mizuguchi managed to be re-elected as Senate President by putting together a coalition that included Senators Matsunaga and Chumbley, both considered sympathetic to same-sex marriage, and Senator McCartney, whose signals were ambiguous. Senate President Mizuguchi subsequently appointed Senators Matsunaga and Chumbley as Co-Chairs of the Senate

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Brief for Amicus Curiae *Na Mamo O Hawai'i*, Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); five scholars (Andrew J. Cherlin Ph.D., Frank F. Furstenberg, Jr. Ph.D., Sara S. McLanahan Ph.D., Gary D. Sandefur Ph.D., and Lawrence L. Wu Ph.D.), the American Friends Service Committee; *see* Brief for Amicus Curiae Am. Friends Service Comm. in Support of Plaintiffs, Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); Gay and Lesbian Advocates and Defenders (along with the National Center for Lesbian Rights, the NOW Legal Defense and Education Fund, Inc., NOW, Inc., and the NOW Foundation, Inc.), *see* Brief for Amicus Curiae Gay & Lesbian Advocates and Defenders, Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); and Hawai'i Women Lawyers, *see* Brief for Amicus Curiae Hawai'i Women Lawyers in Support of Plaintiffs Baehr, et. al., Baehr v. Miike, No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996).

Five briefs supported upholding the existing marriage law. These were submitted by Hawai'i's Future Today, *see* Brief for Amicus Curiae Hawai'i's Future Today, Baehr v. Miike, No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); the Hawai'i Catholic Conference, *see* Brief for Amicus Curiae Hawai'i Catholic Conference, Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); the Church of Jesus Christ of Latter-Day Saints, *see* Brief for Amicus Curiae the Church of Jesus Christ of Latter-Day Saints, Baehr v. Miike, Civ. No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996); the American Center for Law and Justice (on behalf of eight Representatives); and Coral Ridge Ministries (along with sixteen other groups, including the Hawai'i-based Stop Promoting Homosexuality America).

[79] *See* Meki Cox, *Same-Sex Marriage Opponents Oust State Lawmakers*, GARDEN ISLAND (Kauai), Nov. 7, 1996; Rev. Marc R. Alexander, *Commentary: The Message of Election 1996*, HAW. CATH. HERALD, Nov. 15, 1996, at 22.

Judiciary Committee, and made Senator McCartney both Majority Leader and a member of the Senate Judiciary Committee.[80]

On December 3, 1996, to no one's surprise, Judge Chang ruled that the marriage law was unconstitutional.[81] Based on the test required by the Hawai'i Supreme Court, and given the lack of evidence provided to him by the State, Judge Chang concluded that the State had failed to prove a compelling state interest to justify the marriage law.[82] The following day, at the State's request, he suspended the implementation of his decision, in order to provide time for the case to be reviewed, once again, by the Hawai'i Supreme Court.[83]

3. Breakthrough: The 1997 legislative session

If the Legislature were ever going to act, 1997 would have to be the year. On April 29, 1997, the proposed Marriage Amendment was passed by both chambers. The process of passage, however, was neither simple nor straightforward. This process offers important clues for understanding the meaning of the Marriage Amendment.[84]

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[80] *See* Mike Yuen, *Mizuguchi to Return as Head of Senate*, HONOLULU STAR-BULL., Nov. 21, 1996, at A3; *Senate's Dual Leadership Plan Aimed to Improve Responses*, HONOLULU ADVERTISER, Nov. 22, 1996, at A1.

[81] *See* Baehr v. Miike, No. 91-1394-05, 1991 WL 694235 (Haw. Cir. Ct. Dec. 9, 1996).

[82] *See id.* For contrasting legal assessments of the trial, see Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 841-67, 884-91 (1997); *but see* Samuel A. Marcosson, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense"*, 35 U. LOUISVILLE J. FAM. L. 721 (1996-1997).

[83] In March 1997, once the case had been transferred to the Hawai'i Supreme Court, the plaintiffs again filed a motion asking the court to lift the stay. *See* Plaintiffs-Appellees' Motion to Vacate Stay, filed on Mar. 12, 1997, and Appellant Miike's Memorandum in Opposition to Motion to Vacate Stay, filed on Mar. 19, 1997. The supreme court denied the motion. *See* Jean Christensen & William Kresnak, *Same-Sex Dispute Isn't Going Away*, HONOLULU ADVERTISER, Apr. 18, 1997, at A16.

[84] Narrative has its pitfalls. We all know it can be difficult to determine legislative intent. In addition, even if it is determined, some will contend that this intent should not be *determinative*. In my opinion, any serious interpreter should consider all available clues to meaning, whatever she makes of them. For this reason, I spend the bulk of this article narrating the passage of the Marriage Amendment. Later, however, I employ other tools of statutory interpretation in order to attempt to identify the meaning of the Marriage Amendment: analysis of the text itself; *in pari materia* "horizontal" analysis of related constitutional provisions; context-sensitive "vertical" analysis of the text in relationship to the *Baehr* case; an awareness of the socio-political context in which the drama of the issue is being played out; and an examination of the normative commitments of the different points of view at issue in the marriage debate itself. But no method is foolproof; as one might expect, judgment is required. For more on the interpretive process and the raging debate between different schools, see, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48-80 (1994), and Karen Gebbia Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21

Round one: the House swings into action

On January 15, House Speaker Souki, House Judiciary Chair Tom and twenty-eight other co-sponsors introduced House Bill No. 117, "Proposing a Constitutional Amendment Relating to Marriage."[85] It proposed to amend article I, section 5 of the constitution by adding the following new paragraph after the existing text:

> Statutes, regulations, laws, rules, order, decrees and legal doctrines that define or regulate marriage, the parties to marriage, or the benefits of marriage shall not be deemed in violation of this section or any other section of this Constitution by virtue of a limitation of the marriage relationship to the union of only one man and one woman.[86]

In this proposal, the definition of marriage is addressed in permissive, rather than mandatory, terms. Rather than positively defining marriage as "the union of only one man and one woman," or negatively prohibiting marriage between persons of the same sex, the Amendment merely declares that the existing definition of marriage does not violate the constitution. In this respect, it differs dramatically from the defeated 1996 amendment.

The statement of intent in section 1 of House Bill No. 117 is a threefold affirmation of legislative power. First, the statement reaffirms the existing statutory definition of marriage: "The legislature finds that the unique social institution of marriage involving the legal relationship of matrimony between a man and a woman is a protected relationship of fundamental and unequaled importance to the State, the nation, and society."[87] Second, it reasserts legislative prerogatives: "The question of whether or not to issue marriage licenses to couples of the same sex is a fundamental policy issue to be decided by the elected representatives of the people and not by judicial fiat."[88] Finally, it insists that it is open to change: The constitutional measure is designed "to

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SETON HALL LEGIS. J. 233, 267-308 (1997).

[85] H.R. 117, 19th Leg., Reg. Sess. (1997). Along with Speaker Souki and Chairman Tom, the following Representatives signed on as co-sponsors: Okamura, P. Oshiro, M. Oshiro, Menor, Ito, Morihara, Yamane, Garcia, White, Say, Herkes, Santiago, Arakaki, Kawakami, Kanoho, Goodenow, Nakasone, Takamine, Kahikina, Yonamine, Yoshinaga, Chang, Abinsay, Suzuki, Stegmaier, Jones, Cachola, and Ahu Isa. *See* 1997 HAW. HOUSE J. 16.

[86] H.R. 117, 19th Leg., Reg. Sess. (1997). Oddly, the Legislative Reference Bureau "description" of the bill summarized it in these terms: "Limits marriage to one man and one woman through constitutional amendment." *Id.* This description was not only false, it missed the precise difference between the 1996 and 1997 proposed amendments, thus misleading anyone who relied on it.

[87] *Id.*

[88] *Id.*

further ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes."[89]

On January 21, the House Judiciary Committee held a hearing on the Amendment. At the conclusion of the hearing, with all members present, the Committee voted nine "ayes," three "ayes with reservations," and one "nay." The bill was thereby passed, un-amended.[90] On January 22, the Committee issued its formal report on the bill, recommending that it pass second reading and be placed on the calendar for third reading.[91] The report observed that testimony was received in support of the measure by the Hawai'i Catholic Conference and Hawai'i's Future Today, and in opposition to the measure by the Hawai'i Civil Rights Commission and the GLEA Foundation.[92] It also mentioned that "numerous other organizations and private citizens" had offered testimony on both sides of the issue.[93]

In addition to reiterating the statement of purpose in the text of House Bill No. 117, the Committee Report reaffirmed its view, as previously stated in Act 217 of 1994, "that marriage in the State of Hawai'i is reserved exclusively for the lawful union of one man and one woman."[94] "Act 217 was necessary," the report provided, "because the Hawai'i Supreme Court in *Baehr v. Miike* incorrectly interpreted existing state law, both statutory and constitutional, when it held that Hawai'i's marriage laws discriminated on the basis of sex against same-sex couples."[95] The Committee criticized "the judicial branch of government" for continuing to assert this interpretation of the constitution, and insisted that "no serious claim can be made that the voters . . . or the authors of [the] Hawai'i Constitution intended that the prohibition on sex discrimination . . . was a mandate . . . to issue marriage licenses to couples of the same sex."[96] In light of this, the Committee offered its ultimate rationale for putting the Amendment on the ballot:

> Your Committee finds that when an interpretation of the Constitution of the State of Hawai'i does violence to the will of the voters who adopted it, it is

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[89] *Id.*

[90] *See id.* The nine "ayes" were cast by Representatives Tom, Yamane, Cachola, Herkes, Jones, Menor, Yoshinaga, Thielen, and Whalen. The three Ayes with Reservations were cast by Representatives Hiraki, Lee, and Pendleton. The one "nay" was cast by Representative Case. *See* H.R. 117, 19th Leg., Reg. Sess. (1997) (Record of Votes of the Committee on Judiciary).

[91] *See* HOUSE STAND. COMM. REP. NO. 1, 19th Leg., House Judiciary Committee (1997). *See also* 1997 HAW. HOUSE J. at 1118.

[92] *See* HOUSE STAND. COMM. REP. NO. 1, 19th Leg., House Judiciary Committee (1997).

[93] *See id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

> necessary and proper to submit the matter to the voters for resolution. . . . The citizens of the State of Hawai'i are the ultimate constitutional authority. The Constitution is an expression of their will, not the will of any branch of government.[97]

That same day, January 22, Hawai'i Supreme Court Chief Justice Ronald T.Y. Moon delivered his State of the Judiciary Address to the Legislature. In that address, he offered the following remarks:

> [T]he courts are sometimes characterized as legislating from the bench, that is, making or remaking the law. When deciding cases, judges often apply common law, statutory law, or constitutional law to new facts and circumstances. In so doing, we do not intend to usurp the legislative function. However, under our system of checks and balances, if we stray into legislative perogative [sic], the legislature has the ability to cure the trespass. As you know, in our legal system, statutes trump common law, and constitutions trump statutes. We are ever mindful that the legislature - the peoples' representatives - hold the highest trumps. That is, the peoples' representatives have the authority, within constitutional limits, to write or rewrite statutes and to propose amendments to our state constitution.[98]

The chief justice's words were not lost on the Legislature. Referring to his remarks, the *Advertiser* noted that "[s]ome lawmakers took that as a message that if they didn't like the recent state court decisions legalizing same-sex marriage in Hawai'i, the changes are up to them."[99]

On January 23, House Bill No. 117 was brought to the floor of the House for second and third readings. In his remarks on the floor, Chairman Tom elaborated on the above themes:

> Mr. Speaker, all of us submit to the authority of the Judiciary because of our faith that they are the instrument which gives voice to the will of the people as expressed in our Constitution. When that faith is broken, and the Court substitutes its voice for the will of the people, we cease to become a nation of laws authorized and adopted by the governed. . . . The most precious civil right we all enjoy, regardless of our sex, our sexual orientation, our race, or our background, is the right to be governed under laws which are adopted by the consent of the people.[100]

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[97] *Id.*

[98] Chief Justice Ronald T.Y. Moon, Address at the Hawai'i State Legislature, State of the Judiciary Address 2 (Jan. 22, 1997).

[99] Angela Miller, *Justice Speaks Up for Courts*, HONOLULU ADVERTISER, Jan. 23, 1997, at A1. *See also* Editorial, *Legislators Hold Cards in Gay Marriage Issue*, HONOLULU STAR-BULL., Jan. 24, 1997, at A22.

[100] 1997 HAW. HOUSE J. 117 (Statement of Rep. Tom).

Chairman Tom assured his fellow representatives that "there is no reasonable basis to believe, as some have stated, that this amendment to our [c]onstitution will somehow be found invalid."[101] He pointed out that the Hawai'i Supreme Court would have no choice but to accept it.[102] He also argued that the United States Supreme Court was unlikely to invalidate the Amendment, because it "does no more than return Hawai'i to the same laws that govern marriage in the other 49 states."[103] "I am very confident," he stated, "that this proposal, if ratified by the voters, will completely and with finality address the constitutional crisis which our [s]upreme [c]ourt has inflicted upon this State."[104] In conclusion, he asserted:

> Mr. Speaker, both Houses of this Legislature have already decided that marriage in Hawai'i is defined as the union between one man and one woman.... We need a closure to this debate over the proper constitutional role of the Judiciary. That closure can only be achieved when the authors of the constitution are permitted to speak.... The Constitution is the voice of the people of the State of Hawai'i, and they have a right to be heard. I urge the passage of this measure – House Bill 117.[105]

House Bill No. 117 passed third reading by a vote of forty-four to seven.[106]

At the same time that the proposed Marriage Amendment was making its way through the House, a second bill was proposed and advanced by Speaker Souki, Chairman Tom and nineteen other co-sponsors.[107] House Bill No. 118, a bill "Relating to Unmarried Couples," aimed to establish "Reciprocal Beneficiaries" a new legal category in Hawai'i law for adults otherwise ineligible to marry.[108] The Senate had demanded a bill offering benefits to unmarried persons in return for its support for a constitutional amendment. House Bill 118 was the House's attempt to respond to the Senate, without endorsing the Senate's 1996 Domestic Partnership bill.

The purpose of House Bill 118, as stated in proposed Section 1 of the new chapter, was "to make certain rights and benefits presently available only to married couples available to couples comprised of individuals who are legally

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[101] *Id.*

[102] *See id.* at 118.

[103] *Id.*

[104] *Id.* at 117-118.

[105] *Id.* at 118.

[106] *See id.* at 120. Representatives Case, Hamakawa, Morita, Saiki, Takamine, Takumi and Tarnas voted "no." *See id.*

[107] *See* H.R. 118, 19th Leg., Reg. Sess. (Haw. 1997). In addition to Speaker Souki and Chairman Tom, the following Representatives signed on as co-sponsors: Okamura, P. Oshiro, M. Oshiro, Ito, Morihara, Yamane, Yoshinaga, Garcia, White, Say, Arakaki, Suzuki, Goodenow, Lee, Cachola, Morita, Stegmaier, Takamine, and Kanoho. *See* 1997 HAW. HOUSE J. 117.

[108] H.R. 118, 19th Leg., Reg. Sess. (Haw. 1997).

prohibited from marrying one another."[109] Proposed section 2, "Findings," begins by reiterating the importance of marriage as traditionally understood, and observes that "[m]arriage provides access to a multiplicity of rights and benefits that are contingent upon that status."[110] It then offers a justification for extending these rights and benefits to others:

> Many individuals, however, who are not married have significant personal, emotional, and economic relationships with other individuals they are prohibited by law from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender.[111]

Given this purpose, it follows that the requirements for reciprocal beneficiary status are extremely minimal. In contrast to some domestic partnership ordinances, an "intimate" relationship is neither required nor assumed. Indeed, no joint *household* is even required to qualify for reciprocal beneficiary status.[112] The bill proposed to extend four specific rights: (1) the right to hospital visitation and to make health care decisions for the other party; (2) the right to hold property as tenants by the entirety; (3) inheritance rights; and (4) the right to sue for wrongful death.[113]

Significantly, section 15 specified that "[t]his Act, upon its approval, shall take effect upon the ratification of the constitutional amendment, in accordance with article XVII, section 3, of the Constitution of the State of Hawai'i, proposed in House Bill No. [left blank] (1997)."[114] This meant that even if passed, House Bill 118 could not take effect before the general election in November 1998. On January 21, the same day that the House Judiciary Committee acted on House Bill 117, it also acted on House Bill 118. At the conclusion of the hearing, with all members present, the Committee passed the bill, with minor amendments, by the vote of four "ayes," nine "ayes with

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[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *See id.*

[113] *See id.* § 2 (hospital visitation and healthcare decision-making); § 3 (joint tenancy by the entirety, tenancy in common); § 5 (inheritance rights); § 13 (wrongful death actions). Section 12, as introduced, consisted of a string citation of amendments to Hawai'i Revised Statutes section 560, in which the term "spouse or reciprocal beneficiary" was to be substituted "wherever the word 'spouse' or like term appears, as the context requires." *Id.* § 12.

[114] *Id.* § 15.

reservations," and zero "nays".[115] It was subsequently renamed House Bill 118, H.D. 1.

On January 22, the Committee issued its formal report on the bill, recommending that it pass second reading and be placed on the calendar for third reading.[116] This time the report merely observed, without offering names, that testimony had been received in support of the measure "from several members of the public," and in opposition to the measure "from a number of private citizens."[117]

In addition to reiterating the statement of purpose in the text of House Bill No. 118, the Committee report stated that, "[b]ecause this [reciprocal beneficiary] structure is not available to those couples who can legally marry, it does not threaten to undermine marriage between couples of the opposite sex."[118] Indeed, the Committee continued, the measure "will be of substantial benefit to many people in our community."[119] Turning to the question of the effective date of the Act, the Committee inserted "H.B. 117" into section 15, and offered its rationale for this proposal:

> Finally, your Committee believes it is appropriate to make the effective date of this measure coincide with the ratification of the Constitutional Amendment, which proposes to clarify that marriage is defined by the Legislature and not by the Court. This is because if the Amendment is not ratified and the Supreme Court imposes same sex marriage on Hawai'i, this measure would be duplicative of some of the benefits that would accrue to same sex couples.[120]

On January 24, House Bill No. 118, H.D. 1 was brought to the floor of the House for second and third readings. It passed third reading by a vote of forty-one to four.[121]

In the midst of these dramatic developments, a major rally was held outside the State Capitol, co-sponsored by Hawai'i's Future Today and the Alliance for Traditional Marriage. A crowd estimated at 5,000 "flooded the state

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[115] *See* H.R. 118, H.D.1, STAND. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (Haw. 1997), *reprinted in* 1997 HAW. HOUSE J. 104. The four "ayes" were cast by Representatives Tom, Yamane, Cachola, and Yoshinaga. The nine "ayes with reservations" were cast by Representatives Case, Herkes, Hiraki, Jones, Lee, Menor, Pendleton, Thielen, and Whalen. Record of Votes of the Committee on Judiciary (Jan. 21, 1997) *reprinted in* 1997 HAW. HOUSE J. at 104.

[116] *See* H.R. 118, H.D. 1, STAND. COMM. REP. No. 2, HOUSE JUDICIARY COMM. (1997), *reprinted in* 1997 HAW. HOUSE J. 118-19.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 119.

[121] *See* 1997 HAW. HOUSE J. 150 (1997). Voting "no" were Representatives McDermott, Moses, Pendleton and Whalen. Representatives Arakaki, Menor, Stegmaier, Takai, Takamine, and Meyer were excused. *See id.*

Capitol."[122] Meanwhile, "[t]heir opponents – about 200 people who were equally as passionate – stood on the other side of the street."[123]

Round two: the Senate responds

That same day, Senate Judiciary Co-Chairs Chumbley and Matsunaga introduced Senate Bill No. 1800, "Relating to Governmental Regulation of Rights."[124] While the title was in striking contrast to that of House Bill No. 117 ("Proposing a Constitutional Amendment Relating to Marriage"), Senate Bill No. 1800 also proposed a marriage-related amendment to the Hawai'i State Constitution. It proposed to amend article IX, "Public Health and Welfare," by adding the following new section:

> Marriage . . . Section . The State shall have the power to regulate and define the institution of marriage, including the reservation of marriage to couples of the opposite sex; provided that this reservation shall be effective only if the laws of the State ensure that the application of this reservation does not deprive any person of civil rights on the basis of sex.[125]

It then proposed that the following, somewhat more narrow, question be printed on the ballot: "Shall the State have the power to reserve marriage to couples of the opposite sex; provided that doing so does not deprive any person of civil rights on the basis of sex?"[126]

The statement of purpose contained in section 1 of Senate Bill No. 1800 included two concepts. First, it aimed "to preserve traditional marriage,"[127] and, for the Senate, the statement was surprisingly explicit:

> The legislature finds it necessary and appropriate for the people of the State of Hawai'i to constitutionally reserve the institution of marriage to a union between one man and one woman. This action would constitutionally preserve the existing restriction in our marriage laws. The legislature further finds that Hawai'i's existing marriage laws were intended to principally foster the traditional family and should, therefore, be reserved for couples of the opposite sex.[128]

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[122] Jennifer Hong, *Same-Sex Marriage Foes Fill Capitol*, HONOLULU STAR-BULL., Jan. 25, 1997, at A1.

[123] *Id.*

[124] S. 1800, 19th Leg., Reg. Sess. (Haw. 1997); *see also* 1997 HAW. SEN. J. at 113.

[125] S. 1800, 19th Leg., Reg. Sess. (Haw. 1997).

[126] *Id.*

[127] *Id.*

[128] *Id.*

Second, the amendment aimed to ensure "that others are not deprived of civil rights on the basis of sex,"[129] stating its aims in language explicitly invoking the language of article I, section 5:

> However, the legislature must also be cognizant of its obligation to promote equality among all of Hawai'i's citizens, and, therefore, the development of future laws regarding governmental regulation of relationship status shall be designed to foster permanent, committed relationships regardless of race, religion, sex or ancestry. Thus, the legislature cannot:
> (1) Deprive any of our citizens of meaningful access to the courts, thereby potentially violating due process and separation of powers principles;
> (2) Base its restrictions upon animus against any element of our population; nor
> (3) Diminish societal preferences to foster permanent, loving, committed relationships of mutual support.[130]

In a press release issued by the Senate Judiciary Committee the same day, Senators Chumbley and Matsunaga attempted to explain the meaning of their proposal in greater detail.[131] The goal of their text, they said, is "to expedite the resolution of the same sex marriage controversy during this legislative session."[132] After describing the two elements of Senate Bill No. 1800, the press release claimed that

> [t]his approach, using a fair constitutional amendment, will address both the community's concerns and the points of law expressed by the recent court decision in the *Baehr* case. The first part of the amendment will allow the people to preserve traditional marriage between one man and one woman. The second part of the amendment addresses the court's decision which ruled that the State cannot discriminate based upon sex.[133]

It then attributed quotes to each of the Committee Co-Chairs:

> We recognize that the public wants to decide whether marriage should be between one man and one woman; but why would anyone want to deny fundamental civil rights on the basis of sex? The due process and equal protection clause in our State Constitution clearly prohibits discrimination or denying a persons' civil rights based upon race, religion, sex or ancestry.[134]
> In adopting the balanced constitutional amendment approach, we are hoping for a collaborative process with our House counterparts and believe that this position will expedite negotiations with the House of Representatives.[135]

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[129] *Id.*
[130] *Id.*
[131] *See* Press Release from the Hawai'i State Senate Judiciary Committee (Jan. 24, 1997).
[132] *Id.*
[133] *Id.*
[134] *Id.* (quoting Sen. Matsunaga).
[135] *Id.* (quoting Sen. Chumbley).

In a two-page handout attached to the press release, the Senators provided an outline of the bill. First, they described its "Findings and Purpose" in this way:

> A. S.B. No. 1800 reflects two understandings about the people of Hawai'i:
> 1. That we choose to reserve the traditional institution of marriage to a union between one man and one woman; and
> 2. That we believe that couples who enter permanent, loving commitments of mutual support and caring should not be discriminated against because they are a member of a minority or because others in the community may disapprove of them.[136]

Second, they addressed "What S.B. No. 1800 would do."[137] After noting that it would "[p]lace a Constitutional Amendment on the 1998 general election ballot,"[138] they noted a specific difference from the House version: "Unlike the House proposal, the bill does not try to amend our [e]qual [p]rotection [c]lause (article I, sec. 5). The Senate does not believe that [e]qual [p]rotection of the [l]aws or [d]ue [p]rocess should be subject to conditions."[139] In the next breath, the Senators stated that "[t]he Amendment would affirm the power of the People to reserve marriage to 'couples of the opposite sex.'"[140] But it noted that the "restriction" would only be effective if "'the laws of the State ensure that [this] does not deprive any person of civil rights on the basis of sex.'"[141] Then they stated more clearly what this would require, and why:

> 1. The legislature would thus be required to ensure all couples who enter permanent, loving relationships of mutual support and caring with access to "civil rights."
> a. Prior to the General Election of 1998, the legislature would be required to pass a rights package. Such rights would possible [sic] include appropriate testamentary rights (wills and trusts); property rights (tenancy in entirety) [sic]; mutual support commitments and obligations; death and health benefits; and tax and entitlement programs.
> b. The rights package is necessary to finally cancel the *Baehr* decision. Declaring marriage to exist only between opposite sex couples will not prevent the court from declaring the existing marital benefits scheme unconstitutional. This is a likely outcome under *Baehr*.
> 2. An appropriate legislative rights package (a model that is about to be adopted by the House of Representatives, see H.B. No. 118.) would provide for a careful

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[136] *Id.* (attached handouts).
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

> assessment of the costs, benefits and consequences of any rights provided. This is superior to Judge ordered across the board mandates.[142]

From these remarks, it is apparent that the Senators believed they had combined the following legal elements: (1) support for a constitutional amendment to "preserve traditional marriage[;]" (2) support for the Hawai'i Supreme Court's decision in *Baehr* that the existing marriage law is sex discrimination; (3) a commitment to the priority of article I, section 5, that would constitutionally require the passage of a legislative package offering marital benefits to unmarried couples; and (4) a text that could achieve (1), (2) and (3) without creating an internal legal contradiction which would have to be resolved by the supreme court in favor of one element over others.

Although Senate Bill No. 1800 was introduced by Senators Chumbley and Matsunaga on January 24, they waited until early February to hold hearings. From the opening of the session, the membership of the Senate Judiciary Committee was deeply divided on the question of the Marriage Amendment. Of its seven senators, three were expected to oppose Senate Bill No. 1800, based on their votes during the 1996 session: Senators Bunda, Sakamoto, and Anderson.[143] Senator McCartney, now one of the two Majority Leaders of the Senate, had been considered a swing vote in the prior session, but given his new leadership position, was now considered a reliable vote in support of the bill, along with the Co-Chairs.[144] This left the Committee deadlocked with three votes on each side.

The seventh Senator, Richard M. Matsuura, voted against the proposed constitutional amendment in 1996, and was expected to support the Senate version, but his health was failing. On January 31, Senator Matsuura resigned "for health reasons."[145] The following day, a Saturday, Governor Cayetano immediately appointed Wayne Metcalf, currently the State Insurance Commissioner, to replace Matsuura.[146] A graduate of the William S. Richardson School of Law, Senator Metcalf had previously served eight years in the House, including six years as Chair of the House Judiciary Committee. In that capacity, he had led the effort to pass the amendment to the State's employment law which added "sexual orientation" to the list of protected

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[142] *Id.*

[143] Senators Bunda and Anderson had voted to pull the Marriage Amendment out of Senate Judiciary in 1996, after Senators Mizuguchi and Graulty had bottled it up. *See infra* note 70 and corresponding text. Senator Sakamoto, who defeated Senator Graulty in the September 21, 1996, primary election, had campaigned vigorously in favor of a Marriage Amendment. *See infra* note 79 and accompanying text.

[144] *See infra* note 80 and accompanying text.

[145] *See Governor Names Wayne Metcalf to Senate*, Governor, State of Hawai'i, Press Release No. 97-018A (Feb. 1, 1997).

[146] *Id.*

categories.[147] The Governor's announcement noted that Senator Metcalf would take the oath of office on Monday, February 3.[148]

That same morning, the Senate Judiciary Committee held a hearing on House Bill No. No. 117, the Co-Chairs' proposed Senate Bill No. 1800, and other proposed constitutional amendments that had been introduced, with Senator Metcalf now in the seat formerly occupied by Senator Matsuura.[149] At the conclusion of the hearing, before the vote, Senator Chumbley proposed that the substance of House Bill 117 be deleted and substituted with that of Senate Bill 1800.[150] Senator Chumbley stated:

> In what is a significant departure from the position of this Committee and of the Senate last year, we agree that this issue should be put to the voters of Hawai'i in the form of a Constitutional Amendment. However, while we share the House's desire to definitively resolve this issue, we cannot recommend passage

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[147] *Id.*

[148] *Id.* Shortly thereafter, the Governor named ex-Senator Rey Graulty, former Chair of the Senate Judiciary Committee, as the new State Insurance Commissioner. *See Governor Cayetano Names Insurance Commissioner Graulty to Circuit Court*, Governor, State of Hawai'i, Press Release No. 98-229 (Dec. 14, 1998).

[149] Three other constitutional amendments were introduced in the Senate, and were technically (but not seriously) considered by the leadership of the Senate Judiciary Committee. *See* Notice of [Feb. 3, 1997] Hearing, Committee on Judiciary, issued Jan. 28, 1997.

Senate Bill 97 was introduced by the ten Senators identified as opponents of same-sex marriage (Senators Iwase, M. Ige, Anderson, Bunda, Solomon, Sakamoto, Tam, Kawamoto, Tanaka, and Aki). 1997 HAW. SEN. J. 9. It proposed to amend article I, section 5 of the constitution of the State of Hawai'i, by adding the following paragraph:

> For purposes of this section or any other section in this constitution, the term 'sex' means gender and shall not be interpreted to apply, directly or indirectly, to sexual orientation so as to prohibit or otherwise restrict the State from defining marriage as a union between a man and a woman which may be sanctioned and regulated by the State.

S. 97, 19th Leg., Reg. Sess. (Haw. 1997). Senate Bill 36, introduced by Senator Bunda, also proposed to amend article I, section 5 of the Constitution of the State of Hawai'i, by adding the following paragraph:

> Nothing in this section or any other section of this Constitution shall be interpreted to create a constitutional right to marriage between two people of the same gender. Marriage is reserved as a legal relationship that has been sanctioned by the State between a man and a woman as husband and wife. Marriage may be subject to reasonable regulation by the State.

S. 36, 19th Leg., Reg. Sess. (Haw. 1997); *see also* 1997 HAW. SEN. J. 6.

Finally, Senate Bill 912 was introduced by Senators Anderson and Slom. *See* 1997 HAW. SEN. J. 47. It proposed the following amendment, without deciding its location: "Section. Marriage shall be defined in the State of Hawai'i as the legal association reserved exclusively for the lawful union of a man and a woman." S. 912, 19th Leg., Reg. Sess. (Haw. 1997).

[150] Statement of Senator Avery B. Chumbley, Co-Chair Senate Judiciary Committee, *Re: H.B. 117, Proposing a Constitutional Amendment Relating to Marriage*, at 1 (Feb. 3, 1997) [hereinafter Statement of Senator Chumbley].

> of the H.B. No. 117 as received because we find it to be too blunt an instrument to appropriately resolve the complex and delicate constitutional issues raised.[151]

Senator Chumbley identified two major problems with the House Bill. "First, it expressly conditions the '[d]ue [p]rocess and [e]qual [p]rotection' section of our [c]onstitution."[152] "[T]o carve out an inelegant exception to this promise is more than aesthetically offensive," he stated.[153] "[I]t suggests to our children and to the world that our promise may only be good until the next unpopular [s]upreme [c]ourt opinion. This not only sends the wrong message, it is simply wrong."[154] In contrast, Senator Chumbley argued, placing the proposed amendment in article IX, the "Public Health and Welfare" section, sends the message that "no conditions are placed on our commitment to equal rights; rather, a positive expression of our power to regulate marriage, including limiting marriage to opposite sex couples, is reflected in our commitment to the health and welfare of the citizens of Hawai'i."[155]

Senator Chumbley also identified a second problem with the House Bill: "[I]t may be an unconstitutional violation of the principle of separation of powers."[156] In the balance of powers adopted by the Hawai'i Constitution, he argued, "[t]he duty of the legislative branch is to adopt laws, the executive branch administers the law, and the judicial branch interprets the law."[157] House Bill 117, on the other hand, "seeks to shatter this symmetry. It would, by its terms, dictate judicial and administrative interpretations of the constitution while leaving the legislature free to do as it pleases."[158] The result would be that "[s]ome of [Hawai'i's] citizens would thus be effectively deprived of access to the courts on this issue."[159]

He continued, "[w]e believe that this result may be unconstitutional," while acknowledging that "lawyers can reasonably disagree on this issue – 'experts' can be found to argue for either side."[160] Then he offered a strong statement about deprivations of rights:

> But whether technically unconstitutional or not, we know that this result is wrong. It is simply wrong to deprive any of our citizens his or her day in court. This is especially so when the deprivation might be based upon his or her minority status – or because we fear that our commitment to democracy may

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[151] *Id.*
[152] *Id.* at 2.
[153] *Id.* at 3.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 4.
[157] *Id.*
[158] *Id.*
[159] *Id.* at 5.
[160] *Id.*

> permit him or her to prevail. S.B. No. 1800 does not direct judicial or administrative outcomes. Rather it is a positive statement of the power and values of our people.[161]

Finally, the Senator argued that the House version of the Amendment would "deprive citizens of basic governmental rights and services simply because they are involved in committed caring relationships that the majority of us may not yet be prepared to recognize."[162] It would do this by giving the Legislature the power not only to define marriage itself, but also to define the rights and benefits connected with marriage, in a manner that would limit them to heterosexual couples. "S.B. No. 1800 reverses the process prescribed in H.B. No. 117," he declared.[163] "The House version presumes no rights and chooses to grant some. The Senate version presumes a multitude of rights and intends to reserve the ability to restrict them if a substantial governmental interest justifies it."[164] In short, Senator Chumbley concluded: "What we have attempted to do is to craft a constitutional amendment that will accomplish the objective of limiting marriage to couples of the opposite sex while preserving what we know to be our citizens [sic] commitment to fairness, tolerance and equality."[165]

The Judiciary Committee then voted to amend House Bill 117, deleting its substance, and replacing it with the provisions of Senate Bill 1800.[166] The vote was four "ayes," two "nays," and one "excused."[167]

On February 4, the Senate Judiciary Committee issued its formal report on House Bill 117, S.D. 1, recommending that it pass second reading and be placed on the calendar for third reading.[168] The report began by acknowledging that: "in what is a significant shift from the Senate position of the Eighteenth Legislature, this Committee is embracing the House of Representatives proposal to provide an opportunity for the people to vote on a constitutional amendment that would place legal restrictions upon

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[161] *Id.*

[162] *Id.* at 6.

[163] *Id.* at 7.

[164] *Id.*

[165] *Id.*

[166] *See* S. STAND. COM. REP. NO. 10, 19th Leg., Reg. Sess. (Haw. 1997), Senate Judiciary Committee, H.R. 117, S.D. 1, *reprinted in* 1997 HAW. SEN. J. 928.

[167] *See* Record of Votes of the Senate Committee on Judiciary, H.R. 117 (signed by Co-Chair Matsunaga and Senator McCartney), *reprinted in* 1997 HAW. SEN. J. 928. Senators Chumbley, Matsunaga, McCartney and Metcalf voted "aye," and Senators Bunda and Sakamoto voted "nay." Senator Anderson, who lodged a protest and stormed out of the hearing, was excused.

[168] *See* S. STAND. COM. REP. NO. 10, 19th Leg., Reg. Sess. (Haw. 1997), Senate Judiciary Committee, H.R. 117, S.D. 1, *reprinted in* 1997 HAW. SEN. J. 928.

marriage."[169] After describing the three problems with the House version that Senator Chumbley had identified, it defended its proposed solution with the following two-part formulation:

> (1) This provision will have the effect of constitutionally validating existing limitations in current law and protect them against interpretative challenge.
> (2) It is your Committee's intention that this proviso effectively require that similarly situated couples who are prohibited from marriage be provided all substantial government benefits of marriage unless a substantial governmental interest supports their withholding.[170]

The Senate's proposed Amendment, in sum, was built around different assumptions than that of the House. The House version of the Amendment assumed that marriage and marriage benefits go together, and that while the State might choose to extend marriage or marriage-benefits to unmarried couples, it was under no constitutional obligation to do so. The purpose of the Marriage Amendment, to the House, was to reaffirm this fundamental truth. In contrast, the Senate's Amendment appeared to accept the Hawai'i Supreme Court's decision that marriage-related benefits constituted sex discrimination, and aimed to equalize individual access to virtually all marriage-related benefits, irrespective of marital status. However, the Senate was willing to support an amendment that would allow the word "marriage" to be reserved to opposite-sex couples, and – at least for the time being – it was also willing to continue to allow certain benefits to be "restricted" to those with marital status. The burden of proof, however, would be shifted. Such "restrictions" would only be permissible if the State could show that they were required in order to protect "relevant substantial governmental and community interests."[171] The overriding constitutional principle would be one of individual equality.

Consistent with this, the Senate Judiciary Committee substantially revised House Bill 118, H.D. 1, the House's version of the reciprocal beneficiaries bill. It made numerous additions to the House's list of benefits, the most important of which, in section 3, required that any family coverage health insurance policy offer health benefits for reciprocal beneficiaries of the same gender.[172]

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[169] *Id.* at 1.

[170] *Id.* at 2-3.

[171] *Id.* at 3.

[172] *See* H.R. 118, H.D. 1, S.D. 1, 19th Leg., Reg. Sess. (Haw. 1997). In addition to the provision concerning health benefits to reciprocal beneficiaries of the same gender, the Senate's proposed reciprocal beneficiaries' bill included additional sections, numbered sections 15 through 19. These consisted of little more than lists of statutory citations to which the phrase "or reciprocal beneficiary" was to be added, without any explanation. In all, these five sections tried to amend *ninety-two* statutes. *See id.* In addition, the Committee's bill added a residency requirement of one year for both applicants; a severability clause; and made the law effective

On February 3, The Senate Judiciary Committee also considered this bill, now renamed House Bill No. 118, H.D. 1, S.D. 1.[173] At the conclusion of the hearing, before the vote, Senator Matsunaga offered an extended statement, much of which was then incorporated into the Committee's report on the bill.[174] Senator Matsunaga praised the "remarkable and heartening change from the position taken by the House last year, when they did not want to consider or acknowledge the extension of any marital rights to unmarried couples. The chairs would like to very sincerely extend its respect to the House for evolving its position."[175]

After summarizing the provisions of the House's version, the Senator offered a rationale for the addition of certain benefits and the continued limitation of others. With regard to adding certain benefits related to state government employees, tax benefits, wrongful death actions, hospital visitation and health care decisions, and tenancy by the entirety, the Senator explained how each House provision embodied a "right" which should be extended, "in the absence of any reason to the contrary."[176] With regard to continued limitations, he identified two "arguable interests": (1) "The State's interest in preserving the traditional family;" and (2) "The State's interest in avoiding federal and interstate conflicts."[177]

According to Senator Matsunaga, the aim of "preserving the traditional family" stems from the principle that "the citizens of our State may choose to limit marriage to couples of the opposite sex. If they do so, we would be logically obliged to limit benefits and burdens that explicitly relate to the institution of marriage to such couples."[178] Therefore, the Senate's bill did not

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upon ratification of the Senate's proposed Amendment, H.R. 117, S.D. 1. *See id.*

[173] *See* H.R. 118, H.D. 1, S.D. 1, 19th Leg., Reg. Sess. (Haw. 1997). Two other bills were introduced prior to the Senate Judiciary Committee's proposed revision of H.R. 118, H.D. 1. One bill, S. 795, "Relating to Domestic Partnerships," was more comprehensive than the Committee bill. *See* S. 795, 19th Leg., Reg. Sess. (Haw. 1997). Introduced by Senator Mike McCartney, it was similar to the domestic partnership bill passed by the Senate, but killed by the House in the 1996 session. The other bill, S. 98, "Relating to Economic Benefits," was less wide-ranging and policy-oriented. *See* S. 98, 19th Leg., Reg. Sess. (Haw. 1997). It was introduced by the ten Senators already identified as supporters of a House-style constitutional amendment (Senators Iwase, M. Ige, Anderson, Bunda, Solomon, Kawamoto, Sakamoto, Tam, Tanaka, and Aki). It allowed certain adults to file an affidavit of "shared necessities of life," and allowed for retirement beneficiaries, health benefits, wrongful death claims, and joint tax returns. S. 98, 19th Leg., Reg. Sess. (Haw. 1997), section 1.

[174] *See* Statement of Senator Matthew M. Matsunaga, Co-Chair Senate Judiciary Committee, *Re: H.R. 118, H.D. 1, "A Bill for an Act related to Unmarried Couples"* (Feb. 3, 1997) (hereinafter Statement of Senator Matsunaga).

[175] *Id.* at 1.

[176] *Id.* at 4-5.

[177] *Id.* at 6-7.

[178] *Id.* at 6.

include benefits or burdens "explicitly relating to marriage, divorce, parentage and adoption, premarital agreements, mutual support and community property, dower and curtsey, evidentiary spousal privileges, wiretap exceptions, and 'certain very specific family use exceptions.'"[179]

Secondly, according to Senator Matsunaga, the aim of "avoiding federal and interstate conflicts" stems from the principle that "[i]t is a legitimate and substantial State interest to avoid conflict with other states and to acknowledge the power of the federal government within their [sic] proper jurisdiction."[180] For this reason, the Senate's bill excluded programs that were

> substantially funded or regulated by the federal government, including social service benefits, government housing programs, airport and urban redevelopment and relocation, veterans burial benefits, certain resident military benefits, state health family assistance, unemployment insurance definitions, certain banking exceptions, the Hawaiian Homelands inheritance, . . . and relevant interstate compacts . . . relating to probation and parole, mental health, adoption assistance, and reciprocal enforcement of support.[181]

Significantly, the Senator added the following caveat regarding the list: "The exclusion of these rights is not because we believe that they should not or cannot be extended to reciprocal beneficiaries. Rather, we have in this iteration of the bill attempted to avoid predictable legal niggling or unwarranted expressions of fear."[182] He concluded by emphasizing that "[w]e intend to reserve the excluded rights for further study and debate."[183] Following these remarks, the Committee passed the amended bill by a vote of four "ayes," two "nays," and one "excused."[184]

The following day, the Senate Judiciary Committee issued its report on the bill, recommending that it pass second reading and be placed on the calendar

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[179] *Id.* at 7 (citations omitted). The "family use exceptions" to which Senator Matsunaga referred were harbor fishing, Kaneohe Bay recreation permits, *nehu* and *iao* [types of Hawaiian fish] fishing, and agriculture regulation exceptions. *See id.* (citations omitted).

[180] *Id.* In this connection, Senator Matsunaga observed:

> With the passage of the federal Defense of Marriage Act, the federal government seems to have signaled an unwillingness to support or acknowledge the extension of marital benefits to couples other than those in traditional marriages. Similarly, a number of other states have statutorily indicated some discomfort with potential extension of marital benefits.

Id.

[181] *Id.* at 8 (citations omitted).

[182] *Id.*

[183] *Id.* at 9.

[184] Senators Chumbley, Matsunaga, McCartney and Metcalf voted "aye"; Senators Bunda and Sakamoto voted "nay;" and Senator Anderson, who lodged a protest and stormed out of the hearing, was excused. Record of Votes of the Senate Comm. on Judiciary, H.R. 118, H.D. 1 (signed by Senator McCartney as the Chair's Designee).

for third reading.[185] In contrast to the House report on H.B. 118, H.D. 1,[186] the Senate report did not mention the existing marriage law at all.[187] It began by complimenting the House of Representatives for its "heartening change."[188] Describing the provisions of the original House bill as "among the most appropriate and important governmental privileges that could be reasonably extended," it described the House's bill as "a starting point."[189]

The Senate Committee report then stated: "[Y]our Committee cannot in all fairness find that appropriate governmental benefits should be limited to 'rights after death.'"[190] It described its proposed additional benefits in contrasting terms. On the one hand, the report stated, the law "do[es] not include all spousal rights and benefits, nor does it impose all marital burdens."[191] The report also limited benefits, "when a substantial government interest would be injured by such an extension."[192] As examples of such interests that could conflict with certain rights, it listed "the State's interest in preserving the traditional family, and conflicts with federal law or interstate agreements."[193] On the other hand, the report stated:

> Your Committee further notes that the exclusion of certain rights is not because we believe that they should not or cannot be extended to reciprocal beneficiaries. Rather, we have included in this bill, certain governmental rights that we believe any fair minded citizen would agree should reasonably be extended to others.[194]

On February 5, the two bills passed second reading.[195] On February 6, they were brought to the floor for third reading. Eloquent speeches were made in favor of the Senate's version by Senators Chumbley and Matsunaga. Speeches against the Senate's version were offered by Senators Solomon, Slom, Iwase, Sakamoto, Bunda, and Anderson.[196] The final vote was fifteen to ten in favor

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[185] *See* S. STAND. COM. REP. NO. 11, 19th Leg., Reg. Sess. (Haw. 1997).

[186] *See* Statement of Senator Matthew M. Matsunaga, Co-Chair Senate Judiciary Committee, *Re: H.R. 118, H.D. 1, "A Bill for an Act related to Unmarried Couples"* (Feb. 3, 1997) (hereinafter Statement of Senator Matsunaga).

[187] *See* S. STAND. COM. REP. NO. 11, 19th Leg., Reg. Sess. (Haw. 1997).

[188] *Id.* at 1.

[189] The report also mentioned that it considered S. 98, "Relating to Economic Benefits," along with the House bill, as "guideposts to the types of rights that might be reasonably extended to couples legally prohibited from marriage." *Id.* at 2.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See* 1997 HAW. SEN. J. 149-150.

[196] *See* William Kresnak, *Senate OKs Two Bills On Same-Sex Issue*, HONOLULU ADVERTISER, Feb. 7, 1997, at A1, A2. Of particular interest was a colloquy between Senator Iwase and Senator Matsunaga in which Senator Iwase asked Senator Matsunaga whether or not

of the Senate version, H.B. No. 117, S.D. 1.[197] When the vote was taken on H.B. No. 118, H.D. 1, S.D. 1, the Reciprocal Beneficiaries bill, the results were the same.[198]

Round three: the Senate comes under pressure

On February 6, House Speaker Souki and House Judiciary Chair Tom issued a press release in response to the passage of the Senate's version of the Marriage Amendment.[199] House Speaker Souki expressed concern that, "Since the Hawai'i Supreme Court has already ruled that our current marriage law is sex-discrimination, the change proposed by the Senate would virtually guarantee that same-sex marriage will become a reality in Hawai'i."[200] House Judiciary Chair Tom echoed these concerns: "The measure passed by the Senate will not reverse the ruling of the Hawai'i Supreme Court. If anything it will place a right to same-sex marriage in the Hawai'i Constitution."[201] House Speaker Souki added:

> It is difficult to understand why the Senate, which has pledged to place the issue of same-sex marriage before the voters, would propose an amendment which, if approved by the voters, would ensure the right to same-sex marriages, and if not approved, also ensures the right of same-sex marriages. I don't see that as giving the voters the right to decide this important issue.[202]

With regard to the reciprocal beneficiaries legislation, House Speaker Souki and House Judiciary Chair Tom "also expressed concern that there has been no financial analysis of the economic effect of the proposed pension,

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marriage was a "civil right." Senator Matsunaga indicated that it was not. If that is the case, Senator Iwase responded, then why did the Senate's proposed amendment include the second, "provided that" clause, concerning civil rights? The text of the colloquoy is in 1997 HAW. SEN. J. 162-63, and some of the substance can be found in *Senate OKs Benefits For Gay Partnerships*, HONOLULU STAR-BULL., Feb. 7, 1997, at A3. See *infra* text accompanying notes 207 to 213 for a discussion of Senator Anderson's subsequent memo attempting to clarify the meaning of this exchange between Senators Iwase and Matsunaga.

[197] *See* 1997 HAW. SEN. J. 165. Voting for the proposal were Senators Mizuguchi, Baker, Chumbley, Chun-Oakland, Fernandes-Salling, Fukunaga, D. Ige, Ihara, Kanno, Levin, Matsunaga, McCartney, Metcalf, Tam (with reservations) and Taniguchi. Opposed to the proposal were Senators Aki, Anderson, Bunda, M. Ige, Iwase, Kawamoto, Sakamoto, Slom, Solomon, and Tanaka.

[198] *Id.* at 166.

[199] *See* Press Release from Representative Terrance W.H. Tom, *Re: Same-Sex Marriage* (Feb. 6, 1997) [hereinafter Press Release from Rep. Tom].

[200] *Id.* at 1.

[201] *Id.* at 2.

[202] *Id.*

health insurance, and other benefits as proposed by the Senate."[203] House Speaker Souki added, "Before we consider imposing additional financial burdens on small business and increasing the cost of government, we need to evaluate, on a case by case basis, not only the fiscal impacts but also the necessity of imposing these financial burdens."[204]

The Speaker and Chair concluded by reporting that the House would immediately appoint conferees for the conference committees, "but warned of a long and difficult process given the wide philosophical differences between the House and the Senate on the issue of same-sex marriage."[205]

The following day, the House voted to reject both the Senate's proposed amendment and its version of the reciprocal beneficiaries bill.[206] In addition, Senators Anderson and Matsunaga exchanged memoranda regarding Senator Matsunaga's statement, on the Senate floor, that marriage "is not a civil right."[207] In clarification, Senator Matsunaga stated that "both the United States Supreme Court and Hawai'i Supreme Court have found marriage to be a fundamental right."[208] However, he observed, there is "an important qualification": the *Baehr* court "expressly limited this right to opposite sex couples."[209] As evidence, Senator Matsunaga offered two quotes from the 1993 *Baehr* opinion.[210] The Senator concluded, "I think that [it] is unequivocally clear that marriage is not a civil right with respect to other than opposite sex couples, and that the guarantee of civil rights in H.B. No. 117, S.D. 1, cannot be distorted in the manner you apparently fear."[211] Senator Matsunaga circulated a copy of this memorandum to all Senators.[212]

The Senator's statement was somewhat disingenuous, however. While the sections from *Baehr* quoted by Senator Matsunaga in his memorandum were drawn from the *due process* section of the opinion, which indeed reaffirmed that there is "no fundamental constitutional right to same-sex marriage," the Senator attached, as evidence, two pages from the *equal protection* section of the opinion, which held that the existing marriage law constituted sex discrimination, including the precise pages which held that "civil rights" are the same as "natural rights."[213] Senator Matsunaga offered no explanation of

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[203] *Id.* at 1.

[204] *Id.* at 3.

[205] *Id.*

[206] *See* 1997 HAW. SEN. J. 169 (receipt of rejection).

[207] Memorandum from Senator Matt Matsunaga, Co-Chair, Senate Judiciary Committee, to Senator Whitney Anderson, Minority Leader, *Re: Marriage As a Civil Right* (Feb. 7, 1997).

[208] *Id.* at 1.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] Attachment to Memorandum from Senator Matt Matsunaga, Co-Chair, Senate Judiciary

how marriage could be both a "civil right" and a "natural right" for every couple, as the court held was required as a matter of equal protection (absent a compelling state interest), while not being a "fundamental right."[214]

Evidently none of the ten Senators who voted against the Senate version of the Marriage Amendment were sufficiently persuaded by Senator Matsunaga's attempts to reassure them. On February 10, they issued the following statement as a letter to the editor:

> By a 15-10 vote, a divided State Senate passed its changes to H.B. 117, relating to a constitutional amendment on same-sex marriage.
>
> We opposed the Senate version of H.B. 117 because the changes deprived the people of the chance to amend the constitution to allow the State to unconditionally define marriage as a union between a man and a woman. Instead, the Senate version which we opposed would permit the State to define marriage as between a man and a woman if and only if such a definition "would not deprive any person of civil rights on the basis of sex."
>
> The Senate version clearly ignores the will of a vast majority of our people and deprives the people of their right to clarify what their constitution means. Secondly, the Senate version again leaves the definition of marriage up to the courts and not the people.
>
> Finally, the Senate's condition that the State can reserve marriage to a man and a woman if it does "not deprive any person of civil rights on the basis of sex" is totally unnecessary. During the floor debate on the bill, the co-chair of the Senate Judiciary Committee, which proposed this condition, admitted under questioning that the right to marry is *not* a civil right. Given this admission, there is no need to condition the definition of marriage as the Senate version mistakenly attempts to do.
>
> We have and will continue to fight for a clean constitutional amendment which will give the voters a real opportunity to define marriage in this State.[215]

During the balance of February, both amendments hung in the air. Conference committees were appointed for both the Amendment and reciprocal beneficiaries bills, but no meetings were held.[216] Senator Chumbley

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Committee, to Senator Whitney Anderson, Minority Leader, Re: Marriage As a Civil Right (Feb. 7, 1997) (citing Baehr v. Lewin, 74 Haw. 530, 562-63, 852 P.2d 44, 52-54 (1993)).

[214] *See* Memorandum from Senator Matt Matsunaga, Co-Chair, Senate Judiciary Committee, to Senator Whitney Anderson, Minority Leader, *Re: Marriage As a Civil Right* (Feb. 7, 1997).

[215] Statement to the Editor from Senators Malama Solomon, Randy Iwase, Robert Bunda, Marshall Ige, Cal Kawamoto, Joseph Tanaka, James Aki, Norman Sakamoto, Sam Slom, and Whitney Anderson. Letter to the Editor, *Here's Why 10 Senators Opposed Same-Sex Vote*, HONOLULU ADVERTISER, Feb. 19, 1997.

[216] *See* 1997 HAW. SEN. J. 173 (receipt of Feb. 10 appointment of House conferees); and 1997 HAW. SEN. J. 225-26 (appointment of Senate conferees). For both the Amendment and the reciprocal beneficiaries legislation, the conferees consisted of Senators Chumbley, Matsunaga, McCartney and Metcalf, and Representatives Tom, Cachola, Herkes, and Yamane. In addition, Representative Whalen served on the constitutional amendment conference

had made it clear that "[e]ach of us understands that S.B. No. 1800 in its current form is unlikely to be the last word on this subject."[217] So there appeared to be room to negotiate with the House. But there appeared to be little or no incentive for the parties to come to the table, since the apparent final date for passage of an amendment (for presentment to the Governor)[218] was not until April 11.

During the month that followed, a lively public debate took place about the two proposed Marriage Amendments. On February 24, the *Star-Bulletin* released a new poll. The message was clear: "Hawai'i residents remain overwhelmingly opposed to same-sex marriage, and slightly more than half also are against granting limited marital benefits to same-sex couples . . ."[219] To the question: "Do you approve or disapprove of legalizing same-sex marriages?," seventy percent of those polled answered, "disapprove," and only twenty percent answered, "approve."[220] A second question was also asked: "As an alternative to legalizing same-sex marriage, the state Legislature may grant gay and lesbian couples some marital benefits through domestic partnerships or a similar arrangement. Would you approve or disapprove of this proposal?" Even here, fifty-five percent answered, "disapprove," and only forty-two percent answered, "approve."[221]

On Monday, March 3, the *Advertiser* published an "Island Voices" column by the leaders of Hawai'i's Future Today.[222] The article reiterated earlier criticisms that had been made of the Senate's proposed amendment, and called for "legislators to pass a clear constitutional amendment for the people to vote on." "The public," they insisted, "wants resolution soon on this issue."[223] That same morning, the conferees held their first meeting.[224] House Judiciary Committee Chairman Tom went on the offensive, insisting on a "clean" constitutional amendment, and rejecting the Senate's proposal that the amendment have "conditions" and be placed in article IX. Senator Matsunaga

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committee, and Representative Thielen served on the reciprocal beneficiaries conference committee.

[217] Statement of Senator Chumbley, *supra* note 150, at 3.

[218] *See* HAW. CONST. art. XVII, § 3 (requiring that final reading of a legislative proposed amendment can only come "after either or both houses shall have given the governor at least ten days written notice of the final form of the proposed amendment . . .").

[219] *Voters Strongly Oppose Gay Unions, [And Most Are Also Against Granting Marital Benefits To Same-Sex Couples]*, HONOLULU STAR-BULL., Feb. 24, 1997, at A5.

[220] *See id.*

[221] *See id.*

[222] *See* Debi Hartmann, et al., *We Need Same-Sex Amendment*, HONOLULU ADVERTISER, Mar. 3, 1997, at A6.

[223] *Id.*

[224] William Kresnak, *Same-Sex Conferees at Odds*, HONOLULU ADVERTISER, Mar. 4, 1997, at B1.

defended the Amendment, and Senator Chumbley promised to consider the House's concerns. On the question of benefits, Senators Matsunaga and Metcalf delivered an impassioned defense of their version of House Bill 118. When Senator Metcalf insisted that the bill would have no financial impact, Chairman Tom requested evidence of this fact, and Senator Metcalf agreed to supply it to him. The conferees agreed to meet again, but no date was set for the next meeting.[225]

Perhaps stung by Chairman Tom's assault, the Senate responded vigorously. On March 11, Senators Chumbley and Matsunaga supplied a letter with four attachments to Chairman Tom, "to address your concerns regarding the fiscal impacts of providing an expanded benefits package for reciprocal beneficiaries."[226] The following day, Senators Chumbley, Metcalf, Matsunaga and McCartney published their own "Island Voices" column in an effort to clear up the three "most common misperceptions" about the Senate's proposed constitutional amendment.[227]

The first misconception, the Senators claimed, was that "[t]he Senate's version is not a 'clean amendment.'"[228] Not so, they claimed; the amendment "contains two simple affirmations of Hawai'i's principles: the institution of marriage is a union between a man and a woman; and no person should suffer discrimination on the basis of sex."[229] By including both, the Senate meets "with absolute certainty" the criteria that its amendment "cannot be vulnerable to challenges," and "will pass constitutional muster."[230] The second misconception they wished to correct was that, "[t]he Senate amendment will enact, not ban, same-gender marriage."[231] While "[e]nsuring equal rights to

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[225] *See Same-Sex Conferees Say They Can Work It Out*, HONOLULU STAR-BULL., Mar. 3, 1997, at A1; *but see* William Kresnak, *Same-Sex Conferees at Odds*, HONOLULU ADVERTISER, Mar. 4, 1997, at B1.

[226] Letter from Senators Avery B. Chumbley and Matt M. Matsunaga, Co-Chairs, Senate Judiciary Committee, to Representative Tom, Chairman, *Re: Fiscal Impacts of Reciprocal Beneficiaries* (Mar. 11, 1997). The four attachments consisted of a letter from the State Employees' Retirement System, a letter from the Department of Taxation, a packet prepared by the Spectrum Institute (a Los Angeles-based organization which promotes domestic partnerships), and an article entitled, *Domestic Partner Benefits: Employer Considerations*. This was followed up by a March 12 letter to Senator Metcalf from the Insurance Division of the Department of Commerce and Consumer Affairs, assuring Senator Metcalf of no impact on the cost for services if mandated health benefits were to be offered to domestic partners. The letter was formally approved by former Senate Judiciary Committee Chairman Rey Graulty, now the newly-appointed Insurance Commissioner.

[227] Avery Chumbley, et al., *Clearer Look At Same-Sex Bill*, HONOLULU ADVERTISER, Mar. 12, 1997, at A12.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

all our citizens is a part of Hawai'i's legal and social fabric," they insisted that the amendment "will not extend a right of marriage to same-sex couples," and in fact does not extend parentage, custody or child adoption rights.[232] Finally, they addressed a final misconception, that "[t]raditional marriages will be hurt by the extension of limited rights to couples who will not be permitted to marry."[233] Quite the contrary, they argued, "an open society and family stability can only be strengthened by this extension of equality."[234] They described fears of marriage being undermined as "unfounded."[235] They concluded, "[r]ather, we believe that traditional marriage is threatened by such factors as domestic violence, lack of education and our stagnant economy."[236] The next day, the Coalition for Equality & Diversity and Clergy Coalition issued a revised set of "Guidelines for Letters-to-the-Editor."[237] One page began with the heading, "IF YOU CARE ABOUT CIVIL RIGHTS YOUR IMMEDIATE ACTION IS NEEDED!" It announced:

> The four Senate conferees are being bombarded with hundreds of phone calls and letters from their districts to support the House's version of a constitutional amendment. The conferees have heard practically zip from our side. If we don't come up with a sizable counter presence ASAP, odds are the Senate conferees will move closer to the House position. This will amount to a disaster for civil rights.[238]

It encouraged supporters "to call/fax/mail a very brief expression of support to the Senate conferees. Urge them not to compromise any further and that any constitutional amendment must, *at the same time*, permanently protect equality for same gender couples."[239] It also attached a sample letter to the editor from the Reverend Yoshiaki Fujitani, Retired Minister of the Honpa Hongwanji Mission of Hawai'i.[240] "What *is* important is for you to acknowledge their commitment to civil rights, encourage them to remain

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[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *See* Coalition for Equality & Diversity and Clergy Coalition, *Guidelines for Letters-to-the-Editor* (Mar. 12, 1997).

[238] *Id.*

[239] *Id.* (emphasis in original)

[240] *See id.* The sample letter concluded with:

> "We must know that the Most Compassionate One extends his arms to warmly embrace all beings. It is only when we can all affirm this truth that we will have a chance to build a world of true brotherhood and sisterhood. Through my participation in the Clergy Coalition, I am hopeful that we can encourage our leaders to remain true to the long-held commitment of our state and nation to the values of fairness and nondiscrimination."

Id. The alert was faxed from the American Civil Liberties Union of Hawai'i.

steadfast and to do what is just. Brief is fine. From the heart is best. Always remain courteous."[241]

On March 14, the morning of the second conference committee meeting, Chairman Tom struck back with an "Island Voices" column of his own.[242] "Hawai'i's citizens are not confused," he stated:

> They see the real problem: These senators are wrongly equating traditional marriage with sex discrimination. It was wrong for the supreme court to call traditional marriage sex discrimination, and it is equally wrong for the Senate to try to put forward an amendment or any other proposal that does the same. . . . Why should the public support any proposal that repeats the same mistake made by the supreme court?[243]

Tom argued that "[t]he public deserves a 'clean' constitutional amendment, one that is easy to understand and, therefore, easy to support."[244] In his estimation, the House amendment fit the bill. He concluded by appealing to his colleagues: "If the Senate will remove the roadblocks it has put up against this amendment, we can give the citizens of this state the opportunity they have demanded: to vote to preserve traditional marriage."[245]

The next day, the *Star-Bulletin*, generally supportive of same-sex marriage, issued an editorial that sided with Chairman Tom and his fellow House conferees.[246] "The House members have a point. The Senate version seems to be aimed at leaving the situation subject to varying interpretations that conceivably could nullify the objective of banning same-sex marriage."[247] Reminding its readers that "[t]his newspaper has opposed the movement to ban same-sex marriage," it continued, "but if the voters want to insert a ban in the State Constitution, that is their right – subject to possible challenges on the basis of the U.S. Constitution."[248] It added that if a ban is imposed, domestic partnership legislation should be enacted, and concluded with this:

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[241] *Id.*

[242] *See* Terrance Tom, et al., *House Is Right On Same Sex*, HONOLULU ADVERTISER, Mar. 14, 1997, at A20. The column was co-authored with Representatives Cachola, Herkes, Yamane and Whalen, the House conferees. According to the *Honolulu Advertiser*, at the Senate's request, the two sides held a brief second conference committee meeting on March 14. The Senate conferees publicly delivered their letter in response to Chairman Tom's economic questions, and asked for his response. Chairman Tom responded by saying he needed more time to look them over, and the conferees tentatively agreed to meet again on March 19.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *See* Editorial, *Same-Sex Marriage*, HONOLULU STAR-BULL., Mar. 15, 1997, at B2.

[247] *Id.*

[248] *Id.*

> However, if the state [c]onstitution is amended, it should be done in a clear-cut fashion that does not invite conflicting interpretations and further disputes. The Senate and House should resolve their differences quickly and move on to other issues to avoid a repeat of last year's fiasco.[249]

Chairman Tom opened the third conference committee meeting on March 19 playing the role of a negotiator.[250] Lashing out at the numbers he had been provided by the Senate conferees as evidence of the supposed non-impact of the proposed benefits, he complained that the "real problem" was that the two sets of conferees were working from "fundamentally different approaches."[251] The Senators complained that Chairman Tom had not offered his own numbers; Chairman Tom, in turn, insisted that there were no numbers to offer.[252] Indeed, he argued, that was precisely the point: everything was guesswork and nothing was clear.[253] Therefore, he concluded, the Senate's proposed benefits should be scaled back and only included on a case-by-case basis.[254] When Senators Chumbley and Matsunaga protested, Chairman Tom replied, "I can't give you more – you're asking us to make magic."[255]

Then Chairman Tom turned to the proposed constitutional amendments. "Are we going to have a clean amendment or aren't we?," he asked.[256] "People deserve an answer as to *where* we're heading. I don't want [H.B.] 117 held hostage to [H.B.] 118."[257] "You have our position," Senator Chumbley replied.[258] "We don't accept it," Chairman Tom shot back.[259] The Senators denied that the amendment was hostage to anything.[260] Chairman Tom said, "Then let's agree today."[261] The Senators demurred.[262]

At this point in the negotiations, the pressure was almost entirely on the Senate conferees. Having failed to convince even sympathetic newspaper editors that their amendment would accomplish its aim, the burden seemed to be upon the Senators to offer a revised amendment and a revised benefits bill.

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[249] *Id.*

[250] *See* William Kresnak, *Same-Sex Benefits Debated*, HONOLULU ADVERTISER, Mar. 20, 1997, at B4. In addition, the author was present at this meeting, and the following narrative is based in part on his recollections.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.*

On March 21, Hawai'i's Future Today and the Alliance for Traditional Marriage turned up the heat by announcing "The Final Push" – a citizens' "stand-in" at the state capitol on April 2 and 3.[263] Announcing the rally and urging fellow citizens to come, Reverend Alexander wrote:

> We have no choice at this junction .... We are asking everyone to come to the capitol on either or both days, for one hour or four, and stand in the senate offices .... No signs are allowed in the capitol, but you are encouraged to wear appropriate shirts and buttons. At all times act with dignity and respect. We cannot assume that the Senate will act in accord with the wishes of the over 70 percent of the people of Hawai'i who do not want "same-sex marriage." We must be ready to demand that our right to govern ourselves be respected. I know most of us are not accustomed to such action, but how can we allow our democratic rights and the rights of marriage to be subverted by 15 senators?[264]

Round four: the House comes under pressure

On Monday, March 24, the House's momentum was abruptly reversed. The supreme court issued a unanimous decision in the Constitutional Convention case: blank and spoiled ballots were to be counted as "no" votes, because anyone who showed up to vote "cast their ballot," whether or not they chose to vote specifically on the question of the Convention.[265] Since the number of blank and spoiled ballots was greater than the previous margin of victory for the "yes" votes, the previously declared results were invalid.[266] The Constitutional Convention, which would likely have addressed the marriage issue, was thereby canceled.[267] Although the question of the Convention was later revived,[268] on March 24 it appeared to all the players that the court's decision was final, with no possibility of appeal. With the option of a Constitutional Convention removed, a legislatively-proposed amendment would be the only possible way of overruling the Hawai'i Supreme Court. This immediately shifted momentum away from the House. Now the Senate could threaten inaction on the amendment in order to force concessions, especially on the benefits bill, from the House.

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[263] Rev. Marc R. Alexander, *The Final Push: It's Now Or Never*, HAW. CATH. HERALD, Mar. 21, 1997, at 3.

[264] *Id.*

[265] *See* Hawai'i State AFL-CIO v. Yoshina, 84 Hawai'i 374, 935 P.2d 89 (1997).

[266] *Id.*

[267] *Id.*; *see also* Angela Miller, *State Convention Rejected: Court Finds Blanks Outweigh 'Yes' Vote*, HONOLULU ADVERTISER, Mar. 25, 1997, at A1.

[268] For the rest of the story, which ended with the voters declining to call a ConCon, see *infra* at notes 466-76 and accompanying text.

The new dynamics were immediately evident in a lengthy letter sent on March 25 from the Senate conferees to the House conferees.[269] "We believe that you share our frustration over the absence of real progress in our conferences," they began, and then asserted that "[s]itting across the table and reading prepared statements which restate our starting positions simply does the citizens of Hawai'i no good."[270] They asked the House conferees to confirm certain "Areas of Agreement" and "Points of Disagreement."[271]

The Areas of Agreement included: (1) giving the people of Hawai'i the opportunity to vote on an Amendment "limiting the institution of marriage to couples of the opposite sex";[272] (2) seeking such an Amendment in such a way as not to "unreasonably discriminate against any segment of our population";[273] (3) "[t]hat there are non-traditional loving relationships, partners of which have a right to share in many of the legal and economic rights and benefits afforded married couples," and that extending these rights "will not damage meaningful marital relationships";[274] (4) "[t]hat the strengthening of Hawai'i's families would be equally well served" by paying attention to crime and related issues, "so that no time should be wasted on posturing on this issue,"[275] and (5) that the proposed Amendment should be submitted to the Governor by April 11, "if the matter is to be resolved during this session, and that we share a commitment to meet this deadline."[276]

Under the "Points of Disagreement,"[277] the Senate's letter discussed both the reciprocal beneficiaries bill and the proposed Amendment.[278] Beginning with the beneficiaries' bill, it stated that "[w]e understand this bill to represent an agreement in principle that appropriate substantive marital rights should be

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[269] *See* Letter from Senators Avery Chumbley, Matt Matsunaga, Mike McCartney and Wayne Metcalf to Representatives Terrence Tom, Romy Cachola, Robert Herkes, Brian Yamane, Paul Whalen, and Cynthia Thielen (Mar. 25, 1997) [hereinafter Mar. 25 Letter].

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.* Under this specific point the Senate inserted two sub-points: (1) That the House-passed version was the floor of such rights, "and that other rights which share this level of acceptability should be included in the bill;" and (2) "That recognition of these rights should accompany the Constitutional restoration of traditional marriage in Hawai'i." *Id.*

[275] *Id.*

[276] *Id.* This section concluded: "*If you are in disagreement with any of them please advise us as soon as possible so that we may directly address and resolve the matter in conference. Otherwise we will proceed on the assumption that these principles and objectives reflect our mutual understandings.*" *Id.* (emphasis in original).

[277] *Id.*

[278] *See id.*

extended to nontraditional families."[279] After summarizing the Senate's "140 additional statutory provisions," it stated that

> [w]hile more numerous, the Senate amendments do not deviate from the House's apparent intent. *Since the House generated the structure and intent of the rights package, we trust that you are prepared to sincerely examine the Senate amendments insofar as they are consistent with the House's express intent. If this is not the case, please so advise.*[280]

Turning to the proposed Constitutional Amendment, the letter addressed three issues. First, the Senators reiterated their refusal to amend article I, section 5, and added footnotes with similar quotes from Chairman Tom's article of December 1993.[281] Second, the Senators took issue with Chairman Tom's claim that the House's amendment was "clean," and asserted that "[t]he sixty-plus word amendment and question are virtually unfathomable to anyone who is not legally trained."[282] In addition, the language was also "far from 'clean' in its effect," since "implicit in the wave of legal verbiage is the stripping of court and administrative power over this matter."[283] They added, "*We invite you to offer, and we would most certainly consider, more easily comprehensible language.*"[284] Finally, with respect to the Senate's own proposed text, the Senate invited the House to (again in bold letters) "*mutually work on more satisfactory language.*"[285] They insisted that it was not their intent to craft a text that would nullify itself and they stated, "we deny and resent any statements or inferences to that effect."[286] The Senators added (again in bold letters) that "*[w]e will willingly consider alternative language to ensure that nontraditional families are treated fairly under our Constitution. We invite you to make any such proposal and are prepared to do so at your request.*"[287]

"As time is increasingly of the essence," they concluded, "we would appreciate a reply as soon as reasonably possible."[288] With that, the Senate threw the ball back into the House's court. Two days later, Chairman Tom

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[279] *Id.*

[280] *Id.* (emphasis in original). Before leaving the topic of the reciprocal beneficiaries bill, the letter also addressed the various disputes about economic data and committee jurisdiction that had surfaced in early meetings. *See id.*

[281] *See id.* (quoting from Terrance Tom, *Couples Don't Need a License to Be in Love*, HONOLULU ADVERTISER, Dec. 2, 1993, at A21).

[282] *Id.*

[283] March 25 Letter, *supra* note 269, at 1.

[284] *Id.* (emphasis in original).

[285] *Id.* (emphasis in original).

[286] *Id.*

[287] *Id.* (emphasis in original).

[288] *Id.*

fired back a written reply.[289] "I was very disturbed," he began, "that the Senate felt it necessary to resort to rhetoric, misrepresentation, and innuendo in your written communication with the House Conferees."[290] Chairman Tom insisted that he had been acting in good faith, openly offering his reasons on behalf of the House's proposed text.[291] "Instead of a return to the conference table, we received a letter implying that the House has been unwilling to defend its bills, suggesting that we are required to tell you if we are sincere, and other disingenuous requests."[292] He was emphatic: "The House conferees will not support any Constitutional Amendment which gives any power whatsoever to any Court or any administrator to impose same-sex marriage on the people of Hawai'i."[293] Elaborating on this point, he added that "[t]he [c]onstitution is specifically designed to strip power from the Government, contrary to your assertions . . . [t]he [c]onstitution tells the Courts, the Administrators and Legislature what is permissible and what is not permissible. A Court must follow the clear language of the [c]onstitution."[294]

Turning to the benefits bill, he opened with this:

> The House Conferees do believe that there are many forms of loving relationships, familial and social, sexual and non-sexual. The House also believes that many identifiable segments of our society are deserving of the State's attention, support, help and assistance, including the elderly, the disabled, the young, the gifted, the struggling, the sick, those who work for a living, those who volunteer their time for others, those who pay taxes, and so many others. As the elected representatives of the people we can, and do, spend our time addressing these concerns. Every bill that is presented to us is designed in some way to help some segment of our community. It is for these reasons, and not from any belief that traditional marriage is unreasonable or unlawful discrimination, that the House has proposed H.B. 118.[295]

Put more bluntly, "H.B. 118 was never designed to be marriage for those who are not married."[296]

After reiterating his concerns about the cost implications of H.B. 118, Chairman Tom closed by assuring his colleagues that "[w]e can and will make much more progress on this matter if we can meet where we should, at the

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[289] *See* Letter from Representative Terrence Tom to Senators Avery Chumbley, Matt Matsunaga, Mike McCartney, and Wayne Metcalf (Mar. 27, 1997) [hereinafter March 27 Letter].

[290] *Id.*

[291] *See id.*

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.*

conference table. The House Conferees stand ready to meet every day of the week until this matter is resolved."[297]

Round five: showdown, tradeoffs and a final text

The month of April opened with news of "The Final Push" rally on the front page of the *Honolulu Advertiser*.[298] Tracey Bennett, lobbyist for the Marriage Project – Hawai'i was quoted as saying: "It looks like everybody's dug in."[299] Later that morning, the leaders of Hawai'i's Future Today held a press conference and blasted the Senate for its inaction:

> The deadline for all constitutional amendments is April 11. There are only a few days remaining in the session for an amendment aimed at preserving traditional marriage, to be finalized and voted on by the full legislature. The Senate is well aware of this deadline and yet they are still posturing .... If the people of this state do not get to vote on this issue they will completely lose their faith and trust in the people they elected to represent them. In the end, everyone will lose. We must not forget that time is quickly running out.[300]

As the day went on, the pressure increased. Senator Sakamoto circulated a letter to all members of the Legislature that urged "all members of the conference committee to work together to provide a language that gives Hawai'i's voters a clean choice on the issue of marriage."[301] Senator Solomon rose on the Senate floor and delivered the following blistering remarks:

> What we have seen during the 4 years is Senatorial Arrogance opposing the Popular Will. Our Judiciary Committee has concocted an absurd bill and, as can

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[297] *Id.* The same day, Senator Sakamoto circulated a memo to all the members of the Senate and House. It stated, in part:

> Our office has learned that the Department of Education has made no study of the possible impact of same sex marriage on the educational curriculum of Hawai'i's public schools .... Even if the Department of Education does not adopt an official stance of promoting homosexuality, it can be expected that it will be legally obligated to include materials supportive of homosexuality and of same sex marriage. Many parents will find such materials offensive and contrary to the moral values that they are teaching their children.

Letter from Norman Sakamoto, Senator, Hawai'i State Legislature (Mar. 25, 1997) (addressed to members of the Senate and House of Representatives).

[298] *See* William Kresnak, *Same-Sex Solution Elusive*, HONOLULU ADVERTISER, Apr. 1, 1997, at A1, A2.

[299] *Id.* at A2.

[300] DEBI HARTMANN, JACK HOAG, FATHER MARC ALEXANDER, & GEORGE SHEA, SAME-SEX MARRIAGE - LET THE PEOPLE VOTE (Apr. 1, 1997) (pamphlet provided at the Hawai'i's Future Today Press Conference).

[301] Letter from Norman Sakamoto, Senator, Hawai'i State Legislature (Apr. 1, 1997) (addressed to members of the Senate and House of Representatives).

> be seen by Mr. Young's letter, its absurdity is clear to the Public. This senate draft puts all marriages, entered into heretofore or hereafter, in jeopardy of being rendered void if any court shall hold that any state law concerning marriage deprived any person of any civil rights. Mr. Young says, "Balderdash." I say "Nuts." Mr. President, it's time finally to let the people speak. The monkey's on our back. The house bill provides an opportunity for the people to speak. If we, in the senate, continue in denying that opportunity out of mano-a-mano, macho, hubris, or for whatever reason, we have no rightful place in this representative body.[302]

That afternoon, the House and Senate conferees reconvened. This time Chairman Tom brought new proposals to the table concerning both bills. First, he offered a new text for the Constitutional Amendment: "The Legislature shall have the power to reserve the legal recognition of the marriage relationship, and its attendant rights, benefits and burdens to couples of the opposite sex."[303] The Amendment would be placed in article I, but as a separate section 23.[304] The legislative findings accompanying the proposed text remained unchanged.[305]

Second, Chairman Tom offered a new text for the reciprocal beneficiaries bill.[306] His draft removed section 3 of the Senate's version, which had offered health benefits solely to reciprocal beneficiaries of the same gender. In its place, it offered new sections 14-20, requiring that insurers offer plans with health benefits for all reciprocal beneficiaries, with limits upon costs.[307] It also proposed a new section 21, to read as follows: "Notwithstanding any other law to the contrary, the rights and benefits extended by this act shall be narrowly interpreted and nothing in this act shall be construed or implied to create or extend rights or benefits not specifically provided herein."[308] The Senate conferees agreed to consider the proposals, but no next meeting date was set.

Supporters of same-sex marriage were busy applying public pressure as well. The same edition of the *Honolulu Advertiser* included a letter to the editor from Alan Murakami, president of the Honolulu Chapter of the Japanese-American Citizens League.[309] Murakami called a constitutional

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[302] Malama Solomon, Senator, Hawai'i State Legislature, *Point of Personal Privilege* (Apr. 1, 1997) (typescript copy on file with author).

[303] H.R. 117, C.D. 1, 19th Leg., Reg. Sess. (Haw. 1997).

[304] *See id.*

[305] *See id.* The first sentence of section 1 was also formally altered to conform to the proposed text of the Amendment. *See id.*

[306] *See* H.R. 117, C.D. 1, 19th Leg., Reg. Sess. (Haw. 1997).

[307] *See id.* at 28-36.

[308] *See id.* at 36.

[309] Alan Murakami, Editorial, *House Version Wrong On Same-Sex Marriage*, HONOLULU ADVERTISER, Apr. 1, 1997, at C4. Without a trace of irony, the writer simultaneously (1)

amendment "a dangerous precedent for which all minorities should be wary."[310] He argued that "it would be a waste of resources, promote government intrusion into an area of religious and personal privacy, and blur the separation of church and state."[311] If there must be an amendment, he continued, "the Senate position is fairer than that of the House. We deplore the reasoning of the House, which is willing to toy with sacred rights inherent in the equal protection clause of our state [c]onstitution."[312] Then he went for the jugular: "As Americans of Japanese Ancestry learned during an earlier and uglier time this century, discrimination can cause evils that can render great damage to an unpopular minority. Race discrimination then can be gender and sexual orientation discrimination today."[313] From the mainland, a letter also went out to every member of the Legislature from the Stated Clerk of the Presbyterian Church, U.S.A., Clifton Kirkpatrick:

> [I]n support of legislation currently under consideration in the Senate and House of Representatives of the State of Hawai'i which would both recognize marriage as a civil contract between one man and one woman and, at the same time, extend rights and privileges equivalent to those granted to married couples, to those couples in relationships not eligible for marriage.[314]

On the Internet, a message went out from Hawai'i to supporters of same-sex marriage across the country, saying "that if they work hard for just a few more days, 'we can score the civil rights victory of the decade here in Hawai'i.'"[315]

On April 2 and 3, supporters of the Marriage Amendment jammed the State Capitol. They stood peacefully in the offices of Senators Chumbley,

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attacks attempts to "blur the separation of church and state," and (2) attacks "toy[ing] with sacred rights inherent in the equal protection clause of our state constitution." *Id.*

[310] *Id.*

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] Letter from Clifton Kirkpatrick, Stated Clerk of the Presbyterian Church, U.S.A. (Apr. 1, 1997) (addressed to members of the Senate and House of Representatives of the Legislature of the State of Hawai'i). "Equivalent" is the striking word in the letter. The Stated Clerk, in his explanation for sending the letter, stated that the Presbyterian Church, U.S.A. had chosen not to file an amicus brief in *Baehr v. Lewin*, and was sending this letter to respond to the following resolution of the Church's 208th General Assembly in 1996:

> Affirming the Presbyterian church's historic definition of marriage as a civil contract between a man and a woman, yet recognizing that committed same-sex partners *seek* equal civil liberties in contractual relationship with all the civil rights of married couples, we urge the Office of the Stated Clerk to explore the feasibility of entering friend-of-court briefs and supporting legislation in favor of granting civil rights to same-sex partners.

Id. (quoting Resolution of the Church's 208th General Assembly in 1996).

[315] Cheryl Wetzstein, *Deadline Looms In Hawai'i To Ban Same-Sex Unions; Change Sought In Constitution*, WASH. TIMES, Apr. 7, 1997, at A8.

Matsunaga, McCartney and Metcalf.[316] The conferees replied with silence, suggesting that both sides had their heels dug in, or that private negotiations were underway, or a mix of both.

As the week of April 6 opened, there was still no word from the conferees. On Monday, April 7, a large advertisement appeared in the *Honolulu Advertiser* in support of the Senate conferees: "They call them stubborn, we call them courageous."[317] It was sponsored by the Clergy Coalition for Equality and Diversity, and paid for by the ACLU Foundation of Hawai'i.[318] The Coalition also aired radio and TV spots, and presented 1000 signatures from opponents of the Amendment.[319] At the same time, the Human Rights Campaign, a Washington, D.C.-based lobby for lesbian, gay and bisexual rights, "bought air time for a specially produced announcement urging viewers to call their legislators and tell them to 'preserve' the constitution for 'civil rights and fairness.'"[320]

On Tuesday, April 8, the conference committee convened, but only long enough for the Senate conferees to deliver the following new proposed Amendment to the House conferees: "The legislature shall have the power to regulate the issuance of marriage licenses."[321] The text did not recommend a special location in the constitution for the proposed Amendment. The Senate Judiciary Committee's handout provided the following explanation of its proposal:

> A. Effect: Existing restrictions limiting marriage licenses to couples of the opposite sex would be validated. *Baehr v. Lewin* would be overruled in this regard and the courts would be without the power to mandate the issuance of marriage licenses to same-sex couples.
> B. Rights and Benefits: The constitutional amendment does not impose any restrictions upon access to legislature, administration, or courts on the recognition to others of rights and benefits afforded married couples. No such rights are intended to be constitutionally conferred. But no limitation on the due process or equal protection rights of any person are imposed.
> C. Summary: The status of marriage as a union between persons of the opposite sex is constitutionally preserved. The extension of rights to nontraditional couples is permitted.[322]

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[316] *See Same-Sex Marriage Foes Protest*, HONOLULU STAR-BULL., Apr. 2, 1997, at A3.

[317] William Kresnak, *Same-Sex Deadline Passes*, HONOLULU ADVERTISER, Apr. 12, 1997, at A1.

[318] *See id.*

[319] *See id.*

[320] Lisa Keen, *Marriage Fight Takes Odd Turn; Hawai'i Mulls Two-pronged Attack*, WASH. BLADE, Apr. 18, 1997, at 1, 26.

[321] Press Release from Senate Judiciary Committee (Apr. 8, 1997).

[322] *Id.*

In addition, the Judiciary Committee offered an outline of its proposed revisions to the benefits bill. These included retaining all of the House's proposed rights, plus the Senate's proposed rights related to survivorship, health, jointly held property, and legal standing, plus a "[t]wo year fiscal impact study of Senate proposed rights,"[323] and the removal of the provision that the effective date of the act would be tied to the ratification of the proposed constitutional amendment.[324]

Supporters of same-sex marriage were dismayed by this turn of events. Tracey Bennett, the lobbyist for Marriage Project-Hawai'i, said, "I think that the Senate has caved in to the tyranny of the majority and sold out the rights of nontraditional couples to marry . . . I'm crushed."[325] Supporters of the amendment, on the other hand, were encouraged. Rev. Alexander said, "I think it's major progress that the Senate has finally conceded that marriage is not sex discrimination."[326] For their part, House Speaker Souki and Chairman Tom were not satisfied. The Speaker said, "We're just as far apart as we've ever been . . . . It hasn't resolved the problem at all."[327]

On the evening of Wednesday, April 9, the conferees reconvened once again. Chairman Tom offered the following proposed constitutional amendment text, again as a new section 23 within article I: "The legislature shall have the power to reserve marriage to opposite-sex couples."[328] The legislative findings in section 1 of the bill were also modified by the addition of the following sentence: "[b]ecause of its preferred status the legislature can, and does, provides [sic] certain rights and benefits to couples who are legally married."[329] The Senators offered no immediate response.

On Thursday morning April 10, dueling advertisements ran in the newspapers. The first, by the Senate conferees themselves, offered a defense of their position.[330] The second, challenging the Senators, was placed by the Alliance for Traditional Marriage - Hawai'i.[331] The latter advertisement was

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[323] *See id.*

[324] *Id.*

[325] William Kresnak, *Same-Sex Marriage Strategy Shifting*, HONOLULU ADVERTISER, Apr. 9, 1997, at A1 (quoting Tracey Bennett).

[326] *Senators Offer New Same-Sex Amendment*, HONOLULU STAR-BULL., Apr. 8, 1997.

[327] *House Rejects Senate's Idea On Same-Sex*, HONOLULU STAR-BULL., Apr. 9, 1997, at A1 (quoting House Speaker Joe Souki).

[328] H.R. 117, C.D. 1, 19th Leg., Reg. Sess. (Haw. 1997). No revised version of the reciprocal beneficiaries bill was handed out by either set of conferees at this conference committee meeting.

[329] *Id.* The first sentence of section 1 was also altered to conform to the proposed language of the Amendment.

[330] Advertisement by Senate conferees, Apr. 10, 1997, at B2.

[331] Advertisement by Alliance for Traditional Marriage - Hawai'i, HONOLULU ADVERTISER, Apr. 10, 1997, at B2.

entitled, "Gay 'Marriage' in Hawai'i? Presenting 'A Chronicle of Deceit in the Hawai'i State Senate,' Starring Sen. Avery Chumbley, Sen. Matt Matsunaga, Sen. Mike McCartney, Sen. Wayne Metcalf."[332] After providing its alleged "chronicle," the advertisement concluded: "Quite frankly, this [Senate] amendment is a trick. AND THEY KNOW IT. This Friday, April 11, is the Legislature's deadline for all constitutional amendments. ACT NOW! Call these senators today and tell them to quit toying with traditional marriage. It's our last chance."[333]

No further word came from the Senators. Later that day, House Speaker Souki and Chairman Tom held a press conference, in which they insisted that the words "opposite-sex couples" must be in the Amendment.[334] That evening, NBC news did a feature story on the media campaign surrounding the Amendment, and reported that while the Alliance for Traditional Marriage had spent $13,000 on its advertisements, it had been outspent two-to-one by the American Civil Liberties Union.[335] The same segment also showed Senator Chumbley reporting that his fax machine had been going non-stop for two days, receiving faxes from all across the country running almost twenty-five to one against same-sex marriage.[336]

There was no further comment the next day. That evening, a joint conference committee meeting was called, but then cancelled. An "unofficial" meeting went on behind closed doors from 10:30 p.m. to 2:00 a.m., at which time the conferees left abruptly, saying they were "on call" for the next meeting.[337] A lengthy news report in the *Advertiser* on Sunday the 13th indicated that while the Senate appeared ready to accept the House's proposed Amendment, the House was still balking at the Senate's revised reciprocal beneficiaries bill, including the issue of its effective date.[338]

By now, the newspapers were fed up. That same day, the *Honolulu Advertiser* ran a strongly-worded editorial, entitled, "Same-Sex Marriage: A

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[332] *Id.*

[333] *Id.*

[334] *See* Robbie Dingeman & William Kresnak, *Same-Sex Partisans Dismayed: House Promises to Insist on Wording*, HONOLULU ADVERTISER, Apr. 11, 1997, at A1.

[335] Local evening news, NBC television broadcast, Apr. 10, 1997.

[336] *See id.*

[337] *See Benefits Stall Same-Sex Talks*, HONOLULU STAR-BULL., Apr. 12, 1997, at A1.

[338] William Kresnak, *Marriage Ruling Feared; Pressure Builds On Same-Sex Issue*, HONOLULU ADVERTISER, Apr. 13, 1997, at A1, A5. According to the story, "Tracey Bennett, the lobbyist for Marriage Project-Hawai'i, which supports same-sex marriage, said she is convinced lawmakers will agree this week, bowing to pressure to preserve the traditional family." *Id.* at A5. "'If people want to preserve the family, then they should work to end domestic violence and drug abuse, go after deadbeat dads and solve the crime problem,' she said. 'Go after the real family problems.'" *Id.*

compromise is needed; this has gone on long enough."[339] "Allow the House to put its constitutional amendment on the ballot. Between now and the day of the vote, Hawai'i's electorate can debate whether it really wants to place this kind of idea in its constitution."[340] It concluded, "[t]he point now is to deal with this issue and move on. Enough already."[341] On Monday the 14th, the *Star-Bulletin* ran a similar editorial. "House-Senate negotiators have made significant progress toward an agreement on a constitutional amendment banning same-sex marriage," it began, "[t]hey should not let the accord that is within their reach slip through their fingers in the waning days of the legislative session."[342] After reviewing the situation, it concluded:

> We believe the state should refrain from making a moral judgment on homosexual marriage and issue marriage licenses to same-sex couples. But public opinion has been aroused to the point that the proposed constitutional amendment should be placed before the voters. Some benefits should be granted to domestic partners in lieu of marriage benefits. This can be a gradual process. It is reasonable to assess the financial impact on the state and employers before granting benefits, as the House proposes. However, it is not reasonable to let another year go by without action by the Legislature. It's time to make a deal.[343]

As this editorial hit the stands, it appeared that the two sides were indeed nearing an agreement. That afternoon, Chairman Tom said the House might need to agree to the benefits in the Senate's bill in order to ensure agreement on the constitutional amendment. Senate President Mizuguchi said, "I'm confident the House will come and meet us halfway. Hopefully, we can continue to negotiate."[344] But no new time was set for the conference committee to meet.

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[339] Editorial, *Same Sex Marriage: A Compromise Is Needed; This Has Gone On Long Enough*, HONOLULU ADVERTISER, Apr. 13, 1997, at B2 [hereinafter *A Compromise is Needed*].

[340] *Id.* Consistent with its longstanding views, it added, "[b]ut at the same time, enact a straightforward law that allows the state to issue licenses for reciprocal partnerships that convey precisely the same list of rights, privileges and obligations as a marriage license." *Id.* Chairman Tom disputed this recommendation in a subsequent letter to the editor. *See* Terrance Tom, *Same-Sex Editorial Wrong on Three Fronts*, HONOLULU ADVERTISER, Apr. 22, 1997, at A7.

[341] *A Compromise is Needed*, *supra* note 339, at B2.

[342] *Same-Sex Marriage*, HONOLULU STAR-BULL., Apr. 14, 1997, at A8. Notwithstanding Senator Matsunaga's earlier remarks on the Senate floor, the Senate conferees replied with a letter insisting that same-sex marriage "is a 'civil rights' issue." Matt Matsunaga, Avery Chumbley, Wayne Metcalf, and Mike McCartney, *Support Of Civil Rights Cannot Be Done Gradually*, HONOLULU STAR-BULL., Apr. 18, 1997, at A19

[343] *Same-Sex Marriage*, *supra* note 342, at A8.

[344] William Kresnak, *House Softens Terms On Same Sex*, HONOLULU ADVERTISER, Apr. 15, 1997, at A1, A2 (quoting Senate President Norman Mizuguchi). The article also reported that Senator Chumbley, "who is up for re-election next year, said his office received more than 125 telephone calls yesterday from people on the same-sex marriage issue. But he couldn't say whether most of the calls were for or against same-sex marriage." *Id.* at A2.

After two days of further negotiations behind the scenes, the conference committee reconvened on Wednesday evening, April 16. Senator Matsunaga called the negotiations "long," "hard," and "tough," complaining that "[t]here have been lobbying efforts we didn't approve of" (apparently referring to the ads run by the Alliance for Traditional Marriage).[345] Chairman Tom had this to say:

> Clearly the agreements we reach today are historic, for they represent the first time any state in this nation has attempted to address the needs and concerns of gay and lesbian couples in a comprehensive manner. At the same time, our agreements give the people of Hawai'i the opportunity to reconfirm their belief that marriage, the fundamental unit of our society, is the union of one man and one woman. I believe that the nation will be watching closely to learn the results of our efforts, and I hope that our decisions will serve as a model for the rest of the nation in resolving these difficult issues.[346]

Then the conferees adjourned, in order to allow for the final preparation of the bills and committee reports. The next morning, the conferees signed both bills and conference committee reports and delivered them to the Governor, thus meeting the ten-day deadline for amendments.[347]

Sue Reardon, Co-Chair of Marriage Project-Hawai'i, "said she was disappointed and that the decision would hurt Hawai'i and its children because 'this country is about civil rights' and the lawmakers decision will take away the marriage right from gay and lesbian couples."[348] On the other hand, Jack Hoag from Hawai'i's Future Today "praised the lawmakers' actions. 'We're relieved that finally, after several years, the people's voice finally will be heard.'"[349]

Reaction on the mainland was also mixed, on both sides. The *Washington Blade* seemed puzzled.[350] A spokesman for the Washington, D.C.-based Human Rights Campaign stated, "'[t]he benefits are an enormous step forward, but they're not the same as equal treatment under the law.'"[351] The Family Research Council, also based in Washington, D.C., called the package

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[345] William Kresnak, *Accord Reached On Same-Sex Bills*, HONOLULU ADVERTISER, Apr. 17, 1997, at A1 (quoting Senator Matt Matsunaga).

[346] *Id.* (quoting House Chairman Terrence Tom).

[347] *See* H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997); H.R. 118, 19th Leg., Reg. Sess. (Haw. 1997). *See also Ban In Voter Hands*, HONOLULU STAR-BULL., Apr. 17, 1997, at A1.

[348] William Kresnak, *Accord Reached on Same-Sex Bills*, HONOLULU ADVERTISER, Apr. 17, 1997, at A1 (quoting Sue Reardon, Co-Chair of Marriage Project-Hawai'i).

[349] *Id.* (quoting Jack Hoag of Hawai'i's Future Today).

[350] *See* Lisa Keen, *Marriage Fight Takes Odd Turn; Hawai'i Mulls Two-pronged Attack*, WASH. BLADE, Apr. 18, 1997, at 1.

[351] Cheryl Wetzstein, *Hawai'i Compromise Boosts Benefits To Same-Sex Couples*, WASH. TIMES, Apr. 18, 1997, at A3 (quoting David Smith, spokesperson for Human Rights Campaign, a leading homosexual advocacy group in Washington, D.C.).

a "bad deal."[352] Other supporters of a Marriage Amendment were more positive.[353]

On Thursday afternoon, the Hawai'i Supreme Court also denied the Plaintiffs' motion to lift the stay on the trial court's December 1996 decision in *Baehr v. Miike*.[354] At that point, the battle to establish the meaning of the Marriage Amendment began in earnest. Dan Foley told the *Honolulu Advertiser* that the Amendment wouldn't end the *Baehr v. Miike* case because, in his opinion, the proposed text did not ban same-sex marriage, it only stated that in the future the Legislature has the power to reserve marriage to opposite-sex couples.[355] Therefore, Foley insisted that even if the Amendment were to be ratified, the Legislature would still have to pass a bill in the 1999 session.[356] The newspaper story also reported that "[l]awmakers believe, however, that the constitutional amendment and benefits package for 'reciprocal beneficiaries' would put an end to the case, since there is already a law on the books that states marriage is between a man and a woman. Ultimately, the courts would decide."[357]

On April 21, the Senate passed the reciprocal beneficiaries' bill by a vote of twenty-two "ayes" to three "nays."[358] The House did likewise, on April 29, by a vote of thirty-eight "ayes" to ten "nays."[359] The final version included significant concessions from both sides. The House agreed to allow July 1997 to be the effective date of the Act, removing the connection between the

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[352] Family Research Council News Release, *Hawai'i Lawmakers Throw Away Moral Card in Deadly Game Over Homosexual 'Marriage'*, Apr. 18, 1997. Similar sentiments were expressed by the Reverend Lou Sheldon, leader of the Traditional Values Coalition. "Neither side has done a lot of good with this kind of [mixed] message .... Both sides lose a lot. Even though they gain, it's crossed out." Cheryl Wetzstein, *Hawai'i Agreement On Same-Sex Unions Won't Work, Foes Say; Marriage Amendment In Jeopardy*, WASH. TIMES, Apr. 29, 1997, at A10 (alteration in original).

[353] *See* Maggie Gallagher, *Aloha Chorus For The Gay Marriage Debate*, WASH. TIMES, Apr. 22, 1997, at A15; David Orgon Coolidge, *At Last, Hawaiians Have Their Say On Gay Marriage*, WALL ST. J., Apr. 23, 1997, at A19.

[354] *See* Plaintiff-Appellees' Mot. to Vacate Stay (filed Mar. 12, 1997); and Def.-Appellant Miike's Memorandum in Opposition to Mot. to Vacate Stay (filed Mar. 19, 1997). On the supreme court's denial of the motion, see *Same-Sex Dispute Isn't Going Away*, HONOLULU ADVERTISER, Apr. 18, 1997, at A1.

[355] *Accord Reached on Same-Sex Bills*, *supra* note 348, at A1 (quoting Dan Foley).

[356] *See id.*

[357] *See id.* at A7. Evan Wolfson, Foley's co-counsel from the Lambda Legal Defense and Education Fund, echoed these views. *See* Lisa Keen, *Marriage Fight Takes Odd Turn; Hawai'i Mulls Two-Pronged Attack*, WASH. BLADE, Apr. 18, 1997, at 26.

[358] *See* 1997 HAW. SEN. J. 661. The "nays" were cast by Senators M. Ige, Kawamoto, and Slom. *See id.*

[359] *See* 1997 HAW. HOUSE J. 914. The ten "nays" were cast by Representatives Ahu Isa, Chang, Kahikina, McDermott, Meyer, Moses, Pendleton, Ward, Whalen and White. *See id.* Representatives Cachola, Okamura and Takumi were excused. *See id.*

reciprocal beneficiaries act and the proposed amendment.[360] The House also allowed numerous other additional benefits added by the Senate to remain in the statute, including health benefits for reciprocal beneficiaries.[361] On the other hand, the Senate agreed to a two-year cap on health benefits for public employees, to be accompanied by a study, and agreed to limit the costs of reciprocal beneficiary-related health benefits for private employers.[362] In addition, the Senate agreed to delete provisions relating to partnership property, personal income tax, and durational residency requirements.[363] Finally, and perhaps most significantly, the Senate agreed to the House's proposed language, "[n]otwithstanding any other law to the contrary, the rights and benefits extended by this Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided herein."[364]

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[360] *See id.*

[361] *See id.*

[362] *See* 1997 HAW. SEN. J. 661.

[363] *See id.*

[364] H.R. 118, C.D. 1, 19th Leg., Reg. Sess. (Haw. 1997). Following the passage of the bill, 30 members of the Hawai'i Business Health Council sent a letter asking Governor Cayetano to veto the bill. *See* Angela Miller, *Businesses Seek Veto of Benefits Bill*, HONOLULU ADVERTISER, June 14, 1997, at A1. The Governor, who had previously promised to sign the bill, instead allowed it to become law on July 8 without his signature. *See* 1997 Haw. Sess. Laws 383. According to a news report, the Governor called the bill "an important step," but said the bill should be amended to be limited to gay and lesbian couples. *See* William Kresnak, *Partner Benefits Bill Now State Law*, HONOLULU ADVERTISER, July 9, 1997, at A1.

> When you see in the preamble of the bill where it talks about a widowed mother and her son could qualify, that wasn't the intent of what I wanted to see accomplished .... I was opposed to same-sex marriage but recognized the need to be fair to gay couples to provide for loved ones. It's a concern that it's opened up to other people.

Id. Senate Judiciary Co-Chair Matsunaga was positive about the Governor's suggestion that the law be revised, but House Judiciary Chairman Tom was not. *See id. See also* Angela Miller, *Employers Challenge Reciprocal Benefits*, HONOLULU ADVERTISER, July 12, 1997, at A1.

On July 11, five major companies filed suit challenging the law (Outrigger Hotels and Resorts, Bank of Hawai'i, C. Brewer & Co. Ltd., Hawaiian Electric Industries and Theo H. Davies & Co., Ltd.), and seeking a clearer interpretation of its provisions, and claiming that if it were interpreted broadly, it would conflict with the federal Employee Retirement Income Security Act ("ERISA"). *See* Hawaiian Elec. Indus., Inc. v. Akiba, Civil No. 97-00913 (D. Haw. July 11, 1997). The attorney for the companies, John D'Amato, said, "[w]e feel that we've got a state law that goes beyond the authority of the state to make law in the area of benefit plans." *Employers Challenge Reciprocal Benefits*, *supra*, at A1.

The *Star-Bulletin* weighed in with an editorial sympathetic to the Governor's critique. *See Court Challenge Could Improve Benefits Law*, HONOLULU STAR-BULL., July 15, 1997, at A12. Two days later, the newspaper reported that a poll had found that 41.8% of residents approved of the bill, 46.8% disapproved, and only 17.3% would or knew someone who would, sign up for benefits. *See* Linda Hosek, *Reciprocal What? 42% Back Benefits*, HONOLULU STAR-BULL., July 17, 1997, at A1.

As for the Marriage Amendment, the text itself was unchanged from that proposed by the House on April 9. The legislative purpose statement in section 1 of the bill, however, was reworded to read, in final form, as follows:

> SECTION 1. The purpose of this Act is to propose an amendment to article I of the Constitution of the State of Hawai'i, to clarify that the legislature has the power to reserve marriage to opposite-sex couples. The legislature finds that the unique social institution of marriage involving the legal relationship of matrimony between a man and a woman is a protected relationship of fundamental and unequaled importance to the State, the nation, and society.[365] The legislature further finds that the question of whether or not the state should issue marriage licenses to couples of the same sex is a fundamental policy issue to be decided by the elected representatives of the people.[366] This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain

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On July 4, prior to the suit, Insurance Commissioner Graulty had written to the Attorney General, seeking her interpretation of section 4 of Act 383. *See* Op. Haw. Att'y Gen. No. 97-110 (Dec. 2, 1997). On August 14, Attorney General Bronster issued Op. No. 97-05 (Aug. 14, 1997). The opinion concluded that the section which concerns mandatory health coverage, "applies only to insurance companies and not to mutual benefit societies or health maintenance organizations." *Id.* She added that "[w]e are aware that this interpretation will result in a relatively small number of individuals having access to reciprocal beneficiary family coverage," about 1800 out of a total of 320,000. *Id.* "Nevertheless, this interpretation is not only required by the plain language of the relevant statutory sections, but is buttressed further by section 74 of the Reciprocal Beneficiaries Act, which states: "'The rights and benefits extended by this Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided.'" *Id.* (quoting Act 383, Session Laws of Hawai'i 1997).

On September 26, U.S. District Judge David Ezra agreed with the Attorney General and ruled that the law did not cover health maintenance organizations or mutual benefit societies, the subjects of the lawsuit. It was possible, he declared, the law applied to companies that contract with insurance companies for health care, but since the suit before him didn't include insurance companies, he would not rule on this. *See also* Linda Hosek, *Reciprocal Benefits Limited. [A Deal Would Exempt Most Firms From Having To Pay Health Benefits]*, HONOLULU STAR-BULL., Sept. 26, 1997, at A1. On September 30, 1997, Judge Ezra approved a Consent Order which embodied these conclusions.

In December, Attorney General Bronster issued an additional opinion which addressed the remaining questions which Commissioner Graulty had raised in his original July 4 letter. *See* Op. Haw. Att'y Gen. 97-10 (1997).

[365] At this point, the conferees dropped a sentence from the House's proposed version, which read: "Because of its preferred status the legislature can, and does, provides [sic] certain rights and benefits to couples who are legally married." *Compare* H.R. 117, C.D. 1, Proposed 2, lines 9-11, 19th Leg., Reg. Sess. (Haw. 1997), *with* H.R. 117, S.D. 1, C.D. 1, lines 9-11, 19th Leg. Reg. Sess. (Haw. 1997).

[366] At this point, the conferees dropped the phrase, "and not by judicial fiat," which had ended this sentence in the House's proposed version. *Compare* H.R. 117, C.D. 1, Proposed 2, lines 14-15, 19th Leg., Reg. Sess. (Haw. 1997), *with* H.R. 117, S.D. 1, C.D. 1, line 12, 19th Leg., Reg. Sess. (Haw. 1997).

> open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes.[367]

The text of the conference committee report was sparse but clear. Between the opening formalities that the conference committee had met and agreed upon the text of the bill, and the closing formalities that the conference committee recommended its final passage, the conferees offered the following:

> The purpose of the bill is to provide the people of Hawai'i with the opportunity to amend the Hawai'i State Constitution to expressly state that the Legislature has the power to constitutionally reserve marriage to couples of the opposite sex, thereby addressing the ruling in *Baehr v. Lewin* on that issue. Your Committee has amended both the purpose clause of the bill and the language of the proposed amendment to more clearly fulfill these purposes and intentions.[368]

The Marriage Amendment was passed by both chambers of the Legislature on April 29, 1997. The Senate acted first, approving it by a unanimous vote.[369] The House responded with a vote of forty-four "ayes," six "nays," and one member excused.[370]

III. THE MEANING OF THE MARRIAGE AMENDMENT

In light of the above narrative, how shall we characterize the "meaning" of the Marriage Amendment? On the one hand, the Amendment is a simple solution to a straightforward problem: The people, having concluded that the *Baehr* decision misinterprets the Hawai'i Constitution, have amended the constitution in order to correct that misinterpretation. On the other hand, it is necessary to interpret some of the precise phrases of the Marriage Amendment. The debate surrounding its passage involved an extensive and sometimes illuminating dialogue about what the Amendment was or was not intended to accomplish, and how. Certain issues and questioned were considered, and then decided, in the process of finalizing the Amendment text. This section addresses three crucial questions: the Amendment's purpose, placement, and provisions.

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[367] H.R. 117, S.D. 1, C.D. 1, 19th Leg., Reg. Sess. (Haw. 1997).

[368] H.R. 117, S.D. 1, C.D. 1, H.R. CONF. COMM. REP. No. 1, 19th Leg., Reg. Sess. (Haw. 1997).

[369] *See* 1997 HAW. SEN. J. 766.

[370] *See* 1997 HAW. HOUSE J. 922. Representatives Case, Hamakawa, Morita, Saiki, Takumi and Tamas voted "no," and Representative Okamura was excused. *See id.*

A. Purpose

The purpose of the Marriage Amendment is stated in two places in the final documents. It includes a primary substantive purpose, accompanied by a secondary procedural implication. First, section 1 of H.B. 117, C.D. 1 states: "The purpose of this Act is to propose an amendment to article I of the Constitution of the State of Hawai'i, to clarify that the legislature has the power to reserve marriage to opposite-sex couples."[371] Second, the conference committee report accompanying the legislation elaborates on this point:

> The purpose of the bill is to provide the people of Hawai'i with the opportunity to amend the Hawai'i State Constitution to expressly state that the Legislature has the power to constitutionally reserve marriage to couples of the opposite sex, thereby addressing the ruling in *Baehr v. Lewin* on that issue.[372]

In short, the Amendment aims "to clarify" the proper constitutional powers of the Legislature, "thereby addressing" a supreme court ruling which has thrown the state into serious confusion.

The primary purpose of the Amendment is not to *condition* but to *clarify*. More specifically, the Amendment aims to reaffirm the Legislature's power to maintain the existing marriage law, which defines marriage as the union of a man and a woman, without foreclosing the power of the Legislature to change that definition in the future. Why does the Legislature currently consider this existing law valid? In the words of the legislative findings: "the unique social institution of marriage involving the legal relationship of matrimony between a man and a woman is a protected relationship of fundamental and unequaled importance to the State, the nation, and society."[373] This is a positive, substantive statement about the meaning and importance of existing marriage law, accompanied by a willingness to remain open to further petition and deliberation on the issue.

In so doing, the Amendment thereby addresses the ruling in *Baehr v. Lewin* on that issue. The Amendment rejects the attempt in *Baehr* to read the bill of rights in article I in such a way as to usurp this definitional power from the Legislature. This is so important because: "the question of whether or not the state should issue marriage licenses to couples of the same sex is a fundamental policy issue to be decided by the elected representatives of the people."[374]

The purpose of the Amendment, therefore, is two-dimensional, both substantive and procedural. Substantively, the Marriage Amendment makes

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[371] H.R. 117, S.D. 1, C.D. 1, 19th Leg., Reg. Sess. (Apr. 18, 1997).
[372] H.R. 117, CONF. COMM. REPT. No. 1, 19th Leg., Reg. Sess. (1997).
[373] H.R. 117, S.D. 1, C.D. 1, 19th Leg., Reg. Sess. (Haw. 1997).
[374] *Id.*

this simple statement to the government of Hawai'i, not least the judicial branch: Marriage as the union of a man and a woman does not contradict the bill of rights. The bill of rights neither requires nor forbids it. This substantive point leads, then, to a procedural one: The legal definition of marriage belongs to the Legislature.

Together, these two dimensions of the Marriage Amendment convey a positive message. In the words of Chairman Tom, spoken on the House floor the evening that the Marriage Amendment passed, "Passage of this bill will allow the citizens of our state to exercise the most precious and fundamental right they possess, the right to be governed under laws of their own choosing."[375]

B. Placement

The specific location of the Marriage Amendment as article I, section 23 of the Hawai'i State Constitution embodies this understanding of its purpose. Recall that, to begin with, different locations were proposed by each chamber. The House proposed that the Amendment be placed *in* article I, section 5, as an additional paragraph in the equal protection clause of the constitution. Since the court's misinterpretation of that section was the issue, this seemed like the logical place to put it.[376]

To the Senate, however, this was tantamount to placing an "exception" into the heart of the equal protection clause. In response, it proposed that the Amendment be relocated in article IX, the public health and welfare article, as a reflection of the legislature's "commitment to the health and welfare of the citizens of Hawai'i."[377]

The House rejected this proposal, because the Senate's version left untouched both the text of the equal protection clause *and* the court's misinterpretation of it. Perhaps this was what Speaker Souki meant when he warned of "the wide philosophical differences" between the versions initially adopted by each chamber.[378]

On April 1, when the House and Senate conferees reconvened under intense pressure, Chairman Tom proposed a new text, this time to be placed in article

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[375] 1997 HAW. HOUSE J. 919 (statement of Rep. Tom).

[376] *See* H.R. STAND. COMM. REP. No. 1, 19th Leg., Reg. Sess. (1997).

[377] Statement of Senator Chumbley, *supra* note 150, at 3.

[378] Press Release from Representative Terrance W.H. Tom, *Re: Same-Sex Marriage* (Feb. 6, 1997), at 3. It would appear that Speaker Souki's instincts were on target, given the nature and placement of article IX. Sandwiched between article VIII (Local Government) and article X (Education), article IX is a laundry list of ten functions that the state will perform, beginning with public health and ending with public safety. Placing the Amendment in that article would only have reinforced the Hawai'i Supreme Court plurality's view that the State is "the exclusive progenitor of the marriage partnership." *Baehr v. Lewin*, 74 Haw. at 559, 852 P.2d at 48.

I as a new section 23. This proposed location was accepted by both sides, even though the rest of the text was subsequently revised in the course of the negotiations.

On balance, it would appear that the "wide philosophical differences" were resolved in the House's favor. Placing the Marriage Amendment in article I, but not in the equal protection clause, makes two things clear: (1) the Amendment does not "condition" the equal protection clause, (2) the Amendment is not only a general statement about marriage and the separation of powers, but a specific correction of the court's misinterpretation of equal protection under article I.

In addition, the decision not to place the Marriage Amendment in article IX makes it further apparent that marriage is not to be understood as simply one more possible "State Interest," alongside "Slum Clearance" and "Public Sightliness," to be "balanced" against the individual rights in article I. Instead, individual rights, social institutions and government are all acknowledged as part of the legal order, subject to the constitution and statutes of Hawai'i.

One can read this in minimal or maximal ways: As a mere statement that article I, section 5 has nothing to do with whether marriage should be defined as a male-female community; or as a more substantive statement that marriage is a unique community which complements, rather than contradicts, the bill of rights. Interestingly, even this maximal reading allows for legalized "same-sex marriage." It just requires that the Legislature do it.

C. Provisions

There remain at least two important questions of textual interpretation. The first concerns the meaning of the term "marriage": Is it licenses, benefits, or both? The second involves the term "shall": Is the Marriage Amendment self-executing, or does it require further legislation?

1. "Marriage" – the question of licenses and benefits

Does the term "marriage" in the Amendment refer only to a marriage license, or does it also include the rights, responsibilities, benefits and burdens that go with the license?

This is a relevant question because one might make the following argument: The Marriage Amendment resolves the question of how article I, section 5 relates to who gets a marriage *license*. However, it does not prohibit the court from ruling that article I, section 5 requires the equal distribution of what are currently marital *benefits*. Indeed, to be consistent with *Baehr*, the court should so rule.

One might further argue that because the *Baehr* case is solely a challenge to Hawai'i Revised Statutes ("HRS") section 572-1 (the marriage *licensing* provision), and (under the above interpretation) the Marriage Amendment is solely a response to *Baehr*, then the term "marriage" in the Amendment should be interpreted to refer only to marriage *licenses*, rather than the rights, responsibilities, benefits or burdens connected with marital status.

However, the text of the Marriage Amendment gives the Legislature the power "to reserve marriage to opposite-sex couples." It does not make a distinction between licenses and benefits or burdens. The question, then, is whether such a distinction can be fairly read into the text.

This would be an unpersuasive distinction for several reasons. The first has to do with the legal meaning of the term "marriage." Legally speaking, the term "marriage" refers to a *status* which a marriage license recognizes. The license recognizes the existence of the marriage precisely for legal purposes. Those purposes are embodied in the package of rights, responsibilities, benefits and burdens in our laws. So it makes no sense to distinguish between marriage licenses and rights based on marital status.

Second, the Hawai'i Legislature views marriage as a unique social institution. The whole purpose of licensing marriages, in its mind, is to provide rights, duties and benefits to marriages. For instance, the text agreed to by the conference committee finds that "the unique social institution of marriage involving the legal relationship of matrimony between a man and a woman is a protected relationship of fundamental and unequaled importance to the State, the nation, and society."[379] Without foreclosing changes in the future, the current Hawai'i Legislature regards marriage as a pre-existing social institution defined by the union of a man and a woman, not defined first of all by the State. It sees marriage law as a secondary category built upon a primary social institution, rather than the other way around.[380]

Third, while technically speaking the *Baehr* case was launched as an attack exclusively on HRS section 572-1, a provision which solely concerns eligibility for a marriage license, the Plaintiffs' entire challenge of that provision was premised on the intrinsic connection between licenses and benefits. Precisely because marriage licenses are the gateway to rights, responsibilities, benefits and burdens, the Plaintiffs argued that they were entitled to marriage licenses.[381]

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[379] H.R. 117, S.D. 1, C.D. 1, 19th Leg., Reg. Sess. (Haw. 1997) (enacted).

[380] This is consistent with the text of Act 217, which states that "[t]he legislature further finds that section 572-1, Hawai'i Revised Statutes, and all of Hawai'i's marriage licensing statutes, as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages." Act 217, 17th Leg., Reg. Sess. (1994).

[381] *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings Filed on July 9, 1991 at 20, Baehr v. Lewin, 1996 WL 694235 (Haw. Cir. Ct. 1991)

Fourth, the text of the plurality's opinion in *Baehr* itself argues for an inherent link between licenses and what it calls "a multiplicity of rights and benefits reserved exclusively to that particular relation:"[382]

> *By its very nature*, the power to regulate the marriage relation includes the power to determine *the requisites of a valid marriage contract* and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, *the duties and obligations it creates, its effect upon property and other rights*, and the grounds for marital dissolution.[383]

In the passage just quoted, "the marriage relation" embraces both "requisites" and "duties," "obligations," "rights." They are a seamless garment, logically speaking.[384]

Finally, the legislative history surrounding the passage of the Amendment, especially in the final stages of negotiation, confirms that the Legislature meant to include not only licenses but also rights, responsibilities, benefits and burdens within the scope of the term "marriage." The original House proposal explicitly sought to cover "[s]tatutes, regulations, laws, rules, orders, decrees and legal doctrines that define or regulate marriage, the parties to marriage, or the benefits of marriage."[385]

The Senate proposal, in contrast, spoke of "the power to regulate and define the institution of marriage, including the reservation of marriage to couples of the opposite sex." It qualified this, however, by proposing that "this reservation of marriage shall be effective only if the laws of the State ensure that the application of this reservation does not deprive any person of civil rights on the basis of sex."[386] In effect, the Senate initially wished to distinguish between "the institution of marriage" (which it was willing to constitutionally reserve to opposite-sex couples), and legal rights, responsibilities, benefits and burdens related to marriage (which it still wished to subject to equal protection analysis under article I, section 5).

(No. 91-1394-05) (stating that "[p]laintiffs are denied numerous state rights and benefits by the denial of marriage licenses," and listing statutes making benefits contingent on marriage).

[382] *Baehr v. Lewin*, 74 Haw. at 558-559, 852 P.2d at 58 (1993).

[383] *Id.* (emphases added). *See also id.* at 564, 852 P.2d at 60 ("Accordingly, on its face and (as Lewin admits) as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits"); *Id.* at 581, 852 P.2d at 67 (almost identical quote).

[384] Circuit Court Judge Kevin Chang repeated these same connections in the text of his decision. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *19 (D. Haw. 1996). As a result, the only way to separate out licenses and benefits would be for the Legislature to choose to widen eligibility for certain benefits beyond the circle of married persons. This is precisely what was done in the Reciprocal Beneficiaries Act. *See* Act 383, 19th Leg., Reg. Sess. (Haw. 1997).

[385] H.R. 117, 19th Leg., Reg. Sess., 1997 Haw. Sess. Laws (Haw. 1997) (enacted).

[386] H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997).

As we saw in the earlier narrative, it was exactly this attempt of the Senate's which was declared wholly unsatisfactory, not only by the House, but also by the wider public, including the media. Once conferees were appointed and both sides came to the table, the next version, which was proposed by the House, rejected the Senate's approach and re-linked status and benefits: "The legislature shall have the power to reserve the legal recognition of the marriage relationship, and its attendant rights, benefits, and burdens to couples of the opposite sex."[387]

The final back-and-forth between the conferees sheds further light on our inquiry. The Senate conferees responded to the House by offering a different version: "The legislature shall have the power to regulate the issuance of marriage licenses."[388] This proposal was simultaneously broader and narrower than the House's proposal: broader, in that it did not limit the object of the amendment to the question of opposite-sex couples, yet narrower, in that it reduced the focus of the regulatory power to licensing, rather than marriage's "attendant rights, benefits and burdens." It was clear that the Senate still sought to distinguish between "marriage licenses" and marriage-related "rights and benefits" from examining its own commentary on its proposed text:

> B. Rights and Benefits: The constitutional amendment does not impose any restrictions upon access to [the] legislature, administration or courts on the recognition to others of rights and benefits afforded married couples. No such rights are intended to be constitutionally conferred. But no limitation on the due process or equal protection rights of any person are imposed.[389]

This ambiguous language still left open the possibility of distinguishing licensing (supposedly the object of the Amendment) from rights and benefits (supposedly subject to article I, section 5).

Within a day, the House conferees returned to the table with the following language: "The legislature has the power to reserve marriage to opposite-sex couples."[390] This language, in contrast to the Senate's language, was simultaneously narrower and broader: It was narrower, because it focused specifically on opposite-sex couples, yet broader, in that it reinstated the term "marriage," which is wider than "marriage licenses."

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[387] H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997) (enacted).

[388] Press Release from the Senate Judiciary Committee, *Re: Proposed Constitutional Amendment S.B. 117, S.D. 1, C.D. 1 and Reciprocal Beneficiaries Package S.B. 118, H.D. 1, S.D. 1, C.D. 1* (Apr. 8, 1997).

[389] *Id.*

[390] H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997) (enacted). In its proposed bill accompanying the text, it included the following sentence: "Because of its preferred status the legislature can, and does, provides [sic] certain rights and benefits to couples who are legally married." *Id.* at 1, lines 9-11. This sentence was dropped from the final text of the bill.

To be sure, the term "marriage" is less exhaustive than the House's April 1 proposal, which spoke of reserving "the marriage relationship, and its attendant rights, benefits, and burdens to couples of the opposite sex." On the other hand, the term "marriage" is definitely broader than "the issuance of marriage licenses."

This April 9 language became the final version for both chambers. The final text of the Amendment bill also refers to "the unique social institution of marriage involving the legal relationship of matrimony between a man and a woman."[391] The broad term "Legal relationship of matrimony" reinforces the view that the Amendment intends "marriage" to be more than "marriage licenses."

For all these reasons, the term "marriage" in the Amendment should be understood to encompass not only licensing but also rights, responsibilities, benefits and burdens. *Because* the term marriage includes licenses, it logically entails the whole bundle of legal categories which flow from a license it is clear from the history of both the *Baehr* case and the Marriage Amendment that this connection was intended by its drafters.[392]

2. *"Shall" – the question of self-execution*

Is further legislation is required in order to implement the Marriage Amendment, or is it self-executing? The Hawai'i Legislature believes that no further legislation is necessary. The final documents speak explicitly of their intent merely to "clarify" and "confirm" existing legislative power, not to establish a "new" power. On the night of final passage of the Marriage Amendment, Chairman Tom explicitly addressed the issue on the floor of the House. "There are those who, for their own purposes," he said, "have tried to argue that in proposing this amendment the intention is that the 1999 legislature must re-enact marriage legislation. This is absolute nonsense."[393] He pointed out that "[w]e have, and continue, to issue marriage licenses solely to opposite-sex couples because that is the law. Our marriage laws have not been nullified or overturned because there has been no final ruling from the

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[391] H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997) (enacted).

[392] Nevertheless, Senator Matsunaga inserted additional written remarks into the Senate Journal, which he did not deliver orally to his colleagues, which appear to represent an attempt to backtrack to the Senate's April 8 version. Describing the language of the Amendment as "necessarily somewhat ambiguous regarding impact and intent," he stated: "[T]he only substantive expression of intent in the purpose clause is to address the issue of the issuance of marriage licenses. Our intent is to thus limit the scope of the amendment to the ministerial act of issuing licenses. Other constitutional rights regarding attendant rights and benefits are not to be affected." 1997 HAW. SEN. J. 764 (statement of Sen. Matsunaga).

[393] 1997 HAW. HOUSE J. 919 (statement of Rep. Tom).

[s]upreme [c]ourt."[394] This was consistent with the statement of Senate Judiciary Co-Chair Chumbley.[395] The attorneys for the *Baehr* Plaintiffs, however, argue that the Legislature must take additional action.

Shortly after the accord on the Amendment was reached, but before its final passage by both chambers, Foley began to float his interpretation that further marriage legislation would be required in order to "ban" same-sex marriage.[396] On this reading, if the Amendment says "the legislature *shall* have the power," it thereby concedes either: (1) that it doesn't have that power; or (2) that if it once had it, it has since lost it. Either way, according to this point of view, the Amendment represents a fresh grant of power to the Legislature, which must now pass a statute. One version of this argument goes as follows: All the Marriage Amendment does is to make a procedural shift of the marriage question from the supreme court to the Legislature. It leaves the substantive question of marriage untouched; now the Legislature must tackle it afresh.

The problem with this argument is that the Marriage Amendment is not purely procedural. Instead, as we have seen, the substantive dimension of the Marriage Amendment is its message that article I, section 5 has no bearing on the legal definition of male-female marriage, and therefore any interpretations of article I, section 5 that hold otherwise are incorrect and overruled. If these interpretations (i.e. *Baehr*) are overruled, then the existing marriage law continues as is.

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[394] *Id.*

[395] *See* 1997 HAW. SEN. J. 765 (statement of Sen. Chumbley). Senator Chumbley stated that

> [t]hrough the passage of this measure, and the rights package of H.R. No. 118 (which, incidentally, colleagues, just passed the House a little while ago by 41 votes in the affirmative), we hope to make a positive statement to reaffirm the right of the people over their constitution; we express our trust in the judgment of the people; and we manifest our commitment to equal rights.

Id. (emphasis added). Senator Matsunaga did not address the issue. *See* 1997 HAW. SEN. J. 763-64 (statement of Sen. Matsunaga).

[396] *See Accord Reached on Same-Sex Bills, supra* note 348 at A1. As one newspaper reported,

> Dan Foley, the lawyer representing the gay and lesbian couples who sued the state for marriage licenses, said yesterday that even if lawmakers approved the proposed constitutional amendment language, it wouldn't end his case. The proposal doesn't ban same-sex marriage, but merely states the Legislature has the power to reserve marriage to opposite-sex couples, he said. If the proposed amendment is ratified by the voters in the November 1998 election, the 1999 Legislature still would need to pass a law banning same-sex marriage, he said. Foley believes that the Hawai'i Supreme Court will rule before then.

Id. at A7. The reporter added, "Lawmakers believe, however, that the constitutional amendment and benefits package for 'reciprocal beneficiaries' would put an end to the case, since there is already a law on the book that states marriage is between a man and a woman. Ultimately, the courts would decide." *Id.*

A second version of the plaintiffs' argument concentrates on the word "shall": Because the word "shall" ordinarily conveys a future tense, the Legislature is being given a new power. This argument can be elaborated in two ways, one more superficial, the other more sophisticated. The superficial approach claims that "shall" *simply* refers to the future. But words have a context, and in fact the word "shall" is used in the Hawai'i Constitution in a variety of ways.[397]

The more sophisticated version of the "shall" argument claims that the Marriage Amendment is not "self-executing," and that in order to fully execute the Marriage Amendment, the Legislature must enact *new* marriage legislation. Let us consider this claim in more detail.

In its simplest sense, a "self-executing" amendment requires no further legislation in order to take effect, whereas a "non-self-executing" amendment does require legislation to take effect. This, however, only tells us the results of each type, not how to identify which type is which. Generally speaking, article XVI, section 16 of the Hawai'i Constitution provides that "[t]he provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit." While giving us some direction for interpretation, this still leaves us with the task of describing and distinguishing the two kinds of "respective natures" at work.

Looking more closely, some kinds of constitutional provisions seem relatively clear. At one end of the spectrum, we can assume that a provision is self-executing if it expressly declares itself to be self-executing. However, only one provision of the Hawai'i Constitution does this.[398] Also clearly self-executing are so-called "mandatory-prohibitory" provisions, which establish certain rights and prohibit certain legislative acts, such as those often found in bills of rights.[399]

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[397] These various uses of the term "shall" will be considered in the course of our discussion, but for those who like to count words, it may be noted that the word "shall" appears in the following sections of the Hawai'i Constitution: article I, sections 3-22; article II, sections 1-8, 10; article III, sections 1-19; article IV, sections 1-10; article V, sections 1-6; article VI, sections 1-7; article VII, sections 1-13; article VIII, sections 1-6; article IX, sections 1-10; article X, sections 1-6, article XI, sections 1-8, 10; article XII, sections 1-7; article XIII, sections1-2; article XIV; article XV, sections 1-5; article XVI, sections 1-4, 6-7, 9, 12, 14-16; article XVII, sections 2-5; article XVIII, sections 1-11.

[398] *See* HAW. CONST. art. XVII, § 2 (providing that "[t]he provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.") The use of the term "but" offers an interesting clue. It suggests two possibilities. First, it suggests that a "self-executing" amendment would not *also* include language requiring that the legislature "shall" do some additional task. Alternatively, it suggests that if a self-executing amendment requires a legislative response, that legislation may be ministerial (to appropriate, to facilitate), but it may not be substantive.

[399] An example of a "mandatory-prohibitory" provision would be article I, section 4: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise

At the other end of the spectrum, some amendments explicitly require implementing legislation.[400] Other provisions, which use the phrase "as provided by law," do not explicitly mandate implementing statutes, but have been interpreted by the Hawai'i Supreme Court to imply such a requirement. These can be classified as non-self-executing amendments.[401]

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thereof, or abridging the freedom of speech or of the press or the right of the people peaceable to assemble and to petition the government for a redress of grievances." HAW. CONST. art I, § 4. For further discussion of the mandatory/non-mandatory and prohibitory/non-prohibitory distinctions, see Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 341-43 (1993); John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 335-36 (1996); Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something"*, 15 PUB. LAND L. REV. 219, 221-32 (1994).

[400] *See* HAW. CONST. art. I, § 6; art. II, §§ 4, 5, 6, 10; art. III, § 19; art. IV, § 3; art. V, § 6; art. VI, § 4; art. VII, §§ 5, 7, 8, 10, 12, 13; art. VIII, § 1; art. IX, §§ 1, 6; art. X, § 1; art. XI, §§ 2, 3, 7; art. XIV; art. XVI, § 7; art. XVIII, § 8.

These phrases, which require implementing legislation, can be contrasted with general grants of legislative power, which authorize, but do not require, legislative action. *See, e.g.*, HAW. CONST. art. I, § 3 ("The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section."); art. VIII, § 3 ("The legislature shall have the power to apportion state revenues among the several political subdivisions.").

There are also mandatory provisions that refer to "the State," generally, rather than solely or specifically to the Legislature. *See, e.g.*, HAW. CONST. art. 10, § 4 ("The State shall promote the study of Hawaiian culture, history and language."); art. XII, § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence . . . .").

[401] *See* State v. Rodrigues, 63 Haw. 412, 415, 629 P.2d 1111, 1114 (1981) (holding that the phrase "as provided by law," as found in the Hawai'i Constitution article I, section 11, should be construed as a mandate for the Legislature to enact implementing legislation).

The phrase "as provided by law" or its equivalent appears in the Hawai'i Constitution article I, section 11; article II, sections 5, 8, 9; article III, sections 9, 19; article IV, sections 2, 3, 8; article V, sections 1, 3, 6; article VI, sections 1, 2, 3; article VII, sections 3, 4, 5, 6, 7, 8, 9, 13; article IX, section 3; article X, sections 3, 5, 6; article XI, sections 7, 9, 10; article XII, sections 5, 6; article XIII, section 2; and article XVI, § 1.

This should be distinguished from the phrase, "as may be provided by law," or its equivalent, which is found in the Hawai'i Constitution article I, section 13; article III, sections 5, 19; article IV, section 2; article V, sections 2, 4, 5; art. VII, sections 8, 9, 10, 12; article VIII, section 2; article X, section 2; article XI, section 2; and article XVI, section 5. In some cases, this kind of phrase may render an amendment open to further legislation, but not require it for the amendment to be effective. *See* HAW. CONST. art. XVIII, § 3 ("Unless otherwise provided by law in accordance with section 9 of article III, the salary of each member of the legislature shall be twelve thousand dollars a year."). In other cases, this phrase may render an amendment inoperative until the necessary legislation is passed. *See* HAW. CONST. art. II, § 8 ("Special and primary elections may be held as provided by law."). Based on this latter section, the court ruled that absent a statute, the lieutenant governor could not call a special election to fill a vacancy. *See* State v. Gill, 52 Haw. 410, 414-15, 477 P.2d 625, 627-28 (1970).

Between these two obvious examples lie a host of other constitutional provisions. What sorts of characteristics would differentiate the self-executing from the non-self-executing texts? Two Hawai'i Supreme Court cases shed some light on this question. In the first, *Figueroa v. State*, the court offered the following definition of a self-executing provision: "[t]he self-executing clause only means that the rights therein established or recognized do not depend upon further legislative action in order to become operative."[402] In *Rodrigues*, the second case, the court amplified its definition of what constitutes a self-executing amendment:

> A constitutional provision is self-executing if it meets the following test adopted by the United States Supreme Court: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Davis v. Burke*, 179 U.S. 399, 403, 21 S.Ct. 210, 211, 45 L.Ed. 249 (1900), *quoting* T. Cooley, *Constitutional Limitations* 99-100 (6th ed. 1890). Thus a constitutional provision which only establishes a general principle is not self-executing and requires more specific legislation to make it operative.[403]

From these definitions we can identify the following characteristics of a self-executing amendment: (1) it either recognizes or establishes a right; and (2) it does so by providing a rule. Such an amendment moves beyond general principle into the arena of operative law.[404]

We can now apply these general observations to the text of the proposed Marriage Amendment. As we have noted, the purpose of the Marriage Amendment is to reject the *Baehr* misinterpretation of article I, and clarify that article I, section 5 has nothing to do with the question of whether marriage requires a man and a woman. The text is neither expressly self-executing, nor does it explicitly mandate legislative implementation; it falls into the middle zone of the spectrum we have identified.

Applying the two-part test for that middle zone, we can see that the Marriage Amendment meets the self-executing criteria. First, it recognizes a right: the right of the Legislature to maintain the existing male-female

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[402] Figueroa v. State, 61 Haw. 369, 382, 604 P.2d 1198, 1206 (1979).

[403] *Rodrigues*, 63 Haw. at 414, 629 P.2d at 1113.

[404] Another way of formulating Professor Cooley's test is as follows: Would the judiciary's failure to enforce the provision without further legislation frustrate the intent of its drafters? If it would, then the provision is probably self-executing. *See Figueroa*, 61 Haw. at 382, 604 P.2d at 1206 (drawing upon Student Gov't Ass'n of Louisiana State Univ. v. Board of Supervisors, 264 So. 2d 916 (La. 1972)). *See also* Wyatt-Shaw, *supra* note 399, at 221-32 (discussing the majority's formulation of the Cooley test in the *Student Government Ass'n* case as primarily an "intent" test).

definition of marriage. Second, it provides a rule for the exercise of that right: article 5, section 1 does not conflict with the male-female marriage statute; *Baehr* is rejected. The effect of the Amendment is immediate. No "new" grant of power has been made to the Legislature, only a correction of the supreme court's misinterpretation by the people, who are the authors of the Hawai'i Constitution. No legislative action is needed.[405]

This analysis is also fully consistent with the legislative history of the Amendment. The final documents speak explicitly of their intent merely to "clarify" and "confirm" existing legislative power, not to establish a "new" power.[406] On the night of final passage of the Marriage Amendment, Chairman Tom explicitly addressed the issue the floor of the House. "There are those who, for their own purposes," he said, "have tried to argue that in proposing this amendment the intention is that the 1999 [L]egislature must re-enact marriage legislation. This is absolute nonsense."[407] He pointed out that "[w]e have, and continue, to issue marriage licenses solely to opposite-sex couples because that is the law. Our marriage laws have not been nullified or overturned because there has been no final ruling from the [s]upreme [c]ourt."[408] This was consistent with the statement of Senate Judiciary Co-Chair Chumbley.[409]

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[405] If one is thinking of a marriage statute, Hawai'i has had one in force since the 1850s. It is not as though the Marriage Amendment creates some new entity or power which, once approved by the people, needs to be brought into being by the Legislature. If one is thinking of some other form of legislative action that would be needed to implement the Marriage Amendment, it is difficult to imagine what it would be. As we have seen, section 1 of Act 217, 1994 Hawai'i Session Laws expressed great displeasure with the Hawai'i Supreme Court, but it could hardly overrule it. The Marriage Amendment was required because only the people of Hawai'i, acting by constitutional amendment proposed through the Legislature or a Constitutional Convention, could overrule the supreme court's misinterpretation of the Hawai'i Constitution. *See* HAW. CONST. art. XVII. There was literally no other alternative.

[406] *See* 1997 HAW. HOUSE J. 919.

[407] *Id.* (statement of Rep. Tom).

[408] *Id.*

[409] *See* HAW. SEN. J. 765 (statement of Sen. Avery Chumbley). Senator Chumbley stated that:

> [t]hrough the passage of this measure, and the rights package of H.R. No. 118 (which, incidentally, colleagues, just passed the House a little while ago by 41 votes in the affirmative), we hope to make a positive statement to reaffirm the right of the people over their constitution; we express our trust in the judgment of the people; and we manifest our commitment to equal rights.

Id. Senator Matsunaga did not address the issue. *See* 1997 HAW. SEN. J. 763-64 (statement of Sen. Matt Matsunaga). More recently, the two Senators have declared that "[i]n 1994 the Legislature passed such a [marriage] law; therefore, if the amendment passes, the 1994 becomes valid." Matt Matsunaga & Avery Chumbley, *Marriage Amendment Not Meant to Mislead*, HONOLULU ADVERTISER, Sept. 14, 1998, at A8. "Becomes" is a slippery word. *See infra* note

In sum, the argument made by the Plaintiffs' attorneys that the Marriage Amendment is non-self-executing and thus *requires* the passage of new marriage legislation is unpersuasive. Quite to the contrary: the Amendment is fully self-executing. It requires no legislation of any kind. If it passes, *Baehr v. Lewin* and its progeny should be overruled, and HRS section 572-1, currently in force, should be considered effective and presumptively constitutional.[410]

IV. THE FATE OF THE MARRIAGE AMENDMENT

After its passage by the Legislature, the Marriage Amendment went onto the general election ballot for 1998. This final section tells the rest of the story. First it reviews the passage of the Marriage Amendment, and the fate of the Reciprocal Beneficiaries Act and the proposed Constitutional Convention. Then it examines the briefs submitted to the supreme court on the question of the meaning of the Amendment, and the court's decision on December 9, 1999. By all accounts, it is an unfinished story.

A. The Passage of the Marriage Amendment

The drama between April 1997 and November 1998 took place on a number of fronts. It involved a mixture of public appeals, political moves and legal maneuvers. The primary show was the Marriage Amendment. Also of interest was the fate of the Reciprocal Beneficiaries Act and the Constitutional Convention, both resolved en route.

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414 (discussing Dan Foley's interpretation). But they make the key point that there is no "in-between" period during which the Legislature must re-enact the statute.

[410] There is also a little-noticed provision of the Hawai'i Constitution which may be relevant here, although it has generated little case law to date. *See* FEDER LEE *supra* note 11, at 209 (but without commentary from the author). Article XVIII, section 9, declares the following:

> All laws in force at the time amendments to this constitution take effect that 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.

HAW. CONST. art. XVIII, § 9. The only two cases which quote this provision are *Robinson v. Ariyoshi*, 753 F.2d 1468, 1470 (9th Cir. 1985), and *Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1019 (D. Haw. 1987) (arguing that the decree of a Territorial court, prior to Statehood, constitutes valid and continuing law unless and until it is amended by the Hawai'i Constitution or a final decree of the Hawai'i Supreme Court).

If the existing marriage law is "not inconsistent with the constitution as amended" (which it is not, so long as the *Baehr v. Miike* appeal is pending and the law continues to be officially enforced), then it is consistent with this provision that "at the time [the Marriage Amendment] take[s] effect," that law "shall remain in force," until it either expires or is amended or repealed. HAW. CONST. art. XVIII, § 9. In short, the text of the provision suggests that the existing marriage law "remain[s] in force" both before and after the Amendment.

1. The main show: the Marriage Amendment

After the passage of the Marriage Amendment by the Legislature, the focus shifted to the public campaign for and against the ratification of the amendment.

By the end of the 1997 legislative session, the appeal of Judge Chang's decision was complete. All the parties and amici had filed their briefs with the Hawai'i Supreme Court.[411] At any point thereafter, the court could have ruled on the case. From start to finish, the possibility of a pre-emptive court decision loomed over the campaign.[412] Neither side was able to get the court to commit to make a decision either before or after November 1998.[413] As time went on, it appeared likely that the court was going to wait.[414]

In November 1997, Save Traditional Marriage '98 ("STM '98") was formed to urge passage of the Marriage Amendment.[415] The steering committee of STM '98 included Jack Hoag and The Reverend Marc

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[411] Baehr v. Miike, No. 20371 (1997) (appeal pending). In the 1997 appeal, in contrast to the 1996 trial, amicus briefs filed by supporters of the marriage law outnumbered those who opposed it. Along with renewed briefs from organizations which filed at the trial level, *supra* note 78, eight additional briefs were filed. One additional amicus brief in support of same-sex marriage has been filed on behalf of 11 scholars (Urie Bronfenbrenner, Susan D. Cochran, Anthony R. D'Augelli, Susan E. Golombok, Richard Green, Martha Kirkpatrick, Lawrence A. Kurdek, Letitia Anne Peplau, Richard D. Savin-Williams, Royce W. Scrivner, and Fiona Tasker). Seven additional amicus briefs were filed in support of the existing marriage law by the Attorneys General of Nebraska, Alabama, California, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina and South Dakota, and the following organizations: Independent Women's Forum, Agudath Israel of America, Christian Legal Society (along with eleven other groups), the National Association for Research and Therapy on Homosexuality, and the Rutherford Institute. Copies of the briefs are available online at <http://www.cs.unt.edu/home/hughes/index.html>.

[412] Kim Murakawa, *No Same-Sex Ruling In Sight*, HONOLULU ADVERTISER, July 31, 1997, at B4.

[413] On July 29, 1997, confronted with alternative motions that it decide the case during 1997 or postpone its decision until after the vote in November 1998, the court rejected both motions. *See id.* at B4. Perplexed, Dan Foley, attorney for the plaintiffs, responded that "[i]t basically brings some uncertainty into the situation." *Id.* Attorney General Margery Bronster had a similar response: "It leaves open the possibility of confusion, depending on the timing of the decision." *Id.*

[414] Even Dan Foley, ever the public optimist, concluded that a decision before November 3 was unlikely. *See* Peter Frieberg, *The Heat is On, Hawai'i Voters Appear Cool to Same-Sex Marriage Idea*, WASH. BLADE, Aug. 21, 1998 at 1, 19 ("Foley said it now appears 'unlikely' that the court will rule before the November election. Foley said he believes the court's failure to issue a ruling after 14 months suggests the court 'unfortunately succumbed to political pressure.'")

[415] *See* Mike Yuen, *New Isle PAC Hopes to Derail Gay Marriages*, HONOLULU STAR-BULL., Nov. 12, 1997, at A1.

Alexander of Hawai'i's Future Today and Mike Gabbard of the Alliance for Traditional Marriage.[416] The new group first drew significant attention when noted author Stephen Covey spoke at a fundraising dinner.[417] After public criticism, Covey apologized for departing from his company's policy of political non-involvement.[418] Save Traditional Marriage '98 did not attack gays and lesbians.[419] It represented a "moderate community coalition,"[420] rather than "The Religious Right."[421] Save Traditional Marriage '98 had one clear goal–to convince the public that a "yes" vote was a vote for marriage, and a "no" vote would be a vote to allow the Hawai'i Supreme Court to legalize same-sex marriage.[422]

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[416] *See id.*

[417] *See* Shawn Foster, *Covey Backs Cause: Gay Marriage Wrong; Covey Backs Anti-Gay*, SALT LAKE TRIB., Nov. 22, 1997, at A1.

[418] *See* Mike Yuen, *Author Sorry for 'Political' Speech*, HONOLULU STAR-BULL., Feb. 5, 1998, at A1; *Author Covey Says He Isn't Really Anti-Gay*, WASH. BLADE, Feb. 13, 1998, at 16.

[419] The Save Traditional Marriage '98 brochure text reads as follows:

> YES, MARRIAGE IS WORTH DEFENDING. Save Traditional Marriage '98 is a coalition of citizens from across the state dedicated to passing the 1998 constitutional amendment to preserve traditional marriage. GO TO THE POLLS. We urge you as part of the vast majority of Hawai'i's voters who want to stop 'homosexual marriage' - to go to the polls and vote YES on November 3, 1998. A NO or BLANK vote is a vote against traditional marriage. By voting YES, you affirm that marriage should remain as the union between one man and one woman. LAST CHANCE. This is it! Hawai'i's last chance to save traditional marriage is to vote YES on this constitutional amendment. The decision of whether or not Hawai'i should legalize 'homosexual marriage' should be made by the people - not the courts. Your YES vote will help stop Hawai'i's Supreme Court from legalizing 'homosexual marriage.' HOW CAN YOU HELP? Register to vote today. Urge everyone you know to vote YES on the amendment. Remind them that a blank vote is a no vote. Join Save Traditional Marriage '98 and volunteer to help win this battle at the ballot box."

Save Traditional Marriage '98 Brochure.

[420] Advertisement, *Mahalo*, HONOLULU STAR-BULL., Nov. 3, 1998, at A15.

[421] For debates about "the Religious Right," see Ira Rohter, *Right to Rule: Religious Right Aims to Win Elections in 1998, Then Change Laws*, HONOLULU ADVERTISER, July 13, 1997, at B1, B4. Responses to Rohter were offered by Jack Hoag, co-chair of Hawai'i's Future Today, and Francis Ota, an architect and pastor, in Jack Hoag & Francis Ota, *Threat to Hawai'i is not from 'Religious Right'*, HONOLULU ADVERTISER, July 27, 1997, at B3. Rohter, a political science professor and chairman of the Green Party on O'ahu, replied with, Ira Rohter, *Rohter's Warning, In Summary*, HONOLULU ADVERTISER, July 27, 1997, at B3.

Similar bias was displayed by commentators on the mainland who should have known better. *See, e.g.*, Andrew Koppelman, *No Fantasy Island: Gay Rites Gain Momentum in Hawai'i*, NEW REPUBLIC, Aug. 7, 1995, at 22-24 (failing to mention Roman Catholics in the article, and giving the Latter-day Saints only passing notice); Andrew Sullivan, *Hawaiian Aye*, NEW REPUBLIC, Dec. 20, 1996, at 15-16 (characterizing opponents of "same-sex marriage" derisively as "fundamentalists," yet offering no concrete analysis or examples).

[422] *See* Mike Yuen, *'Yes' Won With Focus, Clear Message*, HONOLULU STAR-BULL., Nov. 5, 1998, at A3.

The main group opposing the amendment was called Protect Our Constitution ("POC") and was headed by Jackie Young, a former Vice-Speaker of the Hawai'i House.[423] POC had strong ties to the Washington, D.C.-based Human Rights Campaign.[424] POC portrayed the campaign as a decision as to whether "discrimination" should be included in the Constitution, and avoided any discussion of same-sex marriage.[425] POC blamed the Marriage Amendment on "a small but misguided group of people," and called a "yes" vote a vote to "destroy" Hawai'i.[426] It went after its

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[423] *See* Jean Christensen, *Meaning of Ballot Debated as Hotly as Gay Marriage*, HONOLULU ADVERTISER, Oct. 30, 1998, at A1.

[424] *See* Peter Frieberg, *The Heat Is On*, WASH. BLADE, Aug. 21, 1998, at 1. The following is typical Human Rights Campaign rhetoric:

> By partnering with local activists in Hawai'i, we can marshal the resources and expertise to make a difference in the outcome of the Hawai'i referendum. We are prepared to invest $1.1 million in this effort, but that can only happen if every HRC member stands with us. We know that the religious political extremists are poised to do the same. We must not let them and their campaign of intolerance succeed.

Tracy St. Pierre, *Countdown in Hawai'i*, HRC QUARTERLY, Spring 1998, at 9-11, available online at <http://www.hrc.org/issues/marriage/Hawai'i.html>. One of the favorite "partnering" activities of the HRC-POC joint effort was to attack the Christian Coalition for supposedly being behind efforts to pass the Marriage Amendment in Hawai'i. *See* <http://www.hrc.org/issues/marriage/Hawai'i.html> and <http://www.poc-Hawai'i.org/>. But the group was totally marginal. *See Christian Soldiers Pour in for Same-Sex Battle*, HONOLULU STAR-BULL., June 19, 1998, at A3 ("The Christian Coalition claims 1.9 million members nationwide, but its organizers could not immediately say how many are in Hawai'i.").

[425] Protect Our Constitution Advertisement, *It's Not a Yes or No Vote on Same Sex Marriage*, HONOLULU STAR-BULL., Nov. 2, 1998, at A16.

[426] The Protect Our Constitution brochure handed out at the State Democratic Convention reads as follows:

> FIVE GOOD REASONS WHY OUR CONSTITUTION'S BILL OF RIGHTS SHOULD NOT BE AMENDED. A small but misguided group of people are trying to give the State Legislature the unprecedented power to change the Hawai'i State Constitution's Bill of Rights. Here are five good reasons we should not allow this to happen. 1. This would be the first Constitutional Amendment in Hawai'i's history to deprive specific citizens of rights they now have. Our constitution was written to protect our rights, not take them away. 2. The arguments being used to promote a change in the constitution are the same as those which not so long ago were used to prohibit interracial marriage. This is especially offensive in Hawai'i, where more than half of all marriages are interracial. 3. Changes in our constitution should not be taken lightly. It has rarely been amended and it would be a terrible mistake to use such a powerful weapon to deprive equal rights from one group of Hawai'i's citizens. 4. The state government already has too much power over the way we conduct our lives. We want the government to have less power, not more. Keep the State Legislature out of our lives! 5. What makes Hawai'i so special is our aloha spirit, our tolerance for different cultures, ideas and values, and our respect for those who think differently than we do. We should not permit radical changes that will destroy forever the qualities that make Hawai'i unique in all the world. PROTECT OUR CONSTITUTION.

opponents aggressively, especially the local group Hawai'i Family Forum.[427]

Ignoring the likelihood of the Hawai'i Supreme Court affirming Judge Chang's ruling on appeal if the Amendment were to be defeated, POC claimed that a "no" vote would: "keep[] things the way they are. Traditional marriage is not threatened. [It k]eeps constitutional protection in the hands of the [s]upreme [c]ourt and away from politicians."[428]

Major issues in the campaign involved endorsements and funding. The "no" campaign was endorsed by a number of labor unions and many civic groups, including the League of Women Voters, Japanese American Citizens League - Hawai'i Chapter, and American Civil Liberties Union of Hawai'i.[429] On October 25, 1998, the *Honolulu Advertiser* urged citizens to vote "no", arguing that:

> [a] 'YES' vote would write into our constitution an amendment that says the Legislature has the constitutional right to restrict marriage to one man and one woman. That almost surely would then happen, and by intent and definition it would be gender discrimination. There should be no place in our constitution for that, and there is no need for it in resolving this issue with fairness.[430]

Protect Our Constitution Brochure (available from Protect our Constitution/Human Rights Campaign, 870 Kapahulu Avenue #110, Honolulu, HI 96816). Further information and attacks are available at <www.hrc.org/issues/marriage/Hawai'i.html> or <www.poc-Hawai'i.org/>.

[427] Protect Our Constitution attacked the Hawai'i Family Forum for supposedly crossing the legal line and engaging in "issue advocacy." After considering POC's complaint, on September 8, 1998 the Campaign Spending Commission voted 8-0 to quash their complaint. *See Panel Nixes Complaint on Same-Sex Referendum Ads*, HONOLULU STAR-BULL., Sept. 9, 1998. The ad attacked by POC was as follows:

> The following is a very important voter education message brought to you by Hawai'i Family Forum. When you go to the voting booth on November Third, along with selecting the candidates of your choice, you will be asked to vote on this very important ballot question: "Shall the Constitution of the State of Hawai'i be amended to specify that the Legislature shall have the power to reserve marriage to opposite sex couples?" What exactly does this mean? If you vote "yes," your vote will help support the definition of marriage between one man and one woman. If you vote "no," or if you leave your ballot blank, your vote will help to redefine marriage to include homosexual couples. Don't leave this important issue for someone else to decide. Do your part and register to vote. Then go to the polls on November Third. This message paid for by Hawai'i Family Forum.

Hawai'i Family Forum Advertisement (available from Hawai'i Family Forum, P.O. Box 37007, Honolulu, HI 96837-0007).

[428] Protect Our Constitution Advertisement, *It's Not a Yes or No Vote on Same Sex Marriage*, HONOLULU STAR-BULL., Nov. 2, 1998, at A16.

[429] *See id.*

[430] *On 'Same-Sex' Issue: NO to Preserve Constitution*, HONOLULU ADVERTISER, Oct. 25, 1998, at B2.

The *Honolulu Star-Bulletin* also opposed the Amendment and on October 28 argued:

> The rights of homosexuals to equal treatment should prevail. Government should not impose the moral values of the majority when there is no evidence that society would be harmed if government did not discriminate against homosexuals.[431]

On the other hand, the Marriage Amendment was endorsed by Democratic Governor Ben Cayetano and both of his Republican challengers, Frank Fasi and Linda Lingle, as well as the candidates in both parties for the U.S. House of Representatives.[432]

As might be expected, the Amendment continued to receive strong support from the Most Reverend Francis DiLorenzo, Bishop of Honolulu. In his 1997 Thanksgiving Letter, for instance, Bishop DiLorenzo noted that "[e]ven the bedrock institution of marriage, so basic and crucial to our community's health and well-being, is not safe from redefinition and devaluation anymore."[433] As evidence of the Bishop's breadth of concerns, this sentence appeared amid discussions of domestic violence, unemployment, and the importance of economic and social reform.[434] "Thanksgiving," he concludes, "is a holiday of gratitude and appreciation. We thank God for all of his many blessings. But in the midst of our celebration we cannot forget the pain of our wounded community."[435] In a letter dated October 21, 1998, Bishop DiLorenzo issued a final plea to Catholics and others to support the Amendment.[436]

There were also controversies about whether certain endorsements were real. At one point in the election season, the Protect Our Constitution campaign claimed the endorsement of the American Association of Retired Persons ("AARP"). The AARP then publicly disavowed support for the "no" campaign.[437] Similarly, the statewide teachers union's board voted to oppose

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[431] *Star-Bulletin's Views on Ballot Questions*, HONOLULU STAR-BULL., Oct. 28, 1998, at A24.

[432] *See* Mike Yuen, *Same-Sex Marriage Already an Election Hot Button*, HONOLULU STAR-BULL., Aug. 3, 1998, at A1.

[433] Thanksgiving Letter by Most Reverend Francis X. DiLorenzo, Bishop of Honolulu (Nov. 25, 1997), available at the Diocesan website <www.pono.net>.

[434] *See id.*

[435] *Id.*

[436] Letter by Most Reverend Francis X. DiLorenzo, Bishop of Hawai'i (Oct. 21, 1998).

[437] *See* Mike Yuen, *AARP Rescinds Stand on Marriage Vote*, HONOLULU STAR-BULL., Oct. 24, 1998, at A4.

the Amendment, but without consulting its members.[438] This also caused major internal turmoil.[439]

An interesting twist in the fundraising story came when activist Bill Woods, the original initiator of the *Baehr* case, accused STM '98 of violating the $1,000 limit on campaign contributions.[440] Woods was trying to prevent large donations from coming to supporters of the Amendment.[441] The challenge was dismissed by the Campaign Spending Commission, however, when the Attorney General issued an opinion[442] that the campaign spending limitation was unconstitutional.[443] Ironically, this made it possible for groups such as the Human Rights Campaign to make the largest donations of all. Between 1996 and October 1998, STM '98 raised $845,224 and Protect Our Constitution raised $1,145,388.[444] Nevertheless, although POC raised more, including a contribution of $985,000 from the Human Rights Campaign, it was the $600,000 donation from The Church of Jesus Christ of Latter-day Saints that caused the biggest stir in the media.[445]

Finally, on November 3, 1998, the people of Hawai'i had their opportunity to vote. Their message was a clear reaffirmation of marriage between a man and a woman. The final tally showed sixty-nine percent of voters supporting the Amendment and twenty-nine percent opposing, with two percent of the ballots being left blank.[446] Reactions, as might be expected, were mixed. The Hawai'i Catholic Conference noted, "[t]he people of Hawai'i were given the opportunity to take back the question of marriage, and they took it back."[447] Evan Wolfson, co-counsel for the plaintiffs, replied that the vote showed "why the equality and civil rights of vulnerable minorities should never be put to a vote."[448] The *Honolulu Advertiser* acknowledged that the voters "understood the amendment to be a referendum on the issue of homosexual marriage."

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[438] *See id.*

[439] *See id.*

[440] *See* Op. Haw. Att'y Gen. No. 98-05 (Aug. 10, 1998) (issued as a letter to Duane Black, Chair of the Campaign Spending Commission).

[441] *Id.*

[442] *Id.*

[443] *See* Mike Yuen, *'Yes' Won With Focus, Clear Message*, HONOLULU STAR-BULL., Nov. 5, 1998, at A3.

[444] *See* Jean Christensen & William Kresnak, *Mormons Give Big to Fight Same-Sex*, HONOLULU ADVERTISER, Oct. 24, 1998 at A1.

[445] *See* Mike Yuen, *Same-Sex Marriage: The Entire Nation is Watching Hawai'i*, HONOLULU STAR-BULL., Oct. 29, 1998, at A8.

[446] *See* Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR-BULL., Nov. 4, 1998, at A1; *State Constitution*, HONOLULU ADVERTISER, Nov. 5, 1998, at B3.

[447] Hawai'i Catholic Conference Press Release, *The People Have Spoken, the Court Should Listen* (Nov. 3, 1998).

[448] Evan Wolfson, *Message from Lambda Marriage Project on Advancing Past Hawai'i and Alaska* (Nov. 4, 1998) at <www.lambdalegal.org/cg-bin/pages/documents/message>.

Then it endorsed the abolition of state-recognized marriage in favor of a domestic partnership law.[449] Elite opinion was divided, as usual, but the people had spoken.

2. Two sideshows: reciprocal beneficiaries and the Constitutional Convention

In the period between the passage and the ratification of the Marriage Amendment, other related dramas also played themselves out. Here we briefly review two of the most important: reciprocal beneficiaries and the Constitutional Convention.

Reciprocal beneficiaries

Following the passage of H.R. 118 by the Legislature, thirty members of the Hawai'i Business Health Council sent a letter asking Governor Cayetano to veto the bill. The Governor, who had previously promised to sign the bill, instead allowed it to become law on July 8 without his signature.[450]

According to a news report, the Governor called the bill "an important step," but said the bill should be amended to be limited to gay and lesbian couples.[451] Governor Cayetano stated that

> [w]hen you see in the preamble of the bill where it talks about a widowed mother and her son could qualify, that wasn't the intent of what I wanted to see accomplished. I was opposed to same-sex marriage but recognized the need to be fair to gay couples to provide for loved ones. It's a concern that it's opened up to other people.[452]

Senate Judiciary Co-Chair Matsunaga was positive about the Governor's suggestion that the law be revised, but House Judiciary Chairman Tom was not.[453] The *Honolulu Star-Bulletin* weighed in with an editorial sympathetic to the Governor's critique.[454] Two days later, the newspaper reported that a poll had found that 41.8% of residents approved of the bill, 46.8% disap-

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[449] *See Legislature Must Now Treat Same-Sex Wisely*, HONOLULU ADVERTISER, Nov. 5, 1998, at A12.

[450] *See* 1997 Haw. Sess. Laws 383.

[451] *See* William Kresnak, *Partner Benefits Bill Now State Law*, HONOLULU ADVERTISER, July 9, 1997, at A1.

[452] *See id.*

[453] *See id.*; *See also* Angela Miller, *Employers Challenge Reciprocal Benefits*, HONOLULU ADVERTISER, July 12, 1997, at A1.

[454] *See Court Challenge Could Improve Benefits Law*, HONOLULU STAR-BULL., July 15, 1997, at A12.

proved, and only 17.3% would or knew someone who would, sign up for benefits.[455]

On July 4, Insurance Commissioner Graulty wrote to the Attorney General, seeking her interpretation of section 4 of Act 383.[456] On July 11, five major companies filed suit against the law (Outrigger Hotels and Resorts, Bank of Hawai'i, C. Brewer & Co. Ltd., Hawaiian Electric Industries and Theo H. Davies & Co., Ltd.), seeking a clearer interpretation of its provisions, and claiming that if it were interpreted broadly, it would conflict with the federal Employee Retirement Income Security Act ("ERISA").[457] The attorney for the companies, John D'Amato, said, "We feel that we've got a state law that goes beyond the authority of the state to make law in the area of benefit plans."[458]

On August 14, Attorney General Bronster issued an opinion which concluded that the section which concerns mandatory health coverage "applies only to insurance companies and not to mutual benefit societies or health maintenance organizations."[459] She added that "[w]e are aware that this interpretation will result in a relatively small number of individuals having access to reciprocal beneficiary family coverage," about 1800 out of a total of 320,000.[460] "Nevertheless," she continued, "this interpretation is not only required by the plain language of the relevant statutory sections, but is buttressed further by section 74 of the Reciprocal Beneficiaries Act, which states, 'the rights and benefits extended by this Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided.'"[461]

On September 26, U.S. District Judge David Ezra agreed with the Attorney General and ruled that the law did not cover health maintenance organizations or mutual benefit societies, the subjects of the lawsuit.[462] It was possible, he declared, that the law applied to companies that contract with insurance companies for health care, but since the suit before him didn't include insurance companies, he would not rule on this.[463] On September 30, 1997,

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[455] *See* Linda Hosek, *Reciprocal What? 42% Back Benefits*, HONOLULU STAR-BULL., July 17, 1997, at A1, A6.

[456] *See* Op. Haw. Atty's Gen. No. 97-110 (Dec. 2, 1997).

[457] *See* Hawaiian Elec. Indus., Inc. v. Akiba, Civil No. 97-00913 (D. Haw. July 11, 1997).

[458] Angela Miller, *Employers Challenge Reciprocal Benefits*, HONOLULU ADVERTISER, July 12, 1997, at A1.

[459] Op. Haw. Att'y Gen. No. 97-05 (Aug. 14, 1997).

[460] *Id.*

[461] *Id.* (quoting Act 383, Session Laws of Hawai'i 1997).

[462] *See* Linda Hosek, *A Deal Would Exempt Most Firms From Having To Pay Health Benefits*, HONOLULU STAR-BULL., Sept. 26, 1997, at A1.

[463] *Id.*

Judge Ezra approved a consent order embodying these conclusions.[464] The Act has continued in effect, but without large public participation.[465]

The Constitutional Convention

After the Hawai'i Supreme Court ruled in March 1997 that the 1996 vote for a "ConCon" was invalid, some argued that the court's action violated the Fifteenth Amendment of the Federal Constitution. On May 6, 1997 a class action suit was filed by Let the People Decide, Citizens for a Constitutional Convention, and others in the U.S. District Court for the District of Hawai'i, challenging the court's decision on federal constitutional grounds.[466]

Judge Ezra was also assigned this case. After hearings on July 7 and 10, Judge Ezra ordered a new election to be held within sixty days.[467] On July 18, the State filed a motion opposing Judge Ezra's ruling and appealed his decision to the Ninth Circuit.[468] After a hearing on July 25, Judge Ezra set the deadline of December 6 for a new election.[469] The State then filed a motion with the U.S. Ninth Circuit Court of Appeals, asking that Judge Ezra's ruling be stayed pending the resolution of the State's appeal of his July ruling.[470] On September 10, in a one-sentence order, the Ninth Circuit granted the State's motion, suspended Judge Ezra's ruling, and cancelled the December election.[471] Honolulu Mayor Jeremy Harris called the Ninth Circuit's decision "disappointing," stating that

> [s]ince no such Convention has been held since 1978, it is extremely important that the people of the State, through their elected ConCon delegates, be allowed to propose changes to our State Constitution. I will continue to push for an early election, and to urge people to vote 'yes' when we are finally given the opportunity.[472]

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[464] In December, Attorney General Bronster issued an additional opinion which addressed the remaining questions which Commissioner Graulty had raised in his original July 4 letter. *See* Op. Haw. Att'y Gen. No. 97-10 (1997).

[465] *See* Susan Kriefels, *The Quiet Revolution*, HONOLULU STAR-BULL., May 8, 1998, at A1.

[466] *See* Bennett v. Yoshina, No. 97-00322 (D. Haw. May 6, 1997).

[467] *See Judge May Order Constitutional Convention*, HONOLULU ADVERTISER, July 8, 1997, at B1, B4; *Con Con Vote In 60 Days*, HONOLULU ADVERTISER, July 10, 1997, at A1; *New Con Con Vote Ordered*, HONOLULU ADVERTISER, July 11, 1997, at A1, A17; *State To Seek Stay Of Con Con Ruling*, HONOLULU STAR-BULL., July 11, 1997, at A1.

[468] *Id.*

[469] *Id.*

[470] *Id.*

[471] *See Marriage Debate Heats Up In Hawai'i*, WASH. TIMES, July 21, 1997, at A8; *Court Puts Off Vote On Con Con This Year*, HONOLULU ADVERTISER, Sept. 11, 1997, at A1.

[472] News Release from Mayor, Sept. 11, 1997.

The case was argued before a Ninth Circuit panel composed of Judges Wiggins, Noonan, and Tashima on January 16, 1998.[473] On March 27, 1998, the panel issued a unanimous decision reversing Judge Ezra, and ordering summary judgment for Yoshina.[474] In response, the Hawai'i Legislature passed legislation placing the question of whether or not to convene a Constitutional Convention onto the November 3, 1998, general election ballot.[475] On November 3, 1998, the voters voted not to hold a ConCon.[476]

B. The Marriage Amendment Meets the Hawai'i Supreme Court

The Hawai'i Supreme Court wisely waited to decide the *Baehr* appeal until after the election. Now, with the ratification of the Marriage Amendment, it was time for the court to finally dispose of the case.[477] As usual, however, things were not that simple. During the period between Judge Chang's decision and the ratification of the Marriage Amendment, a period of almost two years, the Department of Health had received marriage license applications from both opposite-sex and same-sex couples but had only issued them to opposite-sex couples. Nevertheless, plaintiffs' attorney Dan Foley argued that the marriage law already included same-sex couples.[478] The final act was set to begin.

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[473] *See* Bennett v. Yoshina, 140 F.3d 1218, 1228 (9th Cir. 1998).

[474] *Id.*

[475] *See* H.R. 3130, H.D. 1, S.D. 1, enacted as Act 131, 1998 Haw. Sess. Laws (June 22, 1998).

[476] *See Complete, Uncertified Results of Hawai'i's General Election: State Constitution*, HONOLULU ADVERTISER, Nov. 5, 1998, at B3.

[477] The court reaffirmed its interpretive supremacy in *Del Rio v. Crake*, 87 Hawai'i 297, 955 P.2d 90 (1998). Speaking for a unanimous court, Chief Justice Moon reminded his fellow public officials down the street that "[t]his court is the 'final arbiter of the meaning of the provisions of the Hawai'i Constitution,'" noting that "[i]f a statute is determined by the court to contravene the equal protection of the laws, such a determination can be changed only by constitutional amendment or via the court's power to overrule its prior decisions." *Id.* at 304, 955 P.2d at 97 (citations omitted). "Only by constitutional amendment" were the magic words, ensuring that the court would not be an idle bystander while the post-Marriage Amendment drama unfolded.

[478] Foley argued that "[c]urrently, the legal definition of marriage in the State of Hawai'i includes same-sex couples." Letter from Daniel Foley to A. Duane Black, Chairperson, Campaign Spending Commission, at 5 (Aug. 25, 1998). Foley claimed that the December 3 declaratory judgment of Judge Chang "was not stayed pending appeal. Only the injunctive relief requiring the Director of Health Services to issue licenses was stayed pending appeal." *Id.* What Foley points out was less dramatic than it sounded: The Legislature had a statute on the books, which is continuing to be enforced; a trial judge had found it unconstitutional, based on a controversial supreme court ruling; and that ruling was on appeal. The Legislature and executive branch had one view; Judge Chang and the supreme court had another; and the people were going to have the last word. *See id.*

1. Supplemental briefs

On November 23, only weeks after the election, the court invited the parties and amici in *Baehr* to file supplemental briefs on the meaning of the Marriage Amendment.[479] The briefs filed by both sides in the case presented at least four key issues to the court:[480]

First issue: Is the Marriage Amendment retroactive?

The nine state Attorneys General who had filed as amici in the case argued that the question of retroactivity was not properly raised by the Amendment because no same-sex marriage has ever been recognized.[481] The plaintiffs argued that in order to be retrospective, a law must clearly state its intent to be retrospective and that the Amendment does not do so.[482]

Second issue: Is the Marriage Amendment self-executing, or must the Legislature re-pass the statute?

The group of legislators who filed as amici in the case argued that because the marriage statute was in force at the time of the passage of the Amendment, it did not have to be reenacted.[483] They further asserted that legislative history of the Amendment indicated that its intent was merely to clarify existing legislative power rather than to create legislative power.[484] The *Baehr* plaintiffs counter-argued that the use of the word "shall" in the Amendment implied that the legislative power bestowed by the Amendment was a power to be exercised in the future.[485] The plaintiffs found support for their assertion in the language of the description of the Amendment published by the Office

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[479] *See* Baehr v. Miike, No. 91-1394-05, Order (Nov. 23, 1998).

[480] *See infra* section III of this article for a fuller discussion of many of these issues.

[481] *See* Baehr v. Miike, No. 91-1394-05, Supplemental Brief of Amici Curiae States of Alabama, California, Colorado, Idaho, Mississippi, Nebraska, South Carolina, South Dakota and Utah at 2 (Dec. 23, 1998). On Feb. 12, 1999, the Attorney General of Nebraska filed notice with the court that California had withdrawn from its support of the brief. *See* Baehr v. Miike, No. 91-1394-05, Notice of California's Withdrawal (Feb. 12, 1998).

[482] *See* Baehr v. Miike, No. 91-1394-05, Plaintiffs-Appellees' Supplemental Brief at 7 (Jan. 22, 1999).

[483] *See* Baehr v. Miike, No. 91-1394-05, Brief of Amici Curiae Representative Michael Kahikina, Representative Ezra Kanoho, Representative Colleen Meyer, Representative David Stegmaier, and Representative Romy M. Cachola at 3 (Dec. 23, 1998).

[484] *See id.* at 4.

[485] *See* Baehr v. Miike, No. 91-1394-05, Plaintiffs-Appellees' Supplemental Brief at 3 (Jan. 22, 1999).

of Elections describing the Amendment as a "step" in prohibiting same-sex marriage.[486]

The plaintiffs in *Baehr* further argued that only the portions of the marriage statute challenged in *Baehr* which do not employ sex-based classifications now exist because the Circuit Court invalidated the other portions and the legislature must act anew to change this fact.[487] The State counter-argued by asserting that where a case was pending and new law is enacted, the previous law would apply.[488] Here, according to the Attorney General, this would mean that the marriage statute challenged in *Baehr*, a challenge to which was pending in the Hawai'i Supreme Court, should be applied as it existed before the 1996 circuit court decision because the Marriage Amendment had validated the statute before it could be finally invalidated by the Hawai'i Supreme Court.[489] She further contended that any constitutional impediment noted by *Baehr v. Lewin* was removed by the Amendment.[490]

Third issue: Does the Marriage Amendment encompass both licenses and benefits?

The Hawai'i Catholic Conference brief noted that the plaintiffs and the courts in *Baehr*, as well as the Legislature, had always linked the status and benefits of marriage.[491] The Conference argued that the Marriage Amendment ended the argument that the Hawai'i Constitution required that marital benefits be extended to same-sex couples.[492] However, the ACLU made the opposite argument in its brief, arguing that the Hawai'i Supreme Court should embrace what it termed the "preservation principle" of constitutional interpretation, whereby a new government power should be construed not to interfere with other constitutional provisions.[493] According to the ACLU's reasoning, the analysis of the court in *Baehr v. Lewin* could still be applied to marriage benefits, even though it could no longer be applied to marital status.[494] The ACLU urged the court to follow the holding of an Oregon Court of Appeals decision which held that under the Oregon Constitution,

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[486] *See id.* at 4-5.

[487] *See id.* at 27.

[488] *See* Baehr v. Miike, No. 91-1394-05, Defendant-Appellant's Supplemental Brief at 2 (Jan. 22, 1999).

[489] *See id.* at 6.

[490] *See id.* at 14.

[491] *See id.*

[492] *See id.* at 6.

[493] *See* Baehr v. Miike, No. 91-1394-05, Brief of Amicus Curiae of the American Civil Liberties Union of Hawai'i Foundation at 7 (Dec. 22, 1998).

[494] *See id.* at 8.

public employers must offer the benefits afforded married couples to same-sex domestic partners.[495] The *Baehr* plaintiffs also endorsed this view.[496]

Fourth issue: Is Baehr v. Lewin *overruled?*

The brief filed by Hawai'i's Future Today argued that "[b]y enacting the amendment with full knowledge of the issues at stake in this case, the People have exercised their sovereign power to directly decide this case"[497] and that the "plain intent" of the wording of the amendment was "to overturn the ruling in [*Baehr v.*] *Lewin* by confirming that the entire question of same-sex marriage is reserved to the legislature, not the judiciary."[498] According to HFT, "the people adopted the amendment and rejected [*Baehr v.*] *Lewin*."[499] The amicus brief of the Hawai'i Catholic Conference also argued that the Amendment overturned *Baehr v. Lewin*, noting that "[t]here is a straight line from the plurality opinion in [*Baehr v.*] *Lewin* to Judge Chang's decision in *Miike*, to the people's rejection of these decisions in the Marriage Amendment.[500] The brief notes that the legislative history of the Amendment indicates that the Legislature was concerned with overturning *Baehr v. Lewin*, not just the *Miike* decision of 1996.[501] Specifically, the Amendment overturned the holding in *Baehr v. Lewin* that the marriage statute was a sex-based classification subject to strict scrutiny based on the court's peculiar analysis of such classifications which focused on the sex of a couple rather than the sex of an individual.[502]

The *Baehr* plaintiffs, on the other hand, argued that *Baehr v. Lewin* was still valid, and therefore applicable to their quest for the benefits of marriage, if not its status.[503]

2. The decision of the supreme court

Almost a year passed with no word from the court. Finally, on December 9, 1999, the court finally issued a four-page summary disposition signed by

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[495] *See* Tanner v. Oregon Health Sciences University, 971 P.2d 435 (Or. App. 1998).

[496] *See* Baehr v. Miike, No. 91-1394-05, Plaintiffs-Appellees' Supplemental Brief at 17 (Jan. 22, 1999).

[497] Baehr v. Miike, No. 91-1394-05, Hawai'i's Future Today's Amicus Curiae Supplemental Brief at 3 (Dec. 23, 1998).

[498] *Id.* at 5.

[499] *Id.* at 6.

[500] *See* Baehr v. Miike, No. 91-1394-05, Supplemental Brief of Amicus Curiae Hawai'i Catholic Conference at 2 (Dec. 23, 1998).

[501] *See id.*

[502] *See id.* at 3.

[503] *See* Baehr v. Miike, No. 91-1394-05, Plaintiffs-Appellees' Supplemental Brief at 20 (Jan. 22, 1999).

three justices (Justices Moon, Levinson, Nakayama) and one judge (Chief Judge Burns, sitting in for Justice Klein, who had earlier recused himself).[504] The court announced it was taking "judicial notice" of the Marriage Amendment.[505] It then announced that in light of the passage of the Marriage Amendment, the case was moot. It reversed the circuit court's decision and directed it to enter judgment for the State.[506]

According to the court, the passage of the Marriage Amendment took the marriage statute out of "the ambit of the equal protection clause . . . insofar as the statute" limited marriage to opposite-sex couples.[507] "Whether or not" the statute was constitutional in the past, the court said, the law had been given "new footing" by the Amendment, and therefore it "must be given full force and effect."[508]

The court characterized the plaintiffs' case as "limited" inasmuch as they were only seeking a marriage license and the resultant marital status. Since the Amendment made the marriage license statute valid, this very specific relief was not available to plaintiffs.[509] The court concluded by reversing the circuit court's decision.[510]

Justice Ramil concurred in the result of the court but wrote separately to make two points.[511] First, Justice Ramil argued that in *Baehr v. Lewin* the court wrongly inserted itself into the marriage debate by defining marriage to include same-sex couples, despite the plain meaning of marriage as the union of a man and a woman.[512] He also argued that the marriage statute classified not on the basis of "sex," as *Baehr v. Lewin* had claimed, but on the basis of "sexual orientation."[513] Nothing in the history of the constitution or society of Hawai'i supported the court's decision, he contended, and *Baehr v. Lewin* was decided without considering the intent of the constitution's framers.[514] The decision whether or not to recognize same-sex "marriage" is a policy decision that should be left to the people, according to Justice Ramil. *Baehr v. Lewin* usurped the authority of the people of Hawai'i.[515]

Second, Justice Ramil criticized the disposition order in several respects. He disagreed that the Marriage Amendment put the marriage statute on "new

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[504] *See* Baher v. Miike, No. 91-1394-05 (Dec. 9, 1999).
[505] *See id.* at 1.
[506] *See id.* at 4.
[507] *Id.* at 2.
[508] *Id.* at 3.
[509] *See id.*
[510] *See id.* at 4.
[511] *See id.* at 1.
[512] *See id.*
[513] *See id.*, n.1.
[514] *See id.* at 3-4.
[515] *See id.* at 4.

footing," and argued that the statute had always been constitutional.[516] He also criticized the court for not explicitly overruling *Baehr v. Lewin*.[517]

In an extended footnote, the court responded to Justice Ramil's concurrence in two respects.[518] First, the majority disagreed with Justice Ramil's view that the court's original 1993 decision redefined marriage to include same-sex unions.[519] Second, the court argued that even if the statute classified on the basis of "sexual orientation" rather than "sex" (as Justice Ramil argued), the statute would still merit strict scrutiny.[520] This is so, the majority opined, because the proceedings of the 1978 Constitutional Convention indicated that the Hawai'i equal protection clause's use of the term "sex" included "sexual orientation."[521]

The court had some, but not a lot, to say about the issues raised in the briefs.

Third issue: Is the Marriage Amendment retroactive?

The court declined to explicitly answer the question. It said that the Marriage Amendment "validated" the statute and placed it "on new footing."[522] But it stopped there, stating that "whether or not" the statute was ever unconstitutional, given the Marriage Amendment, it no longer is, and plaintiffs claims are moot. The most one can say, evidently, is that for all practical purposes the statute was always valid.[523]

Is the Marriage Amendment self-executing, or must the Legislature re-pass the statute?

This is the one question the court appears to have answered, although it did not do so directly. It said, "[i]n light of marriage amendment, [the statute] must be given full force and effect.[524] It also states that "[i]nasmuch as [the

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[516] *See id.* at 5.

[517] *See id.*

[518] *See id.* at 3, n.1 (majority opinion).

[519] *See id.*

[520] *See id.*

[521] *See id.*

[522] *Id.* at 2.

[523] Had the court decided otherwise, it would have raised a host of extremely difficult questions. For a thoughtful (and provocative) analysis of these questions, see Mark Strasser, *Constitutional Limitations and* Baehr *Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L.J. 271 (1998) (arguing that "retroactive nullification" of "same-sex marriages" would be "rank injustice" and fail "constitutional scrutiny").

[524] Baehr v. Miike, No. 91-1394-05, at 3 (Dec. 9, 1999).

statute] is now a valid statute, the relief sought by the plaintiffs is unavailable."[525] So it would appear that the Amendment speaks for itself.[526]

Does the Marriage Amendment encompass both licenses and benefits?

Here the language of the majority gets more slippery. On the one hand, the court characterizes the plaintiffs' claims as "access to applications for marriage licenses and the consequent legally recognized marital status."[527] This suggests that "status" is the consequence of a "license." On the other hand, the court states that "[t]he plaintiffs seek a limited scope of relief in the present lawsuit," which suggests a contrast with a "wider" scope of relief. It is hard to know what that "wider" scope might be, besides access to all the benefits that flow from marital status. The question becomes: is "status" inseparable from benefits (absent other legislative action) or not? The court's message is unclear.

Is Baehr v. Lewin *overruled?*

We have already seen that Justice Ramil seems convinced that the majority's failure to overrule *Baehr v. Lewin* means that the 1993 decision stands. Is that so? Justice Ramil may have overread the majority's opinion. In the text of the majority opinion, not counting the footnote, there is no mention of *Baehr v. Lewin.* The most likely answer then, is that the Marriage Amendment took HRS section 572-1 "out of the ambit of the equal protection clause of the Hawai'i 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".[528]

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[525] *Id.*

[526] The power clarified by the Marriage Amendment is a power that has always previously been enjoyed by the Legislature. It is not an empty vessel waiting to be filled; it is embodied in a law currently in full operation. Some courts have held that once a constitutional impediment to enforcing a statute is removed by a constitutional amendment, no further statutory re-enactment is required. That principle appears to have been followed in the Court's decision, albeit implicitly. *See In re* Rahrer, 140 U.S. 545, 565 (1891) ("That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property.") The principle in *Rahrer* has been reaffirmed more recently in a series of Louisiana cases. *See* Succession of Fragala, 680 So. 2d 1345 (La. App. 2d Cir. 1996); Fullilove v. United States Cas. Co., 129 So. 2d 816 (La.App. 2d Cir. 1961), *cert. denied* (not reported); Dr. G.H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 83 So. 2d 502 (La. App. Orl. Cir. 1955), *rev'd on other grounds*, 90 So. 2d 343 (La. 1956).

[527] Baehr v. Miike, No. 91-1394-05, at 3 (Dec. 9, 1999).

[528] *Id.* at 2.

One of the plaintiffs' attorneys, Evan Wolfson, of the Lambda Legal Defense and Education Fund, tried to point out a silver lining in the end of the case arguing that the court did not overrule *Baehr v. Lewin* and pointing out the court's seeming embrace of the idea that discrimination based on "sexual orientation" deserved strict scrutiny.[529]

3. A strange "ending"

On December 21, 1999, responding to a motion from plaintiffs, the court ordered that its disposition not be published.[530] It offered no explanation. Under the Hawai'i Rules of Appellate Procedure, this means that the decision cannot be cited in any trial court or intermediate court of appeal.[531] Does this mean that the entire debate between the justices is irrelevant? Does it mean that *Baehr v. Lewin* is dead, alive, or some of both? Does it mean that the lengthy footnote about discrimination on the basis of "sexual orientation" should be disregarded? There are no answers to these questions at the present time. The most we can say is that the decision, and the decision to not publish the decision, remind the people of Hawai'i that they were right to reaffirm marriage for themselves.

C. An Unfinished Story

One of the striking facts about the Hawai'i Marriage Amendment is that since it passed, no one has challenged it. During the legislative session, and the campaign which followed, it was continuously alleged that the Amendment was blatantly unconstitutional. Yet even after the ruling of the court, no one has come forward to challenge it. There are probably at least four reasons for this. They also identify some continuing questions. The first is that the Marriage Amendment had the support of all social sectors of Hawai'i, rather than a specific religious, cultural or ideological group. Recall these facts:

- The Amendment was the product of extensive public debate, covering a period of four years, which involved the judicial, executive and legislative branches, and the general public.[532]
- The advocates of the Amendment included legislators who otherwise support "same-sex marriage," and would be likely to vote to legalize it absent dissent from their constituents.[533]

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[529] Evan Wolfson, *Silver Lining in Disappointing End for Hawai'i Case* (Feb. 1, 2000) at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=597>.

[530] *See* Baehr v. Miike, No. 91-1394-05, Order (Dec. 21, 1999).

[531] *See* HAW. R. APP. P. 35c.

[532] *See* discussion *supra* section II.B.

[533] *See id.*

- The major media, consistently supportive of "same-sex marriage," also editorialized in favor of putting the Marriage Amendment on the ballot, in order to finally resolve the issue.[534]
- Religious groups and religiously-committed citizens argued both sides of the issue.[535]
- The primary supporters of the Amendment did not run a "gay-bashing" campaign targeted against lesbians, gays and bisexuals, but instead engaged in a spirited public debate with supporters of same-sex marriage about the role of the courts and the meaning of marriage.[536]

The second reason is that the Hawai'i Constitution offers no real basis for a challenge to the Marriage Amendment.[537] The Amendment, after all, has become part of the constitution. Marriage, due process and equal protection are all in article I now. The court would be unlikely to overturn one section based on another section, especially if the new section has been put in precisely to correct the misuse of the previous section.[538] By dismissing *Baehr* the court seems, at least for now, to have laid that issue to rest.

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[534] *See id.*

[535] *See id.*

[536] *See id.*

[537] Professor Strasser predicted that "[i]nsofar as the proposed amendment to the Hawai'i Constitution is at issue, the Hawai'i Supreme Court will not even be considering whether it is in accord with the state constitution, since that is the document that is being amended." Mark Strasser, *Statutory Construction, Equal Protection, and the Amendment Process: On* Romer, Hunter, *and Efforts to Tame* Baehr, 45 BUFF. L. REV. 739, 761 (1997). Based on the court's disposition, Professor Strasser was right.

[538] Recall again that the *Baehr v. Lewin* court expressly and unanimously rejected the plaintiffs' due process claims. *See Baehr*, 74 Haw. at 550-57, 852 P.2d at 55-57 (plurality discussion and conclusion); *id.* at 588, 852 P.2d at 70 (agreement from dissent). Without addressing the due process question explicitly, Chief Judge Burns concurred "in the result." *Id.* at 583-86, 852 P.2d at 68-70. They inquired whether such a right was "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." *Id.* at 557, 852 P.2d at 57. They also inquired whether such a right was "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." *Id.* Their response was clear: "[W]e hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise." *Id.*

The court's reluctance to venture toward the further shores of due process was reaffirmed in *State v. Mallan*, 86 Hawai'i 440, 950 P.2d 178 (1998). In *Mallan*, the question was whether or not the right to privacy under article I, section 6 of the Hawai'i Constitution "encompasses a right to possess and use marijuana for recreation purposes," and the court decided it did not. The judgment of the court was announced by Justice Ramil and Chief Justice Moon. *See id.* at 179, 950 P.2d at 441. Justice Levinson, the primary author of *Baehr v. Lewin*, issued a furious 110-page dissent. *See id.* at 454, 950 P.2d at 192 (Levinson, J., dissenting). Justices Klein and Nakayama, concurring in the result, called Justice Levinson's dissent "an apologia for the protection of contraband drugs." *Id.* at 509, 950 P.2d at 247.

This does not, however, foreclose a different kind of future challenge, one that Dan Foley has already publicly suggested (but not yet filed).[539] Such a challenge would likely insist, based on article I, section 5, that same-sex couples are entitled to the benefits, rights and protections associated with marriage, albeit not marriage itself. Such a suit would likely not challenge the people's right to define marriage constitutionally. Instead, it would challenge the right to grant rights and benefits based on marital status.

This would be similar to the approach taken by the *Tanner* and *Baker* decisions.[540] It has also been the response of the Alaska plaintiffs in *Brause* after their challenge to the marriage statute was overturned by that state's marriage amendment.[541] Whether the Hawai'i Supreme Court would be receptive to such a challenge is hard to know.

Both parties, and both opinions in the final disposition, seemed to agree that the marriage law discriminates on the basis of "sexual orientation."[542] If so,

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[539] Lisa Keen, *Court 'Punts' on Marriage*, WASH. BLADE, Dec. 17, 1999, at 1.

[540] *See* Tanner v. Oregon Health Sciences University, 971 P.2d 435 (Or. App. 1998) (holding that "sexual orientation" is a suspect classification subject to heightened scrutiny).

[541] See Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 246 n.220 (1999) (describing the new lawsuit filed by the Alaska Civil Liberties Union in the wake of the Alaska Marriage Amendment).

[542] This has always been one of the plaintiffs' claims. *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings Filed on July 9, 1991 (Aug. 29, 1991) at 3, 6-10: "Plaintiffs contend sexual orientation is a fundamental right under the right of privacy, equal protection of the laws, and due process of law of the Hawai'i Constitution. Defendants must show a compelling state interest to deny marriage licenses to Plaintiffs because of Plaintiffs' sexual orientation. Plaintiffs are homosexuals." *Id.* at 3. Then-Judge Klein addressed the issue in his Order Granting Defendant's Motion for Judgment on the Pleadings (Oct. 1, 1991) at 3-6, and expressly held that "[h]omosexuals do not constitute a 'suspect class' for purposes of equal protection analysis under [a]rticle I, [s]ection 5 of the Hawai'i State Constitution." *Id.* at 3. He added that "[d]espite Plaintiffs' argument, the court is hard pressed to equate the civil rights movement by Black-Americans with the quest by homosexuals for equality." *Id.* at 4. The plaintiffs renewed this claim in their original appeal to the Hawai'i Supreme Court. *See* Plaintiffs-Appellants Opening Brief (Feb. 24, 1992), 9-15. The only opinion in *Baehr v. Lewin* to address the issue was Chief Judge Burns' concurrence. Chief Judge Burns argued that if "heterosexuality, homosexuality, bisexuality and asexuality" are "biologically fated," then sexual orientation "probably" should be included as part of the term "sex," and the marriage statute should be subject to strict scrutiny based on sex. If these characteristics were not as "biologically fated" as what he called "the 'biologically fated' male-female difference," then, in his opinion, "each person's 'sex' [would] not include the sexual orientation difference." He called these "relevant questions of fact" to be explored on remand. *See* Baehr v. Lewin, 74 Haw. 530, 586-87, 852 P.2d 44, 69-70 (1993) (Burns, C.J., concurring). The plurality and dissenting opinions, however, agreed with one another, against Chief Judge Burns, that the question of sexual orientation was irrelevant. *See id.* at 558 n.17, 852 P.2d at 58 n.17 (Levinson, J., and Moon, C.J.) ("For the reasons stated in this opinion, it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuals constitute a 'suspect class' because it is immaterial whether the plaintiffs, or any of them, are

this may well come back to haunt (or delight) them. Even if the marriage law is no longer understood as a "sex-based classification," whether de jure or de facto, the court could easily elevate "sexual orientation" to a suspect classification subject to heightened scrutiny. Based on such a standard, it could entertain a claim that benefits, if not status, must be granted on a "non-discriminatory" basis. Some might claim that the court has already held as much in its final disposition. It would be too much to claim this, however, since its comments were in a footnote responding to the concurrence, and the entire disposition has been de-published.[543] In addition, the footnote presented a highly questionable reading of constitutional history.[544] But such an approach is still a live option.

The third reason a challenge to the Marriage Amendment is unlikely is because there is no reason to expect that the U.S. Supreme Court would overturn it. From a federal standpoint, the Marriage Amendment is thoroughly constitutional.[545] To be sure, some attorneys and academics are working mightily to enlist the cases on the right to marry,[546] and sex discrimination,[547] and the Court's recent decision in *Romer v. Evans*[548] in the cause of same-sex marriage.[549] It is unlikely, however, that the U.S. Supreme Court is going to decide that all our marriage statutes, and reaffirmations of

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homosexuals.") and *id.* at 591 n.3, 852 P.2d at 71 n.3 (Heen, J., dissenting) ("Appellants' sexual preferences or lifestyles are completely irrelevant. Although the plurality appears to recognize the irrelevance, the real thrust of the plurality opinion disregards the true import of the statute. The statute treats everyone alike and applies equally to both sexes.")

The otherwise excellent briefs submitted by the State in the second appeal of *Baehr v. Miike*, in their quest to avoid the conclusion that the existing marriage law classifies on the basis of sex, only confused the issue by arguing that the existing marriage law discriminates, instead, on the basis of "sexual orientation". *See* Defendant-Appellant's Opening Brief (Apr. 29, 1997) at 12-19, and Reply Brief, *passim* (June 16, 1997). The footnote in the final disposition only further muddies this water.

[543] *See* dicussion *supra* at section IV.B.

[544] For discussion of the relationship between the terms "sex" and "sexual orientation" during the 1978 Hawai'i Constitutional Convention, see Coolidge, *supra* note 9, at 83 n.297.

[545] For an extended argument to this effect, using the example of Alaska, see Clarkson et al., *supra* note 541, at 249-65 (discussing the right to marry, sex discrimination, and *Romer* cases in relationship to the question of upholding marriage amendments). For federal appellate decisions rejecting "sexual orientation" as a suspect classification, see *id.* at 256, n.265.

[546] The three most important cases are *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987).

[547] See especially *United States v. Virginia*, 518 U.S. 515 (1996).

[548] 517 U.S. 620 (1996).

[549] These scholars include especially Mark Strasser, William Eskridge, and Andrew Koppelman, whose works are cited in Clarkson et al., *supra* note 541, at 250-65. In addition to the articles cited there, one may also consult Strasser's new work, The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Prospects (1999).

those statutes by statute or amendment, depend on nothing more than discrimination or animus.[550]

This is especially likely to be the case with the Hawai'i Amendment, because:

> • The Amendment bill text and committee report emphasize the importance of both individual rights and the institution of marriage, and specifically state that they aim to leave the political process open so supporters of "same-sex marriage" can continue to make their case.[551]
> • The passage of the Amendment was accompanied by legislation conferring selected rights, benefits, and responsibilities, previously associated exclusively with marriage, upon a larger class of citizens, including but not limited to same-sex couples.[552]
> • The Amendment does not prohibit the State from legalizing "same-sex marriage." It only formally reaffirms the marriage lawmaking power of the legislature, where it has in fact rested all along. It is the people's correction of a misinterpretation by the supreme court.[553]

In the words of Professor Richard Duncan, the Amendment is constitutional because:

> The proposed Hawai'i amendment is reasonably and substantially related to the clearly legitimate purpose of returning an important and controversial political issue to the political branch of state government. If adopted by a vote of the people of Hawai'i, the amendment will not decide the issue of same-sex marriage; rather, it will merely restore the power to decide that important issue of social policy to the Hawai'i legislature. The amendment is clearly related to the eminently legitimate goal of protecting the collective right of democratic self-government.[554]

The Marriage Amendment is likely to survive because it genuinely represents the people's decision to reaffirm marriage through their Legislature. The campaign surrounding the Marriage Amendment turned into a public argument about the proper interpretation of the Hawai'i Constitution. At times this got lost in the heated rhetoric between the two sides: One side talked about the need to "Save Traditional Marriage" and the other side talked about the need to "Protect our Constitution." At bottom, however, the "yes" campaign wanted to correct the *Baehr* court's reading of the constitution, whereas the "no" campaign wanted to confirm that reading. There were two

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[550] For articulate replies to the arguments set forth by supporters of same-sex marriage, see the works of Lynn Wardle, Richard Duncan, and Robert George cited in *id.* In addition to the articles cited there, one may also consult George's new work, In Defense of Natural Law (1999).

[551] *See* discussion *supra* section III.A.

[552] *See* discussion *supra* section III.C.2.

[553] *See* discussion *supra* section III.C.1.

[554] Richard F. Duncan, *From* Loving *to* Romer, 12 BYU J. PUB. L. 239, 248 (1998).

legitimate points of view on this question. The people were engaged in a quintessentially democratic debate about how to answer it?[555] The vote on the Marriage Amendment reaffirmed their rightful ability to address this question. The question of "same-sex marriage" was not resolved by the passage of the Marriage Amendment. The only question resolved was whether or not the Hawai'i Constitution resolves the issue. The answer was no. It cannot be unconstitutional for the people to correct their court.

In the last event, the rule of law applies to all who live under it, including those who interpret it.[556] In the words of Professor Stephen Carter of Yale:

> Although judges write as though they are outside the government, I have followed the Reverend Martin Luther King Jr.'s suggestion that courts are no different from any other part of the sovereign. Therefore they share in the responsibility to uphold the dissenting tradition of the Declaration of Independence, and thus not to be too ready to rebuff the repeated petitions of angry citizens. This implies a judicial duty to give a degree of consideration to the public reception of their work, a perhaps heretical claim in this era of judicial popularity, but a perfectly sensible one if one believes that courts, too, govern.[557]

If it is really true that "[a]ll political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people,"[558]

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[555] "By seizing the reins of Hawai'i's democratic institutions, laws and policies can be written for the benefit of the silent local majority. In the process, non-locals can integrate rather than dominate." Andrew Hiroshi Aoki, *American Democracy in Hawai'i: Finding a Place for Local Culture*, 17 U. HAW. L. REV. 605, 616, 638 (1995) (emphasizing the importance of citizen participation according to "local" values of "family-centeredness," "gifting," "consensus resolution" and "openness," while overcoming tendencies toward conflict avoidance and excessive self-restraint).

[556] In the words of Donald Lutz:

> The Supreme Court may be the conscience of America, but ultimately whether that conscience is correct or not is up to a majority, using the political process in the Constitution, to decide . . . . Let the Court do its job as well as it can, and let the rest of the citizens do theirs, in part by using the political system and not leaving it to the Court to complete the Americans' founding as a people.

Lutz, *supra* note 10, at 170. Perhaps then, he hopes, "Americans can speak more clearly to each other as members of a wildly diverse, liberty-loving, self-defining, self-governing people." *Id.*

[557] STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED 142 (1998). Carter adds:

> For every time that we say . . . that *only* our own vision of constitutional meaning has any reality, a reality that must be universal – we are saying, in effect, that there is wickedness abroad but those of us who are able to reason and influence the national sovereign do not share in it. We are saying that everyone else is the problem but we are the solution. We are saying that the millions of Americans who do not trust the national government are right not to trust it; they are right not to trust it because we *are* the national government, and we do not trust them. That is not an attractive vision of democracy.

Id. at 143.

[558] HAW. CONST. art. I, § 1. It is worth noting that this is the beginning of the bill of rights.

and that "[a]ll government is founded on this authority,"[559] then surely the people must have the last word. To do so does not threaten the Hawai'i and Federal Constitutions. Rather, it strengthens them.

V. CONCLUSION

This article has examined the origins, meaning and fate of the Hawai'i Marriage Amendment. It has considered the debate which surrounded its passage, the significance of its provisions, and questions of its interpretation and application in coming years.

On November 3, 1998, the voters of Hawai'i answered "yes" to this question: "Shall the Constitution of the State of Hawai'i be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?"[560] As we have seen, the process of passing, ratifying, and interpreting the Marriage Amendment has been fraught with controversy. This will likely be equally true when the Amendment is applied in the future in response to new challenges.

In the process, however, the myth of the "inevitability" of same-sex marriage was shattered. The *Baehr* case is over. The people's right to decide these questions has been reaffirmed. For those who care about the future of marriage, this is more than enough.[561]

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[559] *Id.*

[560] H.R. 117, 19th Leg., Reg. Sess. (Haw. 1997).

[561] With the triumph of the Marriage Amendment, the marriage debate has moved on to other settings. Supporters of marriage as the union of a man and a woman have won notable victories. The states of Alaska, Nebraska and Nevada have passed their own marriage amendments. ALASKA CONST. art. I, § 25; Nebraska Initiative Measure 416; Nevada Question 2 (the amendment will have to be approved in the next general election as well). *See also* Kevin G. Clarkson, et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier* 16 ALASKA L. REV. 213 (1999). Supporters of same-sex marriage, however, have also achieved dramatic successes. In response to a ruling of the Vermont Supreme Court, handed down only weeks after *Baehr* was dismissed, the Vermont Legislature created a new status called "civil unions" with all the rights, duties and benefits of marriage. *See* VT. ACT 91 (2000); Baker v. Vermont, 744 A.2d 864 (Vt. 1999); David Orgon Coolidge & William C. Duncan, *Beyond* Baker: *The Case for a Vermont Marriage Amendment* 16 VERMONT L. REV. ____ (forthcoming 2001). In addition, on December 19, 2000 the Netherlands fully legalized marriage between persons of the same-sex, provided that one of them is a Dutch citizen or resident. *See* Netherlands Bill 26672, In Regard to the Opening Up of Marriage to Persons of the Same Sex (approved Dec. 19, 2000); Will O'Bryan, *Tulip Service, Holland Oks Marriage Bill*, WASH. BLADE, Dec. 22, 2000, at 1. How the clash between these amendments and statutes will be resolved will be a central question in coming years. See David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority* ____ HARVARD J. L. ETHICS & PUB. POL'Y ____ (forthcoming 2001).

The Future of Same-Sex Marriage

Mark Strasser*

In *Baehr v. Lewin*,[1] a plurality of the Hawai'i Supreme Court held that the state ban on same-sex marriage implicated equal protection guarantees. Because sex is a suspect classification under the Hawai'i Constitution,[2] the case was remanded to give the state an opportunity to establish that its same-sex marriage prohibition was narrowly tailored to promote compelling state interests.[3] On remand, the circuit court held that the state had failed to meet its burden,[4] but stayed that ruling to give the supreme court an opportunity to review it.[5] The supreme court is expected to affirm.[6]

Even if the Hawai'i Supreme Court indeed rules as expected, the future of same-sex marriage in the state still will not be secure, since there will be a referendum in November 1998 on whether the state constitution should be amended to allow the Legislature to reserve marriage for opposite-sex couples.[7] Should that referendum pass[8] and should the Legislature decide to reserve marriage for opposite-sex couples,[9] the anticipated *Baehr v. Miike*

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[1] 74 Haw. 530, 852 P.2d 44, *reconsideration granted in part*, 76 Haw. 276, 875 P.2d 225, (Haw. 1993).

[2] *See id.* at 580, 852 P.2d at 67.

[3] *See id.* at 583, 852 P.2d at 68.

[4] *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

[5] *See* Joel R. Brandes & Carole L. Weidman, *Same-Sex Marriage*, 217 N.Y.L.J. 3 (Jan. 28, 1997) (noting that Judge Chang stayed his own ruling pending state supreme court review).

[6] *See* Larry Kramer, *Same-Sex Marriage, Conflicts of Laws and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1965 (1997) (expressing confidence that the state supreme court will affirm).

[7] *See* 1997 WL 2521072, Assoc. Press Pol. Serv. (April 29, 1997) (discussing state constitutional amendment placed on the general election ballot).

[8] *See* Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples Laws: Medical insurance and survivorship rights are allowed. But a second bill will put amendment on ballot that would let legislators forbid same-sex marriage*, L.A. TIMES, Apr. 30, 1997, at A3 (reporting that polls show about three fourths of Hawai'i residents oppose same-sex marriage).

[9] It seems likely that the Legislature would pass such legislation, since they already have passed legislation which limits marriage to opposite-sex couples. *See* HAW. REV. STAT. § 572-1 (Supp. 1995).

supreme court decision will have been legislatively overruled, since the decision will have been based on an interpretation of the Hawai'i Constitution. Contrary expectations notwithstanding,[10] however, the passage of such a referendum and the accompanying legislation will only bring about more litigation rather than provide an end to it. Despite having been legislatively overruled, the (anticipated) supreme court decision will provide the rationale for striking down the same-sex marriage ban on *federal* constitutional grounds.

I. AFTER *BAEHR V. MIIKE*

If indeed the Hawai'i Supreme Court affirms as expected, there will be a variety of implications, not the least of which might be that the state would be required to recognize same-sex marriages unless or until the referendum passes and the Legislature decides to reserve marriage for opposite-sex couples. Even with the amendment and subsequent legislation, Hawai'i might still be the first state to recognize same-sex marriages, for example, because some marriages had already been celebrated in the interim between the decision and the effective date of the relevant legislation.[11]

Suppose that the Hawai'i voters approve the proposed constitutional amendment and, further, that the Legislature reenacts legislation reserving the right to marry for opposite-sex couples. It is not at all clear that the legislation would pass federal constitutional muster, especially since some of the traditional arguments against same-sex marriage will have been substantially weakened if not clearly undermined when one considers the context in which the legislation had been passed.

A. The Definitional Argument

A variety of courts have suggested that same-sex marriage is simply a contradiction in terms. In *Singer v. Hara*,[12] a Washington appellate court suggested that two men seeking a marriage license had been "denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are

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[10] *See* Cal Thomas, *Marriage From God, Not Courts*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 42 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (noting that the "main event" involves the constitutional amendment).

[11] For a discussion of the constitutionality of that legislation's having retroactive effect, see generally Mark Strasser, *Constitutional Limitations and* Baehr *Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L.J. 271 (1998).

[12] 522 P.2d 1187 (Wash. Ct. App. 1974).

members of the opposite sex."[13] In *Jones v. Hallahan*,[14] the Supreme Court of Kentucky suggested that two women were denied a marriage license because of "their own incapability of entering into a marriage as that term is defined."[15] Basically, these courts suggested that they did not even have to examine whether the implicated state interests justified outweighing the individual interests at issue, because the definition of marriage obviated the need for such an analysis.

The claim that same-sex couples cannot marry because of how marriage is defined might mean: (a) the legislature has chosen to define the term in a particular way and that definition precludes the same-sex parties from marrying each other, or (b) the term has an established, "intrinsic" meaning which precludes the same-sex parties from marrying, regardless of whether the legislature would be willing to change the law or the courts would be willing to interpret the law to permit such marriages to take place. While (b) is a view which some might hold,[16] it is not a view which makes any sense in this context. In the scenario postulated here, same-sex marriages would continue to have been recognized but for the constitutional amendment which allowed the legislature to reserve marriage for opposite-sex couples. It defies common sense to suggest that same-sex couples are definitionally precluded from marrying regardless of legislative will when such couples had in fact been able to marry and would only now be precluded from marrying because of a legislative enactment prohibiting such marriages.

Certainly, (a) is the view which seems more plausible in this context. Yet, if the legislature's having defined marriage in a particular way is going to prevent those not included within the definition from marrying, the legislative definition itself must pass constitutional muster. No legal force is added or immunity acquired merely because the legislature chooses to implement its particular goals via a definition rather than a prohibition. Were a legislature to pass a statute which defined marriage as a civil contract between a man and a woman *of the same race*, no one would say that the implicated constitutional issues would not have to be addressed because the legislature had chosen to *define* marriage as only being between individuals of the same race rather than having chosen to *prohibit* individuals of different races from marrying. So, too, if a legislature decides to define marriage as a civil contract between a man and a woman rather than decides to prohibit marriages between same-sex

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[13] *Id.* at 1192.

[14] 501 S.W.2d 588 (Ky. 1973).

[15] *Id.* at 589.

[16] *See* 142 Cong. Rec. S4947 (daily ed. May 9, 1996) (statement of Sen. Coats) ("The definition of marriage is not created by politicians and judges, and it cannot be changed by them . . . . It is the union of one man and one woman. This fact can be respected or it can be resented, but it cannot be altered.").

couples,[17] that definition will itself have to pass constitutional muster and will not be considered immune from constitutional scrutiny.

In *Baehr v. Lewin*, a plurality of the Hawai'i Supreme Court considered and rejected the argument that marriage is definitionally precluded for same-sex couples.[18] The plurality recognized that an analogous argument had been made by the state of Virginia in defense of its antimiscegenation law, and that the United States Supreme Court had rejected that argument in *Loving v. Virginia*.[19] The Hawai'i plurality suggested that *Loving* unmasked the circular and tautological nature of the definitional preclusion argument and discredited the reasoning underlying it.[20]

The claim is not that *Loving* requires that same-sex marriage bans be struck down as unconstitutional,[21] but merely that the decision suggests, inter alia, that the constitutional issues cannot simply be avoided by positing a particular definition of marriage. Perhaps that point would seem so obvious that it would not need to be made. However, there is reason to think that courts and commentators will continue to claim that same-sex marriages are precluded by definition in the strong sense, i.e., that such marriages cannot exist regardless of what legislative action is taken, even should the Supreme Court of Hawai'i affirm *Baehr v. Miike*.[22]

Consider *Dean v. District of Columbia*,[23] in which two men sought to marry each other. Judge Terry suggested in his concurence that "same-sex 'marriages' are legally and factually – i.e., definitionally – impossible."[24] *Baehr v. Lewin* had already been decided and thus the judge already knew that unless Hawai'i could establish its compelling interests in preventing same-sex

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[17] *Compare* UTAH CODE ANN. § 30-1-2(5) (1995) ("[M]arriages are prohibited and declared void . . . between persons of the same sex.") *with* IND. CODE § 31-7-1-2 (1987) ("Only a female may marry a male. Only a male may marry a female."). The Utah statute seems to offer a prohibition whereas the Indiana statute seems to offer a definition.

[18] *See Lewin*, 74 Haw. at 565, 852 P.2d at 61.

[19] 388 U.S. 1 (1967).

[20] *See Lewin*, 74 Haw. at 569-70, 852 P.2d at 63.

[21] *See id.* at 70, 852 P.2d at 63 (Heen, J., dissenting) ("*Loving* is simply not authority for the plurality's position that the civil right to marriage must be accorded to same sex couples.").

[22] For example, one commentator reads *Baehr v. Lewin* as standing "for the proposition that the law does not create marriage." Lynne Marie Kohm, *A Reply to "Principles and Prejudice": Marriage and the Realization that Principles Win over Political Will*, 22 J. CONTEMP. L. 293, 299 (1996). Indeed, she suggests that even after *Baehr* "there can be no legal right to marriage between two men or two women because such arrangements simply are not marriages." *Id.* at 300. Prof. Kohm seems not to understand that if the supreme court affirms and the referendum does not pass, Hawai'i *will* recognize same-sex marriages. For an example of a court's giving a "creative" reading to *Baehr*, see *infra* notes 23-26 and accompanying text discussing *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

[23] 653 A.2d 307 (D.C. 1995).

[24] *Id.* at 361 (Terry, J., concurring).

couples from marrying, the state might actually recognize same-sex unions. Further, it is not as if the judge would not have been familiar with the *Lewin* decision, since a different judge discussed *Lewin* in that very opinion.[25] If a judge who knows that a state *may* recognize same-sex marriages nonetheless claims that such marriages simply *cannot* be, it is not at all clear that the "mere" fact that such marriages *have* been recognized will preclude a similarly minded judge from nonetheless declaring that such marriages are conceptually impossible.[26]

B. Antimiscegenation Laws and Same-Sex Marriage Bans

Loving concerned interracial marriages rather than same-sex marriages[27] and thus does not establish that same-sex marriage bans are unconstitutional.[28] That point notwithstanding, the reasoning employed in *Loving* to invalidate interracial marriage bans can analogously be used to invalidate same-sex marriage bans, even though race is not a consideration in the latter prohibitions. Especially because equal protection reasoning often involves analogical arguments,[29] equal protection jurisprudence would be stultified were decisions involving race simply considered irrelevant in all cases where race was not an issue.

In *Frontiero v. Richardson*,[30] the Court had to decide the constitutionality of a statute which made it more difficult for a husband than a wife of an armed services member to receive benefits. When suggesting that sex was a classification deserving close scrutiny, the *Frontiero* plurality compared sex to race, reasoning that sex like race "is an immutable characteristic determined solely by the accident of birth."[31] The plurality distinguished sex from other characteristics not deserving close scrutiny by pointing out that "the sex characteristic frequently bears no relation to ability to perform or contribute to society."[32] The *Frontiero* plurality did not simply hold that sex and race

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[25] *See id.* at 316 n.13 (Ferren, J., concurring in part and dissenting in part).

[26] For further discussion of the definitional preclusion argument, see MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION Ch. 1 (1997).

[27] *See Lewin*, 74 Haw. at 588-89, 852 P.2d at 70 (Heen, J., dissenting).

[28] *See id.* (Heen, J., dissenting).

[29] *See* Sharon Elizabeth Rush, *Equal Protection Analogies – Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65, 67 (1997) ("[E]qual protection analysis under the Constitution is structured around analogical reasoning, forcing all groups that allege discrimination as a denial of equal protection to analogize their cases to race discrimination cases.").

[30] 411 U.S. 677 (1973).

[31] *Id.* at 686.

[32] *Id.*

were different and then end the analysis, but instead tried to examine the relevant similiarities and dissimilarities.[33]

When seeking to establish the constitutionality of the state's same-sex marriage ban, the *Lewin* plurality rightly considered *Loving* instructive, since analogues of some of the specious arguments offered to support interracial marriage bans have been offered to support same-sex marriage bans. Should the court again have to decide the constitutionality of a same-sex marriage ban, for example, because the referendum passes and new legislation is enacted, the court will again have to consider whether *Loving* is instructive, this time in a context in which the state constitution explicitly authorizes the legislature to pass a statute reserving marriage for opposite-sex couples.

Certainly, the Hawai'i Supreme Court would not strike the new legislation on state constitutional grounds. However, *Loving* would then be instructive in yet another respect, since the *Loving* Court held that the United States Constitution invalidated several different state constitutional provisions which had improperly restricted marriage.[34] Thus, when *Loving* was decided, the Alabama Constitution read, "The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro."[35] Other state constitutions also prohibited such unions.[36] Nonetheless, notwithstanding these state constitutional provisions, the United States Supreme Court held that these limitations on the right to marry did not pass federal constitutional muster.

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[33] A separate question, which will not be addressed here, is whether orientation itself should be a suspect or quasi-suspect classification. *See generally* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMPLE L. REV. 937 (1991).

[34] *See Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (listing, inter alia, different state constitutions which barred interracial marriage).

[35] ALA. CONST. art. 4, § 102.

[36] *See* FLA. CONST. art. 16, § 24 ("All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited."); MISS. CONST. art. 14, § 263 ("The marriage of a white person with a negro or mulatto, or person who have have one-eigth or more of negro blood, shall be unlawful and void."); N.C. CONST. art. XIV, § 8 ("All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited."); S.C. CONST. art. III, § 33 ("The marriage of a white person and a negro or mulatto or person who have have one-eigth of more of negro blood, shall be unlawful and void."); TENN. CONST. art. XI, § 15 ("The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation inclusive or their living together as man and wife in this State is prohibited.").

C. Equal Protection

In *Baehr v. Lewin*, the plurality examined the State's same-sex marriage ban with strict scrutiny because it held that: (1) the same-sex marriage ban discriminated on the basis of sex both facially and as applied,[37] and (2) sex was a suspect classification under the Hawai'i Constitution and thus all statutes discriminating on that basis had to be examined with strict scrutiny.[38] Suppose that the Hawai'i Legislature reenacts the same-sex marriage ban after it has been authorized to do so. Were that new law challenged in the courts, the supreme court of the state would not look at the statute, conclude that it implicated equal protection guarantees, and then impose strict scrutiny, since the basis for applying strict scrutiny (the Hawai'i Constitution) would also have explicitly authorized the passage of such a law. Rather, the supreme court would conclude that the statute implicated equal protection guarantees and then would impose heightened scrutiny, since the federal Constitution requires that level of scrutiny for classifications based on gender.[39]

The *Lewin* plurality's holding that the same-sex marriage ban involved sex discrimination was important because: (1) the prohibition then had to be subjected to strict scrutiny under the Hawai'i Constitution, and (2) the analysis made the ban a classification based on sex, thereby implicating equal protection guarantees. Should the Hawai'i Legislature reenact the same legislation after being authorized to do so and should that legislation be challenged, (1) will no longer be true – the Hawai'i Constitution would not require that this legislation be examined with strict (or even heightened) scrutiny. However, even if the strict scrutiny test would not be employed because the Hawai'i Constitution's equal protection clause would not be violated by the ban, the prohibition would presumably still be examined with heightened scrutiny, since the analysis formerly establishing a violation of Hawai'i's equal protection clause would still establish a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Thus, if the Legislature reenacts the same measure and if, as the *Lewin* plurality found, the Hawai'i marital statute, "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex,"[40] the new statute will implicate federal equal protection guarantees.

The difficulty for the *Lewin* court was in deciding whether the Hawai'i Constitution mandated that strict rather than heightened scrutiny be applied to

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[37] *See Lewin*, 74 Haw. at 580, 852 P.2d at 67.

[38] *See id.*

[39] *See* J.E.B. v. Alabama, 511 U.S. 127, 135 (1994) (holding that heightened scrutiny is afforded to distinctions based on gender).

[40] *Lewin*, 74 Haw. at 572, 852 P.2d at 64.

the same-sex marriage ban, not in deciding whether the statute implicated equal protection guarantees.[41] Yet, even if "mere" heightened scrutiny is employed, it is unlikely that the state will be able to provide an "exceedingly persuasive justification"[42] for the same-sex marriage ban and thus it is unlikely that the same-sex marriage ban will survive federal constitutional scrutiny. While the proposed amendment to the Hawai'i Constitution will affect whether the Hawai'i Constitution permits the Legislature to prohibit same-sex marriage, it will *not* affect whether such a ban involves sex discrimination either facially or as applied.

Suppose that a state had a provision within its constitution which read: "Of several persons claiming and equally entitled under applicable law to administer an estate, males must be preferred to females."[43] It is clear that such a provision could not be struck down on state constitutional grounds, since the provision would have been within the state constitution itself. However, the state constitutional provision might be challenged on federal constitutional grounds. The state would be unable to deny that the provision involved a classification based on sex, since the provision would have clearly and explicitly discriminated on that basis, although the state might have argued that the classification, admittedly based on sex, was nonetheless not invidious.[44] So, too, even if the Hawai'i Supreme Court is correct that the same-sex marriage ban involves a classification based on sex, the state might nonetheless argue that the classification is not invidious.

II. Interests Implicated in Marriage Bans

Whenever a court is asked to determine whether a particular classification is invidious or, instead, is "a legitimate exertion of the police powers of the State,"[45] the court must examine the state and individual interests implicated by the classification. The Supreme Court has articulated various individual interests in marriage, all of which apply whether the individual seeks to marry a same-sex or an opposite-sex partner. Ironically, the state interests in promoting marriage generally also support the recognition of the right of individuals to marry their same-sex partners, which suggests that such bans are

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[41] *See id.* at 572-80, 852 P.2d at 65-67 (discussing why strict rather than heightened scrutiny would be applied).

[42] United States v. Virginia, 518 U.S. 515, 531 (1996).

[43] *Cf.* Reed v. Reed, 404 U.S. 71, 73 (1971).

[44] *Cf. Loving v. Virginia*, 388 U.S. 1, 8 ("[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.").

[45] Mugler v. Kansas, 123 U.S. 623, 661 (1887).

invidiously motivated. Further, the claim that recognizing same-sex marriage will require the recognition of incestuous or polygamous marriages is clearly false, since some of the interests implicated in recognizing the latter two kinds of marriages simply are not implicated in the recognition of the former kind of marriage.

A. State Interests in Marriage

The state has a variety of interests in promoting marriage. In *Adams v. Howerton*,[46] the court explained that "the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised."[47] These state interests must be examined. First, the state's interest in fostering procreation is not limited to the production of children *through the union* of the two spouses.[48] Rather, the state has an interest in having healthy and flourishing children produced and raised, even if those children are not raised by both of their biological parents. As long as the child will be happy and well-adjusted,[49] it should not matter to the state that the child's parents include only one adult who is biologically related to that child, whether the two parents are of the same or of the opposite sex. Indeed, even where the child is raised by two adults, neither of whom has any biological connection to the child, the state's interests in the next generation are promoted as long as the child is well cared for.

The state has an interest *both* in the production *and* in the raising of children. Even if lesbians and gays were producing *no* children and were "merely" providing homes in which the children might thrive, the state's interest in the next generation would still be promoted by allowing same-sex partners to marry and to provide homes in which the children might be raised to grow up to be happy and productive members of society.[50] Thus, claims to

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[46] 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

[47] *Id.* at 1124.

[48] Notwithstanding that this is *not* the implicated state interest, courts and commentators nonetheless argue as if it were. *See* Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974). *See also* Kohm, *supra* note 22, at 322 (arguing against same-sex marriage because "[t]wo women cannot create a child without the assistance of a man at some point, and two men cannot create a child without the assistance of a woman at some point").

[49] Lesbian and gay couples are raising happy and well-adjusted children. *See generally* Mark Strasser, *Legislative Presumptions and Judicial Assumptions, On Parenting, Adopting, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49, 66-88 (1996).

[50] *See* G. Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, 11 MEM. ST. U. L. REV. 303, 338 (1981) ("The key to a happy, well-adjusted child seems to be parental love, concern and respect, rather than the lifestyle in which one is raised.").

the contrary notwithstanding, the state's compelling interest in fostering procreation and in providing status and stability to the environment in which the children are raised supports rather than undermines the state's recognizing same-sex marriages.[51]

Courts and commentators who discuss why same-sex couples should not be allowed to marry imply that the interest of the state in the creation and care of the next generation can only be served if the children are produced "through the union" of the couple.[52] But that is not the state's interest, as is clear from the state's policies on adoption, foster care, etc. Indeed, given current demographics concerning the surprisingly small percentage of children in households with both of their biological parents, it is at the very least surprising that this kind of argument would be offered.[53] That this argument is not offered, for example, to prevent sterile opposite-sex couples from marrying or to make it more difficult for individuals to adopt children but is only offered in the context of trying to invent some justification for prohibiting same-sex couples from marrying suggests that the analysis is pretextual and not offered in good faith.[54] While it is of course not argued here that sterile opposite-sex couples should be prevented from marrying or that adopting children should be made more difficult, it is argued here that selective use of the "through the union" rationale makes the argument even less plausible.

Marriage provides stability for adults as well as for children. Stability benefits the individuals themselves and society as a whole.[55] In *Smith v. Organization of Foster Families for Equality and Reform*,[56] the Court recognized "the importance of the familial relationship, *to the individuals involved and to . . . society*."[57] It is in *society's* interest that individuals have stable homes which are a source of strength and stability, at least in part, because the individuals will then be more productive members of society.

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[51] *See* Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering* Baehr: *On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 959 (1995) [hereinafter Strasser, *Domestic Relations*].

[52] *See Singer*, 522 P.2d at 1195; *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982). *See also* Kohm, *supra* note 22, at 322.

[53] *See* Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1311 (1997) ("By 1990, however, barely one in every four households was home to a nuclear family [i.e., a married couple and their biological child[ren].").

[54] *See* Strasser, *Domestic Relations*, *supra* note 51, at 959.

[55] For a discussion of the individual interests in marriage, see *infra* notes 91-102 and accompanying text.

[56] 431 U.S. 816 (1977).

[57] *Id.* at 844 (emphasis added).

The state has a financial interest in promoting marriage, for example, because the marital partners will provide care for each other, should the need arise, so that the state will not have to do so.[58] Thus, should someone become ill[59] or temporarily in need of financial support because of unfortunate circumstances,[60] society has an interest in the marital partner's helping out rather than having the state required to do so. By promoting marriage for same-sex couples, the state will be promoting individuals to take care of their (marital) partners in times of need.

Given the incidence of divorce in this country,[61] it is likely that some same-sex couples will seek a divorce, should they be allowed to marry. Yet, society also has an interest in assuring that break-ups occur in an organized way,[62] that property is divided equitably, and that the custodial arrangements for children promote their best interests.[63]

Commentators sometimes discuss the "civilizing" influence of marriage.[64] Especially in the context of whether same-sex couples should be allowed to marry, however, it is quite clear that different individuals have very different things in mind when discussing this issue. While they all have in mind something about the possible effects on attitudes or actions of permitting same-sex individuals to marry, the kinds of attitudes and actions which are included within the "civilizing" category are sufficiently dissimilar that grouping them together may be confusing.

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[58] *See* Jonathan Rauch, *For Better or Worse, in* SAME-SEX MARRIAGE: PRO AND CON A READER 169, 179 (Andrew Sullivan ed., 1997).

[59] *See id.* at 179 (discussing admirable devotion of many gays and lesbians to partners who are ill).

[60] *See Let Them Wed, in* SAME-SEX MARRIAGE: PRO AND CON A READER 181, 183 (Andrew Sullivan ed., 1997) (reprinted from the Economist) (discussing marriage as providing an "economic bulwark" in times of need) [hereinafter *Let Them Wed*].

[61] *See* Christensen, *supra* note 53, at 1311 ("Approximately fifty percent of first marriages end in divorce, as do about sixty percent of second marriages."). *See also* Wendy Koch, *Americans quick to marry - quick to divorce, too Great expectations: "Perhaps other cultures are more tolerant of difficulties,"* S.F. EXAMINER, Mar. 17, 1996, at A2 (half of American marriages end in divorce).

[62] *See* Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 991 (1991) (explaining that a state has an interest in limiting the social costs which are involved in the disorganized breakdown of relations).

[63] If a same-sex couple breaks up, the adult who had the most contact with the children and did the most in raising them might not only not get custody but might not even be allowed to see them. *See generally* Strasser, *Legislative Presumptions*, *supra* note 49, at 90-110 (discussing situations in which same-sex couples are raising children and the relationship between the adults ends).

[64] *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 8-10 (1996); *Let Them Wed*, *supra* note 60, at 183 ("[M]arriage is a great social stabiliser of men . . . .").

Some commentators suggest that same-sex marriage cannot have the desirable civilizing or "domesticating" effect,[65] since individuals who seek to marry their same-sex partners are allegedly promiscuous[66] and, in addition, incapable of not being so.[67] Yet, such an argument is unpersuasive for at least two reasons. First, the initial claims are inaccurate, since the promiscuity is at the very least exaggerated.[68] Second, the implication that gays are subject to uncontrollable urges is clearly false,[69] since the AIDS crisis has brought about a change in sexual behavior.[70]

Consider the suggestion that marriage would not civilize gay men because "the great tendency of homosexual males to be promiscuous"[71] would not be tamed by marriage. Given that there is no reason to believe that only gay males would have such a trait, the claim is presumably that males in general have this trait.[72] Yet, if heterosexual males can be domesticated through

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[65] *See* James Q. Wilson, *Against Homosexual Marriage, in* SAME-SEX MARRIAGE: PRO AND CON A READER 159, 163 (Andrew Sullivan ed., 1997).

[66] *See id.* at 167. Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URBAN L.J. 1057, 1078 (1994) (discussing claim by the Director of Cultural Research Studies at the Family Research Council that "most gay people are generally promiscuous").

[67] *See* Dennis Prager, *Homosexuality, the Bible, and Us – A Jewish Perspective, in* SAME-SEX MARRIAGE: PRO AND CON A READER 61, 66 (Andrew Sullivan ed., 1997) ("Male nature, not the inability to marry, compels gay men to wander from man to man.").

[68] *See* William E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW. ENG. L. REV. 579, 594 (1996) (discussing claims about promiscuity which are often either overstated or simply false); William N. Eskridge, Jr., Essay, *Gaylegal Narratives*, 46 STAN. L. REV. 607, 625 (1994) (discussing "the stereotype that gay men are 'promiscuous'"); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 537 (1992) (discussing beliefs held by some that gay men and lesbians are "promiscuous, predatory, and obsessed with sex"); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 284 (1995) (discussing sweeping generalizations which falsely depict all gays as promiscuous); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J. L. & SOC. PROBS. 91, 93 (1996) (discussing the unfounded myth and stereotype that gays and lesbians are more promiscuous than heterosexuals); Judith Lillian Dillon, Note, *A Proposal to Ban Sexual Orientation Discrimination in Private Employment in Vermont*, 15 VT. L. REV. 435, 479 (1991) (discussing the myth that lesbians and gay men lead promiscuous lifestyles). *Cf.* Campbell v. Sundquist, 926 S.W.2d 250, 263 (Tenn. App. 1996) (suggesting that there is insufficient evidence to prove that homosexual relationships are short lived and shallow).

[69] *See* Thomas R. Mendicino, Note, *Characterization and Disease: Homosexuals and the Threat of AIDS*, 66 N.C. L. REV. 226, 245 (1987) (discussing the false view of gays as having uncontrollable sexual urges).

[70] *See id.* at 233, 245.

[71] *See* Wilson, *supra*, note 65, at 167.

[72] *See* Prager, *supra* note 67, at 66 (discussing the "male tendency to promiscuity"). *See also* Daniel Maguire, *The Morality of Homosexual Marriage, in* SAME-SEX MARRIAGE THE

marriage, notwithstanding this alleged tendency to be promiscuous, some reason must be offered to explain why gay males would not also be changed by marriage. The further argument offered is that only women can domesticate men.[73] Since males would be marrying other males, there would be no one to stop them from their wandering ways.

Yet, there is reason to doubt these characterizations of men and women.[74] Indeed, this kind of argumentation "reflects [the] archaic and stereotypic" beliefs and "fixed notions concerning the roles and abilities of males and females"[75] that the Equal Protection Clause was designed to eradicate. It is much more plausible to suggest that recognizing same-sex marriage would promote longterm monogamous relationships.[76] Further, insofar as marriage even *might* lessen promiscuity and insofar as promiscuity was bad,[77] one would expect this to be a reason to allow such marriages. One would certainly not expect commentators to claim that because it has not yet been *established* that "marriage would have the same, domesticating effect on homosexual members as it has on heterosexuals,"[78] same-sex couples should not be allowed to marry, as if this would have to be something which was proven before one could take the chance of allowing same-sex partners to marry.

When Virginia was trying to defend its antimiscegenation law, it argued that because "the scientific evidence . . . [was] substantially in doubt"[79] with respect to "whether there was any rational basis for a State to treat interracial marriages differently from other marriages,"[80] the Supreme Court "should

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MORAL AND LEGAL DEBATE 57, 66 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (suggesting that there is no reason to think gay men any more likely to be promiscuous than straight men would be if given equal opportunity.).

[73] *See* Prager, *supra* note 67, at 66. ("It is women who keep most heterosexual men monogamous, or at least less likely to cruise, but gay men have no such brake on their cruising natures.").

[74] *See* Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 422 (1996) (discussing feminist critiques suggesting that these claims about the nature of men are cultural excuses which allow men to escape the consequences of their actions).

[75] Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982).

[76] *See* RICHARD A. POSNER, SEX AND REASON 302 (1992) (suggesting that gays are more promiscuous because they cannot marry); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 290-91 (1995); Dwight J. Penas, *Bless the Tie that Binds: A Puritan-Covenant Case for Same-Sex Marriage*, *in* SAME-SEX MARRIAGE THE MORAL AND LEGAL DEBATE 146, 154 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) ("Same-sex marriage would foster commitment, loyalty, and intimacy, just as does heterosexual marriage").

[77] *But cf.* Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 L. & SEX. 83, 112 (1994) (suggesting that some "practice promiscuity as sexual revolution").

[78] Wilson, *supra*, note 65, at 163.

[79] *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

[80] *Id.*

defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages."[81] The Court rejected the state's analysis, recognizing the "invidious"[82] nature of the argument offered, notwithstanding the state's claims about the alleged scientific uncertainties associated with recognizing the marriage at issue. So, too, a court hearing an argument concerning the alleged scientific uncertainties with respect to marriage's civilizing effect on same-sex couples should recognize the invidious nature of the state's argument and treat it accordingly.

The point here should not be misunderstood. It is reasonable to believe that some who marry their same-sex partners will not be monogamous. Yet, it is quite clear that not all heterosexuals who marry are faithful,[83] and no one is (yet) suggesting that they therefore be prohibited from marrying.

There is yet another reason to believe that accusations of incurable promiscuity are not only false but made in bad faith. Accusations of promiscuity are often made against traditionally disfavored groups. For example, some have claimed that minorities are more promiscuous than whites,[84] perhaps as a kind of justification for a reduction in public support of "those" people.[85] Sometimes, single welfare mothers are accused of being promiscuous, at least in part, to help justify compulsory sterilization of them.[86] Accusations of promiscuity are often made as a way of (allegedly) justifying a deprivation of rights which cannot otherwise be justified.

Sometimes, commentators discussing the civilizing effects of marriage are not discussing the sexual habits of the parties but, instead, whether allowing same-sex couples to marry would somehow coopt them into adopting traditional roles and becoming more "mainstream."[87] Of course, some same-

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[81] *Id.*

[82] *Id.* at 11.

[83] *See* Caryn James, *TV mirrors the '90s view of adultery*, SAN DIEGO UNION & TRIB., Aug. 17, 1997, at E13 (discussing broad range of estimates of the percentage of those who have had marital affairs). *See also* Nedrow, *supra* note 50, at 307 (discussing the "propensity for breaking the monogamous mold through divorce and adultery even in the face of severe social and legal sanctions").

[84] *See* Darren Lenard Hutchison, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 608 (1997) ("[U]nder racial hierarchy, blacks are considered sexually deviant – promiscuous and predatory.").

[85] *See* Beverly Horsburgh, *Schrdegreesodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing the Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 561 (1996) (discussing theorists who argue that Blacks are more promiscuous than whites and individuals who use such theories to support their view that public funding should be cut).

[86] *See id.* at 574 (discussing charge and increased likelihood that these women will lose even more of their reproductive rights).

[87] *See* Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation*, *in* SAME-SEX MARRIAGE THE MORAL AND LEGAL DEBATE 164, 165 (Robert M. Baird & Stuart E. Rosenbaum

sex couples are already mainstream, and others are not and will consciously choose to reject traditional roles even if allowed to marry.[88] It is simply too difficult to predict how allowing individuals to marry would affect the roles they will adopt, although it seems plausible to believe that many couples would not adopt significantly different roles than they have already adopted in their longterm, not-yet-legally-recognized relationships. In any event, these simply are not the bases upon which the same-sex marriage issue should be decided.

Suppose that the issue was whether interracial couples should be allowed to marry. Individuals would presumably be embarrassed to argue that the recognition of such marriages should depend either upon whether the union would have a civilizing influence upon the would-be marital partners or upon whether there were assurances that the individuals who entered into such marriages would not be coopted into adopting particular roles or values. The discussion about the civilizing effect would rightly be viewed as insulting and invidious and the discussion about being coopted would rightly be viewed as imposing a political litmus test on a fundamental right. Individuals should be allowed to allocate marital duties in the way they feel appropriate without having their right to marry hang in the balance.[89]

B. Individual Interests in Marriage

The Court has articulated the numerous and significant individual interests which are implicated in marriage. In *Zablocki v. Redhail*,[90] the Court made clear that "the right to marry is of fundamental importance for all individuals."[91] Yet, it strains credulity to claim that lesbians and gays have the fundamental right to marry, but they simply do not have the right to marry each other.[92] One can imagine the response which would be offered were a state to reserve marriage for same-sex couples and then claim that those who

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eds., 1997) (suggesting that permitting same-sex marriage would have an undesirable mainstreaming effect).

[88] *See* Barbara Cox, *A (Personal) Essay on Same-Sex Marriage, in* SAME-SEX MARRIAGE THE MORAL AND LEGAL DEBATE 27, 28 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (suggesting that the author's same-sex union was not a mere "aping" of traditional marriages).

[89] For a discussion of whether this freedom should include the right to enter into polygamous or incestuous marriages, see *infra* notes 106-56 and accompanying text.

[90] 434 U.S. 374 (1978).

[91] *Id.* at 384.

[92] Some commentators see nothing untoward in making such a claim. *See* Kohm, *supra* note 22, at 302 ("Lesbians and gay men are no less entitled to the fundamental right to marriage than heterosexual men and women. Each individual entering into the institution of marriage must simply meet the requirements [of marrying someone of the opposite sex].").

wished to marry opposite-sex partners of course had the fundamental right to marry, just not someone of the opposite sex.

The *Zablocki* Court suggested that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[93] Since gays and lesbians do have and raise children, *Zablocki* would seem to establish that same-sex couples have a fundamental right to marry. Indeed, in some states, both members of a same-sex couple can be recognized as the legal parents of the same child.[94] This makes even clearer that *Zablocki* supports rather than undermines the right of same-sex couples to marry.[95]

There is reason to believe that the Justices understood that *Zablocki* might have implications for the recognition of same-sex marriage. When Justice Powell concurred in *Zablocki*, he suggested that the decision might have implications for a variety of laws. He pointed out that state regulations of marriage have "included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests,"[96] and then suggested that a "'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce."[97]

In *Turner v. Safley*,[98] the Court recognized numerous individual interests in marriage which are constitutionally significant – marriages are "expressions

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[93] *Zablocki*, 434 U.S. at 386.

[94] *See* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (requiring that each member of same-sex couple be recognized as legal parent of same child); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995) (holding the same); Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993) (holding the same).

[95] In *Lewin*, the court denied that individuals had a fundamental right to marry their same-sex partners, in part because of its strained interpretation of *Zablocki*. *See* Baehr v. Lewin, 74 Haw. 530, 561-62, 852 P.2d 44, 56 (1993). For a discussion of why the *Lewin* court's *Zablocki* interpretation was unpersuasive, see Strasser, *Domestic Relations*, *supra* note 51, at 952-55.

[96] *Zablocki*, 434 U.S. at 399 (Powell, J., concurring in the judgment).

[97] *Id. See also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 984 (1992) (Scalia, J., concurring in part and dissenting in part) (comparing homosexual sodomy, polygamy and adult incest). In a different context, Justice Douglas worried that the Court's rulings would force the state to recognize polygamous marriages. *See* Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting) ("What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* [*v. United States*, 98 U.S. 145 (1878)] will be overruled."). For a discussion of why recognizing same-sex marriage would not entail that incestuous or polygamous marriages would also have to be recognized, see *infra* notes 106-56 and accompanying text.

[98] 482 U.S. 78 (1987).

of emotional support and public commitment,"[99] marriages may involve "an exercise of religious faith as well as an expression of personal dedication"[100] and, further, marriage is often a "precondition to the receipt of government benefits."[101] All of these would apply to same-sex as well as opposite-sex couples.[102]

Ironically, the Hawai'i Supreme Court held that there is no fundamental right to same-sex marriage,[103] employing a test which simply was not used by the Supreme Court in *Loving*, *Turner*, and *Zablocki*.[104] Nonetheless, even if the Hawai'i Supreme Court does not believe a fundamental right is at issue, the court will have to consider the individual and state interests which are implicated in a same-sex marriage ban, especially if the court believes that such a ban involves an equal protection violation. The court might well have to consider the spirit of Justice Powell's comments and decide, for example, whether the court's recognizing same-sex marriages would also require the court to recognize incestuous or polygamous unions.

C. Incestuous or Polygamous Unions

A variety of commentators worry that a state's recognizing same-sex marriage would also require the state to recognize incestuous or polygamous marriages.[105] Basically, the suggestion is that if same-sex unions are allowed, then everything must be allowed, including individuals having sexual relations

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[99] *Id.* at 95.

[100] *Id.* at 96.

[101] *Id.*

[102] The passage of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), may mean that same-sex couples will not be entitled to federal benefits, assuming its constitutionality is upheld. For reasons to doubt that the Act passes constitutional muster, see generally Mark Strasser, Loving *the* Romer *Out for* Baehr: *On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997).

[103] *See* Baehr v. Lewin, 74 Haw. 530, 558-71, 852 P.2d 44, 55-57 (1993).

[104] For a general discussion of this point, see MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION Ch. 3 (1997).

[105] *See* Hadley Arkes, *The Closet Straight*, *in* SAME-SEX MARRIAGE: PRO AND CON A READER 154, 158 (Andrew Sullivan ed., 1997) (suggesting that regulations against both polygamy and incest would be affected); William Bennett, *Leave Marriage Alone*, *in* SAME-SEX MARRIAGE: PRO AND CON A READER 274, 275 (Andrew Sullivan ed., 1997) (same); Charles Krauthammer, *When John and Jim Say "I Do"*, *in* SAME-SEX MARRIAGE: PRO AND CON A READER 282, 283-84 (Andrew Sullivan ed., 1997) (discussing regulation of polygamy and incest); Robert H. Knight, *How Domestic Partnerships and "Gay Marriage" Threaten the Family*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 108, 115 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (discussing regulation of incest and polygamy).

with animals,[106] fathers marrying their daughters,[107] etc. Yet, this is ridiculous, as should be clear when one considers what would be involved in each kind of union.

There are obvious differences between same-sex marriages on the one hand and polygamous or incestuous marriages on the other, much less between same-sex marriages and relations between people and animals. Polygamous marriages involve one man's having more than one wife at the same time or one woman's having more than one husband at the same time.[108] Incestuous marriages involve two individuals who marry despite being too closely related by blood. Permitting same-sex marriages would mean that the individual could marry *one person* of the same sex who was *not* a sibling, parent, etc.

1. Incestuous marriages

Allowing two men to marry or two women to marry would no more allow the man to marry his brother or the woman her sister than would allowing two individuals of different sexes to marry entitle a man to marry his sister or a woman her brother. The state interests implicated in preventing incest do not suddenly disappear merely because two individuals of the same sex might be involved in the union.

Certainly, it is not a new phenomenon for courts or commentators to refuse to consider the actual state interests supporting a marital ban and instead to claim that striking down one existing marital prohibition will necessitate striking them all down. In *State v. Bell*,[109] the Supreme Court of Tennessee explained why it would not allow an interracial couple, validly married in Mississippi, to live together as lawful husband and wife in the state of Tennessee.[110] The court explained that were the state to recognize the marriage of two such individuals, "we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister."[111] Just as

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[106] *See* Knight, *supra* note 105, at 115.

[107] *See* Bennett, *supra* note 105, at 275; Arkes, *supra* note 105, at 158 (suggesting that regulations against both polygamy and incest would be affected).

[108] *See* PEGGY COOPER DAVIS, NEGLECTED STORIES THE CONSTITUTION AND FAMILY VALUES 49 (1997) (describing the two forms of polygamy – polyandry (the taking of multiple husbands) and polygyny (the taking of more than one wife)).

[109] 66 Tenn. 9 (1872).

[110] For further discussion of this case, see generally Mark Strasser, *For Whom* Bell *Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 139 (1998).

[111] *Bell*, 66 Tenn. at 11. *See also* Perez v. Lippold, 198 P.2d 17, 46 (Cal. 1948) (Shenk, J., dissenting) ("The underlying factors that constitute justification for laws against miscegenation closely parallel those which sustain the validity of prohibitions against incest and incestuous marriages.").

there was no foundation to the claim that the recognition of interracial marriages would lead to the recognition of incestuous marriages, there is no foundation to the analogous claim with respect to same-sex marriages.

Numerous reasons have been offered to establish why incestuous unions should not be permitted. When a child has incestuous relations with her parent, she may suffer severe emotional and psychological damage.[112] Further, the existence and extent of such harms may not come to light until after the child has become an adult,[113] at which point the harms may be quite severe.[114]

Even if a child has reached adulthood before the incest occurs, her having sexual relations with her father might be quite harmful.[115] Further, despite both individuals being adults, the sexual relations still might not be fully voluntary.[116] Thus, the potential for exploitation and domination might well

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[112] *See* Byrne v. Bercker, 501 N.W.2d 402, 403 (Wis. 1993) ("Plaintiff alleged that, as a result of this sexual abuse, she suffered severe emotional and psychological damage."); Tyson v. Tyson, 727 P.2d 226, 227 (Wash. 1986) (en banc) ("We recognize that child sexual abuse has devastating impacts on the victim."); Benton v. State, 461 S.E.2d 202, 203 (Ga. 1995) ("The prohibition against incest is rationally related to a legitimate governmental interest – the protection of children and of the family unit.").

[113] *See* Melissa G. Salten, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 200-01 (1984) ("Incest victims frequently exhibit extremely low self-esteem and poor capacity for self-protection, and many suffer from profound feelings of isolation and mistrust of men. These emotional injuries are often demonstrated by the victim's inability to form or maintain supportive relationships. Moreover, the intimate relationships which these women do develop may be harmful rather than healing.").

[114] *See Tyson*, 727 P.2d at 234 (Pearson, J., dissenting) ("As the incest victim becomes an adult, she will often begin to exhibit signs of incest trauma. The most common are sexual dysfunction, low self esteem, poor capacity for self protection, feelings of isolation, and an inability to form or maintain supportive relationships."); Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2194 (1991) ("Experts have also noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred that causes self-destructive behavior later on: incestuous childhood victimization commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction.").

[115] Usually, parent-child incest cases involve relationships between father and daughter. *See* Marc Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 217 (1995) ("[I]ncest statistics show that the vast majority of cases of parent-child incest involve heterosexual fathers and their daughters."); Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 881 (1985) ("incest statistics show that the vast majority of cases of parent-child incest involve heterosexual fathers and their daughters.").

[116] *See* Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 672 (1980) ("[I]ncest laws forbidding parent-child marriage are arguably sustainable even when the child

provide the rationale for prohibiting incestuous relationships even if both parties have attained majority,[117] although it is clear that courts are more worried about incestuous relations between a child and an adult than between two adults.[118]

Courts and commentators have suggested that an additional reason to prohibit incest is to encourage individuals to go outside of the family for mates[119] and, further, to encourage the maintenance of safe, sex-free zones within the family.[120] As a Georgia appellate judge explained, "It is the violation of familial relationships and the trust and emotional attachments that stem from those relationships that are, in addition to sexual relations, proscribed by the incest statute."[121] Finally, states are clearly concerned about

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is mature, on the theory that parental authority established during one's childhood may have a lasting impact, dominating what would otherwise be the child's freedom of choice."). *See also* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 757 (1989) (discussing an argument against adult incestuous relations as involving the claim "that consent to incestuous sex is always suspect because of the peculiar, mysterious pressures at work within the nuclear family").

[117] *See* Christopher J. Keller, *Divining the Priest: A Case Comment on* Baehr v. Lewin, 12 L. & INEQUALITY 483, 506 (1994) ("It is the potential for domination and exploitation in incestuous relationships which undermines consent to the extent that the value of the liberty interest is grossly outweighed by its potential for harm.").

[118] *See In re* Estate of Robert D.B. (Cheryl D. v. Estate of Robert D.B.), 559 N.W.2d 272, 275 (Wis. App. 1996) ("Allegations of incest between adults trivialize the truly genuine and unquestionably tragic cases of child or minor sexual abuse.").

[119] *See* Benton v. State, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring) ("[T]he restriction forces family members to go outside their families to find sexual partners.").

[120] *See id.* at 203 ("The prohibition against incest is rationally related to a legitimate governmental interest – the protection of children and of the family unit."); *id.* at 205 (Sears, J., concurring) ("A second purpose of the [incest] taboo . . . is maintaining the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority, and by reducing competition and jealous friction among family members."); *In re* Estate of Loughmiller, 629 P.2d 156, 158 (Kan. 1981) (stating that incestuous marriages should be prohibited to "prevent the sociological consequences of competition for sexual companionship among family members"); *In re* Enderle Marriage License, Pa. D. & C.2d 114, 120 (1954) (explaining that a purpose in forbidding incestuous marriages is "to maintain the sanctity of the home and prevent the disastrous consequences of competition for sexual companionship between members of the same household or family"); Margaret M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. Pub. L. 21, 29 (1993) (discussing theory suggesting that "the incest ban strengthens and stabilizes family relationships by removing the potential for sexual unions and jealousy within the family household"); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1182-83 (1992) ("The prohibition on incest . . . may find support in a concern for promoting social integration by encouraging marriage across family lines and by a concern for preserving nonsexual intimacy within the family.").

[121] Edmonson v. State, 464 S.E.2d 839, 843 (Ga. App. 1995) (Ruffin, J., concurring specially).

possible genetic difficulties which might result were there no rule against incest.[122]

Different states assign very different weights to the possible interests which are implicated when family members have sexual relations with each other. For example, some states seem to worry most about the possible genetic difficulties which might result, while others emphasize very different concerns. As might be expected given these very different emphases, some states regard sexual relations between adoptive parents and their adopted children as incestuous while others do not,[123] and some states regard sexual relations between stepparents and stepchildren as incestuous while others do not.[124] Thus, those states primarily worried about genetic difficulties tend to have more "liberal" marital policies when family members not related by blood wish to marry.

The point here should not be misunderstood. Whenever an adult has sexual relations with a child, there will be an issue of statutory rape, but that is a separate question which does not speak to the incest regulation.[125] The point here is that one state's emphasizing genetics may yield one kind of incest classification while a different state's emphasizing trust and safety might yield a different kind of classification.

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[122] *See* J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 570 (1977) ("Civil laws against consanguineous marriages, often paralleled by criminal prohibitions of incest, are said to prevent the genetic deformities of inbreeding and to promote family harmony by preventing infrafamily sexual jealousy and rivalry."). *See also In re* Estate of Loughmiller, 629 P.2d 156, 158 (Kan. 1981) ("[I]nbreeding is thought to cause a weakening of the racial and physical quality of the population according to the science of eugenics."); *In re* Enderle Marriage License, Pa. D. & C.2d 114, 120 (1954) (explaining that incestuous marriages are forbidden "for eugenic reasons, to preserve and strengthen the general racial and physical qualities of its citizens by preventing inbreeding"). *But see* Bucca v. State, 128 A.2d 506, 510 (N.J. Super. Ct. Ch. Div. 1957) ("Geneticists agree generally that the only effect upon offspring would be an increased chance of transmitting any disease or weakness which already existed in the blood line. Such incestuous relationship may be treated not as biologically harmful but only as sociologically improper.").

[123] *Compare* Bagnardi v. Hartnett, 366 N.Y.S.2d 89 (1975) (permitting adoptive father to marry adopted daughter) *with* Edmondson v. State, 464 S.E.2d 839, 842 (Ga. App. 1995) (reasoning that adoptive father stands on same footing as biological father – having sexual relations with adoptive daughter would be incest).

[124] *Compare* State v. McQuiston, 922 P.2d 519, 525 (Mont. 1996) (suggesting that sexual relations between stepparent and adult stepchild are not forbidden if consensual) *with* State v. Buck, 757 P.2d 861, 864 (Or. App. 1988) (stating that sexual relations incestuous if between individual and child of individual's spouse).

[125] *See* Jackson v. State, 682 N.E.2d 564, 568 (Ind. App. 1997) (Kirsch, J., dissenting) ("A parent of an adopted child or stepchild stands in the same shoes under the current incest statute as does any adult stranger to the child victim; while such a person may be convicted of some other crime, e.g., child molestation, he may not be convicted of incest.").

Suppose that two individuals who are first cousins wish to marry each other. Suppose further that the state legislature is worried about the possible genetic difficulties which might arise from first cousin marriages and has decided to prohibit such unions. If two first cousins of the same sex wish to marry, there will be no worries about the possible genetic difficulties which might result from their union and thus it might seem that if same-sex marriages are permitted, states will be forced to change their incest laws.

Yet, in the scenario above, the state would not be changing its incest law but merely applying it for the purposes for which it had been intended. Currently, several states permit first cousins to marry *only if the parties can establish that they are unable to have a child through their union.*[126] The same-sex couple would be like one of these couples. Just as opposite-sex first cousins unable to have children through their union might be allowed to marry, same-sex first cousins unable to have children through their union might be allowed to marry.

Merely because a state allows first cousins to marry if they cannot reproduce does not entail that the state will therefore be forced to allow *siblings* to marry if they cannot reproduce, since there are other interests implicated when siblings wish to marry. Indeed, merely because some states allow first cousins to marry if they cannot reproduce does not mean that other states must do the same.[127] Thus, it is simply false that permitting same-sex couples to marry will necessitate a change in the incest laws. If opposite-sex first cousins who are unable to reproduce through their union are nonetheless precluded from marrying, the same will be true of same-sex first cousins. The same will be true if same-sex siblings wish to marry, if an adoptive parent wishes to marry a same-sex child, etc.

An examination of the incest statutes of different states will reveal that the states try to tailor their statutes to the interests they believe important – an emphasis on genetic concerns will yield one type of law, and an emphasis on safety and trust within the family will yield another. The kinds of state interests which are implicated when incest statutes are at issue are much different from those cited to justify same-sex marriage bans and thus permitting the latter kind of marriage would hardly require that all incest laws be scrapped.

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[126] *See* ARIZ. REV. STAT. ANN. § 25-101 (West 1991) (allowing first cousins to marry if both over 65 or one is unable to reproduce); 750 ILL. COMP. STAT. ANN. 5/212 (West Supp. 1997) (allowing first cousins to marry if both over 50 or either party permanently and irreversibly sterile); IND. CODE ANN. § 31-7-1-3 (West Supp. 1996) (allowing first cousins to marry if both over 65); UTAH CODE ANN. § 30-1-1 (1995) (allowing first cousins to marry if both over 65 or both over 55 and one cannot reproduce); WIS. STAT. ANN. § 765.03 (West 1993) (allowing first cousins to marry if female 55 or either submits affidavit permanently sterile).

[127] *See In re* Marriage of Adams (Adams v. Adams), 604 P.2d 332 (Mont. 1979) (holding that marriage between first cousins who were joined when he was 72 and she 67 was void).

2. Polygamous marriages

On its face, it seems absurd to claim that permitting same-sex couples to marry would somehow entail that polygamous marriages would also have to be permitted. Those seeking to marry *a* same-sex partner are not asking to marry *many* same-sex partners at the same time. Further, when the reasons supporting polygamous marriage bans are examined, it becomes even clearer that recognizing same-sex marriages would not require that polygamous marriages also be recognized. Those claiming that the recognition of same-sex marriages requires recognition of polygamous marriages, like those making the same claim with respect to incestuous marriages, are in error, precisely because they refuse to take seriously the differing reasons for banning the respective marriages.

Certainly, it is not difficult to understand why some of the reasons offered to support polygamy bans are not taken seriously, since they are simply specious and do not deserve careful consideration. For example, in *Reynolds v. United States*,[128] the Court suggested that it was permissible to prohibit polygamous marriages because only Asian or African peoples had a practice of recognizing such marriages.[129] Yet, marital unions should not be prohibited merely because European countries do not permit them.[130] When something as important as marriage is at issue, the justifications for a marriage ban should indicate with some specificity the harms that will thereby be prevented.[131] Further, when allegations of harm are made, it will not suffice to allude to the "evil consequences" that "flow from plural marriages"[132] without explaining what those consequences are. If indeed, allowing polygamy would have horrendous results and would be "a return to barbarism,"[133] then these terrible effects should be spelled out.

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[128] 98 U.S. 145 (1878).

[129] *See id.* at 164 ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

[130] *See* PEGGY COOPER DAVIS, NEGLECTED STORIES THE CONSTITUTION AND FAMILY VALUES 60 (1997) (stating that it is inappropriate in a multicultural polity to rely upon the argument that polygamy is a feature of Asiatic and African people).

[131] The claim that European practices should not be the sole reason offered is not merely being suggested to foreclose the same argument's being used against same-sex marriages, since several Scandinavian countries already recognize same-sex relationships. *See In re* Custody of H.S.H.-K. 533 N.W.2d 419, 439 (Wis. 1995) (Day, J., concurring and dissenting) (noting that Sweden, Denmark, and Norway have all recognized same-sex relationships).

[132] *Reynolds*, 98 U.S. at 168.

[133] Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).

The Court has sometimes been more willing to articulate its reasons for believing that polygamous marriages may be prohibited without offended the Constitution. In *Davis v. Beason*,[134] the Court suggested that polygamous unions "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man."[135] Certainly, it would not be difficult to see how a polygamous marriage might be problematic if, for example, the (first) wife did not approve of her husband's marrying someone else. In *State v. Musser*,[136] the Supreme Court of Utah discussed an individual who had been induced "to enter polygamy, . . . in opposition to the interests and desires of his wife."[137] The court further discussed "the consequent broken home from the divorce which followed,"[138] both to establish how polygamy could be harmful and to establish that the claims of consent and voluntariness were unconvincing.[139]

Suppose that it could credibly be established that all parties were willing to allow the husband to have more than one legal spouse.[140] There might be additional reasons to believe that polygamy would be destructive to the family, for example, because such an arrangement might encourage competition for scarce resources.[141] Thus, different "families" might be competing for time, financial resources, etc., thereby promoting feelings of insecurity, jealousy, etc.[142]

Some have suggested that polygamous marriages which involve one husband and more than one wife impose great burdens on women[143] or are

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[134] 133 U.S. 333 (1890).

[135] *Id.* at 341.

[136] 175 P.2d 724 (Utah 1946).

[137] *Id.* at 735.

[138] *Id.*

[139] *Id.*

[140] Although polygamy could refer to an individual's having more than wife or husband, *see supra* note 108, the term when used in this country has tended to refer to a man's having more than one wife, so the example used here will involve a man's having more one spouse at a particular point in time.

[141] *See* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1521 (1997) ("The monogamous family . . . is less internally competitive for physical resources and emotional attention. This lack of competition would appear to promote more affectionate and sympathetic relations between family members.").

[142] *See* Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1900 (1997) ("Normative arguments against polygamy include . . . the greater instability resulting from the increased jealousies and resentments in relationships with multiple sexual partners.").

[143] *See id. See also* Carrie Hillyard, Note, *The History of Suffrage and Equal Rights Provisions in State Constitutions*, 10 BYU J. PUB. L. 117, 123 (1996) ("[M]any outside Utah and outside the Mormon Church were concerned for the welfare of the women involved in plural marriage.").

patriarchal.[144] If one considers Mormon practices in the past, however, it is unclear that the burdens on Mormon women were as onerous as supposed – it has been suggested that, historically, Mormon women who were practicing polygamy were allowed to do things, e.g. run their own businesses, that other women were not allowed to do at the time.[145]

Suppose that it were true that Mormon women were given more autonomy than were other women at the time. A separate question would be whether that historical fact would have any bearing on whether polygamous marriages should be allowed now, especially if there are other reasons to preclude such marriages. For example, some commentators argue that the practice of polygamy is incompatible with democracy[146] and, further, that this is the only legitimate basis upon which to outlaw such a practice.[147]

Ironically, given the current analyses concerning why same-sex marriage will not perform its appropriate "civilizing" functions,[148] those practicing polygamy have been accused of being promiscuous. Thus, in *Cleveland v. United States*,[149] the Court suggested that the "establishment or maintenance of polygamous households is a notorious example of promiscuity."[150] As to whether such a charge is merited, this depends upon one's notion of promiscuity. Insofar as one's having relations with one more than one individual would involve promiscuity, an arrangement in which one had relations with more than one spouse would in fact qualify. However, if promiscuity implies one's

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[144] *See* Keith Jaasma, Note, *The Religious Freedom Restoration Act: Responding to* Smith; *Reconsidering* Reynolds, 16 WHITTIER L. REV. 211, 250 (1995) (discussing the Court's view that polygamy is "patriarchal"). *But see* Donald L. Beschle, *Defining the Scope of the Constitutional Right to Marry: More than Tradition, Less than Unlimited Autonomy*, 70 NOTRE DAME L. REV. 39, 90 (1994) (suggesting that gender inequality will not suffice to justify polygamy prohibition). *See also* Nedrow, *supra* note 50, at 337 (discussing the allegedly "somewhat old-fashioned argument that plural marriage should be outlawed because it endangers the general welfare of women").

[145] *See* Hillyard, *supra* note 143, at 122 ("Mormon women became midwives, teachers, seamstresses, hatmakers and shoemakers, produce merchants, and handmade product merchants.").

[146] *See* Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (suggesting that "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth" as that which prohibits polygamy). *See also* Strassberg, *supra* note 141, at 1510 (suggesting that "polygamy was accurately perceived as a threat to fundamental American political ideals and was, therefore, a legitimate federal and state target").

[147] *See* Strassberg, *supra* note 141, at 1576 ("[T]he only legitimate basis for the *Reynolds* [*v. United States*, 98 U.S. 145 (1878)] decision . . . is an understanding of monogamous marriage as having a fundamental role in the creation and maintenance of the modern liberal state, and an understanding of polygamy as a fundamentally illiberal institution which would undermine the modern liberal state.").

[148] *See supra* notes 65-83 and accompanying text.

[149] 329 U.S. 14 (1946).

[150] *Id.* at 19.

being indiscriminate about the identity or number of individuals with whom one had sexual relations, such a charge would seem to be in error in this context, since polygamy would not imply that an individual would be having relations with nonmarital partners.

An individual who wished to practice polygamy but wanted to deflect the promiscuity charge might claim that he was going to have sexual relations only with his most recent wife, thus undermining the charge that he would be having relations with multiple partners. The Court has made clear, however, that such a claim would not be credited, at least in part, because it would be difficult to be sure that individuals were indeed having relations with only the most current wife,[151] even if one could ignore how the other wife or wives would feel about such an arrangement.

Just as it is now suggested that recognizing same-sex marriages would require recognizing polygamous marriages, it was once suggested that recognizing interracial marriages would require recognizing polygamous marriages. In *State v. Bell*, the Supreme Court of Tennessee worried that if a validly celebrated interracial marriage were to be recognized in Tennessee, the "Turk or Mohammedan, with his numerous wives, . . . [could] establish his harem at the doors of the capitol, and we [would be] . . . without remedy."[152] Just as the claim was false with respect to the implications of recognizing interracial marriages, the claim is false with respect to the implications of recognizing same-sex marriages.

Numerous reasons are offered to justify prohibiting polygamous marriages, ranging from claims that such marriages will be destructive to the family[153] to claims that such marriages will result in the state's having to support individuals who may become public charges[154] to charges that such arrangements are incompatible with democracy.[155] None of these reasons has anything to do with the reasons offered to justify same-sex marriages bans and thus the recognition of the latter would imply nothing about whether the former unions should be recognized.

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[151] *See* Cannon v. United States, 116 U.S. 55, 72 (1885) ("Compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates.").

[152] State v. Bell, 66 Tenn. 9, 11 (1872). *See also* Smith v. Goldsmith, 134 So. 651, 652 (Ala. 1931) (comparing polygamy, incest, and miscegenation).

[153] *See supra* notes 134-42 and accompanying text.

[154] *See In re* Interest of Black, 283 P.2d 887, 889 (Utah 1955) (discussing charge that polygamous parents could not adequately support their children).

[155] *See supra* notes 146-47 and accompanying text.

III. CONCLUSION

When deciding whether a particular marital union may be prohibited by a state, one must keep in mind that states are given much, although not unlimited, discretion to set up their own marriage laws. While state prohibitions on incestuous or polygamous marriages have been upheld, state limitations on interracial, prison, and indigent marriages have been struck down as violating the Constitution.[156] When examining a same-sex marriage ban, the question must be whether the justification offered is consistent not only with the arguably permissible prohibitions on incest or polygamy but also with those attempted marital prohibitions which have been held to violate the Constitution.

A. Beliefs About Wrongness

Some commentators believe that same-sex marriage, like polygamy or incest, should remain illegal because some individuals believe it "wrong or unnatural or perhaps harmful."[157] Yet, the same rationale would imply that interracial marriages should not have been permitted.[158] Indeed, not only interracial unions, but interreligious, interethnic, and intergenerational (nonincestuous) marriages might all be precluded on such a rationale. The right to marry cannot simply depend upon whether some portion of the population does not approve of the union.

Suppose that a particular marital union were allegedly "abhorrent to the sentiments and feelings of the civilized world."[159] The question still would be whether reasons could be adduced to justify that abhorrence,[160] since one of the traditional arguments offered to establish why interracial couples should not be allowed to marry was that such unions were abhorrent or offensive.[161] Anyone offering the "offensiveness" criterion to justify prohibiting same-sex

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[156] *See supra* notes 19-21, 27-28, and 34-36 and accompanying text (discussing *Loving*); *see also supra* notes 91-101 and accompanying text (discussing *Turner* and *Zablocki*).

[157] Krauthammer, *supra* note 105, at 284.

[158] *See* Andrew Sullivan, *Introduction* to SAME-SEX MARRIAGE: PRO AND CON A READER xvii, xxi (Andrew Sullivan ed., 1997) ("In 1968, the year that interracial marriage became legal across the United States, a Gallup poll found that some 72% of Americans still disapproved of such marriages.").

[159] Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 48 (1890).

[160] *See* Nedrow, *supra* note 50, at 336 ("That many or even most Americans find the exercise of a constitutionally protected right undesirable or even offensive is no justification for prohibiting the practice.").

[161] *See* Kinney v. Commonwealth, 71 Va. 858, 869 (1878) (describing "connections and alliances [between the races as] so unnatural that God and nature seem to forbid them").

marriages must explain why this analysis would not imply that *Loving* was wrongly decided.[162]

It is simply too simplistic to claim that if incestuous or polygamous marriages may be prohibited then same-sex marriages may also be prohibited,[163] as if the state's being constitutionally permitted to prohibit one type of marriage would entitle it to prohibit any marriage that it saw fit to disallow. The Supreme Court has already made clear that states simply do not have that kind of discretion.

B. Polygamous, Incestuous, Interracial, and Same-Sex Marriages

When considering any marital prohibition, one must determine whether permitting that marriage would be sufficiently harmful to state interests to justify the ban.[164] It is simply false to assume that permitting or prohibiting one marriage entails that the state must treat all of the others in the same way.[165]

Some commentators suggest that incest regulations are both overinclusive and underinclusive.[166] Others suggest that polygamy should be protected,[167] sometimes because of a belief that permitting such marriages will have eugenic benefits.[168] The claim here is neither that polygamous or incestuous marriages should be permitted nor that they should be prohibited but merely that each

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[162] Some suggest that if interracial marriage is protected by the Constitution, notwithstanding the great opposition to such marriages at the time *Loving* was decided, then other marriages, allegedly less offensive to the public, should also be recognized as protected by the Court. *See* Nedrow, *supra* note 50, at 336 ("[P]lural marriage, if decriminalized, would prove to be a less volatile public issue than . . . racially mixed marriages."); Sullivan, *supra* note 158, at xxi-xxii (suggesting that at the time of *Loving* 72% of Americans disapproved of interracial marriage and that now 58% of Americans oppose same-sex marriage).

[163] *See* Ball, *supra* note 142, at 1900 (discussing the view that if the state can prohibit polygamous marriage then it can also prohibit same-sex marriage).

[164] *Cf.* Nedrow, *supra* note 50, at 341 (suggesting that polygamy prohibition must be examined on its own merits).

[165] *Cf. id.* at 347 (arguing that the implicated state interests do not justify prohibiting polygamy).

[166] *See* Milton C. Regan, *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1525 (1993) ("[I]ncest statutes can be seen as both over- and under-inclusive.").

[167] *See* Donald L. Beschle, *Defining the Scope of the Constitutional Right to Marry: More than Tradition, Less than Unlimited Autonomy*, 70 NOTRE DAME L. REV. 39, 82 (1994) (suggesting that the polygamy cases were wrongly decided). *See also* Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions of Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 315 (1981) (suggesting that polygamy and same-sex marriage should be protected).

[168] *See* Nedrow, *supra* note 50, at 306 ("Polygamous mating, on the other hand, may offer substantial advantages for the species if the superior members of a population are enabled to reproduce and survive in disproportionate numbers.").

suggested marital prohibition should be examined in light of the relevant interests. Theorists must refrain from suggesting that striking down one marriage ban will entail that all marriage bans must be struck down. Such arguments are not only theoretically unsupportable but, in addition, have already been historically disconfirmed.

C. The Future

Suppose that the Hawai'i voters approve the state constitutional amendment and the Hawai'i Legislature reenacts the statute reserving marriage for opposite-sex couples. The Supreme Court of Hawai'i should strike the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The statute would clearly involve a gender classification, both facially and as applied, and no exceedingly persuasive justification could be offered to establish its constitutional permissibility.

When other state courts are confronted with a challenge to their state's same-sex marriage ban, they if acting in good faith will presumably find that their state's law employs a gender classification both facially and as applied. They too will find that the state has been unable to offer an exceedingly persuasive justification for that prohibition. While states can prohibit marriages if sufficiently important states interests are implicated, as may be the case in incest and polygamy bans, states cannot prohibit marriages merely because some individuals are offended by them. Ironically, should the referendum pass and the Hawai'i Legislature reenact the previous statute, the ensuing state supreme court decision may help to establish that the same-sex marriage ban is not merely unconstitutional because of a particular state constitutional provision but because such a classification offends federal constitutional guarantees.

The Fine Line Between Love and the Law: Hawai'i's Attempt to Resolve the Same-Sex Marriage Issue

"Marriage. Legal union of one man and one woman as husband and wife."[1]

I. INTRODUCTION

On December 3, 1996, the national spotlight was directed toward the hotly debated issue of same-sex marriage when Hawai'i Circuit Court Judge Kevin Chang released his long awaited decision in *Baehr v. Miike* ("*Miike*").[2] In his opinion, Judge Chang ruled that the Hawai'i statute that banned same-sex marriage was unconstitutional and in violation of the Equal Protection Clause of the Hawai'i Constitution.[3] As a result, Hawai'i became the first state to recognize same-sex marriage, and the tension between those who support it and those who oppose it increased dramatically.[4]

The enthusiasm and emotion aroused by the decision in *Miike* is not surprising. Marriage has always occupied a central role in society. Legalizing same-sex marriage would have "potential consequences, positive or negative, for children, parents, same-sex couples, families, social structure, social mores, public health, and the status of women . . . ."[5] From a more practical standpoint, the status of marriage confers on a couple many rights, benefits, and obligations which affect health care, taxation, inheritance rights, property rights, immigration rights, recovery for emotional distress and wrongful death, adoption, custody and child support rights, and evidentiary privileges, to name

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[1] BLACK'S LAW DICTIONARY 671 (6th ed. 1991). [Editor's note: As noted in the foreword to this same-sex marriage symposium, the articles and comments in the symposium were written over three years ago, during the peak of the same-sex marriage debate in Hawai'i. Selected updates have been made to this piece, however, this comment also contains statements that reflect the same-sex marriage debate and surrounding events as they were three years ago. The foreword contains a synopsis of the developments in this debate since that time. The *University of Hawai'i Law Review* believes that this comment adds an insightful and thoughtful perspective to the growing literature on this country's same-sex marriage discourse.]

[2] Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

[3] *See id.* at *22.

[4] *See* Cindy Moy, *Reactions Run Along Philosophical Lines After Hawaii Recognizes Same-Sex Marriages*, Dec. 6, 1996, *available in* WESTLAW, WEST'S LEGAL NEWS, 12-6-96 WLN 13039, at *1 (copy on file with author).

[5] Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 3 (1996).

a few.[6] On one hand, opponents of same-sex marriage view the recognition of same-sex marriages as radically redefining one of society's most sacred institutions. On the other hand, members of the gay and lesbian rights movement consider marriage as the "ultimate symbol of societal acceptance of lesbians and gay men."[7] Public opinion is divided and both sides view victory as essential to their respective lifestyles. With so much depending on the definition of marriage, the tension caused by the issue is inevitable.

In Hawai'i, the 1993 Hawai'i Supreme Court decision in *Baehr v. Lewin* ("*Baehr*"),[8] holding that the same-sex marriage ban was a form of sex discrimination,[9] left it up to the state Legislature to resolve the issue. Six months after the *Baehr* decision, the Legislature set up a commission to determine the difference between the legal and economic benefits granted to married couples and those available to same-sex couples.[10] The Legislature also attempted to enact a form of domestic partnership to limit the necessity of legalizing same-sex marriage.[11] These attempts failed, however, and there was no such arrangement implemented before the commencement of *Miike* before Judge Chang.[12]

With the *Miike* decision pending, the 1996 Hawai'i elections took place. At these elections, Hawai'i voters chose to hold a constitutional convention.[13] The likelihood of a judicial decree legalizing same-sex marriage played a large part in this result.[14] A constitutional convention would give its elected delegates a chance to propose a constitutional amendment which could ban same-sex marriage. In addition, the 1997 Legislature began another attempt to create a constitutional amendment of its own.

However, on March 24, 1997, the Hawai'i Supreme Court ruled that the "ballots cast" on the constitutional convention issue included blank ballots and

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[6] *See* Christine Jax, *Same-Sex Marriage – Why Not?*, 4 WIDENER J. PUB. L. 461, 463 n.11 (1995).

[7] Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 500 (1995).

[8] 74 Haw. 530, 852 P.2d 44 (1993).

[9] *See id.* at 561, 852 P.2d at 59.

[10] *See* Act 217, § 6, 1994 Haw. Sess. Laws 217 (amending Hawai'i Revised Statutes section 572-1 (1984)).

[11] *See, e.g.*, S. 2419, S. 3208, and S. 3113, 18th Leg., Reg. Sess. (Haw. 1996).

[12] *See* Paul M. Barrett, *How Hawaii Became Battleground for Gays*, WALL ST. J. EUR., June 25, 1996, at 12, *available in* WESTLAW, HINEWS, 6-25-96 WSJ-EURO 12, 1996 WL-WSJE 10746107.

[13] *See* Meki Cox, *Constitutional Convention is Approved*, ASSOCIATED PRESS, Nov. 20, 1996, *available in* WESTLAW, ALLNEWS, 11-20-96 ASSOCPPS, 1996 WL 5412506 (pagination unavailable) (copy on file with author).

[14] *See* Kortny Rolston, *Gays Oppose Marriage Ban; North Dakota Already Has One-Woman, One-Man Law*, BISMARCK TRIB., Feb. 6, 1997, at 01B, *available in* LEXIS, Nexis Library, CURNWS File.

over votes and that, as a result, a majority of voters did not choose to hold a constitutional convention.[15] The ruling had an immediate effect on House and Senate negotiators, who had been haggling over a proposed amendment for months.[16] Without a constitutional convention, any proposed amendment to prevent the legalization of same-sex marriage had to come from the Legislature. Finally, on April 16, House and Senate negotiators agreed on a proposed constitutional amendment to be placed on the ballot of the 1998 elections.[17]

In addition, on July 10, 1997, United States District Court Judge David Ezra ruled that the 1996 election on the constitutional convention was "flawed and unfair" under the United States Constitution because the voters did not "understand what their votes would mean."[18] Judge Ezra ordered the state to hold another vote on the issue.[19] However, the United States Ninth Circuit Court of Appeals has granted a motion by the state to call off the election, previously scheduled for December 6, 1997, and is expected to have a hearing on the issue in January 1998. Thus, with supporters of same-sex marriage waiting for the conclusion of the *Miike* case, which is currently on appeal with the Hawai'i Supreme Court, and opponents pushing for a constitutional amendment, the struggle over same-sex marriage is far from over.

The arguments for and against same-sex marriage can be divided into two categories: public policy arguments and constitutional arguments.[20] On one hand, public policy arguments usually involve the government's interest in regulating marriage, protecting individual freedoms, ensuring procreation and family stability, and safeguarding societal mores and values.[21] These arguments also attempt to clarify the fine line between tolerating a certain lifestyle and imposing that lifestyle upon the rest of society.

Constitutional arguments, on the other hand, deal with the question of whether the right to same-sex marriage falls under any of the protective clauses of the United States Constitution or any of the state constitutions. There are two main constitutional arguments in favor of same-sex marriage.[22] The first is that the right to marry someone of the same sex is a fundamental

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[15] *See* Hawaii State AFL-CIO v. Yoshina, 84 Hawai'i 374, 383, 935 P.2d 89, 98 (1999).

[16] *See* David Orgon Coolidge, *At Last, Hawaiians Have Their Say on Gay Marriage*, WALL ST. J., Apr. 23, 1997, at A19, *available in* WESTLAW, ALLNEWS, 4-23-97 WSJ A19, 1997 WL-WSJ 2418060.

[17] *See* William Kresnak, *Accord Reached on Same-Sex Bills*, HONOLULU ADVERTISER, Apr. 17, 1997, at A1.

[18] Bruce Dunford, *Federal Judge Orders Constitutional Convention Election by Dec. 2*, ASSOCIATED PRESS, July 25, 1997, *available in* WESTLAW, ALLNEWS, 7-25-97 ASSOCPPS, 1997 WL 2541472 (pagination unavailable) (copy on file with author).

[19] *See id.*

[20] *See* Wardle, *supra* note 5, at 4.

[21] *See* Jax, *supra* note 6, at 463.

[22] *See* Wardle, *supra* note 5, at 4.

right protected by the Due Process Clause of the Fifth and Fourteenth Amendments.[23] The second is that prohibiting same-sex marriage is a form of discrimination against a suspect class which is a violation of the Equal Protection Clause of the Fourteenth Amendment.[24] In either case, a law that forbids couples of the same sex to marry may have to pass heightened judicial scrutiny.[25]

Furthermore, in *Romer v. Evans*,[26] the United States Supreme Court recently held that a Colorado amendment which prohibited any government action granting homosexuals preferential treatment was "inexplicable by anything but animus toward the class that it affects . . . ."[27] The Court stated that a "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[28] Consequently, even if laws banning same-sex marriage were subjected to only minimal judicial scrutiny, they may still be struck down if they were enacted because of animosity toward a certain class.

This comment will focus on the constitutional arguments for and against same-sex marriage. It will analyze whether an amendment to the Hawai'i Constitution which prohibits same-sex marriage is likely to withstand federal judicial scrutiny. This comment will also discuss the significance of amending the Hawai'i Constitution. Part II provides a brief history of the same-sex marriage issue, including a summary of past litigation, the *Baehr* and *Miike* cases, and the legislation dealing with same-sex marriage. Part III discusses the importance of a constitutional amendment and the attempts being made in Hawai'i to enact an amendment. Part IV analyzes, under the United States Constitution, the constitutionality of an amendment banning same-sex marriage. Finally, Part V concludes that, under federal judicial review, although an amendment banning same-sex marriage will not invoke heightened judicial scrutiny under due process or equal protection analysis, it

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[23] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right of a uniquely private nature); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by the First Amendment); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate).

[24] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry).

[25] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (stating that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class").

[26] 517 U.S. 620 (1996).

[27] *Id.* at 632.

[28] *Id.* at 634 (citation omitted).

will still be struck down as "inexplicable by anything but animus toward the class that it affects."[29]

II. THE BACKGROUND OF SAME-SEX MARRIAGE LITIGATION

A. The Status of Same-Sex Marriage Before Baehr

Marriage is a state-conferred legal status.[30] Until Judge Chang's ruling in *Miike*, no state in the United States had ever recognized same-sex marriage. State courts that confronted the issue of same-sex marriage unanimously held that same-sex couples were not constitutionally entitled to attain the legal and civil status of marriage.[31] In *Baker v. Nelson*,[32] the Supreme Court of Minnesota held that the application for a marriage license by two men was properly denied.[33] Although the Minnesota marriage license statute did not explicitly prohibit same-sex marriage, the court held that a "sensible reading of the statute disclose[d] a contrary intent."[34] The court also concluded that a major purpose for marriage was procreation, and that although heterosexual couples were not required to show that they would have children, "'abstract symmetry' is not demanded by the Fourteenth Amendment."[35]

In *Jones v. Hallahan*,[36] the Kentucky Supreme Court held that the state did not violate the constitutional rights of two women when it refused to issue them a marriage license.[37] The court concluded that, in the absence of gender-specific language in the statute, marriage must be defined "according to common usage."[38] As a result, the court ruled that the petitioners were "prevented from marrying, not by the statutes of Kentucky or the refusal . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."[39]

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[29] *Id.* at 632.

[30] *See* Baehr v. Lewin, 74 Haw. 530, 558, 852 P.2d 44, 58 (1993).

[31] *See* Dean v. District of Columbia, No. 90-13892 (D.C. Super. Ct. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. Cir. 1995); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); DeSanto v. Barnsley, 476 A.2d 952 (Pa. 1984); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

[32] 191 N.W.2d 185 (Minn. 1971).

[33] *See id.* at 187.

[34] *Id.* at 185.

[35] *Id.* at 187.

[36] 501 S.W.2d 588 (Ky. 1973).

[37] *See id.* at 590.

[38] *Id.* at 589.

[39] *Id.*

Similarly, in *Singer v. Hara*,[40] two men claimed that the state, in denying them a marriage license, violated their state and federal constitutional rights. The men first argued that state marriage laws did not expressly prevent them from marrying.[41] However, the Washington Court of Appeals ruled that the gender-neutral language in the statutes did not indicate a legislative intent to legalize same-sex marriages.[42] In addition, the petitioners argued that the state violated their rights under the equal rights amendment which was recently included as part of Washington's state constitution.[43] Nevertheless, the court concluded that there was no discrimination based on sex because marriage licenses were equally denied to both homosexual men and women.[44]

Although most same-sex marriage cases originated from denied applications for marriage licenses, challenges to same-sex marriage bans also arose under other circumstances. In *Anonymous v. Anonymous*,[45] a man tried to annul his "marriage" to another man whom he mistakenly thought was a woman at the time of their "marriage." The New York Supreme Court declared there was no marriage to begin with.[46] In *Adams v. Howerton*,[47] the court held that Congress did not intend an immigration marriage statute to cover same-sex unions.[48] In *In re Cooper*,[49] the New York Supreme Court refused to allow a homosexual lover to take property under a spousal elective share of an estate because it concluded that a "spouse" was a component of a union between a man and a woman.[50] Attempts to validate same-sex marriage have also been raised in same-sex palimony suits[51] and claims for employee benefits for spouses.[52]

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[40] 522 P.2d 1187 (Wash. Ct. App. 1974).

[41] *See id.* at 1189.

[42] *See id.*

[43] *See id.* at 1190.

[44] *See id.* at 1191. A similar argument was used unsuccessfully in *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, the United States Supreme Court rejected the argument that a ban on interracial marriages was not racially discriminatory because it affected both whites and blacks equally. *See id.* at 7. The court in *Singer* distinguished *Loving* by stating that appellants were "not being denied entry into the marriage relationship because of their sex; rather, . . . because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex." *Singer*, 522 P.2d. at 1192.

[45] 325 N.Y.S.2d 499 (1971).

[46] *See id.* at 501.

[47] 673 F.2d 1036 (9th Cir. 1982).

[48] *See id.* at 1042.

[49] 592 N.Y.S.2d 797 (1993).

[50] *See id.* at 799.

[51] *See, e.g.*, DeSanto v. Barnsley, 476 A.2d 952 (Pa. 1984).

[52] *See, e.g.*, Ross v. Denver Dep't of Health and Hosp., 883 P.2d 516 (Colo. Ct. App. 1994); Phillips v. Wisconsin Personell Community, 482 N.W.2d 121 (Wis. Ct. App. 1992).

Although most same-sex marriage lawsuits have been unsuccessful, there have been some recent decisions in addition to *Baehr* which have suggested an increasing tolerance toward same-sex relationships. In most of these cases, same-sex partners are granted "family" status, allowing them to receive various benefits. For example, in *Braschi v. Stahl Associates*,[53] the New York Court of Appeals held that a homosexual partner qualified as a member of the decedent's "family" under New York's rent-control law.[54] In *In re Guardianship of Kowalski*,[55] the Minnesota Court of Appeals named a lesbian woman as the legal guardian of her disabled partner after the disabled partner's parents denied her visitation rights.[56] Similarly, in *State v. Hadinger*,[57] the Ohio Court of Appeals allowed a lesbian partner to be charged under the state's domestic violence statute.[58]

There has also been evidence of an increased tolerance toward homosexual relationships in cases which have been unsuccessful. In *Shahar v. Bowers*,[59] a federal appeals court held that Georgia's attorney general did not violate the Equal Protection Clause when he withdrew a job offer to a lesbian upon learning that she planned to marry another woman in a religious ceremony.[60] However, this decision was preceded by an earlier ruling by a three-judge panel that found that the petitioner's "right of intimate association was burdened."[61] The panel remanded the case to determine under heightened judicial scrutiny whether the acts of the attorney general violated the petitioner's constitutional rights.[62]

In *Dean v. District of Columbia*,[63] the District of Columbia Court of Appeals upheld the District's same-sex marriage ban.[64] However, Judge Ferren, in his dissenting opinion, concluded that a trial was necessary to determine whether same-sex couples comprised a suspect class entitled to heightened judicial

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[53] 544 N.Y.S.2d 784 (1989).

[54] *See id.* at 790.

[55] 478 N.W.2d 790 (Minn. Ct. App. 1991).

[56] *See id.* at 797.

[57] 573 N.E.2d 1191 (Ohio Ct. App. 1991).

[58] *See id.* at 1193.

[59] 114 F.3d 1097 (11th Cir. 1997).

[60] *See id.* at 1110.

[61] Shahar v. Bowers, 70 F.3d 1218, 1220 (11th Cir. 1995), *vacated*, 78 F.3d 499 (11th Cir. 1996).

[62] *See id.* at 1226.

[63] 653 A.2d 307 (D.C. Cir. 1995).

[64] *See id.* at 308.

scrutiny.[65] Judge Ferren's opinion contains "significant materials for future same-sex marriage litigation."[66]

In addition to these recent cases that suggest tolerance toward same-sex couples, the United States Supreme Court, in *Romer v. Evans*,[67] struck down Amendment 2 to Colorado's state constitution.[68] Amendment 2, passed by Colorado voters in 1992, prohibited all legislative, executive, or judicial action protecting homosexuals from discrimination.[69] Amendment 2 was created in reaction to the enactment of several ordinances in some Colorado municipalities which extended protection based on sexual orientation.

Writing for the majority, Justice Kennedy rejected the state's argument that Amendment 2 was simply withdrawing special rights from homosexuals. Instead, he concluded that the amendment deprived homosexuals of "specific legal protection from the injuries caused by discrimination . . . ."[70] Justice Kennedy also found that Amendment 2 violated the Equal Protection Clause.[71] First, he found that the amendment placed a "broad and undifferentiated disability on a single named group."[72] Second, he concluded that Amendment 2 was "inexplicable by anything but animus toward the class it affects,"[73] and that the desire to disadvantage a politically unpopular group is not a legitimate government interest under equal protection analysis.[74] As a result, Justice Kennedy ruled that Amendment 2 could not withstand even minimal judicial review.[75]

Romer illustrates the increasingly sympathetic view taken by the American courts toward same-sex marriage. This recent development is a departure from a long history of unsuccessful same-sex marriage litigation.[76] This was the backdrop at the time of the release of Judge Chang's decision in *Miike*.

B. Baehr v. Lewin, Baehr v. Miike

The *Baehr* case began on December 17, 1990, when three couples ("Plaintiffs") filed applications for marriage licenses pursuant to Hawai'i

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[65] *See id.* at 358.

[66] Lisa M. Farabee, Note, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 258 (1996).

[67] 517 U.S. 620 (1996).

[68] *See id.* at 635.

[69] *See* Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996).

[70] *Romer*, 517 U.S. at 627.

[71] *See id.* at 635.

[72] *Id.* at 632.

[73] *Id.*

[74] *See id.* at 634.

[75] *See id.* at 632.

[76] *See* Wardle, *supra* note 5, at 10.

Revised Statutes ("HRS") section 572-6.[77] Although HRS section 572-6 did not explicitly prohibit same-sex marriage at the time,[78] John C. Lewin, the Director of the Department of Health, denied the Plaintiffs' applications. In a letter sent to the Plaintiffs, Lewin stated that "the law of Hawai'i does not treat a union between members of the same sex as a valid marriage."[79]

The Plaintiffs then brought a claim in state circuit court to strike down HRS section 572-6 as unconstitutional. In its response, the state asserted the defenses of "failure to state a claim upon which relief can be granted, sovereign immunity, qualified immunity, and abstention in favor of legislative action."[80] Subsequently, the state moved for a judgment on the pleadings and for a dismissal of the complaint for failure to state a claim. On October 1, 1991, the state's motion was granted and the Plaintiffs appealed.[81]

On the appeal, only two of the five regular members of the Hawai'i Supreme Court heard the case: Justice Ronald T.Y. Moon and Justice Steven H. Levinson. Chief Judge James S. Burns and Judge Walter M. Heen of the Hawai'i Intermediate Court of Appeals also heard the case. Chief Judge Burns replaced Chief Justice Herman T.F. Lum who recused himself because he was a defendant in an unrelated lawsuit filed by the law partner of the Plaintiffs' counsel in *Baehr*.[82] Judge Heen replaced Justice Robert G. Klein who recused himself because he was the trial judge for the *Baehr* case before he was appointed to the Hawai'i Supreme Court.[83] Retired Associate Justice Yoshimi Hayashi temporarily filled the fifth and final seat on the court which was vacant at the time the case was argued.[84] However, Retired Associate Justice Hayashi's temporary assignment had expired before the opinion was filed and his vote did not count.[85]

Therefore, *Baehr* was decided by only four people. The final decision consisted of a plurality opinion, a concurring opinion, and a dissenting opinion. Justice Levinson, joined by acting Chief Justice Moon, wrote the plurality opinion.[86] Chief Judge Burns wrote a more narrow concurring

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[77] *See* Baehr v. Lewin, 74 Haw. 530, 538, 852 P.2d 44, 49 (1993).

[78] The Hawai'i Legislature later amended the law to state unambiguously that marriage is permitted only between one man and one woman. *See* Act 217, § 3, 1994 Haw. Sess. Laws 217 (amending Hawai'i Revised Statutes section 572-1 (1984)).

[79] *Baehr*, 74 Haw. at 539 n.3, 852 P.2d at 50 n.3.

[80] *Id.* at 540, 852 P.2d at 50.

[81] *See id.* at 545, 852 P.2d at 52.

[82] *See* Jeffrey J. Swart, Comment, *The Wedding Luau – Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities*, 43 EMORY L.J. 1577, 1602 n.134 (1994).

[83] *See id.*

[84] *See Baehr*, 74 Haw. at 530, 852 P.2d at 46.

[85] *See id.* at 530 n.*, 852 P.2d at 46 n.*.

[86] *See id.* at 535, 852 P.2d at 48.

opinion,[87] while Judge Heen wrote the dissenting opinion.[88] The official case report noted that Retired Associate Justice Hayashi "would have joined in the dissent with Associate Judge Heen."[89] In the end, the Hawai'i Supreme Court vacated the circuit court judgment and remanded the case back to circuit court.[90]

The plurality opinion addressed two major issues. The first focused on whether the "right to marry," protected by the Hawai'i Constitution under article I, section 6, extended to same-sex couples.[91] The court looked to federal cases because the right of privacy in the Hawai'i Constitution originated from the federal right of privacy.[92] The court determined that federal case law "demonstrate[d] that the federal construct of the fundamental right to marry . . . contemplate[d] unions between men and women."[93]

Therefore, the court had to decide if it was willing to extend the fundamental right of marriage to include same-sex marriages.[94] The court emphasized that it was free to give broader privacy protection than that given by the United States Constitution.[95] Using the test set forth in *Griswold v. Connecticut*,[96] the court considered whether the right to same-sex marriage was of "such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice . . . .'"[97] The court also cited *Palko v. Connecticut*,[98] which stated that "only rights that are implicit in the concept of ordered liberty can be deemed fundamental."[99] Applying these standards, the court unanimously held that there was no "fundamental constitutional right to same-sex marriage."[100]

The plurality also addressed whether the denial of marriage licenses to same-sex couples violated the equal protection clause in the Hawai'i Constitution. Although the lower court based its holding mainly on its conclusion that homosexuals were not a suspect class,[101] the Hawai'i Supreme

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[87] *See id.* at 583, 852 P.2d at 68.

[88] *See id.* at 587, 852 P.2d at 70.

[89] *Id.* at 530 n.*, 852 P.2d at 46 n.*.

[90] *See Baehr*, 74 Haw. at 536, 852 P.2d at 48.

[91] *See id.* at 552, 852 P.2d at 55.

[92] *See id.* at 551-54, 852 P.2d at 55-56.

[93] *Id.* at 555, 852 P.2d at 56.

[94] *See id.*, 852 P.2d at 56-57.

[95] *See id.*, 852 P.2d at 56-57 (citing State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988)).

[96] 381 U.S. 479 (1965).

[97] *Baehr*, 74 Haw. at 556, 852 P.2d at 57 (citing *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring)).

[98] 302 U.S. 319 (1937).

[99] *Baehr*, 74 Haw. at 556 n.16, 852 P.2d at 57 n.16 (citing *Palko*, 302 U.S. at 325).

[100] *Id.* at 557, 852 P.2d at 57.

[101] *See* Order Granting Defendant's Motion for Judgment on the Pleadings, No. 91-1394-05 (Haw. Cir. Ct. filed Oct. 1, 1991), at 4.

Court did not address this issue. The court found that "it [was] irrelevant . . . whether homosexuals constitute[d] a 'suspect class' because it [was] immaterial whether the plaintiffs, or any of them, [were] homosexuals."[102]

Instead, the court relied on the equal rights amendment in the Hawai'i Constitution which subjects sex-based discrimination to a higher judicial scrutiny.[103] The court ruled that HRS section 572-1 discriminated based on sex because it refused to allow a man to marry another man simply because he is a man.[104] The court found that Hawai'i's marriage statutes were analogous to the miscegenation statutes that were ruled unconstitutional by the United States Supreme Court in *Loving v. Virginia*.[105] Therefore, the plurality decided that the case should be remanded and that the circuit court should use the "strict scrutiny" standard. If the state could not show that HRS section 572-1 was narrowly tailored to a compelling state interest, HRS section 572-1 would be ruled unconstitutional.[106]

In his concurring opinion, Chief Judge Burns agreed that the case should be remanded. Thus, a majority of justices agreed that there was a material issue of fact to be decided by the circuit court.[107] He also agreed that sex-based discriminations warranted strict scrutiny.[108] However, Chief Judge Burns concluded that the Hawai'i Constitution's references to "sex" included "all aspects of each person's 'sex' that are 'biologically fated.'"[109] As a result, he would consider HRS section 572-1 as sex discrimination only if the Plaintiffs could show that sexual orientation was "biologically fated."[110]

In his dissent, Judge Heen argued that HRS section 572-1 did not discriminate on the basis of sex and should not be subject to any heightened judicial scrutiny.[111] He found that *Loving* was distinguishable from *Baehr* because of "the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman."[112] Judge Heen also concluded that the Plaintiffs were "not being denied entry into the marriage relationship because of their sex; rather, they [were] being denied entry into the marriage relationship because of the recognized definition of that

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[102] *Baehr*, 74 Haw. at 558 n.17, 852 P.2d at 58 n.17.

[103] *See id.* at 580, 852 P.2d at 67.

[104] *See id.* at 557, 852 P.2d at 57.

[105] 388 U.S. 1 (1967).

[106] *See Baehr*, 74 Haw. at 580, 852 P.2d at 67.

[107] *See id.* at 584, 852 P.2d at 68-69.

[108] *See id.* at 584-85, 852 P.2d at 69.

[109] *Id.* at 585, 852 P.2d at 69 (Burns, C.J., concurring) (agreeing that the lower court erroneously dismissed the Plaintiffs' case but basing his concurrence on his conclusion that there were genuine issues of material fact).

[110] *Id.*

[111] *See id.* at 588, 852 P.2d at 70 (Heen, J., dissenting).

[112] *Id.* at 589, 852 P.2d at 71.

relationship as one which may be entered into only by two persons who are members of the opposite sex."[113] Therefore, there was no majority agreement on which issues were to be determined on remand or on which party had the burden of proof.[114]

The state then filed a motion for reconsideration or clarification. The plurality justices declared that:

> [o]n remand, in accordance with the "strict scrutiny" standard, the burden will rest on [the state] to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.[115]

Furthermore, by the time the motion for reconsideration was heard, Justice Paula A. Nakayama was appointed to the Hawai'i Supreme Court. Justice Nakayama joined the plurality opinion, giving it a majority vote.[116] Subsequently, the case was remanded to the circuit court with the state having the burden of proving that section 572-1 was narrowly drawn to further a compelling state interest.

On remand, Judge Kevin Chang heard the case in *Miike*.[117] The state claimed that it had compelling state interests in fostering procreation, assuring the recognition of Hawai'i marriages in other jurisdictions, protecting the state from the reasonably foreseeable effects of the approval of same-sex marriage, and protecting civil liberties.[118] However, the state's main interest was promoting the "optimal development of children."[119]

The state presented testimony from four expert witnesses. The state's experts attempted to show that, "all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female."[120] For example, Dr. Kyle Pruett, the state's expert in psychiarty, testified that "children are more likely to reach their optimal development being raised in an intact family by their mother and father."[121] Also, Dr. Thomas Merrill, the state's expert in psychology, stated that "it is significant to have opposite sex parents for a child's learning."[122]

However, under intense cross-examination by the Plaintiffs, several of the state's witnesses admitted that same-sex couples can and do raise "healthy and

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[113] *Id.* at 590, 852 P.2d at 71.

[114] *See id.* at 647, 852 P.2d at 75 (Burns, C.J., concurring).

[115] *Id.* at 646, 852 P.2d at 74.

[116] *See id.* at 645, 852 P.2d at 74.

[117] Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

[118] *See id.* at *3 (citing Defendant's Pre-Trial Memorandum at 2-4).

[119] *Id.* (citing Defendant's Pre-Trial Memorandum at 1, 2, 4).

[120] *Id.*

[121] *Id.* at *5.

[122] *Id.* at *9.

well-adjusted children."[123] The Plaintiffs also attempted discredit the state's experts. Judge Chang found that Dr. Richard Williams, the state's expert in psychology, was "not persuasive or believable because of his expressed bias against the social sciences . . . ."[124] Similarly, the Plaintiffs pointed out that prior to his rentention in this case, Dr. Merrill had not conducted any study which focused on the children of same-sex couples.[125]

In addition, the Plaintiffs presented testimony from four expert witnesses of their own. All of the Plaintiffs' experts stated that the "sexual orientation of parents is not an indicator of parental fitness."[126] Dr. Pepper Schwartz, the Plaintiffs' expert in sociology, said that there is "no reason related to the promotion of the optimal development of children why same-sex couples should not be permitted to marry."[127] Also, Dr. David Brodzinsky, the Plaintiffs' expert in psychology and child development, concluded that "the primary quality of good parenting is not the particular structure of the family or biology, but is the nurturing relationship between parent and child."[128] Furthermore, Dr. Robert Bidwell, the Plaintiffs' expert in pediatrics, testified that the children of same-sex parents would benefit if their parents were married.[129] Judge Chang found Dr. Schwartz and Dr. Brodzinsky to be "especially credible" and "well-qualified individuals."[130]

Judge Chang concluded that the "single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child."[131] He also determined that the sexual orientation of parents does not "automatically disqualify them from being good, fit, loving or successful parents."[132] Subsequently, despite finding that it was beneficial for a child to be raised by its mother and father, Judge Chang ruled that the state "failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children."[133]

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[123] *E.g.*, *Miike*, No. 91-1394, 1996 WL 694235 at *5 (testimony of Dr. Pruett); *id.* at *7 (testimony of Dr. David Eggebeen, the state's expert in sociology).

[124] *Id.* at *8.

[125] *See id.* at *9.

[126] *Id.* at *11 (testimony of Dr. Pepper Schwartz, Plaintiffs' expert in sociology); *id.* at *13 (testimony of Dr. Charlotte Patterson, Plaintiffs' expert in psychology of child development); *id.* at *14 (testimony of Dr. David Brodzinsky, Plaintiffs' expert in psychology and child development); *id.* at *16 (testimony of Dr. Robert Bidwell, Plaintiffs' expert in pediatrics).

[127] *Id.* at *12.

[128] *Id.* at *15.

[129] *See id.* at *16.

[130] *Id.* at *10.

[131] *Id.* at *17.

[132] *Id.* at *18.

[133] *Id.*

As a result, Judge Chang concluded that the state did not demonstrate the existence of a compelling state interest sufficient to justify withholding the legal status of marriage from the Plaintiffs. He also stated that even if the sex-based classification of HRS section 572-1 served a compelling state interest, the state has not shown "that HRS section 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights."[134] Thus, the court ruled that the sex-based classification in HRS section 572-1 was unconstitutional and enjoined the state from denying any application for a marriage license on the grounds that both applicants are of the same sex.

The state, however, has appealed the ruling to the Hawai'i Supreme Court.[135] Furthermore, Judge Chang granted the state's request to stay the decision until the Hawai'i Supreme Court rules on the case.[136] This allows the state to withhold marriage licenses from same-sex couples until the end of the appeal, which is expected to commence in early 1998.[137] While Hawai'i has gone further than any other state toward legalizing same-sex marriage, the issue still remains unresolved and its outcome remains uncertain.

C. The Reaction to Baehr *and* Miike

The *Miike* decision has placed Hawai'i on the verge of legalizing same-sex marriage. The *Baehr* decision is a strong indication that the Hawai'i Supreme Court will affirm the *Miike* decision. Therefore, same-sex marriage will probably become legal unless opponents respond through legislation.

As the *Baehr* case unfolded, the possibility of state-recognized same-sex marriages spurred legislative action around the country. The Full-Faith and Credit Clause of the United States Constitution says that "Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[138] This requires every state to recognize the judgments of courts from other states. Many states fear that the Full Faith and Credit Clause will force them to recognize same-sex marriages granted in

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[134] *Id.* at *21.

[135] *See* Carl Weiser, *In Perspective: Hawaii Case Won't End Fight Over Same-Sex Marriages; Appeals, Actions by States Put Issue on Uncertain Path*, COURIER-J., Dec. 5, 1996, at 02A, *available in* WESTLAW, ALLNEWS, 12-5-96 COURJ 02A, 1996 WL 6372093.

[136] *See id.*

[137] *See* Associated Press, *Hawaii Could Unleash Suits Over Same-Sex Benefits*, BEST'S INS. NEWS, Sept. 11, 1997, *available in* WESTLAW, ALLNEWS, 9-11-97 BSTW, 1997 WL 7078710 (pagination unavailable).

[138] U.S. CONST. art. IV, § 1.

Hawai'i.[139] So far, twenty-five states have enacted laws prohibiting same-sex marriage.[140]

On the federal level, President Clinton signed the Defense of Marriage Act on September 21, 1996.[141] The Defense of Marriage Act stated that marriage would be defined for federal purposes as a union between a man and a woman.[142] It also stated that states may refuse to recognize same-sex marriages performed in other states.[143] Although the Defense of Marriage Act is the first law to specifically allow a state to legalize same-sex marriage if it wants to, supporters of same-sex marriage will likely challenge the act in court.[144]

In Hawai'i, local lawmakers were equally as active. The Hawai'i Legislature passed a bill that amended HRS section 572-1 to limit marriage contracts to those between a man and a woman.[145] Moreover, a few months after the *Baehr* decision, the Hawai'i Legislature established the Commission on Sexual Orientation and the Law.[146] The purpose of the Commission was to study the dissimilarity between the economic and legal benefits granted to married couples and those available to homosexual couples as well as to recommend any appropriate legislative action.[147]

The Commission was made up of a majority of same-sex marriage supporters and four opponents – two Roman Catholics and two Mormons, explicitly provided for in the legislation. However, the Commission expired amidst a lawsuit challenging the constitutionality of the religious appointments. A federal judge removed the Catholics and Mormons from the Commission. This led to criticism of the lopsidedness of the remaining Commission.[148] As a result, the state legislature formed another Commission in 1995.[149] Like the first Commission, a majority of its members were supporters of same-sex marriage.

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[139] *See* Weiser, *supra* note 135.

[140] *See* Martin Bowley, *Same-Sex Couples, Different Rules*, THE LAWYER, Sept. 16, 1997, at 13, *available in* LEXIS, Nexis Library, CURNWS File.

[141] *See* Tom Curley, *Hawaii Gay Marriage Case has National Implications*, USA TODAY, Dec. 5, 1996, at 04A, *available in* WESTLAW, HINEWS, 12-5-1996 USA TODAY 04A, 1996 WL 2078426.

[142] *See id.*

[143] *See id.*

[144] *See id.*

[145] *See* H.R. 2312, 17th Leg., Reg. Sess (1994), at 3.

[146] *See* HAW. REV. STAT. ANN. § 572-1 (Michie 1993 & Supp. 1994).

[147] *See* Act 217, § 6, 1994 Haw. Sess. Laws 217 (amending Hawai'i Revised Statutes section 572-1 (1984)).

[148] *See* McGivern v. Waihee, No. 94-00843 HMF, (D. Haw. 1994); Greg Wiles, *4 Barred Members Want Same-Sex Panel Disbanded*, HONOLULU ADVERTISER, Jan. 5, 1995, at A1, A2.

[149] *See* S. 888, § 3, 18th Leg., Reg. Sess. (Haw. 1995) (signed by Governor Mar. 28, 1995).

When it appeared that the Commission would recommend – and that the Legislature would enact – some form of domestic partnership, the state requested and received a postponement of the *Miike* trial. The enactment of some form of domestic partnership would have greatly lessened the need to legalize same-sex marriage.[150] As expected, the Commission recommended that the Legislature legalize same-sex marriage or at least enact some form of broad domestic partnership.[151]

Thus, the Legislature now had a chance to address the issue. The State Senate approved a bill allowing same-sex domestic partnerships.[152] The House, however, argued that the voters should decide whether to allow same-sex marriage and approved a proposal for a constitutional amendment banning same-sex marriage.[153] After heated debates, both the House proposal to amend the Hawai'i Constitution and the Senate bill to establish a form of domestic partnership failed.[154] Despite much rhetoric from the Legislature, the controversy concerning same-sex marriages continued.

After Judge Chang's decision in *Miike*, the Hawai'i Legislature once again attempted to resolve the issue in January 1997.[155] Despite making the same-sex marriage issue "one of their highest priorities,"[156] the House and Senate negotiators were unable to come to an agreement before their internal deadline of April 11, 1997.[157] The House insisted that the proposed amendment contain the language "opposite-sex couples" while the Senate demanded that a package of rights for same-sex couples accompany the amendment.[158] It was not until April 16, just before the actual deadline of April 18, that the two sides reached an agreement.

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[150] *See* Associated Press, *Same-Sex Marriage Trial Postponed Until 1996*, L.A. TIMES, July 15, 1995, at 16.

[151] *See* David W. Dunlap, *Panel in Hawaii Recommends Legalizing Same-Sex Marriage*, N.Y. TIMES, Dec. 11, 1995, at A18.

[152] *See* Associated Press, *Gay Marriages Split Hawaii Legislature: Senate Says Yes, House Says Let Public Vote*, PHOENIX GAZETTE, Mar. 6, 1996, at A11, *available in* WESTLAW, ALLNEWS, 3-6-96 ARIZREPUB A11.

[153] *See id.*

[154] *See* Paul M. Barrett, *How Hawaii Became Battleground for Gays*, WALL ST. J. EUR., June 25, 1996, at 12, *available in* WESTLAW, HINEWS, 6-25-96 WSJ-EURO 12, 1996 WL-WSJE 10746107.

[155] *See* H.R. 117, § 1, 19th Leg., Reg. Sess. (Haw. 1997).

[156] Jean Christensen, *Tom Wants Action on Gay Unions*, HONOLULU STAR-BULL., Jan. 20, 1997, at A3.

[157] *See* William Kresnak, *Same-Sex Deadline Passes*, HONOLULU ADVERTISER, Apr. 12, 1997, at A1.

[158] *See id.* at A8.

The agreement consisted of two bills. Both bills were approved in lopsided votes by the full Legislature.[159] The first bill proposed a constitutional amendment that states: "The legislature shall have the power to reserve marriage to opposite-sex couples."[160] The amendment will appear on the ballot of the next general election, which is scheduled for November 1998.[161]

The second bill established "the most sweeping package of rights and protections ever offered to same-sex couples anywhere in the U.S."[162] This bill contained sixty rights and benefits for "reciprocal beneficiaries" – couples who cannot legally marry, such as gay and lesbian couples.[163] The package includes health coverage, employment leave, joint tenancies, insurance and state pensions, and property inheritance without a will.[164]

However, this new law was recently challenged. Seven companies, attempting to block the law, sued the state in federal court.[165] United States District Court Judge Ezra agreed with the companies and ruled that this new law did not apply to most private companies because it conflicted with the Employee Retirement Income Security Act, a federal law that already governs health plans and benefits.[166] This decision was consistent with a prior opinion by the attorney general that said the law could apply only to employers who contracted with insurance companies for health coverage.[167]

As of September 26, 1997, Hawai'i has registered 234 reciprocal beneficiary relationships.[168] Presently, the state and the seven companies are trying to work out an agreement that would satisfy Judge Ezra's ruling.[169] This ruling does not directly affect the same-sex marriage case before the Hawai'i Supreme Court or the constitutional amendment expected to be on the November 1998 ballot.[170]

Therefore, although no state has ever legalized same-sex marriage, the recent rulings in *Baehr* and *Miike* have made it conceivable that Hawai'i will be the first. Nationally, federal and state lawmakers have responded by passing legislation addressing the issue. Similarly, the Hawai'i Legislature has

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[159] *See* Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples*, L.A. TIMES, Apr. 30, 1997, at A3, *available in* LEXIS, Nexis Library, CURNWS File.

[160] Kresnak, *supra* note 17, at A1.

[161] *See id.*

[162] Bowley, *supra* note 140, at 13.

[163] *See id.*

[164] *See id.*

[165] *See* Linda Hosek, *Reciprocal Benefits Limited*, HONOLULU STAR-BULL., Sept. 26, 1997, at A1.

[166] *See id.*

[167] *See id.* at A9.

[168] *See id.*

[169] *See id.* at A1.

[170] *See id.* at A9.

proposed a constitutional amendment which would allow the state to ban same-sex marriage. However, despite all the legislative action, the future of same-sex marriage remains unclear.

III. ATTEMPTING TO AMEND THE HAWAI'I CONSTITUTION

Since the Plaintiffs strategically brought their case in state, not federal, court and only alleged violations of state law, namely the Hawai'i Constitution, the Hawai'i Supreme Court had the final authority to rule on the matter.[171] This absence of federal question precluded the possibility that a federal court would overturn the Hawai'i Supreme Court decision in *Baehr*. In the *Miike* case, both supporters and opponents of same-sex marriage expect the Hawai'i Supreme Court to uphold Judge Chang's decision on appeal.[172] The only two justices from the *Baehr* case who are on the present court are Justice Levinson and Chief Justice Moon. Both of them joined in the plurality opinion that was very sympathetic toward same-sex marriage.[173] Assuming that Justice Levinson and Chief Justice Moon affirm Judge Chang's decision, the Plaintiffs will need a vote from only one of the remaining three justices to prevail. One of the three remaining justices, Justice Nakayama, joined in the plurality opinion on the state's motion for reconsideration.[174]

By affirming Judge Chang's decision, the Hawai'i Supreme Court would be ruling that a law which prohibits same-sex couples from marrying violates the Hawai'i Constitution. Consequently, any further legislation banning same-sex marriage would not withstand judicial review by the Hawai'i Supreme Court. Therefore, the only way to neutralize the court's ruling is to amend the state constitution. If the Hawai'i Constitution were amended to prohibit same-sex marriage, the Hawai'i Supreme Court's ruling in *Miike* would be moot since the court must abide by the language of the constitution.[175] Chief Justice Moon suggested that the Legislature has a "powerful 'trump' because they can dispatch constitutional amendments to be approved by voters while the courts can only interpret the Constitution."[176]

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[171] *See* State v. Lopez, 78 Hawai'i 433, 445, 896 P.2d 889, 901 (1995) (noting that the Hawai'i Supreme Court has the final and unreviewable authority to interpret and enforce the Hawai'i Constitution).

[172] *See* Curley, *supra* note 141, at 04A.

[173] *See Baehr*, 74 Haw. at 535, 852 P.2d at 48.

[174] *See id.* at 645, 852 P.2d at 74.

[175] *See generally* HAW. CONST. art. XVI, § 4 (requiring all public officers to take an oath swearing to "support and defend the Constitution of the United States, and the Constitution of the State of Hawaii").

[176] Associated Press, *Legislators Hold Cards in Gay Marriage Issue*, HONOLULU STAR-BULL., Jan. 24, 1997, at A22.

A constitutional amendment prohibiting same-sex marriage would also be much more permanent than any legislation doing the same thing because it is much harder to amend the constitution than it is to enact new legislation.[177] Furthermore, amending the constitution requires that the people of Hawai'i vote on the matter.[178] Opponents of same-sex marriage have called the *Baehr* case an example of "bald legal activism."[179] The opportunity to amend the state constitution "enables the People to 'overrule' judicial decisions"[180] when "their courts spiral out of control."[181]

There are two ways to amend the Hawai'i Constitution. First, the state legislature may propose an amendment by a two-thirds vote in each house.[182] Second, delegates to a constitutional convention may propose an amendment.[183] In both cases, a proposed amendment would need to be "approved at a general election by a majority of all the votes tallied upon the question."[184]

In Hawai'i, opponents of same-sex marriage pushed for a constitutional amendment through both a constitutional convention and the Legislature. In the 1996 elections, Hawai'i voters elected to have a constitutional convention. However, on March 24, 1997, the Hawai'i Supreme Court negated this result and ruled that the voters did not elect to hold a constitutional convention. In *Hawaii State AFL-CIO v. Yoshina*,[185] the court held that the number of "ballots cast" must include blank ballots and over votes. As a result, the number of people who voted in favor of a constitutional convention fell short of a majority.[186]

Meanwhile, the Hawai'i Legislature was attempting to create a proposed amendment of its own. The uncertain status of the constitutional convention and the Hawai'i Supreme Court's ruling in *Hawaii State AFL-CIO* had a direct effect on the House and Senate negotiators. Without the possibility of a

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[177] *See* HAW. CONST. art. III, § 15 (listing the requirements for a bill to become a law); HAW. CONST. art. XVII, § 3 (requiring that a constitution amendment via a proposal by the legislature receive approval by a two-thirds vote of each house plus a majority of the votes cast in a general election); HAW. CONST. art. XVII, § 2 (listing the requirements for a constitutional amendment via a constitutional convention).

[178] *See* HAW. CONST. art. XVII, § 2 (stating "amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question").

[179] Moy, *supra* note 4, at *1 (quoting Tom Pritchard, executive director of the Minnesota Family Council).

[180] Farabee, *supra* note 66, at 248-49 (quoting Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 156 (1995)).

[181] Coolidge, *supra* note 16, at A19.

[182] *See* HAW. CONST. art. XVII, § 3.

[183] *See* HAW. CONST. art. XVII, § 2.

[184] *Id. See also* HAW. CONST. art. XVII, § 3.

[185] 84 Hawai'i 374, 935 P.2d 89 (1997).

[186] *See id.* at 383, 935 P.2d at 98.

constitutional convention, the two sides had to come to an agreement in order to overturn the *Miike* decision. Legislators had "no safety valve"[187] and a "judicial gun was at their heads."[188]

On April 16, 1997, negotiators from the House and Senate agreed on a proposed constitutional amendment that would allow the Legislature to overturn the *Miike* decision.[189] The House passed the amendment by a 44-6-1 vote and the Senate passed it by a 24-0-1 vote.[190] The amendment is expected to appear on the ballot of the 1998 elections where polls show that Hawai'i voters will ratify it.[191] However, the Hawai'i Supreme Court rejected a request by the state for it to delay its ruling on the same-sex marriage case until after the 1998 elections.[192]

Furthermore, on April 15, 1997, supporters of same-sex marriage filed a class-action lawsuit in federal court against state officials. The lawsuit alleged that the elections office violated the constitutional rights of the voters by the way it counted the ballots cast for the constitutional convention in the 1996 elections.[193] Despite upholding the Hawai'i Supreme Court's ruling that blank and over votes counted as "ballots cast,"[194] Judge Ezra held that the election was "fundamentally flawed" and ordered the state to hold another election on the constitutional convention issue.[195]

However, this did not resolve the matter. On September 10, 1997, the United States Ninth Circuit Court of Appeals granted a motion by the state to call off the election which was scheduled for December 6, 1997.[196] The

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[187] Associated Press, *High Court KOs Con Con*, ASSOCIATED PRESS, Mar. 25, 1997, *available in* WESTLAW, ALLNEWS, 3-25-97 ASSOCPPS, 1997 WL 2511521 (quoting Jack Hoag of Hawai'i's Future Now which opposes same-sex marriage) (pagination unavailable) (copy on file with author).

[188] Coolidge, *supra* note 16, at A19.

[189] *See* Kresnak, *supra* note 17, at A1.

[190] *See* David Orgon Coolidge, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 17 n.43 (1997).

[191] *See* Kresnak, *supra* note 17, at A1.

[192] *See* Deb Price, *Hawaii's Top Court Appears Willing to Legalize Same-Sex Marriage*, DETROIT NEWS, Sept. 5, 1997, at E2, *available in* WESTLAW, ALLNEWS, 9-5-97 DETROITNWS E2, 1997 WL 5596778.

[193] *See* Walter Wright, *ConCon Backers Go to Court*, HONOLULU ADVERTISER, Apr. 16, 1997, at B1.

[194] *See Hawaii State AFL-CIO*, 84 Hawai'i at 383, 935 P.2d at 98

[195] *See* Cheryl Wetzstein, *Marriage Debate Heats Up in Hawaii*, WASH. TIMES, July 21, 1997, at A8, *available in* WESTLAW, ALLNEWS, 7-21-97 WATIMES A8, 1997 WL 3678528.

[196] *See* Bruce Dunford, *The U.S. 9th Circuit Court of Appeals has Granted . . .*, ASSOCIATED PRESS, Sept. 10, 1997, *available in* WESTLAW, ALLNEWS, 9-10-97 ASSOCPPS, 1997 WL 2548469 (pagination unavailable) (copy on file with author).

federal appeals court is expected to have a hearing on the issue in January 1998.[197]

Therefore, opponents of same-sex marriage continue their struggle to prevent the Hawai'i Supreme Court from legalizing same-sex marriage. The only way to do this, however, is to amend the Hawai'i Constitution. Presently, an amendment proposed by the legislature is scheduled to appear before the voters in November 1998. In addition, the Ninth Circuit Court of Appeals is expected to rule on whether or not the state must hold another election for a constitutional convention. In any event, supporters of same-sex marriage are sure to challenge any amendment making same-sex marriage illegal.

IV. ANALYSIS: THE LIKELIHOOD THAT A CONSTITUTIONAL AMENDMENT WILL BE UPHELD BY A FEDERAL COURT

Even if the Hawai'i Constitution were amended to ban same-sex marriage, supporters in Hawai'i would not be left without other options. For example, they could fight for the legalization of same-sex marriage in another state and hope that Hawai'i will enforce it under the Full-Faith and Credit Clause of the United States Constitution.[198] Proponents could also challenge the constitutional amendment and appeal to the federal courts.[199] In this case, supporters would have to prove that the constitutional amendment violated the United States Constitution. The following section will discuss the likely outcome of such a challenge by analyzing some of the major issues which would arise. These major issues include whether an amendment prohibiting same-sex marriage violates either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

A. There is No Fundamental Right To Same-Sex Marriage

Under the Fourteenth Amendment of the United States Constitution, "[n]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."[200] One of the functions of the Due Process Clause is to limit the substantive power of the states so that they cannot regulate conduct in ways which infringe on an individual's "right of

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[197] *See id.*

[198] This may also require a successful challenge to the Defense of Marriage Act. This subject will not be discussed in this comment.

[199] *See* U.S. CONST. art. VI, cl. 2 (stating "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

[200] U.S. CONST. amend. XIV, § 1.

privacy." Under substantive due process analysis, laws which impair "fundamental" rights are subjected to strict judicial scrutiny and are upheld only if they are "necessary" to achieve a "compelling" government objective.[201] If the right is not fundamental, the court will use the "mere rationality" standard. Under the "mere rationality" standard, a law must utilize means which are "rationally related" to a "legitimate" state interest.[202] Since laws are rarely struck down under the "mere rationality" standard and rarely upheld under strict scrutiny, the key issue is whether the right to same-sex marriage is a fundamental right under the Due Process Clause.

1. Marriage is a fundamental right

There is no question that marriage is a fundamental right.[203] The United States Supreme Court recognized the preferential status of marriage as far back as 1878 when it stated that upon marriage "society may be said to be built."[204] In *Skinner v. Oklahoma*,[205] the Court stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[206] The Court, in *Loving v. Virginia*, struck down a miscegenation statute and held that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness."[207] Over a decade later, in *Zablocki v. Redhail*,[208] the Court "reaffirm[ed] the fundamental character of the right to marry."[209] The Court has even found restrictions on marriages for prison inmates unconstitutional.[210] Thus, it is clear that the United States Supreme Court has consistently recognized marriage as a fundamental right.

2. The fundamental right to marriage does not include same-sex marriages

To determine whether the fundamental right to marriage extends to include same-sex marriages, the question of which rights are fundamental must first be analyzed. In *Palko v. Connecticut*,[211] the United States Supreme Court held

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[201] *See, e.g.*, Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Reynolds v. Sims, 377 U.S. 533, 561 (1964).

[202] *See, e.g.*, Railways Express Agency v. New York, 336 U.S. 106 (1949).

[203] *See* Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

[204] Reynolds v. United States, 98 U.S. 145, 165 (1878).

[205] 316 U.S. 535 (1942).

[206] *Id.* at 541.

[207] *Loving*, 388 U.S. at 12.

[208] 434 U.S. 374 (1978).

[209] *Id.* at 386.

[210] *See* Turner v. Safley, 482 U.S. 78, 99 (1987).

[211] 302 U.S. 319 (1937).

that the rights which qualify for heightened judicial protection are those which are "implicit in the concept of ordered liberty."[212] The Court further stated that "[i]f the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."[213] In *Griswold v. Connecticut*,[214] Justice Goldberg declared in his concurring opinion that to decide whether a right is fundamental, the court must "look to the traditional and [collective] conscience of our people to determine whether a principle is so rooted there as to be ranked as fundamental."[215] Thus, the right to same-sex marriage will be entitled to heightened judicial protection under the Due Process Clause only if it meets this criteria.

However, under these standards, it is highly unlikely that the right to same-sex marriage will qualify as a fundamental right. The "traditional and [collective] conscience" of this country has long condemned homosexual behavior and has never recognized same-sex marriages.

No state legislature has ever legalized same-sex marriage[216] and prior to *Miike*, courts have unanimously rejected claims for same-sex marriage.[217] Up until 1961, all fifty states outlawed sodomy and over twenty states still do so today.[218] In addition, surveys have showed that Americans oppose same-sex marriage by a margin of about two to one.[219]

Initially, it appeared that the scope of the "right of privacy" was expanding and would eventually include same-sex marriages. Substantive due process claims were successful in securing protection for various rights such as the right to obtain contraception[220] and the right to have an abortion.[221] However,

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[212] *Id.* at 325.

[213] *Id.* at 326.

[214] 381 U.S. 479 (1965)

[215] *Id.* at 493.

[216] *See* Wardle, *supra* note 5, at 54.

[217] *See supra* section II.A.

[218] *See* Deb Price, *Colonial-era Anti-sodomy Laws Now Simply Reflect Discrimination*, DETROIT NEWS, July 11, 1997, at E2, *available in* WESTLAW, ALLNEWS, 7-11-97 DETROITNWS E2, 1997 WL 5592392.

[219] *See* Linda Aragon & Angela Miller, *Committee OKs Same-Sex Bill*, HONOLULU ADVERTISER, Jan. 22, 1997, at B1 (stating that "opinion polls that have showed up to 70 percent of Hawaii's electorate opposes legalizing same-sex marriage"); WASH. TIMES, July 13, 1995, at A2 (detailing poll results indicating that 63 percent of voters surveyed opposed legalizing same-sex marriage); Walter Isaacson, *Should Gays Have Marriage Rights?*, TIME, Nov. 20, 1989, at 102 (stating that 69 percent of Americans disapprove of legally sanctioned homosexual marriages); *Marriage – The Toughest Battle Lies Ahead*, HUM. RTS. CAMPAIGN Q., Winter 1996, at 16 (stating that 56% of Americans oppose making same-sex marriages legal).

[220] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[221] *See* Roe v. Wade, 410 U.S. 113 (1973) (abortion for adult women); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (abortion for minors).

more recent decisions by the Supreme Court have limited the protective scope of substantive due process.[222]

The most damaging of these cases to supporters of same-sex marriage is *Bowers v. Hardwick*.[223] In *Bowers*, the United States Supreme Court upheld a Georgia sodomy statute and ruled that it did not violate the fundamental rights of homosexuals.[224] A homosexual man who was charged with violating the statute by committing sodomy with another man brought the suit.[225] The Court stated that sodomy had long been illegal in the United States and that "[a]gainst this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[226] The Supreme Court thus rejected any claim that homosexual behavior is protected as a fundamental right.

The claim that the right to same-sex marriage is a fundamental right is also contrary to prior case law. In *Zablocki*, the Court suggested that not all restrictions on marriage violate fundamental rights when it stated that:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subject to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[227]

Past challenges to same-sex marriage bans based upon a right of privacy have all failed because federal courts have never acknowledged the right to same-sex marriage.[228] Even the Hawai'i Supreme Court, in *Baehr*, rejected the assertion that the right to same-sex marriage is a fundamental right.[229]

Therefore, it is highly unlikely that a constitutional amendment to the Hawai'i Constitution which prohibits same-sex marriage will be struck down on the grounds that it violates the Due Process Clause of the Fourteenth Amendment. The prior decisions of the United States Supreme Court have

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[222] *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia statute criminalizing sodomy); *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (increasing the probability that state laws regulating abortions will be sustained); Cruzan v. Missouri Department of Health, 497 U.S. 261 (1990) (ruling that a state may constitutionally refuse to allow life-preserving medical procedures to be terminated unless there is "clear and convincing evidence" that this is what the patient would have wanted); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (holding that a state may prohibit the use of public facilities in abortions).

[223] 478 U.S. 186 (1986).

[224] *See id.* at 194.

[225] *See id.* at 186.

[226] *Id.* at 194.

[227] Zablocki v. Redhail, 434 U.S. 374, 380 (1978).

[228] *See, e.g.*, Jones v. Hallanhan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. 1974).

[229] *See* Baehr v. Lewin, 74 Haw. 530, 557, 852 P.2d 44, 57 (1993).

established the limits of the "right of privacy" and these limits do not include the right to same-sex marriage. Every same-sex marriage claim based on substantive due process arguments has failed. It is highly improbable that the United States Supreme Court would be willing to recognize the right to same-sex marriage as a "new fundamental right."[230] Consequently, an amendment infringing upon that right would only need to pass the "mere rationality" standard. Thus, the better argument for same-sex marriage supporters would be that an amendment banning same-sex marriage violates the Equal Protection Clause.

B. The Prohibition of Same-Sex Marriage Does Not Discriminate Against Any Suspect Class

The Equal Protection Clause of the 14th Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[231] The Equal Protection Clause ensures that people who are similarly situated are similarly treated. As in the case of laws which infringe on "fundamental" rights, laws which discriminate against a "suspect class" are also subjected to heightened judicial scrutiny.[232]

The Supreme Court has already designated groups based on race,[233] nationality,[234] and alienage[235] as suspect classes. Therefore, courts will subject any law which discriminates against these groups to strict scrutiny. The Court has also granted "quasi-suspect" status to certain groups such as those based on gender[236] and illegitimacy.[237] Laws which discriminate against men, women, or illegitimate children are required to pass the "intermediate scrutiny" standard and must therefore utilize means that are "substantially related" to an "important" state interest.[238] All other laws need only pass the "mere rationality" standard.[239] As in the case of substantive due process analysis, the test used in examining a statute is the most important factor in determining whether the statute will be upheld. Therefore, the main issue under equal protection analysis is whether a ban on same-sex marriage discriminates against any suspect or quasi-suspect class.

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[230] *Id.* at 555, 852 P.2d at 57.

[231] U.S. CONST. amend. XIV, § 1.

[232] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976).

[233] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[234] *See* Korematsu v. United States, 323 U.S. 214 (1944).

[235] *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[236] *See* Craig v. Boren, 429 U.S. 190 (1976).

[237] *See* Trimble v. Gordon, 430 U.S. 762 (1977).

[238] *See Craig*, 429 U.S. at 197.

[239] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985).

1. Homosexuals are not a suspect class

The most obvious equal protection claim for supporters of same-sex marriage is that a prohibition of same-sex marriage discriminates against homosexuals. In the past, however, no federal court has ever treated homosexuals as a suspect class.[240] In *High Tech Gays v. Defense Industry Security Clearance Office*, the Ninth Circuit held that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny."[241] More recently, in *Equality Foundation v. Cincinnati*,[242] the Sixth Circuit declared that "homosexuals are entitled to no special constitutional protection, as either a suspect class or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected."[243] In fact, since the United States Supreme Court ruling in *Bowers*, most of the circuits have ruled the same way.[244] Additionally, although the *Romer* court struck down a constitutional amendment because it discriminated against homosexuals, the Court used the "mere rationality" standard in doing so.[245]

Proponents of same-sex marriage, however, have argued that homosexuals should be considered a suspect class. In determining whether a certain group qualifies as a suspect class, the United States Supreme Court has considered five main factors: (1) whether there has been a past history of discrimination toward the class;[246] (2) whether the class possesses a characteristic that bears no relation to the ability to perform or contribute to society;[247] (3) whether the

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[240] *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985).

[241] *High Tech Gays*, 895 F.2d at 574.

[242] 54 F.3d 261 (6th Cir. 1995).

[243] *Id.* at 266, n.2.

[244] *See* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985). In an earlier decision by the Ninth Circuit, *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1987), Judge Norris applied "strict scrutiny" to a classification based on sexual orientation. Later, however, the Ninth Circuit, sitting en banc, vacated Judge Norris' opinion and affirmed its result on nonconstitutional grounds. *See* Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1988) (en banc).

[245] *See* Romer v. Evans, 517 U.S. 620, 632 (1996). The Court ruled that Amendment 2 "lack[ed] a rational relationship to legitimate state interests." *Id.*

[246] *See* Frontiero v. Richardson, 411 U.S. 677, 685-86 (1973).

[247] *See id.*

class is marked with a stigma or "badge" of distinction;[248] (4) whether the class is in a position of political powerlessness;[249] and (5) whether the class possesses an immutable characteristic.[250] Presently, the question of whether or not homosexuals satisfy these criteria remains unanswered.

The first factor is whether the class has a long history of discrimination against it. This should be fairly easy for homosexuals to establish. Having been originally condemned in the Bible,[251] homosexuality has never been a part of mainstream American society. Current bans on same-sex marriage and sodomy evidence this fact. Homosexuals have also been the victims of various hate crimes.[252] Furthermore, in *High Tech Gays*, the court agreed that gays and lesbians have suffered a history of discrimination.[253]

The second factor is whether the class possesses a characteristic that is not related to one's ability to contribute to society. This should also be fairly easy for homosexuals to establish. Some have argued that homosexual status projects a negative image of a person, decreasing his productivity, efficiency, and revenue.[254] However, a federal court is likely to find that a person's sexual orientation has no relation to his ability to "contribute to society."[255]

The third factor is whether the class is marked by a stigma or "badge" of distinction. This is much harder for homosexuals to establish. In *High Tech Gays*, the court concluded that homosexuality does not meet this requirement because it is behavioral rather than visible.[256] In *Equality Foundation*, the Sixth Circuit argued that homosexuals "are not identifiable 'on sight' unless they elect to be so identifiable."[257] However, those sympathetic to homosexuals maintain that homosexuals are forced to conceal their status to avoid discrimination. They claim that terms such as "coming out" and "out of

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[248] *See* Mathews v. Lucas, 427 U.S. 495, 506 (1976).

[249] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

[250] *See Frontiero*, 411 U.S. at 685-86.

[251] *See Romans* 1:27 ("[T]he men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.").

[252] *See generally* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387 (1994) (providing a history of hate crimes against homosexuals).

[253] *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

[254] *See, e.g.*, Gaylord v. Tacoma School District, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (finding that a teacher's ability was hampered by public displays of homosexuality which were regarded as immoral by society).

[255] *See, e.g.*, Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996) (finding that the "sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents").

[256] *See High Tech Gays*, 895 F.2d at 573.

[257] Equality Foundation v. Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995).

the closet" demonstrate a "badge" of distinction.[258] They also point out that established suspect and quasi-suspect classes such as nationality and illegitimacy are also not identifiable by sight.

The fourth factor is whether the class is politically powerless. The political powerlessness of homosexuals is also undetermined. Those against granting homosexuals suspect class status assert that homosexuals are usually wealthier than the rest of the population[259] and that they "already operate at the highest levels of society: in boardrooms, governments, the media, the military, the law, and industry."[260] However, supporters of the homosexual movement argue that they are an unpopular minority and that their failure to legalize same-sex marriage is proof of their limited political power. Furthermore, they point out that most of the progress made by homosexuals thus far has occurred while their sexual orientations were kept secret.[261]

Nevertheless, the most important and most uncertain issue that must be resolved is whether sexual orientation is an immutable trait. Presently, the scientific community is split. Advocates of homosexual rights point to recent scientific studies that suggest that homosexual behavior is biologically determined. For example, Simon LeVay, who conducted a brain-structure study in 1991, concluded that the hypothalamus in homosexual men is less than half the size of those in heterosexual men.[262] However, critics question the reliability of these studies and refer to other studies that fail to conclusively prove the biological determinism of homosexuality.[263] They also argue that sexual orientation includes a behavioral choice that does not exist in other immutable characteristics such as race or gender.[264]

Some courts have already addressed the importance of this issue. In his concurring opinion in *Baehr*, Chief Judge Burns stated that his decision would hinge on whether the Plaintiffs could show that sexual orientation was "biologically fated."[265] Similarly, in his dissenting opinion in *Dean v. District of Columbia*,[266] Judge Ferren concluded that a trial was needed to determine if same-sex couples were a suspect or quasi-suspect class. Judge Ferren stated that he did not want to rule on "a subject so elusive, and so controversial, as

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[258] *See* Jax, *supra* note 6, at 474.

[259] *See* Wardle, *supra* note 5, at 93 (citing MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL, HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 90's, 252 (1989)).

[260] *Id.* (citing Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24, 34).

[261] *See* Farabee, *supra* note 66, at 265.

[262] *See* Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991).

[263] *See, e.g.*, Wardle, *supra* note 5, at 62-74.

[264] *See id.* at 62.

[265] Baehr v. Lewin, 74 Haw. 530, 585, 852 P.2d 44, 69 (1993).

[266] 653 A.2d 307 (D.C. Cir. 1995).

the nature, causes, preventability, and immutability of homosexuality without the benefit of a trial record with the right kind of expert testimony."[267] Many of the past federal decisions denying suspect class status to homosexuals relied on the assumption that homosexuality was a behavioral, not an immutable, characteristic.[268] If this assumption is proven false, the traditional standing of homosexuals as a nonsuspect class may change.

However, it is unlikely that a constitutional amendment banning same-sex marriage in Hawai'i will receive strict scrutiny under equal protection analysis. It is still unsettled whether homosexuals sufficiently meet all of the criteria of a suspect class. A scientific finding that sexual orientation is an immutable characteristic would greatly increase their chances of being considered a suspect class. However, given the recent decision in *Romer* which subjected an amendment discriminating against homosexuals to the "mere rationality" standard, a future Hawai'i amendment would probably be held to the same standard if challenged.

2. A prohibition of same-sex marriage will not be subjected to heightened scrutiny as a form of sex discrimination

Another equal protection argument made by supporters of same-sex marriage is that prohibiting same-sex marriage is a form of sex discrimination. This was the argument used by Justice Levinson in his plurality opinion in *Baehr*. The opinion stated that it was "irrelevant, for the purposes of the constitutional analysis germane to this case, whether homosexuals constitute a 'suspect class' because it is immaterial whether the plaintiffs . . . are homosexuals."[269] Justice Levinson concluded that HRS section 572-1 discriminated on the basis of sex because it allowed a man to marry a woman but not another man.[270] The court compared HRS section 572-1 to the miscegenation statute in *Loving v. Virginia*. In *Loving*, the United States Supreme Court held that "equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[271] Justice Levinson reasoned that if the word "race" in *Loving* was replaced by "sex," and if the Fourteenth Amendment was replaced by article I, section 5 of the Hawai'i Constitution (containing the Equal Rights Amendment), then the

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[267] *Id.* at 356.

[268] *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990); (stating that "[h]omosexuality is not an immutable characteristic").

[269] *Baehr*, 74 Haw. at 558 n.17, 852 P.2d at 58 n.17.

[270] *See id.* at 564, 852 P.2d at 60.

[271] Loving v. Virginia, 388 U.S. 1, 8 (1967).

plurality decision was identical to the one in *Loving*.[272] Hawai'i's Equal Rights Amendment states that "[n]o person shall . . . be denied the enjoyment of the person's civil rights or discriminated against in the exercise thereof because of race, religion, sex, or ancestry."[273] The plurality opinion noted the inclusion of "sex" along with "race," "religion," and "ancestry" and, as a result, ruled that Hawai'i's marriage law should be subject to strict scrutiny.[274]

However, the conclusion reached by the Hawai'i Supreme Court in *Baehr* is not likely to be accepted at the federal level. First, unlike the Hawai'i Constitution, the United States Constitution does not have an equal rights amendment. Therefore, even if same-sex marriage bans are a form of sex discrimination, the United States Supreme Court would require that it be subjected to "intermediate scrutiny" rather than "strict scrutiny."[275] Under "intermediate scrutiny," laws prohibiting same-sex marriage have a much better chance of being upheld.[276] Furthermore, many commentators feel that the ERA was not intended to apply to discrimination against same-sex couples and that the "wording of the ERA and its legislative history make it clear that it would not legalize homosexual marriages."[277]

Second, without the Hawai'i Equal Rights Amendment, which equates sex discrimination with racial discrimination, the comparison between *Baehr* and *Loving* is not as compelling. Opponents of same-sex marriage have argued that the Court in *Loving* only rejected equal applicability as a justification for invidious racial discrimination and not as a justification for gender discrimination.[278] The Court in *Loving* noted that the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination."[279] Thus, a federal court may decide not to apply the reasoning in *Loving* to same-sex couples. If so, it is unlikely that a constitutional amendment barring same-sex marriages will be subjected to heightened judicial scrutiny on the basis that it is a form of sex discrimination.

Therefore, a constitutional amendment prohibiting same-sex marriage would probably only need to pass the "mere rationality" standard under equal protection analysis. No federal court has ever held homosexuals to be a

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[272] *See Baehr*, 74 Haw. at 582, 852 P.2d at 68.

[273] HAW. CONST. art. I, § 3.

[274] *See Baehr*, 74 Haw. at 580, 852 P.2d at 67.

[275] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[276] *See id.*

[277] Thomas Emerson & Barbara Lifton, *Should the ERA Be Ratified?*, 55 CONN. BAR J. 227, 233 (1981); *see also* MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION (1986).

[278] *See* Wardle, *supra* note 5, at 84.

[279] Loving v. Virginia, 388 U.S. 1, 10 (1967).

suspect or quasi-suspect class. Also, it is still uncertain whether homosexuals sufficiently satisfy the criteria needed for their group to qualify as a suspect class. Homosexuals may never receive suspect class status without conclusive evidence that sexual orientation is an immutable trait.

In addition, a federal court is unlikely to find that a same-sex marriage ban is a form of sex discrimination. The Hawai'i Supreme Court's analysis in *Baehr* will not be as successful on the federal level because, unlike the Hawai'i Constitution, the United States Constitution does not have an Equal Rights Amendment. As a result, to strike down a constitutional amendment prohibiting same-sex marriage, opponents of the amendment must show that it fails the "mere rationality" standard.

C. An Amendment to the Hawai'i Constitution Prohibiting Same-Sex Marriage Would Be Struck Down Under Romer v. Evans

Thus, an amendment to the Hawai'i Constitution prohibiting same-sex marriage does not infringe on any fundamental right or discriminate against any suspect or quasi-suspect class under the United States Constitution. Consequently, such an amendment would not receive heightened judicial scrutiny and need only pass the "mere rationality" standard to be upheld. Nevertheless, in light of the Supreme Court's recent decision in *Romer v. Evans*, a possible constitutional amendment in Hawai'i is likely to be struck down as "inexplicable by anything but animus toward the class that it affects."[280]

The case in *Romer* arose when Colorado voters adopted "Amendment 2" to their state constitution. Amendment 2 precluded any government action designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices, or relationships."[281] The motivation for Amendment 2 was the recent passing of various ordinances in certain Colorado municipalities.[282] These ordinances prohibited discrimination against anyone on the basis of their sexual orientation, and were therefore effectively repealed by Amendment 2.[283]

By a six to three vote, the United States Supreme Court struck down Amendment 2. In his majority opinion, Justice Kennedy ruled that Amendment 2 failed the "mere rationality" standard.[284] First, Justice Kennedy noted that Amendment 2 imposed a "broad and undifferentiated disability on

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[280] Romer v. Evans, 517 U.S. 620, 632 (1996).
[281] *Id.* at 624.
[282] *See id.* at 623.
[283] *See id.* at 624.
[284] *See id.* at 632.

a single named group."[285] Hence, there was no "rational relation" between the means chosen and the alleged state interest.[286] Second, Justice Kennedy asserted that Amendment 2 was enacted to disadvantage homosexuals and that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest."[287] As a result, the Court held that Amendment 2 violated the Equal Protection Clause.[288]

In his vigorous dissent, Justice Scalia accused the majority of "tak[ing] sides in the culture wars, . . . reflecting the views and values of the lawyer class."[289] Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia characterized Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores."[290] He also argued that Amendment 2 was supported by a legitimate rational basis. Relying on *Bowers v. Hardwick*, a case not even addressed by the majority, Justice Scalia determined that if "it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct."[291]

The decision in *Romer* suggests a favorable outcome for supporters of same-sex marriage. The *Romer* decision is much more sympathetic towards homosexuals than the Court's prior decision in *Bowers v. Hardwick*. In fact, Justice Scalia, in his dissent, argued that the decision in *Romer* contradicted the decision in *Bowers*.[292] Many argue that the *Romer* decision overruled *Bowers* or at least substantially weakened it.[293] Some have even suggested that *Romer* indicates a shift in the Court's attitude toward homosexual litigants.[294]

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[285] *Id.*

[286] *See id.* at 633.

[287] *Id.* at 634 (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

[288] *See id.* at 635.

[289] *Id.* at 652.

[290] *Id.* at 636.

[291] *Id.* at 641.

[292] *See id.* at 636.

[293] *See, e.g.*, *Gay Rights Watershed? Scholars Debate Whether Past and Future Cases Will Be Affected by Supreme Court's Romer Decision*, 82 JUL. A.B.A. J. 30 (1996).

[294] *See, e.g.*, Tobias Barrington Wolff, *Principled Silence*, 106 YALE L.J. 247 (1996). Wolff states that "[f]or the first time in its history, the Supreme Court has drawn a line that the state may not cross in its treatment of gay people." *Id.* at 247. Wolff also calls *Romer* the "seminal decision in the jurisprudence of equal protection for gay people." *Id.* at 248. Wolff further suggests *Romer* may lead to heightened judicial protection for gay people in the future. *See id.* at 252.

Consequently, a challenge to a same-sex marriage ban is more likely to succeed.

As for a possible amendment to the Hawai'i Constitution to ban same-sex marriage, the Supreme Court is likely to find that it was also motivated by "animus" toward homosexuals. The present situation in Hawai'i has many similarities to the situation leading to the enactment of Amendment 2 in Colorado. For example, Amendment 2 was passed in reaction to the enactment of several ordinances granting protection to homosexuals. Similarly, an amendment to the Hawai'i Constitution expressly prohibiting same-sex marriage, whether proposed by the Legislature or through a constitutional convention, would certainly be the result of the recent decision in *Miike*.

In Hawai'i, the public's "animus" toward homosexuals has been evident. In a recent survey conducted in Hawai'i, seventy percent of those surveyed said they disapproved of same-sex marriage.[295] On January 24, 1997, while the Hawai'i Legislature was discussing a possible constitutional amendment that would ban same-sex marriage, an estimated 5,000 people gathered at the Hawai'i State Capitol to protest the legalization of same-sex marriage.[296] The protesters, who far outnumbered the estimated 200 supporters of same-sex marriage across the street, held signs which read, "*Hono*lulu, not *Homo*lulu" and "If I marry my dog, can I get a tax deduction?"[297] The same-sex marriage issue also affected the results of the 1996 elections. Many people voted in favor of a constitutional convention so that they may have a chance to amend the Hawai'i Constitution in case Judge Chang ruled in favor of same-sex marriage in *Miike*.[298] In September, many blamed Senator Rey Graulty's unsuccessful bid for re-election on his position in support of same-sex marriage.[299]

The Hawai'i Legislature has also displayed "animus" toward homosexuals. After the Hawai'i Supreme Court decision in *Baehr*, the Legislature amended HRS section 572-1 to limit marriage to opposite-sex couples.[300] In the enactment, the Legislature condemned the Hawai'i Supreme Court for substituting its own beliefs for the will of the public.[301] The Legislature further

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[295] *See* Star-Bulletin Staff, *Voters Strongly Oppose Gay Unions*, HONOLULU STAR-BULL., Feb. 24, 1997, at A5.

[296] *See* Jennifer Hong, *Same-Sex Marriage Foes Fill Capitol*, HONOLULU STAR-BULL., Jan. 25, 1997, at A5.

[297] *Id.*

[298] *See* Rolston, *supra* note 14, at 01B.

[299] *See* Associated Press, *Same-Sex Marriage Dominates Hawaii News in 1996*, ASSOCIATED PRESS, Dec. 27, 1996, *available in* WESTLAW, ALLNEWS, 12-27-96 ASSOCPPS, 1996 WL 5429816 (pagination unavailable) (copy on file with author).

[300] *See* Act 217, § 3, 1994 Haw. Sess. Laws 217 (1984).

[301] *See id.* at § 1.

stated that the plurality opinion in *Baehr* "effaces the recognized tradition of marriage in this State and, in so doing, impermissibly negates the constitutionally mandated role of the legislature as a co-equal, coordinate branch of government."[302]

However, there is little consensus regarding the impact that *Romer* will have on future same-sex marriage claims. Those against same-sex marriage argue that Amendment 2 in *Romer* is distinguishable from same-sex marriage bans because same-sex marriage bans, unlike Amendment 2, do not discriminate on the basis of "homosexual, lesbian, or bisexual orientation," but on the basis of conduct, behavior or relationship.[303] In addition, Amendment 2, unlike same-sex marriage bans, did not merely deny legal preference to homosexuals, but it denied them basic equal protections of law.[304] Advocates of same-sex marriage bans also argue that nothing in *Romer* implies any disapproval of laws that protect marriage and that the "unanimous, international, and multicultural consensus on the meaning of marriage has a solid, rational, and clearly legitimate foundation that should easily withstand any assault based upon *Romer*."[305]

Supporters of same-sex marriage bans suggest that laws prohibiting same-sex marriage be drafted in a positive manner.[306] Lawmakers should emphasize that the object of such laws are to define marriage and not to attack same-sex couples.[307] They advise that laws which emphasize what marriage is, rather than what it is not, will be more likely to "successfully deflect an animus-based attack using *Romer*."[308]

Nevertheless, a constitutional amendment prohibiting same-sex marriage in Hawai'i would most likely fail the "mere rationality" standard if reviewed by a federal court. Similar to Amendment 2 in *Romer*, the purpose of such an amendment would be to overturn the rulings in *Baehr* and *Miike* which granted protection from discrimination to same-sex couples. Thus, despite the fact that a same-sex marriage ban is unlikely to invoke heightened judicial scrutiny, an amendment which prohibits same-sex marriage would still be found unconstitutional under the Equal Protection Clause.

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[302] *Id.*

[303] *See A More Perfect Union – Federalism in American Marriage: Hearing on S. 1740 Before the U.S. Senate Judiciary Comm.*, 104th Cong. (1996) (statement of Lynn D. Wardle, Professor, Brigham Young University).

[304] *See id.*

[305] Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and* Romer v. Evans, 72 NOTRE DAME L. REV. 345, 357-58 (1997).

[306] *See* Coolidge, *supra* note 190, at 92.

[307] *See id.*

[308] *Id.* at 92-93.

V. CONCLUSION

Currently, the future of same-sex marriage in Hawai'i remains undecided. Given the complexity of the various arguments and the numerous issues still unresolved,[309] it may be a long time before a final outcome is reached. Due to the great importance of marriage,[310] both supporters and opponents of same-sex marriage are determined to continue their struggle until the issue is decided in their favor.

Supporters of same-sex marriage have recently achieved victories in *Baehr* and *Miike*.[311] These cases are examples of the recent tendency by American courts to take a more sympathetic view toward homosexuals.[312] Opponents of same-sex marriage now face the task of reversing this recent trend. In Hawai'i, those wishing to overturn the results of *Baehr* and *Miike* must push for a constitutional amendment.[313]

Presently, an amendment proposed by the Legislature is scheduled to appear on the ballot of the November 1998 elections.[314] In addition, supporters of a constitutional convention will argue in favor of another election on the issue before the Ninth Circuit Court of Appeals in early 1998.[315] An amendment making same-sex marriage illegal, whether proposed by the Legislature or by the delegates of a constitutional convention, is unlikely be approved by Hawai'i voters, the majority of whom oppose same-sex marriage.[316] However, an amendment to the Hawai'i Constitution may not to occur before the Hawai'i Supreme Court hears the appeal on the *Miike* case.[317] As a result, same-sex marriages may be "constitutionally mandated and then constitutionally outlawed, creating an extremely messy legal tangle."[318]

Assuming that Hawai'i amends its constitution to prevent same-sex couples from getting married, supporters of same-sex marriage must then look to the federal courts for help.[319] On an appeal to a federal court, an amendment banning same-sex marriage in Hawai'i will probably prevail against any substantive due process claims. Under the standards set forth by the United States Supreme Court in their "right of privacy" decisions, the right to same-

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[309] *See supra* section IV.

[310] *See supra* section I.

[311] *See supra* section II.B.

[312] *See supra* section II.A.

[313] *See supra* section III.

[314] *See id.*

[315] *See id.*

[316] *See* Star-Bulletin Staff, *supra* note 295, at A5. *See also* section IV.C, *supra*.

[317] *See supra* section III.

[318] Andrew Sullivan, *Hawaiian Aye: Nearing the Altar on Gay Marriage*, NEW REPUBLIC, Dec. 30, 1996, at 15, *available in* LEXIS, Nexis Library, CURNWS File.

[319] *See supra* section IV.

sex marriage does not qualify as a fundamental right and is therefore not entitled to heightened protection.[320]

Similarly, an amendment prohibiting same-sex marriage will not be subjected to heightened scrutiny under the Equal Protection Clause. A same-sex marriage ban does not discriminate against any established suspect or quasi-suspect class.[321] Homosexuals have never been afforded suspect class status and are unlikely to receive such status unless it is found that sexual orientation is an immutable characteristic.[322] In addition, a federal court is unlikely to find that a same-sex marriage ban is a form of sex discrimination.[323] Unlike the Hawai'i Supreme Court in *Baehr*, federal courts are not bound by an equal rights amendment and are therefore not likely to adopt the reasoning used in *Baehr* to show sex discrimination.[324]

Consequently, a future Hawai'i amendment prohibiting same-sex marriage will be subjected only to the "mere rationality" standard. However, given the United States Supreme Court's recent decision in *Romer*, it is highly likely that such an amendment will be seen as the result of "animus" toward homosexuals.[325] This is not considered a legitimate state interest.

Therefore, a possible constitutional amendment prohibiting same-sex marriage would most likely get struck down if challenged in federal court. Although it would not invoke any form of heightened judicial scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, a same-sex marriage ban in Hawai'i would most likely fail the "mere rationality" standard on the grounds that it was the result of "animus" toward homosexuals. As a result, such an amendment would be ruled unconstitutional and in violation of the Equal Protection Clause.

Brad K. Gushiken[326]

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[320] *See supra* section IV.A.

[321] *See supra* section IV.B.

[322] *See supra* section IV.B.1.

[323] *See supra* section IV.B.2.

[324] *See id.*

[325] *See supra* section IV.C.

[326] Class of 1998, William S. Richardson School of Law. The author would like to thank the *University of Hawai'i Law Review* staff. This comment is dedicated to my parents, Allan and June, Reid, and Roxanne for all of their love, guidance, and support.

Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA

I. INTRODUCTION

Time is discrimination's worst enemy. Over time, slaves regained their freedom,[1] women were allowed to vote,[2] schools were desegregated,[3] and interracial couples were allowed to marry.[4] These triumphs over discrimination did not occur overnight. Each began with a handful of proud and determined individuals fighting against the majority in order to obtain fundamental rights that were being denied. Each was a fight against discrimination. The battle to end discrimination, however, is not over. As Hawai'i took one step closer toward ending discrimination against same-sex couples in *Baehr v. Miike*,[5] Congress took two steps back.

In response to the possibility that same-sex marriages will be legalized in Hawai'i, Congress passed the Defense of Marriage Act, ("DOMA").[6] The

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[1] *See* U.S. CONST. amend. XIII. [Editor's note: As noted in the foreword to this same-sex marriage symposium, the articles and comments in the symposium were written over three years ago, during the peak of the same-sex marriage debate in Hawai'i. Selected updates have been made to this piece, however, this comment also contains statements that reflect the same-sex marriage debate and surrounding events as they were three years ago. The Foreword contains a synopsis of the developments in this debate since that time. The *University of Hawai'i Law Review* believes that this comment adds an insightful and thoughtful perspective to the growing literature on this country's same-sex marriage discourse.]

[2] *See* U.S. CONST. amend. XIX.

[3] *See* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Equal Protection Clause of the Fourteenth Amendment).

[4] *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding that statutes prohibiting marriages between persons of different races are contrary to the Equal Protection Clause of the Constitution).

[5] No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The case was originally titled *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993). Because the Plaintiffs were suing John Lewin in his official capacity as the Director of Department of Health, State of Hawai'i, when Lawrence Miike assumed the position of Director of Department of Health, State of Hawai'i, he was automatically substituted for Defendant Lewin pursuant to Rule 43(c) of the Hawai'i Rules of Appellate Procedure. *See id.* at 1.

[6] The Act is codified in two parts, 28 U.S.C. section 1738C, and 1 U.S.C. section 7. The Act provides:

> 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

Defense of Marriage Act explicitly allows states to disregard same-sex marriages legally performed in another state, if a state legalizes such marriages. The consequences include denying these couples the rights and benefits of marriage,[7] such as inheritance rights, as well as making the children of such marriages illegitimate when these families cross state lines.

By passing DOMA Congress is not only condoning discrimination against same-sex couples, it is perpetuating it. Specifically precluding same-sex couples from marrying perpetuates discrimination against same-sex couples, just as miscegenation laws[8] perpetuated racial discrimination. Laws that make class distinctions, whether based upon race, gender, sexual orientation, or religion, proclaim to the world, this group is different, and should be treated differently than the majority.[9]

This comment argues that DOMA is unconstitutional because it violates the Full Faith and Credit Clause of the United States Constitution[10] and the principles established by the United States Supreme Court in *Romer v. Evans*.[11] In addition, this comment demonstrates why the United States Supreme Court

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a right or claim arising from such relationship.

28 U.S.C. § 1738C (West 1996). The other part provides:

> 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, the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (West 1996).

[7] See *infra* notes 272, 275 and accompanying text for further information regarding rights and benefits given to married couples.

[8] Miscegenation laws prohibited interracial marriages, for example, a Virginia law provided:

> All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

VA. CODE. ANN. § 20-57 (repealed 1968).

[9] This comment is not for the proposition that all laws that make class distinctions should be prohibited. There are laws that make class distinctions which yield positive results, for example requiring reasonable accommodations for the disabled. Rather, this comment is concerned with distinctions that are based on the most private and intimate aspects of one's life, that is, social and sexual relations.

[10] The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1. As discussed *infra* section IV.A of this comment, the plain language of DOMA, "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State[,]" appears to directly contradict the plain language of the Full Faith and Credit Clause.

[11] 517 U.S. 620 (1996).

should require states to extend full faith and credit to same-sex marriages of another state, if such marriages are legalized, and illustrates why public policy arguments do not justify non-recognition of otherwise valid same-sex marriages.[12]

Section II provides a brief history of same-sex marriages and unions throughout the world. Section III discusses the history of *Baehr v. Lewin*, ("*Lewin*").[13] Section III also discusses the holding and rationale of *Baehr v. Miike* ("*Miike*").[14] Section IV explains DOMA and argues that it violates the Full Faith and Credit Clause, and should also be found unconstitutional under *Romer v. Evans*.[15] Section V considers whether public policy arguments should allow a state to refuse to recognize another state's same-sex marriages, if such marriages are legalized. Section V also examines the policies that states are likely to put forth in opposition to recognizing same-sex marriages validly performed in another state, and explains why such policies are without merit.

II. A BRIEF HISTORY OF SAME-SEX MARRIAGE

The legalization of same-sex marriages in the United States is a current and highly controversial topic.[16] Same-sex marriage, however, is neither new, nor is it unique to the United States. Such marriages have existed throughout history.[17]

In order to understand the history of same-sex marriage, it is important to understand different concepts of marriage. In the United States, "[m]arriage is a state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation."[18] Throughout the world, however, marriage exists in many different forms.[19] For purposes of this comment, the term "marriage" refers to

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[12] At the time of publication, no states have legalized same-sex marriages.

[13] 74 Haw. 530, 852 P.2d 44 (1993).

[14] No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

[15] 517 U.S. 620 (1996).

[16] See *infra* section III, for a discussion of *Baehr v. Lewin*, [hereinafter *Lewin*] 74 Haw. 530, 852 P.2d 44 (1993) and *Baehr v. Miike*, [hereinafter *Miike*] No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

[17] *See, e.g.*, William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1435 n.44 (1993) [hereinafter Eskridge, *History*]. While there is a plethora of materials on same-sex marriage written by historians, social anthropologists and scholars of comparative literature, this part is only intended to give the reader a general insight into the historical aspects of same-sex marriages and unions.

[18] *Lewin*, 74 Haw. at 558, 852 P.2d at 58.

[19] *See, e.g.*, SUSAN A. SPECTORSKY, CHAPTERS ON MARRIAGE AND DIVORCE (1993) (explaining legal and cultural aspects of marriage in Muslim countries).

relationships and unions that have been institutionalized. While the term "institutionalized" is, in itself, broad, the examples in this comment have been limited to those which are accepted throughout society and most often carry with them legal and social consequences.[20]

In the United States, the legal construction of marriage[21] evolved to conform to the majority's view of what a relationship should be, that is, a monogamous relationship between a man and a woman.[22] Yet, it is easy to see, especially with the benefit of hindsight, that the majority is not always right. For example, interracial marriages were at one time illegal in the majority of the states.[23] In the criminal prosecution of an interracial couple charged with violating Virginia's ban on interracial marriages, the trial judge expressed the majority view, stating:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[24]

Although it seems unimaginable that a judge would make such a comment today, at that time, such views were common. In 1967, the year in which the Supreme Court in *Loving v. Virginia*[25] struck down miscegenation laws as unconstitutional,[26] sixteen states had such laws.[27] Fourteen other states had

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[20] Such consequences include customary duties, ownership of property, and the right to seek damages for adultery. *See infra* notes 71, 77, 81 and accompanying text.

[21] This refers to the state sanctioning of marriage, as opposed to the social and psychological aspects of marriage, such as affection, security, and sexual or physical attraction.

[22] Although marriage laws have been modified over time due to changes in cultural conditions, for example allowing interracial marriages, marriage laws still exclude many non-traditional families. *See* Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 93 (1991).

[23] *See infra* notes 27-28.

[24] Loving v. Virginia, 388 U.S. 1, 3 (1967) (citing the trial judge's opinion in the criminal prosecution of Richard Loving and Mildred Jeter). Richard Loving, a white man, and Mildred Jeter, a Negro woman, were married in the District of Columbia, pursuant to its laws. *See id.* Sometime after they were married, they moved to Virginia. *See id.* A grand jury indicted them, charging them with violating Virginia's ban on interracial marriages. *See id.* They plead guilty to the charge and were sentenced to one year in jail. *See id.* The trial judge suspended the sentence on the condition that they leave Virginia and not return together for 25 years. *See id.*

The trial judge's rationale and claim to knowledge of a deity's plan is best countered by a statement found in the book by PAUL C. ROSENBLATT ET AL., MULTIRACIAL COUPLES: BLACK & WHITE VOICES 279 (1995), which reads, "[b]iracial children are the most beautiful children .... It's God's way of showing the world that there shouldn't be bigotry." *Id.*

[25] 388 U.S. 1 (1967).

[26] *See id.* at 12.

[27] *See* ALA. CONST. art. 4, § 102, ALA. CODE tit. 14, § 360 (1958); ARK. STAT. ANN. § 55-104 (1947); DEL. CODE ANN. tit. 13, § 101 (1953); FLA. CONST. art. 16, § 24, FLA. STAT. ch.

miscegenation laws but repealed them prior to *Loving*.[28] Thus, the majority (three-fifths) of the United States once considered interracial marriages to be wrong, unnatural, and illegal. It is clear, however, that the majority view is not always right, this is evidenced by the fact that such marriages are commonplace today.[29]

While, at this time, the majority view in the United States might consider same-sex marriages wrong, unnatural, and illegal, that does not mean that such a view is necessarily right. Legalizing same-sex marriages, like interracial marriages, is a significant step towards ending discrimination. Notwithstanding the current heated controversy surrounding same-sex marriages, such marriages are neither new to Western culture nor other cultures throughout the world.[30]

Although documents and records are scarce, it appears that in Ancient Egypt, approximately 2600 B.C., same-sex relationships were accepted and institutionalized.[31] One example of evidence supporting this conclusion is the existence of artifacts and tombs depicting same-sex couples in intimate poses.[32] Ancient depictions of the Pharaoh Ikhnaton (1379-1362 B.C.) and his son-in-law, Smenkhare present further evidence of such, as well. According to Professor William Eskridge, "[t]hey are shown together nude-a convention quite rare in Egyptian representations of royalty. On a stele, Ikhnaton strokes

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741.11 (1965); GA. CODE ANN. § 53-106 (1961); KY. REV. STAT. ANN. § 402.020 (Supp. 1966); LA. REV. STAT. ANN. § 14:79 (West 1950); MISS. CODE ANN. § 459 (1956); MO. REV. STAT. § 451.020 (Supp. 1966); N.C. CONST. art. XIV, § 8, N.C. GEN. STAT. § 14-181 (1953); OKLA. STAT. tit 43, § 12 (Supp. 1965); S.C. CONST., art. 3, § 33, S.C. CODE ANN. § 20-7 (Law. Co-Op. 1962); TENN. CONST. art. 11, § 14, TENN. CODE ANN. § 36-402 (1955); TEX. PENAL CODE, art. 492 (1952); W. VA. CODE ANN. § 4697 (1961).

[28] The states were Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *See Loving*, 388 U.S. at 6 n.5.

[29] *See* Carol Pearson, *Current Affair Feature: Interracial Marriage* (November 6, 1995) (visited Feb. 3, 1997) <http://www.intac.com/PubService/human_rights/newsstand/1995/Nov94/06nov/interracial marriage.html> (copy on file with author). According to Carol Pearson,"[i]n the past 25 years, the number of Black and White couples has more than quadrupled from 65 thousand in 1970 to 296 thousand today." *Id.*

[30] This part is intended to give the reader an overview of the history of same-sex marriage. For a more in depth discussion of same-sex marriage throughout history see, for example, JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980) [hereinafter BOSWELL, CHRISTIANITY]; JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) [hereinafter BOSWELL, UNIONS]; E.E. EVANS-PRITCHARD, KINSHIP AND MARRIAGE AMONG THE NUER (1951); Eskridge, *History, supra* note 17.

[31] *See generally* DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 25-77 (1988).

[32] Eskridge, *History, supra* note 17, at 1437.

Smenkhare under the chin. Smenkhare is given titles of endearment that had been used previously for Ikhnaton's concubines and queen."[33]

Evidence of same-sex marriages can also be found in the statutes of Mesopotamia. For example, Table 1, section 34 of the Hittite Laws, dating from approximately 800 B.C., explains the procedure by which a slave can marry a female.[34] Section 36 then proceeds to explain the procedure by which a slave can marry a male.[35] In *The Case for Same-Sex Marriage*, Professor Eskridge points out that if slaves are allowed to engage in such marriages, it is likely that a free Hittite citizen could do the same.[36] The Hittites also had a law that specifically forbade father-son incest, "a restriction one would hardly expect in a society where homosexuality was not well known and (at least in some contexts) legal."[37]

While the evidence of same-sex relationships and same-sex marriages discussed above is far from conclusive, evidence of the presence of same-sex relationships in Ancient Greece and Rome is far stronger. In Plato's *Symposium*, same-sex relationships were discussed a great deal. At one point, equating homosexuality with democracy, Plato wrote:

> By contrast, in places like Ionia and almost every other part of the Persian empire, taking a lover is always considered disgraceful. The Persian empire is absolute; that is why it condemns love as well as philosophy and sport. It is no good for rulers if the people they rule cherish ambitions for themselves or form strong bonds of friendship with one another. That these are precisely the effects of philosophy, sport, and especially of Love is a lesson the tyrants of Athens learned directly from their own experience: Didn't their reign come to a dismal end because of the bonds uniting Harmodius and Aristogiton[38] in love and affection?

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[33] *Id.* at 1438 n.50.

[34] *See id.* at 1440-41. "[I]f a slave gives the bride-price to a woman and takes her as his wife, no-one shall [make him] surrender her." *Id.* (citing EPHRAIM NEUFELD, THE HITTITE LAWS 8-11 (1951)).

[35] *See id.* at 1441. "If a slave gives the bride-price to a free youth and takes him to dwell in his household as spouse, no-one shall [make him] surrender him." *Id.* (citing EPHRAIM NEUFELD, THE HITTITE LAWS 8-11 (1951)).

[36] WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 20 (1996)[hereinafter ESKRIDGE, THE CASE].

[37] BOSWELL, CHRISTIANITY, *supra* note 30, at 21 n.39.

[38] PLATO, SYMPOSIUM n.20 (Alexander Nehamas & Paul Woodruff Trans., 1989). The story of Aristogiton and Harmodius is that they attempted to assassinate the tyrant Hippias in 514 B.C. when he tried to come between them. *See* BOSWELL, CHRISTIANITY, *supra* note 30, at 51 n.23. Although their attempt failed, they inspired universal admiration among later Greeks. *See id.* The tyranny fell three years later, and the lovers were celebrated as tyrannicides. *See id.*

> So you can see that plain condemnation of Love reveals lust for power in the rulers and cowardice in the ruled . . . .[39]

Another example is Aristophanes' oration in the *Symposium*.[40] Aristophanes discusses how men who love other men would strive to be like them, thus becoming more masculine than men who loved women:

> While they are boys, because they are chips of the male block, they love men and enjoy lying with men and being embraced by men; those are the best of boys and lads, because they are the most manly in their nature. Of course, some say such boys are shameless, but they're lying. It's not because they have no shame that such boys do this, you see, but because they are bold and brave and masculine, and they tend to cherish what is like themselves. Do you want me to prove it? Look, these are the only kind of boys who grow up to be politicians.[41]

While most people would not consider the relationships discussed to be marriages, there was a ritual in Crete, a planned and public abduction of one's same-sex mate, which followed the same courtship as a marriage:[42]

> Apart from the abduction aspect, this practice has all the elements of European marriage tradition: witnesses, gifts, religious sacrifice, a public banquet, a chalice, a ritual change of clothing for one partner, a change of status for both, even a honeymoon. The public statement at the banquet prefigures what would eventually become the single most important element of marriage in Roman and Christian law: a declaration of consent to the union . . . "Do you take . . . ?"[43]

The Romans, like the Greeks, were similarly accepting of same-sex relationships.[44] Moreover, there is some evidence that some such relationships were considered to be marriages in imperial Rome.[45] Gaius Suetonius, a Roman historian in discussing Nero, a first-century emperor, reported that:

> [Nero] went through a wedding ceremony with [Sporus]–dowry, bridal veil and all–which the whole Court attended; then brought him home, and treated him as a wife. He dressed Sporus in fine clothes normally worn by an Empress and took him in his own litter not only to every Greek assize and fair, but actually through the Street of Images at Rome, kissing him amorously now and then.[46]

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[39] PLATO, SYMPOSIUM, *supra* note 38, at 182B-182D.

[40] *See id.* at 189E-194E.

[41] *Id.* at 192A

[42] *See* BOSWELL, UNIONS, *supra* note 30, at 89.

[43] *Id.* at 91.

[44] *See* ESKRIDGE, THE CASE, *supra* note 36, at 22.

[45] *See id.* (citing CANTARELLA, BISEXUALITY IN THE ANCIENT WORLD 106-14 (1983)).

[46] GAIUS SUETONIUS TRANQUILLUS, THE TWELVE CAESARS 223 (Robert Graves trans., 1957).

Suetonius then explains how later, Doryphorus, "married [Nero]–just as he himself had married Sporus."[47]

Same-sex marriages were not unique to Roman emperors; Roman citizens also had same-sex marriages. Juvenal,[48] although disapproving of same-sex marriages, sarcastically noted their commonality by the end of the first century. For example, the interlocutor in Juvenal's *Satires*, referring to the marriage of Gracchus, states, "I have a ceremony to attend tomorrow morning in the Quirinial valley . . . . [A] friend [Gracchus] is marrying another man and a small group is attending."[49] There are many more illustrations of same-sex marriages and relationships throughout the early history of Rome included in plays, stories, and even in the writings of Cicero.[50]

Changes that occurred between the later Roman Empire and the early Middle Ages[51] replaced the extreme tolerance of Roman mores with ambivalence towards homosexual behavior.[52] The change in the attitudes concerning homosexuals could be linked to the increasing influence of Christianity during the late Empire.[53] One of the principal and personal practices of devout Christians was the practice of celibacy.[54] Celibacy was encouraged by prominent church fathers such as Clement and St. Augustine.[55] The early Christian tradition, inspired by Judaism, promoted the idea that the

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[47] *Id.* at 224.

[48] Decimus Junius Juvenalis, commonly known as Juvenal (55?-127?), was a great Roman satiric poet. *See* JOHN FERGUSON, JUVENAL: THE SATIRES X, XVI-XVII (1979). Juvenal's masterpiece is *The Satires*, a collection of 16 satiric poems about the corruption and degradation of life in Rome. *See id.* at XIX.

[49] BOSWELL, UNIONS, *supra* note 30, at 81 (quoting JUVENAL, 2 SATIRES 132-35 (G. G. Ramsey trans., 1950)).

[50] *See id.* at 80 (citing PHILIPPIC 2.18.45, where Cicero persuaded Curio the Elder to honor the debt of his son incurred on behalf of Antonius, to whom the younger Curio was, according to Cicero, "united in a stable and permanent marriage, just as if he had given him a matron's *stola*"). A *stola* was the distinctive garb of a married Roman woman. *See id.* at 80 n.132.

[51] *See* Eskridge, *History*, *supra* note 17, at 1511 n.99. Christians were persecuted by the Emperor Diocletion in the late third century. *See id.* After his death in 306 A.D., the Empire was in a state of civil war. *See id.* In 324 A.D., Constantine, a converted Christian, united the Empire and reigned for 13 years. *See id.* Thus, the Christian influence was secured, and remained until the fall of Rome in 476. *See id.*

[52] *See generally* BOSWELL, UNIONS, *supra* note 30.

[53] *See generally* Eskridge, *History*, *supra* note 17.

[54] The philosophy was to either abstain completely from sexual activities or to engage in intercourse for the purpose of procreation. Sexual activities were not to be done for the pleasure itself. Hence, because same-sex intimacy could not lead to procreation, such activity was criticized. *See* BOSWELL, UNIONS, *supra* note 30, at 118-19.

[55] *See* BOSWELL, UNIONS, *supra* note 30, at 110. *See also* Eskridge, *History*, *supra* note 17, at 1449.

purpose of human sexuality was procreation.[56] Similarly, other philosophical schools of thought, such as Stoicism, Neo-Platonism, and Manicheanism, proclaimed that "intercourse was supposed to take place only so as to produce children."[57]

While same-sex unions were thus seemingly condemned in the early Middle Ages by the majority of Christian Churches, the Roman Catholic and Greek Orthodox Churches responded differently.[58] The Churches developed ceremonies that brought together members' desires to bond with another of the same-sex, with the Churches' commitment to the spiritual aspect of developing relationships.[59] The rituals were considered "brother-making," "enfraternization," and "spiritual brotherhoods."[60] The Church archives depict ceremonies very similar to common day marriages, these ceremonies are summarized as follows:

> 1) The couple stands in front of the lectern, on which the Gospel and a cross are placed, the older of the two standing to the right.
> 2) The ceremony begins with prayers and litanies celebrating earlier examples of same-sex couples or friends in the early Church.
> 3) The couple is girded with a single belt, signifying their union as one, and they place their hands on the Gospel and receive lit candles.
> 4) The priest reads from one of Paul's epistles (1st Corinthians 12:27) and the Gospel (John 17: 18-16), followed by more prayers and litanies.
> 5) The assembled are led in the Lord's Prayer, followed by Holy Communion, and the Eucharist, for the couple.
> 6) The priest leads the couple around the lectern, each holding the hand of the other, while the assembled sing a hymn.
> 7) The couple exchange a kiss, and the service concludes with the singing of Psalm 132:1 ("Behold how good and sweet it is for brothers to live as one.").[61]

These ceremonies are virtually identical to "traditional" marriages in the United States. The inherent similarities between the ceremonies described above and traditional wedding ceremonies in the United States are unmistakable. The gender of the couples does not take anything away from the ceremonies. The couples in these ceremonies are clearly committing

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[56] *See generally* PETER BROWN, THE BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY (1988) (discussing Christian influence and practices and its effects on sexuality and sexual relationships). *See also* Eskridge, *History*, *supra* note 17, at 1449-50.

[57] BROWN, *supra* note 56, at 21.

[58] *See* Eskridge, *History*, *supra* note 17, at 1449-50.

[59] *See id.* at 1450.

[60] *See id.*

[61] ESKRIDGE, THE CASE, *supra* note 36, at 25-26 (citing PAVEL FLORENSKIJ, LA COLONA E IL FONDAMENTO DELLA VERITA 521-25 (Pietro Modest trans., 1974) (describing the ceremony and its liturgy)).

themselves to each other; uniting themselves as one, in front of friends, loved ones, and under God.

Additionally, same-sex marriages were not limited to Western cultures; same-sex marriages were equally prevalent throughout North and South America.[62] The institutionalization of same-sex marriages was prevalent throughout the Incan, Aztec, and Mayan civilizations, as well as in the Indies and the area that is now the United States, prior to European colonization.[63] Evidence of such marriages comes from records of those societies, as well as from accounts written by Spanish explorers and missionaries.[64] An example of such evidence is found in the writings of Francisco Lopez De Gomara, who, in describing customs of American Indians, wrote, "the men marry other men who are impotent or castrated and go around like women, perform their duties and are used as such and who cannot carry or use the bow."[65] There are also accounts of same-sex unions between women. Pedro de Magalhaes described how women in Brazil would "give up all the duties of women and imitate men . . . . [E]ach has a woman to serve her, to whom she says she is married . . . ."[66]

Similarly, in *Institutionalized Homosexuality of the Mohave Indians*, George Devereux provides a detailed, academic account of Native American same-sex marriages and unions.[67] He describes, for example, how in the Mohave Society, *alyha* (homosexual men) would marry men.[68] The same was true for the *hwame* (homosexual women).[69] These marriages were socially accepted and institutionalized, and even included a courtship process by which a suitor would dance and flirt with the *alyha*.[70] Marriage, both same-sex and different-sex, within Native American cultures was accepted for social and sexual

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[62] For a more complete analysis of same-sex marriages and unions in the Americas see FRANCISCO GUERRA, THE PRE-COLUMBIAN MIND (1971). *See also* JONATHAN N. KATZ, GAY AMERICAN HISTORY (1976).

[63] *See generally* FRANCISCO GUERRA, THE PRE-COLUMBIAN MIND (1971).

[64] *See id.*

[65] *Id.* at 85.

[66] PEDREO DE MAGALHAES, THE HISTORIES OF BRAZIL 88-89 (John B. Stetson, Jr. trans., 1922) (1576)).

[67] *See* George Devereux, *Institutionalized Homosexuality of the Mohave Indians*, 9 HUMAN BIOLOGY 490 (1937).

[68] *See id.* at 513.

[69] *See id.*

[70] *See id.* According to Devereux, the downside of marrying an *alyha* was that getting divorced was not easy to do because the men were strong and they "might beat you up." *Id.* at 514. Moreover, the *hwame* were divorced by their wives more often than the *hwame* would divorce them. *See id.* at 515.

benefits, as well as for economic benefits, such as the division of labor, for "the *alyha* made exceptionally industrious wives."[71]

Same-sex unions and marriages have also been documented in many African cultures.[72] David F. Greenberg, who wrote on the social history of homosexuality, demonstrates that studies by anthropologists provide evidence that same-sex unions and marriages, similar to those of Native Americans, may have existed in many tribes throughout countries in Africa.[73] Such countries include Angola, South Africa, Zaire, Zimbabwe, Madagascar, Senegal, Uganda, Ghana, and Kenya.[74] In one example, Greenberg discusses how the *mugawe*, a male religious leader of the Kenyan Meru, is "considered a complement to the male political leaders and consequently must exemplify feminine qualities: he wears women's clothing and adopts women's hairstyles; he is often homosexual, and sometimes marries a man."[75]

Female same-sex marriages were also not uncommon in Africa.[76] A woman who "takes on the legal and social roles of husband and father by marrying another woman according to the approved rules and ceremonies of her society"[77] is commonly referred to as a "female husband."[78] Other examples

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[71] *Id.* at 514. For further reading on same-sex marriage, homosexuality, and Native American societies, see generally JUDY GRAHN, ANOTHER MOTHER TONGUE: GAY WORDS, GAY WORLDS (1984); WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE (1986); Paula G. Allen, *Lesbians in American Indian Cultures*, 3 CONDITIONS 67 (1981); Evelyn Blackwood, *Sexuality and Gender in Certain Native American Tribes: The Case of Cross-Gender Females*, 10 SIGNS 27 (1984); Donald G. Forgey, *The Institution of Berdache Among the North American Plains Indians*, 11 J. SEX RES. 1 (1975); W. W. Hill, *Note on the Pima Berdache*, 40 AM. ANTHROPOLOGIST 338 (1938); W. W. Hill, *The Status of the Hermaphrodite and Transvestite in Navaho Culture*, 37 AM. ANTHROPOLOGIST 273 (1935); Nancy O. Lurie, *Winnebago Berdache*, 55 AM. ANTHROPOLOGIST 708 (1953); Elsie C. Parsons, *The Zuni La'Mana*, 18 AM. ANTHROPOLOGIST 521 (1916); James S Thayer, *The Berdache of the Northern Plains*, 36 J. ANTHROPOLOGICAL RES. 287 (1980); Harriet Whitehead, *The Bow and the Burden Strap: A New Look at Institutionalized Homosexuality in Native North America* (1980).

Note that several of the titles above include the term "berdache." The term berdache in Native American civilizations refers to a person, either male or female, who takes on some of the characteristics of the opposite sex and does not follow the general gender role of the that sex. Berdaches, for example, often take on particular responsibilities generally assumed by the opposite sex. *See* KATZ, *supra* note 62 at 285.

[72] *See* GREENBERG, *supra* note 31, at 60-61.

[73] *See id.*

[74] *See id.*

[75] *Id.*

[76] *See* DENISE O'BRIEN, FEMALE HUSBANDS IN SOUTHERN BANTU SOCIETIES, IN SEXUAL STRATIFICATION: A CROSS-CULTURE VIEW (1977).

[77] *Id.* at 109.

[78] *Id.*

of same-sex marriages in Africa were documented by E. E. Evans-Pritchard,[79] who describes both the social and legal aspects of same-sex marriages among the Nuer.[80] "[Same-sex] marriages are by no means uncommon in Nuerland, and they must be regarded as a form of simple legal marriage . . . . [I]f she is rich she may marry several wives. She is their legal husband and can demand damages if they have relations with men without her consent."[81] Allowing one to demand damages if one's spouse has an affair with another demonstrates that these marriages not only have social consequences, but that they have legal ramifications as well.

Studies show that societies throughout Asia and the Pacific have also had institutionalized same-sex relationships.[82] Same-sex marriages in China, during the Yuan and Ming dynasties (1264-1644) are depicted in seventeenth-century stories of Li Yu.[83] Li Yu's stories describe how same-sex couples would engage in marriage rituals, adhering to the formal requisites and rituals of marriage, such as a bride-price.[84] His stories suggest the commonality of such marriages, and evidence the institutionalization of same-sex marriages in the Chinese culture.[85]

Evidence similarly indicates the existence of same-sex marriages in Feudal Japan.[86] Paul G. Schalow described formal ceremonies that united a *samurai* with a *wakashu* (boy).[87] The ceremonies included a "formal exchange of written and spoken vows, giving the relationship a marriage-like status. The verbal exchange of vows was formulaic and involved a promise to love in this life and the next."[88] Interestingly, this vow is "one step beyond our 'till death do us part.'"[89]

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[79] *See* E. E. EVANS-PRITCHARD, KINSHIP AND MARRIAGE AMONG THE NUER (1951).

[80] The Nuer are a Nilotic people living in the savannah country near the Upper Nile. *See id.* at v. The information in Evans-Pritchard's book was collected during 12 months in which Evans-Pritchard lived among the Nuer. *See id.*

[81] *Id.* at 108-09.

[82] *See* GREENBERG, *supra* note 31, at 58. Such societies include Vietnam, India, Burma, China, New Zealand, the Cook Islands, Nepal and Tahiti. *See id.*

[83] *See* Eskridge, *History*, *supra* note 17, at 1465 (citing LI YU, A TOWER FOR THE SUMMER HEAT (Patrick Hana trans., 1992)).

[84] *See id.*

[85] *See id.*

[86] *See id.* at 1467-68 (citing PAUL G. SCHALOW, INTRODUCTION TO IHARA SAIKAKU, THE GREAT MIRROR OF MALE LOVE 1, 27 (Paul G. Schalow trans., 1990)).

[87] *See id.* at 1467. This transgenerational, same-sex process was called "boy love." *See id.* While sex was one element of the man-boy relationship, the *nenja* (adult male lover), was to provide other aspects of life, such as social backing, emotional support, and be a role model for the boy. *See id.* at 1467-68. In return, the boy was to demonstrate that he was worthy of his *nenja* by being a good student of *samurai* manhood. *See id.* at 1468.

[88] Eskridge, *History*, *supra* note 17, at 1467.

[89] *Id.*

Same-sex marriages were institutionalized in areas throughout the Pacific as well. In Tahiti, men who displayed many traditional feminine characteristics, such as performing traditional women's work and dressing in female attire, were called *mahus*.[90] The Tahitians had a designated *mahu* for each district, whom the principal chiefs would take as wives.[91]

In Hawai'i, same-sex relationships were common and widely accepted prior to the arrival of the missionaries.[92] Journal entries from Captain Cook's Third Voyage reveal that the Hawaiian culture did not attach stigmas to same-sex relationships or prohibit them; the Hawaiians "indeed accepted and celebrated them."[93] Journal entries written by James King (1750-1784), second lieutenant of the *Resolution*,[94] Charles Clerke (1743-1779), Cook's successor,[95] and David Samwell (1751-1798), a surgeon on the *Discovery*,[96] all discuss, although disapprovingly, the same-sex relationships in the Hawaiian culture.[97]

In March 1779, James King, referring to how he believed the Hawaiian women must feel, wrote, "but what no doubt must be the most grievous of all is the being depriv'd of the natural affections of their Husbands, & seeing this divided by the other sex: the foulest polutions disgrace the Men, & we had no doubt of what an Takanee [*aikane*] meant."[98] Charles Clerke, who also viewed the Hawaiian relationships in a disapproving way wrote:

> Marriage, if at all known among them, is very little encouraged, we saw no traces of it, every Aree [*ali'i*] according to his rank keeps so many women and so many young men (I'car'nies [*aikane*] as they call them) for the amusement of his leisure hours; *they talk of this infernal practice with all the indifference in the world, nor do I suppose they imagine any degree of infamy in it.*[99]

Clerke's journal entry illustrates how such relationships were accepted and considered to be a normal part of society. Moreover, the relationships carried social and political ramifications.

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[90] *See* GREENBERG, *supra* note 31, at 58.

[91] *See id.* at 58-59.

[92] *See* Robert J. Morris, *Aikane: Accounts of Hawaiian Same-Sex Relationships in the Journals of Captain Cook's Third Voyage (1776-1780)* 19(4) JOURNAL OF HOMOSEXUALITY 21 (1990). The journals are quoted as written. Except for words in brackets, included in Morris' article, the spelling, capitalization, and punctuation appear as was written.

[93] *Id.* at 22.

[94] *See id.* at 28. The *Resolution* was one of the ships used in the voyage to Hawai'i.

[95] *See id.*

[96] *See id.* The *Discovery* was also one of the ships used in the voyage to Hawai'i.

[97] *See id.* at 29-33.

[98] *Id.* at 29. It seems that King understood *aikane* to mean homosexual lover. While it is not clear whether he understood *aikane* to carry any particular social or political significance, the openness of such relationships to which he refers, indicates that same-sex relationships were a normal part of the culture.

[99] *Id.* at 30 (emphasis added).

David Samwell, who met with Kamehameha the Great[100] when Kamehameha came aboard the *Discovery*, observing that same-sex relationships, especially amongst royalty, were based on aspects that were social and political, not simply physical or sexual, wrote:

> Another Sett of Servants of whom he has a great many are called Ikany [*aikane*] and are of superior Rank to Erawe-rawe [*he lawelawe*: "minister"]. Of this Class are Parea [*Palea*] and Cani-Coah [*Kanekoa*] and their business is to commit the Sin of Onan upon the old King. This, however strange it may appear, is fact, as we learnt from frequent Enquiries about this curious Custom, and *it is an office that is esteemed honourable among them* & they have frequently asked us on seeing a handsome young fellow if he was not an Ikany [*aikane*] to some of us.[101]

On February 4, 1779, Samwell, referring to the homosexual aspect of the *aikane*, wrote, "we have great reason to think that that Unnatural Crime which ought never to be mentioned is not unknown amongst them."[102] Similarly, John Ledyard, an American from New England, believing in the necessity of conveying the truth about other cultures, although hesitantly, confirmed the existence of same-sex relations in early Hawaiian culture:

> [I]t is a disagreeable circumstance to the historian that truth obliges him to inform the world of a custom among them [Hawaiians] contrary to nature, and odious to a delicate mind . . . [and] it would be to omit the most material and useful part of historical narration to omit it; the custom alluded to is that of sodomy, which is very prevalent if not universal among the chiefs . . . . As this was the first instance we had ever seen of it in our travels, we were cautious how we credited the first indications of it, and waited untill opportunity gave full proof of the circumstance. The cohabitation is between the chiefs and the most beautiful males they can procure about 17 years old, these they call Kikuana, which in their language signifies a relation. These youths follow them wherever they go, and are as narrowly looked after as the women in those countries where jealousy is so predominant a passion; they are extremely fond of them, and by a shocking inversion of the laws of nature, they bestow all those affections upon them that were intended for the other sex.[103]

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[100] *See id.* For the history of how King Kamehameha I, also referred to as Kamehameha the Great, became the sole ruler of the islands of Hawai'i, Maui, Lanai, Molokai, Oahu, Kauai, and Ni'ihau, see S.M. KAMAKAU, RULING CHIEFS OF HAWAII 117-200 (1992).

[101] Morris, *supra* note 92, at 30-31 (emphasis added). Journal written January 29, 1779.

[102] *Id.* at 31. Journal written February 4, 1779.

[103] *Id.* at 32. From the writing, Lenyard appears to have attempted to keep a rather open mind to the difference in cultures. His journal continued:

> We did not fully discover this circumstance until near our departure, and indeed lamented we ever had, for though we had no right to attack or ever to disapprove of customs in general that differed from our own, yet this one so apparently infringed and insulted the first and strongest dictate of nature, and we had from education and a diffusive

The journal entries above, although loaded with tones of ethnocentrism, are strong evidence that same-sex relationships were both accepted and institutionalized in Hawai'i.[104]

The existence of same-sex relationships is not, however, limited to the above examples. "Homosexual behavior has existed throughout history and in every known culture."[105] In 1951, a study concerning sexual practices throughout the world led to the discovery that:

> In 49 (64 percent) of the 76 societies other than our own for which information is available, homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community . . . .
>
> In many cases this [same-sex] behavior occurs within the framework of courtship and marriage, the man who takes the part of the female being recognized as a berdache and treated as a woman. In other words, a genuine mateship is involved.[106]

It is evident that socially accepted and institutionalized same-sex marriages and unions have existed in some of the earliest civilizations known. Furthermore, such relationships have continued to exist throughout history and the world. Same-sex marriages are therefore, not new, uncommon, or unnatural. Thus, the evidence presented above provides a concrete basis upon which one may dispel the "custom" and "historic" rationale courts have proffered against same-sex marriages.[107]

> observation of the world, so strong a prejudice against it, that the first instance we saw of it we condemned a man fully reprobated.

Id.

[104] For more on same-sex relationships in Hawai'i see Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture and Values for the Debate about Homogamy*, 8 YALE J.L. & HUMAN. 105 (1996) (discussing how same-sex marriages should be legalized in Hawai'i under what he calls "the Hawaiian clauses"). The Hawaiian clauses are statutes and sections under the Hawai'i State Constitution requiring that the State must recognize Hawaiian culture and traditions. *See id.* Because same-sex relationships, and arguably marriages, were customary in Hawai'i, the State must recognize them. *See id.*

[105] MARY ANN SCHWARTZ & BARBARA MARLIENE SCOTT, MARRIAGES & FAMILIES, DIVERSITY AND CHANGE 199 (1994).

[106] ESKRIDGE, THE CASE, *supra* note 36, at 29 (quoting CLELLAN S. FORD AND FRANK A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 130-31 (1951)).

[107] Most courts that have struck down same-sex marriages have done so on the basis of "culture" or "tradition." *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973). "Marriage was a custom long before the state commenced to issue licenses for that purpose . . . . In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary." *Id.* at 589. *See also* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). The court in *Baker* stated:

> The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis . . . .

III. *BAEHR V. LEWIN*: THE PEOPLE, THE CASES, AND THE PROGNOSIS

A. The Man, The Means, and The Hero[108]

1. Bill: the man with a mission[109]

One day in 1985, Bill decided he wanted to marry his loved one. They had been dating for several years. However, there was a problem that prevented them from marrying. The typical hurdles did not apply. Neither of them were already married and they were not related any way. The problem, rather, was that the person Bill wanted to marry was, like Bill, a man.

Bill Woods[110] is a public health administrator who holds a masters degree in public health administration and is active in the political arena. In 1972, he coordinated the first gay and lesbian support group in Hawai'i. He founded and is the director of the Gay and Lesbian Community Center.[111] Bill assisted in passing Hawai'i's Equal Rights Amendment,[112] legalizing abortion, and the Constitutional Convention. Moreover, Bill has been active in hundreds of civil rights and discrimination cases.

Knowing that marrying the man he loved would be a difficult and uphill battle,[113] Bill looked to the laws of all fifty states to determine which state

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> This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend.

Id. at 186.

[108] This part includes a personal overview of some of the parties involved in *Lewin* and *Miike*. The reason for including this information is to help the reader remember that there is more to these cases than simply plaintiffs and law; there are *people* involved, there is *love* involved, and there are actual *lives* involved.

[109] The personal information discussed in this part regarding Bill Woods was obtained during a telephone interview with Bill Woods, founder and director of the Gay and Lesbian Community Center conducted on Feb. 20, 1997.

[110] Dan Foley referred to Bill as "the father of gay rights." Interview with Dan Foley in Honolulu, Haw. (Feb. 7, 1997).

[111] Bill founded the community center in 1973. This was the first gay and lesbian community center in the country. Telephone Interview with Bill Woods, Founder and Director of the Gay and Lesbian Community Center (Feb. 20, 1997).

[112] The Hawai'i State Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the persons civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

HAW. CONST. art. I, § 5 (1978).

[113] At that time, all attempts at state recognized same-sex marriages had failed. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (upholding the denial of a

would be most receptive to same-sex marriage. He knew that under the Hawai'i State Constitution, discrimination based on sex was expressly prohibited.[114] However, discrimination based on sexual orientation was not explicitly prohibited.[115] Unlike the United States Constitution, the Hawai'i State Constitution expressly prohibits a person from being denied equal protection of the laws because of race, religion, sex or ancestry.[116] In Hawai'i, any classification based on race, religion, sex or ancestry is subject to strict scrutiny, that is, the classification will be sustained only if "suitably tailored to serve a compelling state interest."[117] Bill decided that Hawai'i, because of its more expansive constitution, provided the best forum for a same-sex marriage case.

He considered having a mass wedding the day of the 1989 Gay Pride Parade and suggested the idea at a Pride Parade and Rally Counsel executive meeting.[118] The decision was made; thirty couples were to be married the day of the Gay Pride Parade.[119] The plan was to marry the couples and then proceed to court to have the marriages legally recognized.

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marriage license to a same-sex couple); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (upholding a statute denying a marriage license to same-sex couples); De Santo v. Barnsley, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (refusing to recognize the right to a common law same-sex marriage); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. App. 1974) (upholding a state's refusal to issue a marriage license to two men); Burkett v. Zablocki, 54 F.R.D. 626, 626 (E.D. Wis. 1972) (dismissing an action by two women to obtain an order to compel the county clerk to issue an application for a marriage license); *see also* Adams v. Howerton, 673 F.2d 1036, 1042-43 (9th Cir. 1982) (upholding a federal immigration law that excluded same-sex marriages for citizenship purposes); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 501 (1971) (declaring that a marriage between two men was void, even though the husband thought he was marrying a woman at the time of their marriage).

[114] *See* HAW. CONST. art. I, § 5. For text of article I, section 5, see *supra* note 112.

[115] *See id.*

[116] Under the United States Constitution, only classifications which are "suspect" are subject to strict scrutiny, however, the United States Supreme Court has recognized only three classifications as suspect: race, *see* Loving v. Virginia, 388 U.S. 1, 11 (1967); alienage, *see* Graham v. Richardson, 403 U.S. 365, 372 (1971); and national origin, *see* Korematsu v. United States, 323 U.S. 214, 216 (1944). The Court has only recognized two other classification as quasi-suspect: gender, *see* Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24 (1982); and illegitimacy, *see* Lalli v. Lalli, 439 U.S. 259, 265 (1978). Quasi-suspect classifications must be "substantially related to a legitimate state interest." Mills v. Habluetzel, 456 U.S. 91, 99 (1982). Thus, Hawai'i's constitution provides greater protection to those covered under the constitution than under the United States Constitution.

[117] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). See *infra* note 157 for a more in depth discussion of strict scrutiny.

[118] *See* Telephone Interview with Bill Woods, *supra* note 111. Bill Woods founded the Pride Parade and Rally Counsel, which organizes and carries out the Gay Pride Parade. *See id.*

[119] *See id.* Troy Perry, who planned on becoming licensed to solemnize marriages, was going to marry the couples. *See id.*

Bill sought help from leaders of many civil rights organizations. Much to his dismay, however, neither the Hawai'i chapter of the American Civil Liberties Union ("ACLU"), the National American Civil Liberties Union Gay and Lesbian Project, nor the Lamda Legal Defense and Education Fund wanted to help.[120] It seemed he was on his own. Because of the difficulty in finding someone to represent the couples who planned to get married, the mass wedding was canceled.

The process was difficult and during this time Bill and his partner separated. Believing in the cause, Bill continued working towards legalizing same-sex marriages. He realized that whoever chose to get married would be fighting not only the state, but also the ACLU and approximately twenty-five Gay and Civil Rights organizations.[121] Because many people did not want to cause waves with their friends and associates in other organizations, the thirty couples ultimately withered down to three couples:[122] Ninia Baehr and Genora Dancel, Pat Largon and Joseph Melillo, and Tammy Rodrigues and Antoinette Pregil.[123]

2. *Genora and Ninia: the means to get there*[124]

Genora and Ninia were born only four days apart in Honolulu, Hawai'i. They met at a television station where Genora was working as a broadcast engineer.[125] The two hit it off right away.[126] They began to spend more and more time together and things were going great for the both of them. A problem arose, however, when Genora needed to take Ninia to the emergency room. Although Genora had two full coverage health plans through her jobs,

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[120] *See id.* According to Bill, the ACLU determined it would not take the case after taking a poll to determine the general consensus within the gay community. *See id.*

[121] *See id.* Many organizations were against same-sex marriages because they thought it would make a mockery of gays and lesbians, some thought it was not the right time, and some thought gays and lesbians should not marry. *See id.*

[122] *See id.* Bill and his partner separated during the process. *See id.* Bill, however, believed in the cause and continued working towards legalizing same-sex marriages. *See id.*

[123] *See id.* Pat Largon and Joseph Melillo were the first couple to agree to continue. *See id.* Genora Dancel and Ninia Baehr were the second to couple to decide to get married. *See id.* Tammy Rodrigues and Antoinette Pregil were the third couple to become involved. *See id.* The three couples ultimately became the Plaintiffs in *Lewin.*

[124] The information presented in this part, concerning Genora Dancel and Ninia Baehr, was obtained during a telephone interview with Genora Dancel conducted on Feb. 20, 1997.

[125] Telephone Interview with Genora Dancel (Feb. 20, 1997). At that time Genora was working for two different television stations, Channel 13, and PBS. *See id.* They met at PBS. *See id.* Ninia was running the women's health clinic at the University of Hawai'i. *See id.*

[126] *See id.* Genora admitted that when they first met, she was so nervous that she was pacing back and forth, and even bumping into walls. *See id.* She was especially worried, however, about having food stuck in her braces. *See id.*

Ninia could not be covered because she was neither family nor her spouse. One must remember that, unlike heterosexual couples, Genora and Ninia did not even have the option to get married. Regardless of how committed they are to each other, without a marriage license issued by the state, they can not be assured of all the benefits and protections which come with marriage,[127] such as spousal coverage under a health insurance plan. Ninia and Genora had no choice but to pay the accruing medical bills out of their own pockets.[128]

In September of 1990, Genora proposed to Ninia.[129] She bought an engagement ring and proposed to Ninia, who happily accepted. Ninia subsequently learned about Bill's plan to attempt to legalize same-sex marriages. Ninia and Genora decided to do everything they could to have their commitment to each other recognized in the eyes of the law.

On December 17, 1990 the three couples, Ninia and Genora, Tammy and Antoinette, and Pat and Joseph, went to the Department of Health ("DOH"). Each couple filed an application for a marriage license, just as heterosexual couples are required to do.[130] All three couples, however, were denied marriage licenses on the basis that they were of the same sex.[131] The couples

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[127] *See infra* notes 272, 275 for discussion of various rights, benefits, and protections given to married couples.

[128] *See* Telephone Interview with Genora Dancel, *supra* note 125. Such incidents are common for same-sex couples. This is one example of how the cost of living for a same-sex couple is higher than that of a married couple. While employers offer additional insurance coverage for an employee's spouse, same-sex couples need to obtain private insurance. This is not limited to health insurance, however, married couples also receive discounts on other types of insurance programs, such as, life insurance and auto insurance; these discounts are rarely offered to same-sex couples.

[129] *See id.* When asked what made her decide to propose, Genora responded, "If you love somebody, you just really want to tie the knot." *Id.*

[130] Hawai'i law provides in pertinent part:

> To secure a license to marry, the persons applying for the license shall appear personally before an agent authorized to grant marriage licenses and shall file with the agent an application in writing. The application shall be accompanied by a statement signed and sworn to by each of the persons, setting forth: the person's full name, date of birth, residence; their relationship, if any; the full names of parents; and that all prior marriages, if any have been dissolved by death or dissolution.

HAW. REV. STAT. § 572-6 (Supp. 1992). Note that there is no explicit requirement for the couple to be of the same or opposite sex.

[131] Each of the same-sex couples who applied for a marriage license received a letter from the Department of Health's Assistant Chief and State Registrar, Office of Health Status Monitoring, which stated in pertinent part, "we decline to issue a license for your marriage to one another since you are both of the same sex[.]" Baehr v. Lewin, 74 Haw. 530, 539, 852 P.2d 44, 50 n.3 (1993) (citing to Exhibits "A," "C," and "D," attached to the Plaintiffs' complaint).

Initially, however, the couples almost succeeded in obtaining the marriage licenses. According to Ninia, "the clerk almost gave us the license and then her supervisor came out and

now had a basis to file their lawsuit; all they needed was an attorney who believed in their cause and who would fight for them.

3. Dan: the hero[132]

Dan Foley is not an average lawyer, "he's a hero."[133] Dan is a product of San Francisco in the 1960s. He was involved in many political demonstrations, such as anti-war movements. In 1969, he joined the Peace Corps and went to Lesotho, Africa, while the country was in a state of civil war. In 1970, Dan was expelled from Lesotho, having been accused of being a communist. Because the allegations were meritless, he realized just how powerless people could be.

Being from a family with low economic status, Dan realized that if he wanted to protect people's rights and make changes, he must do it in the courtroom. Dan earned his Jurist Doctorate from the University of San Francisco. He soon discovered, however, that he did not want to do the things most lawyers do, so, in 1974, he joined the Peace Corps for a second time. This time, he went to Micronesia to help write their constitution. As part of the drafting process, Dan studied a multitude of constitutions from countries all around the world to determine what is best. This forced him to consider not only what he thought was right for himself, but also what was right for all people. In writing the constitution, Dan realized the importance of protecting civil rights. It was then that he really developed a passion for it. After his term in the Peace Corps ended, Dan remained in Micronesia working as legislative counsel.

In 1983, Dan left Micronesia and came to Hawai'i, where he started working at a law firm specializing in Native Hawaiian rights.[134] Dan, however, still had a passion for civil rights, and in 1984, he became the legal director for the ACLU, Hawai'i Chapter. His passion continued to grow as he worked on many civil rights cases to protect the rights of the people.[135]

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said, 'Oh no, no, you can't do that'." *Investigative Reports: For Better or For Worse* (A&E television broadcast, Feb. 15, 1997) [hereinafter *Investigative Reports*].

[132] The personal information presented in this part regarding Dan Foley was obtained during a personal interview with Dan Foley in Honolulu, Hawai'i, conducted on Feb. 7, 1997, and a telephone interview with Dan Foley, conducted on Oct. 6, 1997. [Editor's Note: In 2000, Dan Foley was appointed by Gov. Benjamin Cayetano to sit on the Hawai'i Intermediate Court of Appeals.]

[133] Telephone Interview with Genora Dancel, *supra* note 125. This is how Genora Dancel described Dan. *See id.*

[134] The name of the law firm was Yuklin, Aluli, Mililani, & Trask.

[135] Such cases include *Hula Halau Ohana v. Hanabou Tavaras*, U.S. Dist. Ct. 85-1259 (1985) (prohibiting a Miss Gay Molokai pageant violates First Amendment Rights) and *State v. Kam*, 69 Haw. 483, 493, 748 P.2d 372, 378-379 (1988) (holding that a personal decision to

Dan left the ACLU in 1987 and went into solo practice.[136] In February 1991, Bill Woods approached Dan and explained that three couples had been denied marriage licenses because they were the same-sex. He also told Dan that several other organizations and attorneys had rejected his request for assistance, and asked whether Dan would represent the couples. Considering that no one else would take the case[137] and that the same-sex marriage issue had never been decided in Hawai'i,[138] he agreed to take the case.[139]

B. The Battles to Legalize Same-Sex Marriage

1. Baehr v. Lewin

On May 1, 1991, the Plaintiffs filed a complaint in the Circuit Court of the First Circuit of Hawai'i.[140] The complaint sought a declaration that Hawai'i Revised Statute ("HRS") section 572-1[141] was unconstitutional under the

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read or view pornographic materials in the privacy of one's own home is protected under the right to privacy). Dan believes that there must be a process to be heard. Telephone Interview with Dan Foley (Oct. 6, 1997). The Bill of Rights was developed to protect minorities, the powerless, and the poor. *See id.* Everyone, not just the rich and those who have coffee with the President, have a right to a hearing when their rights are violated. *See id.*

[136] *See id.* He later formed the partnership Partington & Foley where he is currently working. *See id.*

[137] *See id.* ACLU Hawai'i Chapter, National ACLU Gay and Lesbian Project and Lamda Legal Defense and Education Fund had all previously rejected Bill's request for their assistance in this case. *See* Telephone Interview with Bill Woods *supra* note 111.

[138] Issues regarding the validity of same-sex marriages have been litigated in other states. See *supra* note 113 and accompanying text for an overview of such cases.

[139] Prior to Bill's request, Dan had never considered same-sex marriages. However, when he was told that everyone else had turned down the case, he thought of his wife and two children, and then thought, "Who am I to tell these couples they can't have what I have? That would be arrogant." Although he took the case, Dan said that he was not really expecting to win. He was hoping for some good principles and language to come out of the case which could be used as a stepping stone to achieve similar goals in the future. *See* Telephone Interview with Dan Foley, *supra* note 135. Genora, however, said she truly believed that they would prevail. *See* Telephone Interview with Gerona Dancel, *supra* note 125.

[140] The complaint was filed against John C. Lewin, in his official capacity as Director of the Department of Health State of Hawai'i.

[141] Hawai'i Revised Statute section 572-1 provides:

> Requisites of a valid marriage contract. In order to make a valid marriage contract, it shall be necessary that:
>
> 1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;
>
> 2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit court

Hawai'i State Constitution because the DOH's interpretation and application of the statute denies same-sex couples access to marriage licenses.[142] The Plaintiffs' complaint alleged that denying same-sex couples access to marriage licenses violates their right to privacy guaranteed by article I, section 6 of the Hawai'i Constitution.[143] The complaint also claimed that such a prohibition denied same-sex couples equal protection of the laws and due process of law guaranteed by article I, section 5 of the Hawai'i Constitution.[144] In addition, the complaint sought a preliminary and permanent injunction prohibiting future denials of marriage licenses on that basis.[145]

The State moved for a judgment on the pleadings for failure to state a claim upon which relief could be granted.[146] The circuit court granted the motion and dismissed the complaint.[147]

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within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 [consent of parent or guardian];

3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;

4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

6) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained from the agent appointed to grant marriage licenses; and

7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the man and woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

HAW. REV. STAT. § 572-1 (1985)

[142] *See* Baehr v. Lewin, 74 Haw. 530, 539-40, 852 P.2d 44, 50 (1993).

[143] The Hawai'i State Constitution provides:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

HAW. CONST. art. I, § 6.

[144] *See Lewin*, at 539-40, 852 P.2d at 50.

[145] *See id.*

[146] *See id.* While the State also asserted the defenses of sovereign immunity, qualified immunity, and abstention in favor of legislative action, the motion to dismiss was granted on the sole basis of failure to state a claim upon which relief could be granted. *See id.* at 540-41, 852 P.2d at 50.

[147] *See* Baehr v. Lewin, No. 91-1394-05, Order Granting Defendant's Motion For Judgment On The Pleadings [hereinafter Order]. Although the case was dismissed, Genora and Ninia continued to feel optimistic about the case. At this point, Dan also felt optimistic because the lower court dismissed the case without looking at the merits, and he believed this case required findings of fact.

In dismissing the claim, the circuit court judge, Judge Klein, reasoned that "the right to enter into a homosexual marriage is not a fundamental right protected by [a]rticle I, [s]ection 6 of the Hawai'i State Constitution."[148] Judge Klein also held that HRS section 572-1, "which permits heterosexual marriages but not homosexual marriages does not violate the [d]ue [p]rocess [c]lause of [a]rticle I, [s]ection 5 of the Hawai'i State Constitution. The law does not infringe upon a person's individuality or lifestyle decisions . . . ."[149] The court then declared that the benefits of marriage are extended to only "traditional family units, which consist of male and female partners. [H]omosexual marriage has never been considered to be a fundamental right under any known state constitution or the United States Constitution . . . ."[150] Judge Klein also concluded that homosexuals do not constitute a "suspect class"[151] for the purpose of equal protection analysis under article I, section 5 of the Hawai'i State Constitution,[152] because homosexuals were not "politically powerless."[153] Plaintiffs appealed the circuit court's decision to the Hawai'i Supreme Court.[154]

On appeal, the Hawai'i Supreme Court held that HRS section 572-1 on its face, and as applied, discriminates on the basis of sex because it "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 [of the Hawai'i State Constitution]."[155] The Supreme Court vacated and remanded

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[148] *Id.* at 2. A curious thing happened here; the court referred to "homosexual" marriages. At no time did the Plaintiffs ever asserted that they were homosexuals. The issue in this case concerned the *gender* of the couples, not their *sexual orientation*. Homosexuals can marry; if a gay male and a lesbian female were to apply for a marriage license, they could obtain one. Therefore, the court erred in discussing "homosexual marriages." *See id.*

[149] *Id.*

[150] *Id.* at 3, (citing Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971)). The notion of "traditional family units . . . of male and females" will be discussed in section V.B of this comment.

[151] *See* Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) (holding that the Federal Bureau of Investigation's ("FBI's") refusal to hire a person because she was homosexual was not subject to strict scrutiny because homosexuals are not a suspect class).

[152] *See* Order, *supra* note 147, at 4.

[153] *See* City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 442-45 (1985) (holding that mental retardation is not a quasi-suspect classification).

[154] The case was heard before Chief Justice Moon, Justice Levinson, Chief Judge James S. Burns and Judge Walter M. Heen, of the Hawai'i Intermediate Court of Appeals, who were replacing Justice Lum and Justice Klein, and retired Associate Justice Hayashi, who was assigned by reason of vacancy. *See* Baehr v. Lewin, 74 Haw. 530, 535, 852 P.2d 44, 48 (1993).

[155] *Id.* at 581, 852 P.2d at 67. Justice Levinson wrote the majority opinion, in which Chief Justice Moon joined. Although he agreed with the result, Chief Judge Burns in his concurring opinion set forth a different analysis. He held that the statute would be discriminatory only if the Plaintiffs could prove that sexual orientation was "biologically fated." *See id.* at 585, 852 P.2d at 69. Judge Heen dissented, arguing that the statute does not discriminate on the basis of

the lower court's order.[156] On remand, the State of Hawai'i had the burden of proof under the "strict scrutiny" standard.[157] In order to overcome the presumption that HRS section 572-1 was unconstitutional, the State was required to prove that the statute furthered a compelling state interest and that the statute was narrowly drawn to avoid abridgments of constitutional rights.

2. Baehr v. Miike

On remand, the case was heard by Judge Chang, as *Baehr v. Miike*.[158] In Defendant's First Amended Pretrial Statement, the State alleged five main compelling State interests:

> 1. That the State has a compelling interest in protecting the health and welfare of children and other persons;
> 2. That the State has a compelling interest in fostering procreation within a marital setting;
> 3. That the State has a compelling interest in securing or assuring recognition of Hawaii marriages in other jurisdictions;
> 4. That the State has a compelling interest in protecting the State's public fisc from the reasonably foreseeable effects of State approval of same-sex marriage in the laws of Hawaii;

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sex. *See id.* at 590-91, 852 P.2d at 71. He argued that because the statute does not allow men to marry other men, or women to marry other women, neither sex was being given or denied a right or benefit given to the opposite sex. *See id.* Justice Hayashi would have joined Associate Judge Heen's dissent, however, Hayashi's assignment expired prior to the filing of the opinion. *See id.* at 587, 852 P.2d at 70 n.1.

[156] *See id.* at 583, 852 P.2d at 68.

[157] *See id.* Strict scrutiny is the highest level of review; it is difficult to overcome the burden of proof. *See* FARBER, ESKRIDGE, AND FRICKEY, CONSTITUTIONAL LAW, THEMES FOR THE CONSTITUTION'S THIRD CENTURY 144 (1993). Strict scrutiny involves an inquiry into the relationship between the means and the end of the legislation. *See id.* Initially, the end, or the goal of the legislation, must be "compelling," which is understood as being something more than "important." *See id.* Strict scrutiny also requires that the means to achieve that goal be "necessary"; a rational relationship, or even a significant relationship, between the means and the end is not sufficient to pass strict scrutiny. *See id.*

On remand, the State argued that the goal was promoting the optimal development of children. *See infra* section III.B.2. The means to achieve that goal was banning same-sex couples from marrying. Therefore, in order to pass constitutional muster under strict scrutiny, the goal, promoting the optimal development of children must be a compelling state interest, and banning same-sex couples from marrying must be necessary to achieve that goal.

[158] No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Lawrence H. Miike took over as director of the Department of Health. Pursuant to Rule 43(c) of the Hawai'i Rules of Appellate Procedure, when Miike took over Lewin's position, he was automatically substituted for Lewin, thus changing the name of the case from *Baehr v. Lewin* to *Baehr v. Miike*.

5. That the State has a compelling interest in protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens.[159]

Although the State alleged five interests, the State focused primarily on the protection of children.[160] In Defendant's Pre-Trial Memorandum, the State asserted: "It is the State of Hawai'i's position that, all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female . . . ."[161] Similarly, in his opening statement, defense counsel stated, "[t]he State has a compelling interest in promoting the optimal development of children . . . . It is the State's policy to pursue the optimal development of children, to unite children with their mothers and fathers, and to have mothers and fathers take responsibility for their children."[162]

In an attempt to meet its burden and prove that legalizing same-sex marriages would be injurious to children, the State presented four expert witnesses, namely, Kyle Pruett, M.D.,[163] David Eggebeen, Ph.D.,[164] Richard Williams, Ph.D.,[165] and Thomas S. Merrill, Ph.D.[166] The first witness the State called was Dr. Pruett. Although he was the State's witness, Dr. Pruett, on cross-examination, stated that same-sex parents produce children with a clear sense of gender identity.[167] He further testified that single parents, gay and lesbian parents, and same-sex couples are able to raise happy, healthy and well adjusted children.[168] Moreover, he testified that same-sex couples, gay fathers and lesbian mothers "can be, and do become, good parents."[169] Dr. Pruett also testified that gay and lesbian parents are as fit and loving parents as non-gay parents, and agreed that same-sex couples should be allowed to adopt children.[170]

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[159] *Id.* at 3 (citing Defendant's First Amended Pretrial Statement at pages 2-4).

[160] *See id.* at 4-10.

[161] *Id.* at 3 (citing Defendant's Pre-Trial Memorandum at 1). It is an interesting statement, yet it is not very often that all things are equal.

[162] *Id.*

[163] Dr. Pruett is an expert in psychiatry, and he focuses on child development. *See id.* at 4.

[164] Dr. Eggebeen's expertise is in sociology, with a focus on demographics related to family and children. *See Miike*, No. 91-1394, 1996 WL 694235 at 6.

[165] Dr. Williams is an expert in psychology, and he focuses on analyzing and critiquing research methods. *See id.* at 8.

[166] Dr. Merrill's expertise is in the field of psychology, and he concentrates on human, gender, and child development. *See id.* at 9.

[167] *See id.* at 4.

[168] *See id.* at 5.

[169] *Id.*

[170] *See id.*

Dr. Eggebeen was the State's second expert witness. He testified during cross-examination that "gay and lesbian couples can, and do, make excellent parents and that they are capable of raising a healthy child."[171] More importantly, Dr. Eggebeen testified that children of same-sex couples would be helped if their families had access to, or were able to receive the benefits of marriage, including: 1) state income tax advantages; 2) public assistance; 3) enforcement of child support, alimony or other support orders; 4) inheritance rights; and 5) the ability to prosecute wrongful death actions.[172]

The third witness to testify for the State was Dr. Williams, who criticized particular studies that he believed the Plaintiffs would use. According to Judge Chang, however, "[t]he testimony of Dr. Williams [was] not persuasive or believable because of his expressed bias against the social sciences, which include[s] the fields of psychology and sociology."[173] Dr. Williams testified that "modern psychology is so flawed that no fix, reconciliation or overhaul can correct it."[174] Accordingly, because Dr. Williams' testimony was not credible, his attempts to discredit Plaintiffs' studies were unsuccessful.

The final witness to testify for the State was Dr. Merrill, whose experience in cases involving sexual orientation was limited.[175] Dr. Merrill compared child development in same-sex versus opposite-sex parents for the first time when retained for this case.[176] He testified that the sexual orientation of a parent is not an indication of parental fitness, and that gay and lesbian couples with children have successful relationships.[177] A question posed to Dr. Merrill:

> Q. Now, doctor, do you think the children, regardless of whether they have a mother and a father, male-female parents, single parents, adoptive parents, gay and lesbian parents, same gender parents, should have the same opportunity in society to reach their optimum development, each child? [sic]
> A. Yes, I do.[178]

Finally, Dr. Merrill stated that benefits, such as health care, education and housing, should not be denied to children based on the status of their

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[171] *Id.* at 7.

[172] *See id.* at 8. In this section of the transcript, Dr. Eggebeen also agreed that if same-sex couples were to receive the social status derived from marriage, the children of those couples would be benefited. *See id.*

[173] *Id.* at 8.

[174] *Id.* Dr. Williams' skepticism of most research methods became even more evident when he testified that he did not believe there is any scientific proof of evolution. *See id.*

[175] *See id.*

[176] On a previous occasion, Dr. Merrill was retained to do a custody evaluation involving a same-sex relationship on the mother's side. *See id.* at 10. He testified that while the mother had a same-sex relationship, that did not affect his evaluation in the case. *See id.*

[177] *See id.*

[178] *Id.*

parents.[179] He testified that "[o]pposite-sex, same-sex, single and adoptive parent status should not be a basis to deny benefits to children."[180] Thus the State's *own* experts testified that the best interest of children would be furthered by allowing same-sex marriages.

Because the burden of proof was on the Defendant, the Plaintiffs were not required to present any evidence. Nevertheless, the Plaintiffs presented evidence proving that same-sex marriages do not hinder child development. The Plaintiffs presented testimony from four expert witnesses, namely, Pepper Schwartz, Ph.D.,[181] Charlotte Patterson, Ph.D.,[182] David Brodzinsky, Ph.D.,[183] and Robert Bidwell, M.D.[184]

Plaintiffs' first witness, Dr. Schwartz, testified that the sexual orientation of parents is not an indicator of parental fitness[185] and that there is no reason relating to the promotion of child development why same-sex couples should not be allowed to marry.[186] Similarly, Plaintiffs' second witness, Dr. Patterson, testified that a biological relationship between a parent and a child is not essential to raising a healthy child.[187] In addition, Dr. Patterson testified that child development would not be hindered if same-sex couples were allowed to marry.[188]

Dr. Brodzinsky, the Plaintiffs' third witness, testified that the primary quality of good parenting is based in the nurturing relationship between the parent and the child, not in the biology of the parent or structure of the family.[189] Dr. Brodzinsky further testified that children adopted by same-sex couples do not have any increased risk of behavioral or psychological problems.[190] More specifically, Dr. Brodzinsky noted that same-sex couples do in fact adopt children.[191]

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[179] *See id.*

[180] *Id.*

[181] Dr. Schwartz is an expert in sociology and interdisciplinary studies of sexuality, specializing in gender and human sexuality, marriage and the family, and same-sex relations in parenting and research. *See id.* at 11.

[182] Dr. Patterson is an expert in the psychology of child development, specializing in gay and lesbian parenting and the development of children of gay and lesbian parents. *See id.* at 12.

[183] Dr. Brodzinsky is an expert in psychology and child development, specializing in adoption and development of children raised by nonbiological parents. *See id.* at 13.

[184] Dr. Bidwell is an expert in pediatrics, specializing in adolescent medicine. Dr. Bidwell has treated or provided medical service to hundreds of children with a single gay or lesbian parent or same-sex parents. *See id.* at 15.

[185] *See id.* at 11.

[186] *See id.* at 12.

[187] *See id.* at 13.

[188] *See id.*

[189] *See id.* at 15.

[190] *See id.*

[191] *See id.* at 14.

The final witness to testify for the Plaintiffs was Dr. Bidwell, who testified that gay, lesbian, and same-sex couples raise children who are as healthy and as well adjusted as children raised by different-sex couples.[192] While Dr. Bidwell acknowledged that some adolescents and teenaged children in same-sex family environments have experienced "difficult time[s]" because their family is "not the same as the majority of families that surround them,"[193] he testified that it was a phase in their development and that he "[did] not know of any teenager who [had] not gotten through this phase intact as a healthy adolescent."[194] Dr. Bidwell concluded by testifying that the health, development and adjustment of the children of same-sex parents would benefit if their parents were married.[195]

All of the testimony presented by the Plaintiffs indicated that legalizing same-sex marriages would be more beneficial to children and child development. Judge Chang "found the testimony of Dr. Schwartz and Dr. Brodzinsky to be especially credible."[196] It is clear, therefore, that the optimal development of children, which the State itself argued was a compelling State interest, would actually be promoted if same-sex marriages were legalized.

Given the testimonies presented, Judge Chang concluded that the State did not present a compelling state interest so as to justify the facial sex discrimination of HRS section 527-1.[197] In so concluding, Judge Chang emphasized that, Defendant's own expert, Kenneth Pruett, agreed that gay and lesbian parents "are doing a good job"[198] raising children and, most importantly, "[that] the kids are turning out just fine."[199] Based on the State's failure to demonstrate a compelling state interest, Judge Chang held that the State "is enjoined from denying an application for a marriage license solely because the applicants are of the same sex."[200]

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[192] *See id.* at 16.

[193] *Id.*

[194] *Id.* at 16. Dr. Bidwell testified that not all children go through such stages; "[r]emarkably, most of them, they make their accommodations." *Id.*

[195] *See id.* Dr. Bidwell testified that although the children may have special experiences, it does not create any developmental damage; "[t]hey find ways to deal with it. . . . [I]f anything, I think they grow stronger through that experience. They learn about life. They learn about diversity. . . . It creates strength and promotes growth." *Id.* (citing the trial transcript).

[196] *Id.* at 10.

[197] *See id.* at 21.

[198] *Id.* at 18.

[199] *Id.*

[200] *Id.* at 22. It is not clear exactly what the State would have had to prove. For example, did Judge Chang find for the Plaintiffs because the "goal," promoting the optimal development of children, is not a compelling state interest, or was it because the "means," denying same-sex couples the right to marry, is not "necessary" to effectuate that goal? See *supra* note 157 for an explanation of strict scrutiny, the "goal," the "means" and "necessary."

The State has appealed this decision to the Hawai'i Supreme Court and Judge Chang's decision has been stayed pending appeal. Thus, at this time, same-sex couples may not legally marry in Hawai'i until the Supreme Court rules on the case. Given the supreme court's previous ruling in *Lewin*, however, there is a strong likelihood that, on appeal, the Court will affirm Judge Chang's decision. The court previously held that HRS section 527-1 was unconstitutional under the Hawai'i Constitution. [201] In order to justify upholding the discriminatory statute, the State needed to prove that the statute furthered a compelling state interest and was narrowly drawn.[202]

Notwithstanding the fact that strict scrutiny is a difficult standard to overcome, all of the State's witnesses agreed that gay and lesbian parents are just as qualified as opposite-sex couples in raising children.[203] It is therefore likely that the Hawai'i Supreme Court will affirm Judge Chang's decision, thereby legalizing same-sex marriages in Hawai'i.[204]

IV. DOMA, THE ATTEMPT TO DESTROY SAME-SEX MARRIAGES: AN ANALYSIS OF DOMA, FULL FAITH AND CREDIT, AND *ROMER V. EVANS*

While the decision in *Lewin* and *Miike* are steps towards ending discrimination against same-sex couples, Congress, by contrast, has taken affirmative steps in perpetuating such discrimination. On September 21, 1996, the Defense of Marriage Act[205] was signed into law. The Act, which allows

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When Judge Chang was asked what the State would have needed to do in order to pass strict scrutiny, he refused to answer the question because the case is on appeal. Discussion with Judge Chang in Honolulu, Haw. (Apr. 23, 1997).

[201] *See* Baehr v. Lewin, 74 Haw. 530, 583, 852 P. 2d 44, 68 (1993).

[202] *See id.*

[203] *See Miike*, No. 91-1394, 1996 WL 694235, at 4-10.

[204] The case was emotionally taxing for both the attorneys and the Plaintiffs involved. Dan Foley, who was harassed by opposers of same-sex marriages, received threatening telephone calls, and was taunted on the streets. *See* Telephone Interview with Dan Foley, *supra* note 135.

Genora and Ninia found the process to be physically draining. Throughout the entire course of the case, however, Ninia and Genora managed to be involved in many community service activities, such as giving talks to students throughout the country about accepting people for who they are. *See* Telephone Interview with Genora Dancel, *supra* note 125.

Genora and Nina still maintain their Hawai'i residency, however, they are now residing in Maryland so that Genora may attend Johns Hopkins Medical School. Ninia works as a grant writer for a non-profit organization, while Genora is planning on finishing medical school and becoming an anesthesiologist. When the final appeal is over, the two are going to have a small wedding on the slopes of Haleakala on the island of Maui, Hawai'i.

When asked whether they plan on suing to have Maryland recognize their marriage, Genora replied that they just want to get on with their lives and that they will leave the rest up to someone else. Genora stated that while the entire case has been exciting and intense, they are looking forward to having their lives back to normal. *See id.*

[205] DOMA is codified in two parts at 28 U.S.C. section 1738C and 1 U.S.C. section 7.

other states to completely disregard an otherwise valid same-sex marriage, provides:

> 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.[206]
>
> 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, the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[207]

If Hawai'i legalizes same-sex marriages and a same-sex couple weds in Hawai'i, then under DOMA, other states do not have to recognize their marriage as being valid. Consequently, if that couple journeys to a state which does not afford recognition of that marriage, they would not receive the benefits and rights that are extended to opposite-sex married couples.

The Defense of Marriage Act was developed in response to the possibility – and fear – that same-sex marriage might soon become legal, at least in Hawai'i. In the House Committee of the Judiciary's Report on DOMA,[208] the Committee referred to *Lewin* as "[an] orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers."[209] The Committee also stated that, "the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state [S]upreme [C]ourt have given credence to a legal theory being advanced by gay rights lawyers."[210] Moreover, according to the Committee, "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children."[211] However, as this comment

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[206] 28 U.S.C. § 1738C (West 1996).

[207] 1 U.S.C. § 7 (West 1996).

[208] H.R. Rep. No. 664, 104th Cong., 2nd Sess. (1996) [hereinafter HOUSE REPORT], *reprinted in* 1996 U.S.C.C.A.N. 2905, *available in* 1996 WL 391835.

[209] *Id.* at 3.

[210] *Id.* at 4. The Committee was referring to Justice Levinson and Chief Justice Moon of the Hawai'i Supreme Court. Justice Levinson wrote the majority opinion in *Lewin* and Chief Justice Moon joined in the same. *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, 48 (1993).

[211] HOUSE REPORT, *supra* note 208, at 9. The issues of procreation and child protection will be addressed in section V.B when discussing public policies which a state might put forth in opposition to recognizing same-sex marriages.

will now argue, DOMA is unconstitutional under the United States Constitution's Full Faith and Credit Clause[212] and under the United States Supreme Court case *Romer v. Evans*.[213]

A. DOMA v. the Full Faith and Credit Clause

The constitutionality of DOMA may be challenged as a violation of the Full Faith and Credit Clause of the United States Constitution. The Full Faith and Credit Clause reads:

> Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.[214]

Taking the plain meaning of the language "full faith and credit *shall be given*,"[215] the provision mandates compliance under the United States Constitution.[216]

While the Full Faith and Credit Clause mandates that full faith and credit be given to the acts of other states, DOMA's explicit language, which reads, "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State"[217] directly contradicts the United States Constitution. Therefore, DOMA should be found unconstitutional. Although Congress may prescribe how such acts, records and proceedings shall be proved and the effect of such acts, records and proceedings,[218] "it is reasonable to think that the clause does not allow Congress to *undo* the effect of state judgments by saying that they are of 'no effect.'"[219] If Congress was able to give "no effect" to other states' acts:

> [A] good deal of the entire federal system could be undone, and the full faith and credit clause would give the national government extraordinary authority . . . . Congress could simply say that any law that Congress dislikes is of 'no effect'

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[212] U.S. CONST. art. IV, § 1.

[213] 517 U.S. 620 (1996).

[214] U.S. CONST. art. IV, § 1.

[215] *Id.* (emphasis added).

[216] The issue of whether a state is required to give full faith and credit to another state's act, records, and proceedings if there is a "strong public policy" against such recognition will be addressed in section IV of this comment.

[217] 28 U.S.C. § 1738C (West 1996).

[218] *See* U.S. CONST. art. IV, § 1.

[219] *Defense of Marriage Act: Hearings on S. 1740 Before U.S. Senate judiciary Committee*, 104th Cong., 2nd Sess (1996) (testimony of Cass R. Sunstein, Professor of Law, University of Chicago) [hereinafter Sunstein, *Hearings*], *available in* 1996 WL 10829449 at 6.

> in other states, and in that way Congress could essentially confine the reach of any disfavored law to the enacting state itself.[220]

The United States Constitution is the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[221] Moreover, "[t]he Senators and Representatives . . . and the Members of the several State Legislatures . . . both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."[222] If Congress had power to declare that a state's acts are of 'no effect,' then the Full Faith and Credit Clause of the Constitution would be rendered moot.

The Defense of Marriage Act was designed specifically to minimize the effect of any court's decision to legalize same-sex marriages.[223] In the House Committee of the Judiciary's Report on DOMA, the Committee stated that DOMA has two primary purposes.[224] The first purpose is "to defend the institution of traditional heterosexual marriage."[225] DOMA's second purpose is "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, *free from any federal constitutional implications* that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[226] Thus, the Committee report provides evidence that DOMA is an attempt to circumvent the Full Faith and Credit Clause. The Committee sought to achieve their goal of minimizing the effects of same-sex marriages "[b]y taking the Full Faith and Credit Clause out of the legal equation."[227] Thus, DOMA blatantly violates the plain language of the Full Faith and Credit Clause.

The purpose of the Full Faith and Credit Clause is also violated by DOMA. In *Order of United Commercial Travelers of America v. Wolfe*,[228] the Supreme Court wrote:

> The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy

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220 *Id.*
221 U.S. CONST. art. VI, cl. 2.
222 U.S. CONST. art. VI, cl. 3.
223 *See* HOUSE REPORT, *supra* note 208, at 2-13.
224 *See id.* at 2.
225 *Id.*
226 *Id.* (emphasis added).
227 *Id.* at 12.
228 331 U.S. 586 (1947).

> upon a just obligation might be demanded as of right, irrespective of the state of its origin.[229]

The purpose and extent of the Full Faith and Credit Clause was also emphasized by the Supreme Court in *Sherrer v. Sherrer*[230] as follows:

> The [F]ull [F]aith and [C]redit [C]lause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such is part of the price of our federal system.[231]

The language used by the United States Supreme Court in the above cases demonstrates that the Full Faith and Credit Clause is not to be ignored or circumvented at the whim of Congress; rather, it is the provision in the Constitution that binds the independent, sovereign states into one United Nation. Thus, the effects clause "gives Congress power to help ensure recognition of sister-state judgments and help ensure the smooth functioning of a federal system,"[232] it does not authorize Congress "to pick and choose among the judgments that states should be required to recognize."[233] Furthermore, DOMA is "an unprecedented exercise of congressional authority under the [F]ull [F]aith and [C]redit [C]lause, and Congress may well lack power to negate full faith and credit in these circumstances."[234]

The Defense of Marriage Act not only violates the plain language of the Full Faith and Credit Clause, it allows the several states to completely ignore otherwise legal marriages. As such, not only are the states able to make their own marriage laws, but they are free to disregard certain marriages made under the laws of another state, thereby dividing the nation. By doing so, the nation becomes a multiplicity of divided, independent foreign sovereignties, rather than union of complimentary and cooperating states. Accordingly, by allowing such a division, DOMA violates the policy behind the Full Faith and Credit Clause, as well as the plain language of the Clause. Therefore, once challenged, DOMA is likely to be found unconstitutional.

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[229] *Id.* at 618.

[230] 334 U.S. 343 (1948).

[231] *Id.* at 355 (citing Williams v. North Carolina, 317 U.S. 287, 302 (1942)).

[232] Sunstein, *Hearings*, *supra* note 219 at 6.

[233] *Id.*

[234] *Id.* at 9.

B. Full Faith and Credit and Marriage

While the United States Supreme Court has not, as of yet, invoked full faith and credit to require one state to recognize a marriage performed in another state,[235] the Court stated in *Estin v. Estin*[236] that:

> Marital status involves the regularity and integrity of the marriage relation. It affects the legitimacy of the offspring of marriage . . . . The State has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. The interest of the State extends to its domiciliaries. *The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation.* [237]

The Supreme Court, in no uncertain terms, acknowledged the importance of protecting and recognizing a couple's marital status, whether by a marriage recently formed or dissolved, and regardless of where the couple or individuals subsequently go.

In *Williams v. State of North Carolina*,[238] the Supreme Court further emphasized the importance of according uniform effect to valid changes in marital status:

> Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.[239]

Similarly, in *Order of United Commercial Travelers of America v. Wolfe*,[240] the Supreme Court analogized becoming a member of a corporation to

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[235] *See* Beth A. Allen, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619, 671 (1996) (citing Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 275 (1996)).

[236] 334 U.S. 541 (1948) (holding that a Nevada divorce decree was entitled to full faith and credit in New York insofar as it affected marital status, but decree did not relieve husband from obligation to continue alimony payments under New York judgment).

[237] *Id.* at 546 (emphasis added).

[238] 325 U.S. 226 (1945) (affirming a conviction of bigamous cohabitation when defendants, domiciled in North Carolina, went to Nevada to divorce their spouses and marry each other and returned to North Carolina). The Court reasoned that judicial power to grant a divorce is founded on domicile, and defendants were not domiciled in Nevada. *See id.* at 229.

[239] *Id.* at 230.

[240] 331 U.S. 586, 625 (1947) (holding that South Dakota was required to give full faith and credit to provision in certificate issued by Ohio fraternal benefit society, notwithstanding that South Dakota enacted statute declaring such provisions void).

marriage, and held that the relationship formed was subject to the Full Faith and Credit Clause:

> Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. . . . For the act of becoming a member (of a corporation) is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation.[241]

The cases cited above support the conclusion that the United States Supreme Court should uphold the application of the Full Faith and Credit Clause to same-sex marriages if such marriages become legalized. The Supreme Court has emphasized, repeatedly, the importance of recognizing and protecting marital status in a uniform fashion throughout the nation. Therefore, if a same-sex couple resides in a state that legalizes same-sex marriages and weds in that state, their marriage should thus be valid and recognized in any state under the Full Faith and Credit Clause.

C. Romer v. Evans

The Defense of Marriage Act may also be challenged as unconstitutional under the recent United States Supreme Court decision, *Romer v. Evans*.[242] The case, which was decided just four months prior to President Clinton's signing DOMA into law,[243] presents a substantial challenge to bans on same-sex marriages. In *Romer*, the Court struck down an amendment to the Colorado Constitution that would have precluded the government from establishing safeguards to protect people from discrimination based on sexual orientation.[244] The amendment was a response to several ordinances, which

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[241] *Id.* at 617.

[242] 517 U.S. 620 (1996).

[243] *Romer* was decided May 20, 1996 and President Clinton signed the Defense of Marriage Act into law in the early morning of September 21, 1996.

[244] The amendment, which has become known as Amendment 2, provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, not any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Evans v. Romer, No. 92 CV 7223, at 1 (Colo. Dist. Ct. Dec. 14, 1993), *available in* 1993 WL 518586, at 1 (citing Amendment 2). The amendment passed by a vote of 53.4% to 46.6%. *See id.*

had been passed in various municipalities, that banned discrimination based on sexual orientation in certain transactions and activities.[245] Specifically, the amendment overturned these ordinances to the extent that they prohibited discrimination on the basis of "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."[246] In essence, the amendment specifically *allowed* discrimination on the basis of homosexuality.

In a six to three decision,[247] the Supreme Court struck down Amendment 2 on the basis that the amendment violated the Equal Protection Clause of the United States Constitution.[248] Justice Kennedy, in the majority opinion, stated that the Constitution "neither knows nor tolerates classes among citizens."[249] The Court noted that, "[u]nheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."[250] Keenly aware of the "unprecedented"[251] nature of Amendment 2, the Court used "careful consideration to determine whether [such an amendment was] obnoxious to the constitutional provision."[252] The Court presented two reasons for invalidating the amendment: 1) that it was a per se violation of the Equal Protection Clause; and 2) that it failed to pass the rational basis test. [253]

First, the Court struck down the amendment as a per se violation of the Equal Protection Clause because it imposed a "broad and undifferentiated disability on a single named group."[254] In so holding, the Court ruled that, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[255] The amendment was, in

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[245] The ordinances prohibited discrimination based on sexual orientation in housing, employment, public accommodations, and health and welfare services. *See, e.g.*, DENVER REV. MUNICIPAL CODE art. IV §§ 28-91 to 28-119 (1991); ASPEN MUNICIPAL CODE § 13-98 (1977); BOULDER REV. CODE §§ 12-1-1 to 12-1-11 (1987).

[246] *Romer*, 517 U.S. at 624. The result of the amendment, for example, would allow a potential employer to say, "I will not hire you because you are homosexual."

[247] *See id.* at 621. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer joined. *See id.* Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined. *See id.*

[248] *See id.* at 632.

[249] *Id.* at 623 (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[250] *Id.*

[251] *Id.* at 633.

[252] *Id.*

[253] *See id.* at 632-33. The Court stated that the rational basis test calls for "the most deferential of standards," and "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate governmental interest." *Id.*

[254] *Id.* at 632.

[255] *Id.* at 633. The Court further stated that, "[t]he amendment withdraws from homosexuals, but no others, specific legal protection from injuries caused by discrimination." *Id.* at 627.

effect, segregating homosexuals, lesbians, and bisexuals into a single classification, and then declaring that they shall not be entitled to any protection against discrimination on that basis.

Second, because Amendment 2 lacked a rational relationship to a legitimate state interest, it effectively failed the rational basis test.[256] The State only needed to show that the law advanced a legitimate governmental interest.[257] In order to justify upholding the amendment, the State argued that the need to protect its citizens' right to freedom of association, especially landlords and employers who have either personal or religious aversions to homosexuals was a legitimate governmental interest.[258] The Court rejected this argument however, reasoning that the amendment was "so far removed from these particular justifications"[259] that it was "impossible to credit them."[260] Moreover, the Court reasoned that "the disadvantage imposed is born of animosity,"[261] and "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[262]

Finally, the Court stated that:

> [T]he amendment imposes a special disability upon [homosexuals] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . These are protections taken for granted by most people because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civil life in free society.[263]

Thus, under *Romer*, no state may specifically exclude homosexuals from the fundamental protections and rights guaranteed to people under the United States Constitution.

D. DOMA v. Romer

Similar to Amendment 2 in *Romer v. Evans*, DOMA is unprecedented in nature; "[i]ndeed, it appears that this is the first time in the nation's history that

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[256] *See id.* at 632. The rational basis test is typically easy to pass. *See supra* note 253 for discussion of the rational basis test. Despite the light burden, the Court was unable to find such a relation. *See Romer*, 517 U.S. at 632.

[257] *See id.*

[258] *See id.* at 635.

[259] *Id.*

[260] *Id.*

[261] *Id.* at 634.

[262] *Id.*

[263] *Id.* at 631.

Congress has expressly said that a state is permitted not to recognize a judgment of another state."[264] Furthermore, like Amendment 2, DOMA is "an oddity in our constitutional tradition . . . . [It] is drawn explicitly in terms of sexual orientation. [The Act] makes a distinction between same-sex marriages and all other marriages . . . ."[265] Because of the unprecedented nature of DOMA,[266] the Court, when confronted with the issue, should use "careful consideration to determine whether [DOMA is] obnoxious to the constitutional provision."[267]

Unlike Amendment 2, which was state law, DOMA is federal law. However, DOMA, like Amendment 2, should be struck down because it is a per se violation of the Equal Protection Clause. The Act specifically singles out a particular group, same-sex couples,[268] and denies that group protection of the laws. The Defense of Marriage Act explicitly authorizes states to disregard legal marriages "between persons of the same sex."[269] The Act "says nothing about incestuous marriages, bigamous marriages, marriages among minors, or polygamous marriages. Nor has Congress ever enacted a measure involving those kinds of marriages."[270] By singling out same-sex marriages, DOMA imposes a "broad and undifferentiated disability on a single named group."[271] Therefore, DOMA is a per se violation of the Equal Protection Clause, and is thus unconstitutional.

If a state legalizes same-sex marriages, a same-sex couple legally married in one state could be denied the rights, benefits, privileges and protections that come with that marriage if they cross the state line.[272] The Supreme Court, however, has already ruled in *Romer* that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the

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[264] Sunstein, *Hearings*, *supra* note 219, at 8.

[265] *Id.*

[266] *See id.* at 9.

[267] *Romer*, 517 U.S. at 633.

[268] In reality, DOMA is singling out homosexuals. The Act only refers to same-sex marriages. However, the House Committee of the Judiciary's Report on DOMA states that the Act is to protect "heterosexual marriage." HOUSE REPORT, *supra* note 208, at 9. Thus, while a same-sex marriage between heterosexual men or heterosexual women would technically be a heterosexual marriage, DOMA is obviously aimed at homosexual marriages.

[269] 28 U.S.C. § 1738C (West 1996).

[270] Sunstein, *Hearings*, *supra* note 219, at 8.

[271] *Romer*, 517 U.S. at 632.

[272] Such rights and benefits are by no means nominal. Legal and economical benefits extended to spouses include property rights, tax breaks, veterans' and social security benefits, testamentary benefits, recovery for loss of consortium, employment benefits, lower insurance premiums, spousal testimonial privileges, financial support upon separation, and status of next-of-kin to make medical decisions or burials arrangements. *See* Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 92 (1991).

most literal sense."[273] DOMA denies same-sex couples,[274] and only same-sex couples, federal recognition and benefits.[275] Furthermore, DOMA allows states to disregard otherwise valid marriages of same-sex couples, and only same-sex couples. Thus, DOMA denies same-sex couples "the right to seek specific protection from the law,"[276] and as such, it is a per se violation of the Equal Protection Clause.[277]

Moreover, because the Act specifically and exclusively targets same-sex couples, it raises a presumption of animus against homosexuals, and as such:

> It may violate the equal protection component of the due process clause, since this would be the first time in the nation's history that [Congress] has freed a state from such an obligation, and Congress' selectivity – not freeing states from such an obligation in cases of polygamy, bigamy, incest, marriage to minors – may be impermissible discrimination.[278]

"[L]egislation making it more burdensome for a single group of citizens to seek the government's protection is a per se denial of equal protection of the laws."[279] The Defense of Marriage Act blatantly singles out same-sex couples and explicitly denies them any protection of the law. Therefore, under the principles and rules set out in *Romer*, it seems overwhelmingly likely that DOMA will not withstand any challenge and will be invalidated as unconstitutional.

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[273] *Romer*, 517 U.S. at 633.

[274] As discussed *supra* section III.B.2, it is likely that the Hawai'i Supreme Court will uphold *Baehr v. Miike*, thus legalizing same-sex marriages in Hawai'i. Therefore, for this part, "same-sex couple" will refer to a couple of the same-sex that is legally married, presupposing that same-sex marriage is legalized.

[275] Such benefits are substantial. *See supra* note 272. The federal tax benefits extended to married couples alone are significant. For example, legally married couples may transfer any amount of property to one another free from income, estate, and gift taxes. *See* I.R.C. § 1041(a)-(b) (1997). Married couples may also take advantage of a one-time $125,000 exclusion of capital gains from the sale of their principal residence if it is jointly owned and at least one spouse is over the age of 55. *See* I.R.C. § 121 (1997). Furthermore, if a married couple decides to get divorced, they may divide their property without recognizing any gains. *See* I.R.C. § 1041 (a)-(c) (1997). Married couples may file joint returns. *See* I.R.C. § 6013(a) (1997). Additionally, a spouse may receive a tax exemption for property inherited from one's spouse. *See* I.R.C. § 2056 (1997). Of course, the list of benefits above is not exhaustive.

[276] *Romer*, 517 U.S. at 633.

[277] The Equal Protection Clause reads, in part:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[278] Sunstein, *Hearings*, *supra* note 219, at 7.

[279] Note, *Leading Cases*, 110 HARV. L. REV. 135, 163 (1996).

V. PUBLIC POLICY AND ITS BOUNDARIES

Even assuming DOMA can be successfully struck down as unconstitutional,[280] there is an exception to the Full Faith and Credit Clause that may allow states to preclude recognition of same-sex marriages. The House Committee of the Judiciary's Report on DOMA noted "the U.S. Supreme Court has recognized a public policy exception that, *in certain circumstances*, would permit a State to decline to give effect to another State's laws."[281] The *Restatement (Second) of Conflicts of Law* section 283(2) accurately explains this public policy exception to recognizing marriages performed in another state:

> A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid *unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.*[282]

Similarly, marriage evasion laws may be used to invalidate particular marriages performed in another state. A typical marriage evasion law reads as follows:

> Marriages valid by the laws of the place where contracted, are valid in this state; provided, that marriages solemnized in any other state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, and *parties residing in this state can not evade its laws as to marriage by going into another state or country for the solemnization of the marriage ceremony.*[283]

The case *Mortenson v. Mortenson*[284] sets forth a prime illustration of how the public policy exception and marriage evasion laws function. In *Mortenson*, an Arizona court declared the marriage of a couple who were first cousins invalid. The couple was residing in and intending to reside in Arizona, but went to New Mexico to get married.[285] New Mexico law allowed first cousins to be married, whereas Arizona law prohibited marriages among first cousins.[286]

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[280] Because at this time same-sex marriages are not legal, no one has standing to challenge DOMA because there has been no actual injury.

[281] HOUSE REPORT, *supra* note 208, at 6 (emphasis added).

[282] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 283(2) (1971) (emphasis added).

[283] ARIZ. REV. STAT. ANN. § 25-112 (West 1953) (emphasis added).

[284] 316 P.2d 1106 (Ariz. 1957).

[285] *See id.* at 1106.

[286] *See id.* at 1107.

Arizona, however, had a marriage evasion law in effect.[287] Because Arizona had the most significant relationship with the couple at the time of the marriage and because the couple was domiciled in Arizona, the Arizona court had jurisdiction to invalidate their marriage. The fact that the couple had traveled to New Mexico simply to evade the marriage laws of Arizona, and that the couple resided, and at all times intended to reside in Arizona brought them clearly within the prohibitory language of the statute. Therefore, under both the *Restatement* and Arizona's marriage evasion law, the court nullified the couple's marriage.[288] Ironically, if the couple had been residents of New Mexico, not planning on residing in Arizona at the time of their marriage, upon a subsequent move to Arizona, their marriage would have been legally valid and accordingly upheld in the state of Arizona.[289]

Evasion of a state's marriage laws will not, however, necessarily cause the marriage to be invalid upon returning to that state. In *Wilkins v. Zelichowski*,[290] a sixteen year old girl left New Jersey to become married in Indiana, specifically to evade a New Jersey law prohibiting females under the age of eighteen from marrying.[291] Notwithstanding the evasion of New Jersey's law, a New Jersey court upheld the marriage, stating, "it must be recalled as a basic general doctrine that the law favors marriage and its continuance . . . ."[292] The court added that "[m]arriage is a contract and like other contracts its validity is determined ordinarily by the *lex loci contractus* [that is, the place of its performance]."[293] Upon discussing public policy the court wrote, "[t]he policy cannot be said to be so imperative in character, so strongly indicative of an inflexible and unyielding conviction, that marriage of a female under 18 years of age is universally to be condemned, and such an evil example as to override the well recognized doctrine of comity which calls for acceptance of the status."[294]

According to the *Restatement*, in order for a state to invalidate a marriage because of a strong public policy, the state attempting to invalidate the marriage must have "*had the most significant relationship* to the spouses and marriage *at the time of the marriage*."[295] Furthermore, in order for a state to nullify a marriage under a marriage evasion law, two elements must be

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[287] *See* ARIZ. REV. STAT. ANN. § 25-112 (West 1953). *See supra* note 283 and accompanying text.

[288] *See Mortenson*, 316 P.2d at 1107.

[289] The court emphasized that "[m]arriages performed outside the state which offend a strong public policy *of the state of domicile* will not be recognized as valid in the domiciliary state." *Id.* at 1108 (emphasis added).

[290] 129 A.2d 459 (N.J. Super. Ct. App. Div. 1957).

[291] *See id.* at 460.

[292] *Id.* at 461.

[293] *Id.*

[294] *Id.* at 462.

[295] RESTATEMENT, *supra* note 282 (emphasis added).

satisfied: (1) state intent to disallow the marriage; and (2) spousal intent to evade state law.[296] Thus, under both the *Restatement* and marriage evasion laws, the state must have a specific relationship to a spouse, that is, one of the spouses was either residing or intending to reside in the state now attempting to invalidate the marriage. Furthermore, for the laws to be applicable, that relationship must have existed at the time of the marriage. If at the time of a marriage neither spouse was residing or intending to reside in a particular state, that state could not then use the *Restatement* or a marriage evasion law to nullify the marriage. This is because the state did not have a significant relationship with the spouses, nor were the spouses attempting to evade that state's marriage laws. Therefore, if a state legalizes same-sex marriages, such laws should not be adequate grounds for invalidating the marriage of a same-sex couple who resides and weds in that state, and later decides to move to another state which does not recognize such marriages.[297]

A. Public Policy and the Supreme Court

While there is a public policy exception to the Full Faith and Credit Clause, the United States Supreme Court in *Estin v. Estin*[298] addressed how full faith and credit should, or rather, how it should not be applied:

> The situations where a judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter's policy, have been few and far between. The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.[299]

In *Order of United Commercial Travelers of America v. Wolfe*,[300] the Court, in addressing conflicting policies and the Full Faith and Credit Clause, stated, "the room left for the play of conflicting policies is a narrow one . . . . [T]he

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[296] *See* Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 116 (1996) (citing *In re* Zappia, 21 I. & N. Dec 439 (BIA 1967)).

[297] One who does not have a significant relationship with a particular state at the time of the marriage or one who is not a resident, or intending to be a resident of a particular state at the time of marriage, falls outside of the literal reading of the laws. *See supra* notes 282-283 and accompanying text.

[298] 334 U.S. 541 (1948).

[299] *Id.* at 545-46.

[300] 331 U.S. 586 (1947).

[F]ull [F]aith and [C]redit [C]lause abolished . . . the general principle of international law by which local policy is permitted to dominate rules of comity."[301] Thus, the Supreme Court has made it clear that while there are public policy considerations in applying full faith and credit, the Clause was intended to unite all of the states into one federal system. This is so, even if it requires one state to recognize acts that it considers unfavorable, so long as such acts are made under the laws of another state. Such being the case, states should be required to recognize legally performed same-sex marriages as being a part of a United Nation. The following quote articulates the overall view of how the Court believes full faith and credit and state policies relate, and thus is appropriate to quote at length:

> This is, rather, a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus presents the issues here presented, we do not conceive it to be a part of our function to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters. Nor do we understand the decisions of this Court to support the proposition that the obligation imposed by Article IV, § I of the Constitution and the Act of Congress passed thereunder, amounts to something less than the duty to accord full faith and credit to decrees of divorce entered by courts of sister States. The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such is part of the price of our federal system.[302]

The above cases illustrate the policy of the Full Faith and Credit Clause, the public policy exception to the Full Faith and Credit Clause, and marital status. The United States Supreme Court has repeatedly ruled that states' public policies must give way to other states' laws as a part of being united under a single federal system. Therefore, full faith and credit should be applied to legally performed marriages, regardless of the gender of the couples.

B. Critique of Public Policy Arguments

There are several arguments which states may advance in an attempt to trigger the public policy exception to the Full Faith and Credit Clause. Such arguments, however, are easily overcome. One of the most common public

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[301] *Id.* at 617.

[302] Sherrer v. Sherrer, 334 U.S. 343, 354-55 (1948) (citing Williams v. North Carolina, 317 U.S. 287, 302 (1942)).

policy arguments against same-sex marriage is tradition and custom.[303] For example, one court wrote:

> Marriage was a custom long before the state commenced to issue licenses for that purpose .... In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.[304]

Similarly, the State in *Lewin* furthered the same argument stating that same-sex marriages are innately impossible because a marriage, by definition, is only between a man and a woman.[305] The *Lewin* court, however, rejected this argument as being "tautological and circular."[306] The court analogized the State's argument to the arguments in *Loving* that interracial marriages should not be allowed because it had "never been the 'custom' of the state to recognize mixed marriages, marriage 'always' having been construed to presuppose a different configuration."[307] The court concluded by stating, "we reject this exercise in tortured and conclusory sophistry."[308]

In *Bowers v. Hardwick*,[309] Justice Blackmun quoted Oliver Wendell Holmes, who articulated the repugnance of following a law simply because it is a tradition:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[310]

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[303] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

[304] *Jones*, 501 S.W.2d at 589. *See also Baker*, 191 N.W.2d at 186, where the court stated:

> The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.... This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend.

Id.

[305] *See* Baehr v. Lewin, 74 Haw. 530, 570, 852 P.2d 44, 63 (1993).

[306] *Id.* at 569-70, 852 P.2d at 63. The Hawai'i Supreme Court further countered this line of thinking, stating, "[w]ith all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will...." *Id.*

[307] *Id.* at 570, 852 P.2d at 63.

[308] *Id.* at 571, 852 P.2d at 63.

[309] 478 U.S. 186 (1986).

[310] *Id.* at 199 (Blackmun, J., dissenting) (quoting Justice Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

Clearly, such "tradition" and "custom" arguments are neither based in logic nor responsive to societal changes.[311] Oliver Wendell Holmes, Justice Blackmun and the Hawai'i Supreme Court all realized that customs change as times change. One should not heedlessly acquiesce to "custom" without first determining what is right. The courts have articulated the position that "constitutional law may mandate, like it or not, that customs change with an evolving social order."[312]

Another public policy argument favored by opponents to same-sex marriage is that same-sex couples cannot procreate. Although this argument has been advanced in many courts,[313] it is seriously undercut by several factors. To begin, married couples are not required to procreate. For example, in 1984, the State of Hawai'i amended its statute to remove as grounds for annulment, that one party was "impotent or physically incapable of entering into a 'marriage state.'"[314] More importantly, those who cannot procreate, such as the elderly, and those who choose not to procreate are not precluded from marrying on that basis.

Moreover, this argument is undermined by the United States Supreme Court's recognition that people have the right to use contraceptives.[315] That right applies to people, married or single.[316] The Supreme Court has also held that women have the right to have an abortion.[317] Indeed, the affirmation of these fundamental rights, as determined by the highest court in the United States, is in direct contravention to the promotion of procreation.

The most compelling rationale against the procreation argument, however, is that same-sex couples do in fact procreate, either through artificial

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[311] If one were simply to follow customs, changes would rarely occur. If, for example, people blindly accepted the fact that traditionally, (before 1920) women were not allowed to vote, no changes would have occurred and women might not be allowed to vote today.

[312] *Lewin*, 74 Haw. at 570, 852 P.2d at 63. In *Bowers*, Justice Stevens observed that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Bowers*, 487 U.S. at 216 (Stevens, J., dissenting). The same should hold true in the same-sex marriage case.

[313] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971). "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family . . . ." *Id. See also* Singer v. Hara, 522 P.2d 1187, 1195 (Wash. App. 1974) (refusing to authorize same-sex marriages because the "impossibility" of reproduction).

[314] *Lewin*, 74 Haw. at 536 n.1, 852 P.2d at 49 n.1 (citing Act 119, § 2 1984 Haw. Sess. Laws 238-39).

[315] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the right of married couples to use contraceptives is protected under the right to privacy).

[316] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down a statute which prohibited distributing contraceptives only to married couples).

[317] *See* Roe v. Wade, 410 U.S. 113 (1973) (finding that, under the right to privacy, a woman has a constitutional right to decide whether to terminate her pregnancy).

insemination or the use of a surrogate.[318] Women may be artificially inseminated, while males may utilize a surrogate mother in order to have children.[319] Furthermore, same-sex couples may also adopt.[320] While adoption is not in and of itself procreation, adoption indirectly fosters procreation, for placing a child up for adoption provides an alternative to abortion.

Those opposed to same-sex marriage have also stressed that such marriages are harmful to the well-being of children. This is the argument put forth by the State in *Miike*,[321] as well as the basis set forth for the enactment of DOMA.[322] While protecting children is a legitimate concern, banning same-sex marriages does not alleviate that concern. As noted, same-sex couples can, and do, have children. Yet, those couples, because they are unable to attain marital status, are unable to receive the many benefits that *help children*. In Hawai'i alone, there are over 200 state marital rights and benefits which same-sex couples are unable to receive.[323] Such rights and benefits include: 1) award of child custody and support payments in divorce proceedings;[324] 2) the right to file a nonsupport action;[325] 3) the right to notice, protection, benefits, and inheritance;[326] and 4) various state income tax advantages, such as deductions, credits, rates, exemptions, and estimates.[327] These are just a few examples of the rights and benefits bestowed upon married couples; all of which could benefit children of same-sex couples.

More important than benefits, however, is the issue of guardianship and custody. Generally, if one partner of a same-sex couple uses a surrogate or is

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[318] *See* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996). *See also*, Libby Post, *The Question of Family: Lesbians and Gay Men Reflecting a Redefined Society*, 19 FORDHAM URB. L.J. 747 (1992).

[319] *See* Chambers, *supra* note 318, at 465-69. *See also* Post, *supra* note 318. "[L]esbian or gay couples have raised children together, defined themselves to the child as his or her parents, instilled a value system and cultural ties, introduced an extended set of family members to the child and indeed, developed a substantial relationship with the child, whereby the child views both partners as his [or her] parents." *Id.* at 756.

[320] *See* Chambers, *supra* note 318, at 469-70. *See also*, Post, *supra* note 318, at 756. *See also, e.g., Investigative Reports*, *supra* note 131, interviewing a male couple who had two daughters. *See id.* Each male, through a surrogate, had a daughter. *See id.* The couple then did a cross adoption, thereby making each the legal parent of both children. *See id.*

[321] *See supra* section III.B.2 and accompanying text.

[322] *See* HOUSE REPORT, *supra* note 208, at 9 (stating, "[s]imply put, government has an interest in marriage because it has an interest in children").

[323] *See, e.g.*, Plaintiffs' Opening Brief pages 15-18, Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

[324] *See* HAW. REV. STAT. § 571 (1985 & Supp. 1992).

[325] *See id.*

[326] *See* HAW. REV. STAT. § 560 (1985 & Supp. 1992).

[327] *See* HAW. REV. STAT. § 235 (1985 & Supp. 1992).

artificially inseminated, only *that* person becomes the legal parent,[328] unless the couple is able to perform a cross adoption.[329] Although both parents may have a genuine parental relationship with the child, that relationship is not enough to establish legal custody for the non-biological parent. "[I]f the 'legal' parent dies, the other partner can be denied custody of the child unless the deceased parent specifically designates in his or her will that the partner act as guardian for the child."[330] Absent such a designation, the law does not protect the relationship between the surviving parent and the child.[331] Thus, the non-biological parent could lose custody to relatives of the biological parent, notwithstanding the fact that those awarded custody might be strangers to the child.[332] Taking a child away from its only surviving parent and then turning the child over to strangers is not in the child's best interest. Although one may not be a biological parent, he or she is still that child's parent and should have all the rights of a biological parent, for the child's sake.

In addition, gay and lesbian couples are just as capable of raising healthy, happy, well-adjusted children as opposite-sex couples.[333] It is undisputed that simply being an opposite-sex couple does not necessarily make that couple qualified to raise children. Children are abused and neglected by parents in opposite-sex marriages. The traditional nuclear family, "with a breadwinner-husband and a homemaker-wife who live with their biological children,"[334] is no longer so traditional.[335] There are many single parents, step-parents and foster-parents who are successfully raising children. What is really important is that a couple is willing to raise, nurture, and love a child, not the gender of the parents.

Just as the House Committee of the Judiciary's Report on DOMA stated that the "government has an interest in marriage because it has an interest in children,"[336] the Supreme Court has also expressed its concern for children in situations where a state refuses to recognize a marriage. In *Estin*, the Supreme Court stated, "children born of the only marriage which is lawful in the State of his domicile should not carry the stigma of bastardy when they move elsewhere. These are matters of legitimate concern to the State of the

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[328] *See* Post, *supra* note 318, at 756.

[329] *See, e.g., Investigative Reports, supra* note 131.

[330] Post, *supra* note 318, at 756.

[331] *See id.*

[332] *See id.*

[333] See, for example, testimony by both defense and plaintiff's expert witnesses in *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

[334] Treuthart, *supra* note 272, at 91.

[335] *See id.* "Only 27% of the U.S. households consist of two parents with children, down from 40% in 1970." *Id.* at n.1 (citing Isaacson, *Should Gays Have Marriage Rights?*, TIME, Nov. 20, 1989, at 101).

[336] HOUSE REPORT, *supra* note 208, at 9.

domicile."[337] Therefore, uniform recognition and validation of marriages will protect children from being deemed illegitimate if their parents cross a state line.

Perhaps the concern about children is that they may be teased and tormented due to the fact that their parents are of the same-sex. In *Palmore v. Sidoti*,[338] there were concerns that a white child would be harassed if the child's mother was allowed to have custody of the child because the mother's second husband was black. In response, the Supreme Court, rather eloquently, stated that, "[p]rivate biases may be outside the reach of law, but the law cannot, directly or indirectly, give them effect."[339]

Doing what is right is not always easy. Same-sex couples and children of same-sex couples will almost inevitably encounter difficulties--or more appropriately termed, discrimination. "The Constitution cannot control such prejudices, but neither can it tolerate them."[340] If the State's public policy and concern is to protect children, recognizing same-sex marriages, rather than condemning them, is a necessary step. "Sexual orientation shouldn't even be an issue, and someday, it won't."[341] That day can arrive sooner by affording national recognition to legally performed same-sex marriages if such marriages are legalized.

Other compelling reasons exist to support the legalization and uniform recognition of same-sex marriages. Discrimination against same-sex couples is sex discrimination.[342] The Hawai'i Supreme Court recognized this during oral arguments in *Lewin* when one justice asked the Defendant:

> Q. If a man and a woman walk in to your office and apply for a marriage license you give it to them, right?
> A. Yes.
> Q. Now, if a man and a man, or a woman and a woman walk into your office and apply for a marriage license, you don't give one to them, right?
> A. Right.
> Q. Isn't *that* discrimination?[343]

In *Loving*, the Court observed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of

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[337] Estin v. Estin, 334 U.S. 541, 547 (1948).

[338] 466 U.S. 429 (1984).

[339] *Id.* at 433.

[340] *Id.*

[341] Telephone Interview with Dan Foley, *supra* note 135.

[342] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

[343] Telephone Interview with Dan Foley, *supra* note 135. When Dan heard this dialogue, he thought to himself, "somebody finally gets it." *Id.*

happiness by free men."[344] Samuel Marcosson has referred to laws prohibiting same-sex marriage as "miscegenosexual"[345] laws. To exemplify the discriminatory aspect of denying same-sex marriages, one can take the language of *Loving* and replace "race" with "sex." To illustrate: "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious [sexual] discriminations. Under our Constitution, the freedom to marry or not marry, a person of another [sex] resides within the individual and cannot be infringed by the State."[346]

Illustrating the similarities of miscegenation and same-sex marriages, Andrew Koppelman wrote:

> [W]hen we assess the constitutionality of laws that discriminate against interracial couples, we do not ask whether sexual desire for a person of a different race is biologically caused or whether it can be "cured." The very question is weird, racist, and insulting. Its answer, if there is one, clearly has no constitutional significance. The same should be true of laws that discriminate against lesbians and gay men. Even if some persons who are attracted to persons of the same sex could choose heterosexual partners . . . the state has no legitimate interest in influencing that choice.[347]

Differences are what everyone has in common. As the Nation becomes smaller, as the world becomes a "global village," everyone will be faced with many cultures, traditions, likes and dislikes. Yet, "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[348]

VI. CONCLUSION

Lewin and *Miike* are not attempts to destroy marriage, they are attempts to end discrimination and promote equality for everyone. Same-sex marriages are not new to the world, they are much older than marriages in the United States, reaching back to some of the first known civilizations. While DOMA is a response to the real possibility that same-sex marriages will become legal, at least in Hawai'i, DOMA should not pose a serious threat. This is because once someone has standing to challenge the Act,[349] DOMA is likely to be

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[344] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[345] *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L. J. 1, 6 (1992).

[346] *Loving*, 388 U.S. at 12 (substituting [sexual] for [racial] and [sex] for [race] respectively).

[347] Koppelman, *supra* note 342, at 203.

[348] Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (citing Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972)).

[349] Because same-sex marriages are not legally recognized in any state as of this time, no one has had an "actual injury" as a result of DOMA.

found in violation of the Full Faith and Credit Clause and under *Romer*. The real challenge, however, lies within the individual states. A state may not be required to recognize another state's marriages if that state can show a strong public policy against such recognition. Such public policy arguments, however, should be easily overcome. Marriage evasion laws, however, might be used to invalidate marriages of same-sex couples who, while residing in a state which prohibits same-sex marriages, run off to a state which allows same-sex marriages, solely to get married. If, however, a same-sex couple resides and weds in a state that legalizes same-sex marriages and subsequently moves to another state, their marriage should be valid throughout the country.

The time has come for this country to forge ahead and put an end to the discrimination. Same-sex marriages will not destroy "traditional" marriages, they will complement them. If states allow same-sex marriages, it will not only help to protect the children and the couples involved, it will send a message to the entire country that people involved in same-sex relationships deserve as much respect and protection as everyone else. One should heed the words of Dr. Schwartz,[350] who eloquently articulated why same-sex marriage should be allowed, on both a personal level and a societal level:

> I think that marriage is really a high state of hope and effort for people. I think when we deny it to people we say that–that there's some other location for love and raising children and that we're not as concerned about these kids' welfare or in some ways we don't think it would be good for them to be in a married home. It's not that those children don't exist, it's not that those families don't exist, they do.
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> To me, I think that most Americans believe in marriage strongly. I believe by taking other people into the fold and asking that they behave as responsible to their children to give them support to have both rituals to enter into their relationships and legal complications by exiting them, that we shore up how important we think marriage is. . . . I think it in no way undermines it and I think it strengthens it by our insistence about how important it is and why we hope this will be available for all families.[351]

People must learn to release their prejudices. To release one's prejudices, however, will take more than reading the words of a few judges and scholars; it will take realizing that we, as humans, are all different, yet we are all the same. We fear what is different, and that is why we are the same. If we come to acknowledge that there are differences, and that the differences may also be "right," we can let go of the fear.

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[350] Dr. Schwartz is an expert in sociology and interdisciplinary studies of sexuality with a special expertise in gender and human sexuality, marriage and the family, and same-sex relations in parenting. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235 at 11 (Haw. Cir. Ct. Dec. 3, 1996).

[351] *Id.* at 12.

Unfortunately, our fears are most often disguised as hatred, and hatred is much more difficult to overcome; difficult, but not impossible. The point is this: we, as humans, are who we are. We think differently. We like different foods. We look different, and we love differently. That is not wrong, it just is. Everyone must have an equal opportunity; do not mind how they look, disregard where they are from, do not ask who they worship, and ignore with whom they choose to share their most personal and intimate experiences. If the states lead, eventually, the people will follow. With each generation, sexual orientation will become an issue of the past, and discrimination and prejudice will slowly wither and die.

Brett P. Ryan[352]

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[352] Class of 1998, William S. Richardson School of Law. The author is grateful to Genora Dancel, Dan Foley, and Bill Woods for their interviews, insight, and inspiration in completing this Comment. The author is especially grateful to his parents for teaching him to stand up for what he believes is right – even if he must stand alone, for that is the most important time to stand up.

The Hawai'i Recreational Use Statute: A Practical Guide to Landowner Liability

I. INTRODUCTION

The Hawai'i Loa Ridge hiking trail, located above a gated community in east Honolulu, O'ahu is off limits to hiking groups unless they are willing to "sign their life away" with a liability waiver at the guard shack.[1] Moreover, some hunters have been turned away at the guard shack despite the fact that no "hunting cap" or limit on the number of hunters allowed on the trail at any one time exists and despite the fact that they were willing to sign the waiver.[2] These hunters were given the reason that there were already hunting groups on the mountain.[3]

Similarly, there is a hiking trail in Wai'anae, on the west coast of O'ahu, where the Hawai'i Nature Center is prohibited from taking its hiking groups across land leased by another conservation group, the Nature Conservancy, because the Hawai'i Nature Center charges a small fee for its hikes.[4] Unless the Hawai'i Nature Center obtains a certificate of insurance to indemnify the Nature Conservancy, the Nature Conservancy will not allow outside hikes to access the Wai'anae trail.[5] In fact, the Nature Conservancy itself will not

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[1] Telephone Interview with Jeff Mikulina, Executive Director, Sierra Club Hawai'i Chapter (Feb. 6, 1999).

The reader will note that throughout this comment the author has relied heavily upon interviews with members of sectors of the community most heavily impacted by the Hawai'i Recreational Use Statute ("HRUS"). These interviews are intended to fill the gaps that currently exist between the statute and case law. Interviewees were chosen because they are the key players in the community in terms of utilization of the statute, litigation regarding the statute, and advocating for changes in the statute. Thus, they have the most practical knowledge regarding the impacts of the statute on a very real life level.

Further, several articles have been written regarding other states' recreational use statutes. Since state recreational use statutes are considerably similar, the author feels that interviews also serve the purpose of setting this article apart by giving a "snapshot" into the lives of those most affected by Hawai'i's recreational use statute.

[2] *See* Telephone Interview with Greg Gillia, President, O'ahu Chapter of the National Wild Turkey Federation (Apr. 8, 1999).

[3] *See id.* Mr. Gillia stressed that this was his personal experience when he attempted to enter Hawai'i Loa Ridge to hunt wild pig. *See id.* He reported that he was told by the State Department of Land and Natural Resources that there should be no cap to hunting access on Hawai'i Loa Ridge as long as the hunter was willing to sign the liability waiver. *See id.*

[4] *See* Telephone Interview with Diana King, Educational Director, Hawai'i Nature Center (Feb. 1, 1999).

[5] *See* Telephone Interview with Pauline Sato, Oahu Preserves Manager, The Nature Conservancy (Feb. 8, 1999). The land leased by the Nature Conservancy is owned by one of the largest private landholders in Hawai'i, the Campbell Estate. *See id.*

allow anyone to participate in its own *free* guided hikes without signing a liability waiver.[6]

Thirty years ago, to address exactly these kinds of restrictions imposed by private landowners on recreational access, the Hawai'i Legislature adopted what is now commonly known as the Hawai'i Recreational Use Statute ("HRUS").[7] Enacted to encourage landowners to open up their property by providing limited immunity from tort liability (so long as the landowner did not charge a fee), the Legislature's hope was that more landowners would allow the public access to their lands with potential recreational value.[8] Three decades later, however, the problem of restricted access persists, limiting access for some of Hawai'i's most active recreational users.

Like Hawai'i, all states across the nation have enacted some sort of "recreational use statute" to limit landowner liability to recreational users.[9] The objective basis for the enactment of these statutes is to promote increased public access to private lands by limiting the liability of landowners to situations where: (1) they receive compensation for the use of their property; and (2) injury results from malicious or wilful acts of the owner.[10] Thus, the degree to which landowners do in fact open their lands to the public directly correlates to how effectively this legislation relieves them of their common law duty of care.

The recreational use of private lands is of particular importance in Hawai'i, a state composed of an island chain, where land is at a premium because of the physical limitation on all sides by the Pacific Ocean, and because of the unique

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[6] *See id.*

[7] HAW. REV. STAT. § 520 (1998).

[8] See STAND. COMM. REP. NO. 534 LANDS AND NATURAL RESOURCES ON S.B. 56, 5th Leg., Reg. Sess. (1969), *reprinted in* 1969 HAW. SENATE J. at 1075.

[9] *See* Stuart J. Ford, *Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 WIS. L. REV. 491, 498 & n.24 (1991). This comment explains that 48 states have enacted recreational use statutes, with Alaska and North Carolina as the states which had no recreational use statute. *See id.* However, in 1995, North Carolina enacted its version of that state's recreational use statute. *See* N.C. GEN. STAT. § 38A-1 to -4 (1997). In Alaska, tort immunity is provided for personal injuries or death occurring on unimproved land if the person entered the land for a recreational purpose and had no responsibility to compensate the owner for the person's use or occupancy of the land. *See* ALASKA STAT. § 09.65.200 (Michie 1998). In addition, Alaska has recently passed a bill providing tort immunity to landowners who provide access to trails across their lands via a conservation easement granted to the state or a municipality. *See id.* § 34.17.055. The immunity applies to the private landowner and the state or municipality and it also applies whether the recreational user was injured on the easement or had wandered off to some other part of the landowner's property. *See id.*

[10] *See Public Recreation on Private Lands: Limitations on Liability*, 24 SUGGESTED ST. LEGIS. 150 (1965) (a "model act" authored by the Council of State Governments, which meets every year in Washington, D.C.) [hereinafter *Model Act*].

historical development of land ownership patterns in the state. For example, the interior public lands of the Hawaiian islands, typically designated by the state as forest preserves to protect prime watersheds, are often ringed by large private land holdings that the public has to cross in order to gain access to spectacular hiking trails.[11]

Even today, however, many private landholders remain concerned about the protection the HRUS will provide them if they open up their lands for recreational purposes.[12] Why are these private landowners still fearful about opening their lands for recreational purposes when the HRUS was enacted to encourage them to do so by relieving such worries about liability? What do Hawai'i's landowners fear from allowing hikers and other recreational users onto their lands? What recreational opportunities are Hawai'i's communities losing in the process?

This comment will examine some of the ongoing problems with the HRUS faced by landowners and recreational users alike. The sections that follow demonstrate the thesis of this comment – that landowners will continue to doubt the protection afforded by the HRUS until the statute has been interpreted by consistent decisions of Hawai'i's state courts.

Section II examines the legislative history of the statute to help explain the concerns that generated the need for such legislation in Hawai'i. Section III looks at landowners' and recreational users' concerns with the statute. Section IV contains an overview of the problems with the HRUS, examining the exceptions to the immunity protection provided by the statute and the definitional deficiencies presented by the terms "recreational purpose" and "land" as used in the statute. Keeping in mind that the statute has rarely been tested in Hawai'i state court, each analysis section explains either the attempts that have been made within our state to deal with these problems, how other states are addressing these issues, or both, and ideas for improving our state statute.

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[11] *See* Interview with Curt Cottrell, Program Director, Hawai'i Department of Land and Natural Resources *Na Ala Hele* (Trails) Program in Honolulu, Haw. (Apr. 7, 1999). According to *Na Ala Hele* estimates, the public is guaranteed access to only 23 out of 227 known trails and access roads on the island of O'ahu. *See id.* The rest of the trails may or may not be open to the public for recreational use under some other public entity, or are restricted access according to conditions set by the landowner whose land the trail crosses. *See id. Na Ala Hele*'s estimates for the outer islands paint a similar picture: Kaua'i, 34 trails and access roads out of 167 are guaranteed open to the public; on Moloka'i, 4 out of 46; on Maui, 23 out of 115; and on Lana'i, 4 out of 62. *See id.* The estimates for the Big Island of Hawai'i are 23 out of 131, however, included in the total number are the shoreline access paths (not trails, but lateral access for the public to reach the beaches, usually controlled by the counties) for that island. *See id.*

[12] *See* Telephone Interview with Benjamin Kudo, Partner, Dwyer, Imanaka, Schraff, Kudo, Meyer & Fujimoto (Jan. 25, 1999).

II. BACKGROUND

A. Traditional Common Law Relating to the Use of Private Land

Traditional common law tort theory provides that the status of a person entering the land determines the landowner's duty of care toward that person.[13] Thus, when an injury occurs on the premises of an owner, the extent to which the owner can be held liable depends on whether the visitor is categorized as an invitee, a licensee, or a trespasser.[14]

Under traditional common law, landowners have a duty to warn invitees of known defects on the premises and to inspect and correct potential defects.[15] Licensees are owed a duty only if the landowner knows or has reason to know that a dangerous condition exists and does not take steps to make the condition safe or warn the licensee.[16] Trespassers are owed the lowest duty of care because they enter the premises without the landowner's permission.[17] A landowner merely has a duty to refrain from causing wilful or wanton injury to trespassers.[18] An exception to this rule applies, however, if the landowner knows or should know of the trespasser's presence or knows that people habitually trespass on the property. Then, the duty to refrain from causing wanton or wilful injury becomes a duty to warn of concealed dangers caused by artificial conditions.[19]

B. Modern Common Law Duty to Users of Private Lands in Hawai'i

In Hawai'i, similar to many other states,[20] these traditional common law status distinctions were largely abolished by the Hawai'i Supreme Court's 1969 decision in *Pickard v. City and County of Honolulu*.[21] The court,

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[13] *See generally* 62 AM. JUR. 2D *Premises Liability* § 72 (1990) (explaining the common law duty of care toward persons entering upon private land).

[14] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 58 at 393 (5th ed. 1984).

[15] *See* RESTATEMENT (SECOND) OF TORTS § 341 (1965).

[16] *See id.* § 342.

[17] *See* BLACK'S LAW DICTIONARY 1504 (6th ed. 1990).

[18] *See generally* KEETON ET AL., *supra* note 14, § 58, at 393.

[19] *See* RESTATEMENT (SECOND) OF TORTS § 334-36 (1965).

[20] *See generally* JAMES A. HENDERSON ET AL., THE TORTS PROCESS 301-303 (Aspen Law & Business eds., 4th ed. 1994).

[21] 51 Haw. 134, 452 P.2d 445 (1969). In *Pickard*, the plaintiff fell through a hole in the floor of a public restroom and sued the City and County of Honolulu for his injuries. *See id.* The City and County contended it did not owe a duty to a mere licensee and, alternatively, that the plaintiff was contributorily negligent because he entered the restroom even though the lights did not work and he could not see his way. *See id.*

following the lead of California's Supreme Court in a radical break from traditional common law doctrine one year earlier in *Rowland v. Christian*,[22] ruled that an occupier of land simply has a duty to use the standard tort duty of "reasonable care" for the safety of all persons reasonably anticipated to be on the premises regardless of the legal status of the individual.[23] Now, instead of automatically categorizing an entrant before applying the corresponding common law rules, *Pickard*'s unitary standard requires a court and jury to focus on whether the landowner acted reasonably in managing the property with respect to the foreseeable entrant, thus simplifying the inquiry and effectively raising the standard of care higher than the traditional rules.[24]

At the same time, however, the Hawai'i Legislature recognized that the threat of litigation would discourage private landowners from making their lands available for recreational use.[25] Overcoming this disincentive required immunization of landowners for injuries occurring on their property.[26] The HRUS was meant to provide the means to this end.

C. An Introduction to the HRUS

While Hawai'i tort law imposes a common law duty of reasonable care on everyone, it provides an exception from that duty in its recreational use statute, chapter 520 of the Hawai'i Revised Statutes.[27] The current version of the HRUS provides that owners of possessory or nonpossessory interests in land

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[22] 443 P.2d 561 (Cal. 1968) (holding that common law status distinctions of trespasser, licensee, and invitee are no longer determinative of landowner liability and that the proper test to be applied is whether in the management of the land, the owner has acted reasonably in view of the probability of injury to others).

[23] *See Pickard*, 51 Haw. at 135, 433 P.2d at 446 (*Pickard* is Hawai'i's seminal case that found that the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others).

[24] *See id.* Compare with *Doe v. Grosvenor Properties (Hawai'i) Ltd.*, 73 Haw. 158, 163-64, 829 P.2d 512, 515 (1992), where the Hawai'i Supreme Court declared:

> Although the *Pickard* duty of reasonable care regardless of status distinctions continues to define a landowner's duty of care in this jurisdiction, status distinctions remain important in the decision to create exceptions to the general rule that it is unreasonable to impose a duty to anticipate and control the actions of third persons. Exceptions to the rule that there is no duty to protect may arise when justified by the existence of some special relationship between the parties, (e.g., common carrier to passengers, innkeeper to guest).

Id.

[25] *See* STAND. COMM. REP. NO. 534, *supra* note 8 at 1075. *See also* STAND. COMM. REP. NO. 760 JUDICIARY ON S.B. NO. 56, 5th Leg., Reg. Sess. (1969), *reprinted in* 1969 HAW. HOUSE J. at 914.

[26] *See id.*

[27] HAW. REV. STAT. § 520 (1998).

owe no duty of care to keep the premises safe for persons coming onto their land for any recreational purpose.[28] Under the statute, landowners owe no duty to warn recreational entrants of hazardous conditions, uses, structures, or activities.[29] The statute enumerates certain activities as falling within the definition of recreational purpose, such as hiking, swimming, camping, and hunting.[30]

Chapter 520 of the Hawai'i Revised Statutes expressly provides that landowners who permit recreational users to enter their properties do *not* assure that the premises are safe, do *not* confer upon the person entering the legal status of invitee or licensee, and do *not* assume responsibility for their injuries.[31] The statute, however, does not confer immunity from liability in instances where the landowner wilfully or maliciously fails to guard or warn of a dangerous condition, where the landowner charges a fee for the recreational use of their land, or for injuries suffered by a house guest while on the owner's premises.[32] Additionally, government lands are specifically excluded from immunity under the statute.[33]

D. Legislative History of the HRUS

During the 1950's and 60's, various states across the nation began to adopt recreational use statutes in response to the recognition of the growing need in American society for more recreational land.[34] In the post-World War II era, overpopulation and greater leisure time led to increased participation in

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[28] *See id.* § 520-2. "Owner means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises." *Id.*

[29] *See id.* § 520-3. "[A]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes . . . ." *Id.*

[30] *See id.* § 520-2. "'Recreational purpose' includes but is not limited to any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical archaeological, scenic, or scientific sites." *Id.*

[31] *See id.* § 520-4.

[32] *See id.* § 520-5.

[33] *See id.* § 520-2. "'Land' means land, roads, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to realty, *other than lands owned by the government*." *Id.* (emphasis added).

[34] *See* George R. Thompson & Michael H. Dettmer, *Trespassing on the Recreational User Statute*, 61 MICH. STATE B.J. 726, 727 (1982) (seminal recreational use legislation was enacted in the following states: Colorado (1963), Delaware (1953), Florida (1963), Maine (1961), Maryland (1957), Michigan (1953), Nevada (1963), New Hampshire (1961), New York (1963), Ohio (1963), South Carolina (1962), Tennessee (1963), and Wisconsin (1963)).

recreational activities.[35] However, national and state parks began to become crowded, while many wilderness areas were succumbing to suburban sprawl.[36] Despite a resurgent interest in adding new lands to the National Parks System, it seemed highly unlikely at the time because of rising land prices and falling state budgets that there would be an improvement in recreational opportunities without the contribution of private landowners.[37]

The imperative of encouraging private landowners to open up their land for private recreational use was eventually recognized in 1965 when the Council of State Governments, a governmental body that meets once per year and is made up of officials from various states, adopted "Suggested State Legislation" to that end.[38] Known as the "Model Act,"[39] it recommended that state legislatures pass "an act to encourage landowners to make their land and water areas available to the public by limiting liability in connection therewith."[40] The Model Act was subsequently adopted over the next several years with language substantially similar in format by several states, including Hawai'i.[41]

On July 14, 1969, Hawai'i Governor John H. Burns approved the state Legislature's Act 186 and enacted what is now commonly known as the HRUS.[42] Unfortunately, there is very little legislative history available regarding the original enactment of the HRUS. It is clear, however, that the Hawai'i Legislature made small adjustments to the 1965 Model Act to ensure that the HRUS would not apply to government lands.[43] As a whole, though,

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[35] *See id.*

[36] *See* John C. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1, 3-4 (1977).

[37] *See id.*

[38] *See Model Act, supra* note 10 at iii. "Suggested State Legislation" is a report that contains proposals approved by the Committee of State Officials on Suggested State Legislation of the Council of State Governments that meets every year in Washington, D.C. *See id.* The Suggested State Legislation should "be introduced only after careful consideration of local conditions, existing statutory practices and constitutional requirements." *Id.*

[39] *See id.* at 150.

[40] *Id.* The council was made up of representatives from various states. State representative Robert W. B. Chang represented Hawai'i. *See id.* at v.

[41] *See* Gibson v. Keith, 492 A.2d 241, 243 (1985) (noting that, "[one variation of the Model Act], adopted by sixteen states, including Delaware–Arkansas, Georgia, *Hawaii*, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Nebraska, Oregon, Pennsylvania, South Carolina and Utah–represents the model act essentially unchanged.") (emphasis added).

[42] *See* S.B. 56, 5th Leg., Reg. Sess. (Haw. 1969) (enacted).

[43] *See Model Act, supra* note 10 at 150. The Model Act makes clear in its preamble that it is "designed to "encourage [the] availability of *private* lands by limiting the liability of landowners." *Id.* (emphasis added). The actual language of the model legislation, however, does not differentiate between private and public landowners. *See id.*

given the noted similarity between the HRUS and the Model Act,[44] the Hawai'i legislature appeared to be motivated by the concerns expressed in the Model Act regarding the growing need for recreational lands.[45]

Ten years later, in 1979, a national coalition of sporting and environmental groups cosponsored an investigation and report on landowner liability and trespass laws.[46] The report found that existing legislation across the country was still largely ineffective at getting landowners to open up their lands for recreational use because of continued landowner suspicion of complex laws that were inconsistent from state to state.[47] In addition, judicial construction of these statutes tended to be strict because the underlying legislative policy of limiting a landowner's duty to recreational users was in derogation of the traditional common law.[48] The results of this study culminated in a revision of the 1965 Model Act regarding recreational use statutes that became known as the 1979 Model Act.[49] One major difference between the 1965 Model Act and the 1979 Model Act is that the latter defines "owner" to include any "individual, legal entity, or *governmental agency* that has any ownership or security interest whatever or lease or right of possession in the land."[50] Hawai'i never adopted the 1979 Model Act definitions and did not add governmental agencies to the HRUS definition of "owner."[51] Hawai'i's state government, however, already has broad immunities under the State Tort Liability Act.[52]

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[44] *See, e.g.*, STAND. COMM. REP. NO. 760, *supra* note 25, wherein the stated purpose of the bill repeats verbatim the Model Act.

[45] *See Model Act*, *supra* note 10 at 150.

[46] *See* Ford, *supra* note 9 at 499-500 & n.31. The report was sponsored by the National Association of Conservation Districts, the International Association of Fish and Wildlife Agencies, the National Rifle Association, the National Wildlife Federation, and the Wildlife Management Institute. *See id.*

[47] *See id.* at 500.

[48] *See id.*

[49] *See* Joan M. O'Brien, *The Connecticut Recreational Use Statute: Should a Municipality Be Immune From Tort Liability?*, 15 PACE L. REV. 963, 973 (1995). *See also Private Lands and Public Recreation Act*, 39 SUGGESTED ST. LEGIS. 107 (1978) [hereinafter *Model Act II*].

[50] *See Model Act II*, *supra* note 49, at 107 (1978) (emphasis added).

[51] *Id.* The legislative history is again unfortunately sparse regarding the consideration given the 1979 Model Act by the Hawai'i Legislature. Presumably, however, the Legislature was at least aware of the revisions because a delegation of representatives from the State was listed as present at the Committee on Suggested State Legislation of the Council of State Governments that year. *See id.* at p. vii. That delegation included: Millicent Kim, House Research Officer; Wendall Kimura, Office of the Senate; Representative Tony T. Kunimura; Senator Joseph Kuroda; Melvin Y. Shinn, Counsel to the Senate President; Representative Katsuya Yamada; and Senator Mamoru Yamasaki. *See id.*

[52] *See* HAW. REV. STAT. §§ 662-2 to -17 (1998). The State Tort Liability Act waives the State's sovereign immunity and provides that the State will be liable in the same manner and to the same extent as a private person under similar circumstances. *See id.*

In 1985, President Reagan appointed a Commission on Americans Outdoors (the "Commission") whose task was to make recommendations to ensure the future availability of outdoor recreation for the American people.[53] The Commission completed its report in 1986 noting that projections made in 1962 concerning national recreational demand for the year 2000 were reached in 1980.[54] The Commission predicted that the pressures on America's lands and waters for recreational activities would continue to grow.[55] It recommended that federal and state governments enact or improve recreational use statutes to provide greater protection to governmental entities and private providers who allow the public to use their land for recreation.[56]

In 1988, the Hawai'i Legislature established a statewide trail and access program known as "*Na Ala Hele*" (from the Hawaiian phrase "*E mau na ala hele*," meaning "preserve the trails to walk on") under chapter 198D of the Hawai'i Revised Statutes.[57] Under chapter 198D-7, the Department of Land and Natural Resources, in consultation with the State Office of the Attorney General, was tasked with examining the legal issues relating to trails and accesses in Hawai'i.[58] One year later in 1989, a report was presented by the

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[53] *See* PRESIDENT'S COMM'N ON AMS. OUTDOORS, APPENDIX: A LITERATURE REVIEW, at i (Dec. 1986).

[54] *See* PRESIDENT'S COMM'N ON AMS. OUTDOORS, REPORT AND RECOMMENDATIONS TO THE PRESIDENT, at 147 (Dec. 1986).

[55] *See id.*

[56] *See id.* at 150. It is doubtful, however, that the Commission's report resulted in revision of any states' recreational use statute because its emphasis was on the federal role in outdoor policy. *See* Terry L. Anderson, *Camped Out in Another Era*, WALL ST. J., Jan. 14, 1987, *available in* WL-WSJ 314464. The fundamental thesis of the report was that the only way recreational land can be protected is through expanding the government's ownership and control. *See id.*

[57] *See* HAW. REV. STAT. § 198D (1998). Although *Na Ala Hele* came into existence following the Commission's report, the trail program was not a result of the Commission's report. *See* Interview with Curt Cottrell, *supra* note 11. While there was a strong nationwide trend toward fitness and health in the late 1980's (baby boomers were facing middle age and health became a priority at the same time that their earning potential and disposable income peaked, thus the genesis of the "running boom" and the demand for more "linear recreational corridors"), the state Legislature acted solely on local concerns unique to Hawai'i. *Id.* To begin with, tourism and resort development were on the rise and there was a push to preserve ancient Hawaiian trails. *See id.* In addition, at the time, Hawai'i had the largest budget surplus of any state in the nation because of the real estate boom spurred on by tourism in the late 1980's and thus could well afford a state trail and access program. *See id.* Finally, many of these trails had been developed in the 1930's and 1940's by the Civilian Conservation Corps. *See id.* At that time, the "litigious attitude" that exists in our society today was not a concern. Since people continue to use these trails today, however, liability *became* a concern for the legislature. *See id.*

[58] *See* S. CON. RES. NO. 239, 15th Leg., Reg. Sess. (1989).

State Attorney General's Office.[59] This report noted that the immunity provided under the HRUS was not absolute and that landowners were still being exposed to tort liability even though they were making private land available for recreational use in compliance with the statute.[60] The report made several suggestions for statutory amendments that would reduce landowners' exposure to liability and encourage them to provide access through their lands.[61] These suggestions included: granting absolute immunity to landowners; allowing prevailing landowners to recover attorneys' fees and legal costs against the plaintiff and the plaintiff's attorney; limiting the damage recovery to $150,000; and including state and county lands under the HRUS, thereby providing them the same protection as private landowners.[62]

The Attorney General's report, however, had very little noticeable impact as there was no significant legislative activity on the HRUS until 1996. Then, the statute was amended to include protection of landowners required by the state or county to provide parking or access through or across their property to reach other property used for recreational purposes.[63] There was concern expressed by plaintiff advocate groups that the amendment's expanded definition of recreational purpose would create a fiction that the mere use of a person's land would be deemed recreational in nature.[64] Thus, the Legislature specified that the new subsection 520-4(b) of the Hawai'i Revised Statutes, be restricted to limitations on the liability of a landowner who is required or compelled to provide access to public recreation facilities or public trails through or across that owner's property because of state or county land use, planning, or zoning laws, ordinances, rulings, regulations, or orders.[65] According to committee reports, recent United States Supreme Court decisions delineating unconstitutional takings of property requiring just compensation motivated the legislature at the time this measure was enacted.[66]

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[59] *See* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239 REQUESTING THE ATTORNEY GENERAL AND THE DEPARTMENT OF LAND AND NATURAL RESOURCES TO EXAMINE THE LEGAL ISSUES RELATING TO TRAILS AND ACCESSES IN HAWAI'I (1989).

[60] *See id.* at 2.

[61] *See id.* at 16-17.

[62] *See id.*

[63] *See* STAND. COMM. REP. NO. 1648, PLANNING, LAND AND WATER USE MANAGEMENT ON S.B. NO. 2548, 18th Leg., Reg. Sess. (1996), *reprinted in* 1969 HAW. SENATE J. at 837.

[64] *See Hearing on S.B. 2548 Before the Water and Land Use Planning Committee*, 18th Legis., Reg. Sess. 837 (Haw. 1996) (written testimony of Robert Toyofuku, Consumer Lawyers of Hawai'i).

[65] *See* HAW. REV. STAT. § 520-4(b) (1998).

[66] *See* STAND. COMM. REP. NO. 1648, *supra* note 63 at 837. The report states:

> [I]n light of the United States Supreme Court cases of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the issue of taking may arise when a government mandates public access over private property.

More recently, in 1997, the case of *Collins v. Maui Land & Pineapple Co.*[67] prompted the Legislature to once again amend the HRUS. Ernest Lee Collins, a paramedic working for American Medical West, a company contracting with the State to provide emergency ambulance services on Maui, was called to rescue a tourist.[68] The tourist had injured herself on a beach access trail that traversed private land owned by Maui Land and Pineapple Company ("MLP"), but was held open to the public free of charge for the sole purpose of permitting access to the beach.[69] During the rescue, Collins injured his back when his foot slipped on the trail while attempting to remove the tourist from the area with the help of the fire department in a "stokes" basket.[70] Collins brought suit against the landowner, MLP.[71]

The case was heard in the United States District Court for the District of Hawai'i.[72] Judge Helen Gillmor denied MLP's motion for summary judgment by concluding that the HRUS did not bar Collins' claim because paramedics did not fall under the definition of "recreational user" as expressed in the HRUS.[73] The state Legislature reacted the same year by amending the HRUS to address the concern of landowner's immunity from liability for claims of "persons who enter the premises in response to an injured recreational user."[74]

The Legislature made no changes to the HRUS in 1998. In 1999, however, there were a number of proposals before the state Legislature. The proposed amendments, some old, some new, included: extending the same protection from liability afforded to private landowners under the HRUS to government lands;[75] requiring that persons entering lands for recreational use be

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Although these cases are decided on a case-by-case basis, your committee is concerned that if the government mandates access and subsequently prohibits a landowner from protecting itself from tort liability by way of a waiver, this may exacerbate the current situation and further preclude the provision of public access to recreational areas by private landowners.

Id.

[67] No. 95-00994 HG, slip opinion (D. Haw. Mar. 5, 1997) (Order denying motion of defendant Maui Land & Pineapple Co., Inc. for summary judgment).

[68] *See id.* at 1.

[69] *See id.*

[70] *See id.* at 2.

[71] *See id.*

[72] *See id.* at 1.

[73] *See id.* at 9.

[74] STAND. COMM. REP. NO. 1693, JUDICIARY S.B. NO. 647, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. HOUSE J. at 1767. *See also* CONF. COMM. REP. NO. 71 ON S.B. NO. 647 *reprinted in* 1997 HAW. SENATE J. at 877.

[75] *See* S.B. 380, 20th Leg., Reg. Sess. (Haw. 1999); H.B. 395, 20th Leg., Reg. Sess. (Haw. 1999); S.B. 622, 20th Leg., Reg. Sess. (Haw. 1999); H.B. 1705, 20th Leg., Reg. Sess. (Haw. 1999); S.B. 965, 20th Leg., Reg. Sess. (Haw. 1999); H.B. 582, 20th Leg., Reg. Sess. (Haw. 1999).

responsible for their own personal safety and well being;[76] and requiring that losing plaintiffs under the HRUS pay the attorneys' fees and costs of the prevailing defendant landowner.[77] All of these proposed amendments died before the Legislature and were replaced by a proposal that added only undeveloped government lands under the control of the state's trail and access program, *Na Ala Hele*, to the definition of lands under the HRUS.[78]

The Legislature thus continues to tinker with the HRUS. Its efforts reflect an attempt to effect a compromise between the need for access to more of Hawai'i's recreational areas and providing assurances to some of the largest landholders in the state who doubt the reliability of the protections afforded by the HRUS.[79] These landowners have legitimate concerns, ranging from liability to vandalism, which prevent them from opening their lands to the public for recreational use.

III. LANDOWNERS' CONCERNS

Nationwide, landowners have numerous concerns about opening their lands to public recreational users: (1) managing lands for public recreation is primarily "managing for people," and many private landowners have neither the training nor the desire to manage visitors; (2) recreational use is sometimes not compatible with the principle uses of the land; (3) acts of trespass, vandalism, and litter are increasing and "wilful trespass with firearms" is upsetting to many landowners; (4) many landowners seek privacy and discourage use by others for personal reasons; and (5) incentives for landowners are often lacking.[80] These and other reasons led the 1986 President's Commission on Americans Outdoors to conclude that substantial portions of private lands may never be available for general public recreation use.[81]

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[76] *See, e.g.*, S.B. 622 *supra* note 75.

[77] *See, e.g.*, H.B. 1705 *supra* note 75.

[78] *See* Interview with Curt Cottrell, *supra* note 11. While trails under the *Na Ala Hele* program are presumably protected by the State Tort Liability Act, Mr. Cottrell believes that this "added protection" would induce more private landowners to enter into memoranda of agreement with *Na Ala Hele*, allowing access to trails across privately held land. *Id.*

[79] *See* Telephone Interview with Alika Neves, Land Manager for Bishop Estate, Hawaii's largest private landholder (Feb. 22, 1999). Mr. Neves indicated that the Bishop Estate feels more protection from liability by restricting access than by relying on the HRUS. *See id.* In Mr. Neves opinion, if the HRUS afforded complete immunity except in cases where a dangerous condition existed that the landowner knew about but failed to warn, the trustees would probably feel more comfortable relying upon the protections afforded by the HRUS. *See id.*

[80] *See* PRESIDENT'S COMM'N ON AMERICANS OUTDOORS, *supra* note 54, at 149.

[81] *See id.*

In Hawai'i, landowners have experienced problems from recreational users such as increased litter on the property or excessive noise created by dirt bikes and off-road vehicles.[82] Some individuals who gain access to land with a landowner's permission for "picnicking" instead bring guns and shoot signs or fence posts, use beer bottles for target practice, shoot cattle, or illegally poach.[83] Entrants have destroyed gates or left them open or closed, contrary to the landowner's wishes.[84] Some people wander off of trails and destroy surrounding vegetation.[85] Any exotic plant seeds traveling with these "wanderers" may germinate and destroy native vegetation in pristine areas.[86] A related problem, particular to Hawai'i and a few other states, is the cultivation of marijuana, where growers tap into the landowners' waterlines or steal fertilizers to use on the marijuana plants.[87]

The largest concern cited by landowners in Hawai'i when denying access to their lands, however, is the legal uncertainty over how the state courts will

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[82] *See* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239, *supra* note 59, at 2 n.1.

[83] *See id.*

[84] *See id.* Private land holdings cover many of the original roads into interior hunting lands or paths down to the sea used by fishermen. *See* Telephone Interview with B. Ka'imiloa Chrisman, M.D., Field Representative for the National Muzzle Loading Rifle Association, Hamakua Representive for the National Wild Turkey Federation, Hawai'i Representative for the Big Island Safari Club, Big Island Representative for the Physicians for Responsible Gun Ownership (Apr. 7, 1999). This is a major problem for hunters and they sometimes get so frustrated by blocked access that they break down gates or drive around trees to get to hunting grounds they have used for generations. *See id.*

[85] *See* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239, *supra* note 59, at 2 n.1.

[86] *See* Telephone Interview with B. Ka'imiloa Chrisman, M.D., *supra* note 84. A related issue is that landowners do not want *anyone* coming on their land since the enactment of the federal Endangered Species Act. *See id.* Landowners have informally reported to hunters that they fear discovery of a new endangered species unique to Hawai'i on their property that would force them to stop all use of the land. *See id.* Indeed, although its islands represent just two-tenths of one percent of total U.S. land area, three-quarters of the nation's extinct plants and birds once lived in Hawai'i. *See* Elizabeth Royte, *On the Brink: Hawaii's Vanishing Species*, NAT'L GEOGRAPHIC, Sept. 1995, at 10, 14. More than a third of the 526 plants and the 88 birds on the U.S. endangered and threatened species lists come from Hawai'i. *See id.*

This has frustrated many hunting groups, as "hunters tend to be very individualistic." *See* Telephone Interview with B. Ka'imiloa Chrisman, M.D., *supra* note 84. Some hunters feel that large, well funded mainland groups such as the Sierra Club, the Nature Conservancy, and even the federal government are "coming here and telling us what to do." *Id.* Their suggested solution includes offering landowners alternatives in addition to farming and cattle ranching such as hunting, that would help by not only "encouraging the diversification of habitat," but by aiding the state's sagging tourist economy. *Id.*

[87] *See* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239, 59, at 2 n.1.

interpret the HRUS.[88] There are few Hawai'i cases applying the statute. Most cases that have applied the HRUS have been heard in the United States District Court for the District of Hawai'i.[89] In general, these cases have yielded positive results for the landowner.[90] However, the landowner in most of these cases was the United States, and the HRUS was applied under the Federal Torts Claim Act ("FTCA").[91] Under the FTCA, the United States is liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.[92] Thus, the federal district courts may be influenced by the status of the defendant when interpreting and applying the HRUS to the United States government.

In any event, the federal courts' interpretation is not binding upon the Hawai'i state courts. State court law can "trump" federal court law under what is commonly referred to as the "Erie Doctrine" after the 1938 case, *Erie Railroad Company v. Tompkins*,[93] which first expressed these principles.[94] The fundamental principle of the Erie Doctrine is that the federal government's power to make laws is limited to the powers enumerated in the United States Constitution.[95] Implicitly, the federal courts' Article III power to adjudicate diversity cases is not a grant of power to make state substantive law.[96] There is no enumerated federal power to make general law, commercial, tort, or otherwise.[97] A federal district court sitting in diversity must apply the

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[88] *See* Telephone Interview with Benjamin Kudo, *supra* note 12.

[89] *See, e.g.*, Howard v. United States, No. 95-00642 DAE (D. Haw. Jan. 3, 1997); Covington v. United States, 916 F. Supp. 1511 (D. Haw. 1996); Palmer v. United States, 742 F. Supp. 1068 (D. Haw. 1990); *aff'd*, 945 F.2d 1134 (9th Cir. 1991); Collard v. United States, 691 F. Supp. 256 (D. Haw. 1988); Stout v. United States, 696 F. Supp. 538 (D. Haw. 1987); Proud v. United States, 723 F.2d 705 (D. Haw. 1984).

[90] *See, e.g.*, Howard v. United States, No. 95-00642 DAE (D. Haw. Jan. 3, 1997) (HRUS protected the United States from liabilities sustained by a volunteer sailing instructor who injured her foot on a military dock); Palmer v. United States, 742 F. Supp. 1068 (D. Haw. 1990) *aff'd* 945 F.2d 1134 (9th Cir. 1991) (HRUS protected United States from liability for injuries sustained by plaintiff when he fell on steps at Tripler Army Medical Facility swimming pool); Stout v. United States, 696 F. Supp. 538 (D. Haw. 1987) (HRUS precluded liability for injuries sustained by a boy while climbing a tree on a military base).

[91] *See, e.g.*, *Covington*, 916 F. Supp. at 1521; *Collard*, 691 F. Supp. at 257; *Proud*, 723 F.2d at 706.

[92] *See, e.g.*, *Proud*, 723 F.2d at 706 (holding that under the FTCA, the law of Hawai'i governs the federal government's liability in an action to recover damages for injuries sustained by minor in diving accident at Haleakala National Park).

[93] 304 U.S. 64 (1938).

[94] *See id.*

[95] *See* Allen Ides, *The Supreme Court and the Law to be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 27 (1995).

[96] *See id.*

[97] *See id.*

substantive law of the state, both legislative and decisional.[98] In the absence of a federal law on point, state law will be applied.[99] In practice, this means that a court sitting in diversity will usually apply state substantive law because, in a typical diversity case, there is no pertinent federal substantive law.[100]

Thus, when no interpretation of a state statute from the state court decisions exists, federal courts tend to interpret the statute strictly, looking to the literal language of the statute as a foundation for drawing their conclusions.[101] The federal district courts for the District of Hawai'i have, accordingly, interpreted the HRUS quite narrowly, thereby supporting landowner rights.[102]

Hawai'i's landowners, however, find little comfort in the "pro-landowner" stance that the federal courts have taken.[103] This is because the Hawai'i Supreme Court has a history of rendering decisions that favor the public or subgroups within the general public over the landowner.[104] The State's political history helps explain this trend.

With the post-World War II election of Governor John Burns in 1962, following years of domination by conservative business interests, Hawai'i's government shifted into the hands of liberal democrats and their supporters, mostly working people and those who had come from a plantation background.[105] William S. Richardson, who served as Lieutenant Governor under Burns, was appointed Chief Justice of the Hawai'i Supreme Court.[106] Chief Justice Richardson was committed to serving the "common people."[107] It is not surprising, then, that the Richardson court would adopt a very liberal and activist posture in its decisions.[108]

On the other hand, a phenomenon which started in the 1970's and continues through to the present has been the conservative nationwide movement for tort and insurance reform.[109] With regard to those areas of tort law of primary

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[98] *See id.* at 24.

[99] *See id.* at 20.

[100] *See id.*

[101] *See* Interview with Ted Meeker, Assistant U.S. Attorney, in Honolulu, Haw. (Mar. 19, 1999).

[102] *See id.*

[103] Interview with Benjamin Kudo, Partner, Dwyer, Imanaka, Schraff, Kudo, Meyer & Fujimoto via e-mail (Mar. 25, 1999).

[104] *See* Richard S. Miller & Geoffrey K.S. Komeya, *Tort and Insurance Reform in a Common Law Court*, 14 U. HAW. L. REV. 55, 61 (1992) (discussing court's tendency to favor "common people").

[105] *See id.*

[106] *See id.*

[107] *Id.* at 62.

[108] *See id.* at 61. William S. Richardson was appointed and qualified as the Chief Justice of the Hawai'i Supreme Court on March 25, 1966. *See id.* at 59 n.17. He served as Chief Justice until his retirement on December 30, 1982. *See id.*

[109] *See* Miller & Komeya, *supra* note 104, at 62.

concern to those seeking tort and insurance reform in Hawai'i, the pro-plaintiff revolution of the Richardson era has all but come to an end.[110] Thus, some pro-recovery doctrines adopted during the Richardson years have been overturned, rights of victims have been kept within narrow bounds, and opportunities to expand recovery have generally been rejected.[111]

As far as most landowners are concerned, however, as long as the public remains so "suit-happy," it would take a definite indication from the court that the HRUS would be interpreted favorably for landowners before they would take much comfort in it.[112] As noted in 1986 by the President's Commission on Americans Outdoors:

> [There is] a willingness of the American public to seek compensation for accidents which used to be viewed as a part of life. At the same time that people are more willing to sue, they are more willing to participate in high risk sports. Recreational activities with greater risk, such as hang gliding, rock climbing, and white water rafting are increasing in popularity. While there are more risks people are willing to take there a fewer risks people are willing to accept. . . . Another factor is that insurance companies and others are increasingly willing to settle cases out of court to save time and money. This encourages frivolous lawsuits.[113]

Landowners and their counsel continue to believe that, where there is a seriously injured plaintiff, there will be a creative plaintiff's attorney who will find a way to argue that the HRUS does not apply to the particular circumstances of that case.[114] Some counsel believe that getting past a motion to dismiss or a motion for summary judgment is not that difficult to do in Hawai'i courts.[115] Once this happens, the landowner is on trial and the pressures to settle are tremendous.[116] Thus, the fear of possible liability,

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[110] *See id.* at 66.

[111] *See id.* at 65. For example, Hawai'i's Supreme Court used to be the most liberal court in the United States regarding tort actions for negligent infliction of emotional distress, allowing recovery even for damage to property. *See, e.g.*, Rodrigues v. State of Hawai'i, 52 Haw. 156, 472 P.2d 509 (1970). The court, however, has "backed off on emotional distress as an independent cause of action." Telephone Interview with Richard Miller, Professor Emeritus, William S. Richardson School of Law (Apr. 11, 1999).

[112] *See* Interview with Gary Slovin, Partner, Goodsill, Anderson, Quinn, & Stifel in Honolulu, Haw. (Feb. 13, 1999).

[113] PRESIDENT'S COMM'N ON AMS. OUTDOORS *supra* note 54 at 155.

[114] *See* Interview with Gary Slovin, *supra* note 112.

[115] *See id.* Judges in the Hawai'i courts are reluctant to grant summary judgment motions because they don't want their decisions to be overturned on appeal. *See id.* Unless the case is "absolutely black and white" the Hawai'i Supreme Court disfavors summary judgment and will send the case back to the lower court for a decision. Telephone Interview with Jim Mee, Project Attorney, Pacific Legal Foundation Project Hawai'i (Apr. 5, 1999).

[116] *See* Interview with Gary Slovin, *supra* note 112.

coupled with the lack of any significant benefit to the owner from opening the land, causes many landowners to continue to refuse access to their property.[117]

From a landowner's perspective, another major continuing problem with the HRUS is that it contains many ambiguities that can allow an injured party to argue that the statute does not apply in many situations.[118] Unless the law is so clear that the landowner can win on summary judgment, landowners will find it more comforting, legally speaking, to deny access completely than to take their chances with the poorly defined protection the HRUS affords.[119]

For example, although Hawai'i's largest landholder, Bishop Estate,[120] used to hold its extensive land holdings open for recreational use, approximately eight years ago it adopted a policy that denies accessibility to all but its leased lands (on their leased lands, if the lessee has no objection to the public's recreational use, Bishop Estate allows access).[121] This policy came about as a direct result of litigation.[122]

From the perspective of many active hikers, however, while landowners undoubtedly experience difficulties from some users of their lands, there is no evidence that well-established, responsible, organized groups such as the Sierra Club or the Hawai'i Mountain and Trail Club have contributed to these problems.[123] A similar argument is made by responsible, organized hunting associations such as the Hawai'i Pig Hunters' Association and the Hawai'i

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[117] *See* Memorandum from Richard Stone to *Na Ala Hele* 5 (Sept. 11, 1990) (on file with Curt Cottrell, Program Director, *Na Ala Hele*).

[118] *See id.* at 9.

[119] *See* Interview with Gary Slovin, *supra* note 112.

[120] *See* Telephone Interview with Alika Neves, *supra* note 79.

[121] *See id.* This is because the lease requires insurance in addition to the insurance Bishop Estate already carries for its own protection. *See id.* The lessee indemnifies Bishop Estate should a suit be brought. *See id.*

[122] *See id.* Mr. Neves recalled one instance in which a woman sued Bishop Estate when she slipped on a public boat ramp on adjacent lands. *See id.* Bishop Estate won that case, but the cost and time involved in defending the suit caused the trustees to close down the estate lands. *See id.* In another instance, a "Good Samaritan" sued Bishop Estate after following a fire truck to the scene of a rescue where he fell from a cliff on Bishop Estate land while trying to aid the firefighters. *See id.* While there had been numerous suits prior to these, these were the two, as Mr. Neves recalls, that ultimately caused Bishop Estate to adopt its current policy. *See id.*

One result of this policy has been that the Hawai'i Trail and Mountain Club has lost long time access to land that used to be leased to Wailua Sugar Company from Bishop Estate. *See* Telephone Interview with Steve Brown, Trails Committee Chair, Hawai'i Trail and Mountain Club (Feb. 16, 1999). This means the loss of access to six trails in the mountains above Haleiwa on the north shore of O'ahu. *See id.* Similarly, the O'ahu Pig Hunter's Association reports that they have been denied access to this land, although they continue to try to work out an arrangement with Bishop Estate. *See* Telephone Interview with Rodney Jose, Former President, O'ahu Pig Hunter's Association (Apr. 10, 1999).

[123] *See* Memorandum from Richard Stone, *supra* note 117, at 8.

Chapter of the National Wild Turkey Federation.[124] In fact, these groups and other responsible users may deter misuse by trespassers and others.[125] Further, illegal activities such as poaching are not solved and may actually be aggravated by a "no access" policy where no one is on the land to witness and report such transgressions and so they remain hidden from discovery.[126]

Additionally, it should be remembered that lawsuits resolved by recreational use statutes are very rare.[127] Nationwide, most lawsuits involve cases in which the landowner did something outrageous, charged fees for access, failed to perform simple risk management, or are in states where the courts are allegedly biased against the statute.[128] Except for ocean injury lawsuits directed largely at state and county government or resort owners, there does

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[124] *See* Telephone Interview with Greg Gillia, *supra* note 2. Hunters who belong to hunting associations are more informed about hunting laws because they must take a hunter's education course required by the state in order to obtain a hunting license. *See id.* Because of this hunting course, they are more likely to abide by the law. *See id.* It is people hunting without a license "who could care less," and will cut fences or break locks to gain access to restricted private lands. *Id.* A lot of non-registered hunters "just go anywhere they want to go" and wind up doing a lot of damage (i.e., destroy vegetation, cut their own trails, and steal). *Id.* Hunting associations stress responsibility and feel that these "poachers" give hunters a bad name. *Id.* Many of the people hunting on private lands without permission, however, feel that they have a right to be there because they know the land and have lived in the area for generations. *See* Telephone Interview with B. Ka'imiloa Chrisman, M.D., *supra* note 84. Many of the original roads into hunting lands or down to fishing areas have since been blocked by private land ownership. *See id.*

A related issue is the controversial decision handed down from the Hawai'i Supreme Court in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (1995) ("*PASH*"), which upheld the practice of traditional and customary rights of Native Hawaiians on undeveloped land for those who can prove Native Hawaiian ancestry. While discussion of the *PASH* decision is beyond the scope of this paper, it has been suggested that immunity could be provided to landowners for injuries to practitioners of Native Hawaiian traditional and customary rights on others' private land by amending the HRUS or implementing a new law incorporating similar language specifically for practitioners. *See* Assistant Professor Denise E. Antolini, *PASH Study Group Materials: Issues Related to the PASH/Kohanaiki Decision* (1997 Hawai'i State Bar Association Convention, "Life With PASH!"), Dec. 9 1997 at 11.

[125] *See* Memorandum from Richard Stone, *supra* note 117 at 8.

[126] Telephone Interview with Pascal Dabis, President, O'ahu Pig Hunters Association (Apr. 10, 1999). For example, when negotiating with Bishop Estate to regain access to lands formerly leased by Wailua Sugar Company, the O'ahu Pig Hunters Association pointed out that if their members were allowed access, they would provide a means for Bishop Estate to monitor the remote mountain areas where the group hunts, as they could report any suspicious or illegal activities they witnessed directly to Bishop Estate. *See id.*

[127] *See* CHARLES A. FLINK & ROBERT M. SEARNS, GREENWAYS: A GUIDE TO PLANNING, DESIGN, AND DEVELOPMENT 286 (Island Press 1993).

[128] *See id.*

not appear to be any serious lawsuits reported resulting from public use of private land in Hawai'i.[129]

While it will never be possible to eliminate all disputes, it may be possible to make the HRUS less ambiguous to alleviate landowners' legitimate fears of litigation, while also balancing the protection of the public. Keeping in mind that landowners will continue to doubt the protection of the statute until it is definitively interpreted by the Hawai'i state courts, the remainder of this comment will be devoted to exploring problems that might arise under the HRUS should it ever be litigated in state court. By comparing and contrasting District Court of Hawai'i decisions and problems that have involved recreational use statute litigation in other states, the intention is to suggest legislative methods that might help further the stated purpose of the HRUS.[130]

IV. STUMBLING BLOCKS CREATED BY DEFINITIONAL AMBIGUITIES IN THE HRUS

The next section will first address the exceptions to the immunity provided by the statute. Definitional problems with "recreational purpose" will then be examined. Finally, definitional problems with which "lands" are covered under the statute and the controversial proposals for adding government lands to this definition will be evaluated. It is interesting to note that at least two in-depth analyses of the HRUS were made approximately ten years ago.[131] The problems noted in those analyses continue to plague the statute today.

A. The Wilful and Malicious Conduct Exception

Immunity under the HRUS is not absolute and the statute sets out, in section 520-5 of the Hawai'i Revised Statutes, the activities that will expose a landowner to tort liability despite the fact that the land has been made available for recreational use in compliance with the statute.[132] Because ambiguities exist as to how these exceptions will be defined and applied by the Hawai'i courts, landowners fear exposure to legal expenses and the liability risks that might occur if a court determines that the HRUS is inapplicable.[133]

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[129] *See* Memorandum from Richard Stone, *supra* note 117, at 8.

[130] *See* HAW. REV. STAT. § 520-1 (1998). "The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." *Id.*

[131] *See* Memorandum from Richard Stone, *supra* note 117; *see also* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239, *supra* note 59.

[132] *See* HAW. REV. STAT. § 520-5 (1998).

[133] *See* Interview with Gary Slovin, *supra* note 112.

One important exception under the statute, section 520-5(1), imposes liability "for wilful or malicious failure to guard or warn against a dangerous condition, use, or structure which the owner knowingly creates or perpetuates or for wilful or malicious failure to guard or warn against a dangerous activity which the owner knowingly pursues or perpetuates."[134] On the one hand, federal court interpretation of this section has been pro-landowner. For example, in a case where a tourist sued for damages for injuries he sustained while "boogie-boarding" in the ocean adjacent to property owned by Wailea Development Company, the District Court for the District of Hawai'i in a decision written by Judge Martin Pence held: "the willfullness [sic] exception of Chapter 520 is not intended to include the mere failure to warn of the per se dangerous natural conditions always existing in ocean waters."[135] Accordingly, even a wilful or malicious failure to guard or warn against a natural condition is not actionable under section 520-5 since a natural danger is not one which the landowner knowingly creates or perpetuates.[136]

Further, in ruling for the defendant United States in a case where an eleven-year-old boy drowned after being knocked down by a wave in ocean waters off of a beach at Bellows Air Force Base, O'ahu, district court Chief Judge Alan C. Kay adopted California's three-prong test for defining wilful conduct.[137] Under this test, three essential elements must be present before a negligent act becomes wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to possible, result of the danger; and (3) conscious failure to act to avoid the peril.[138] Such a definition is helpful to landowners and their legal counsel because it provides predictability and legal precedent.

In contrast, Hawai'i state courts have not directly addressed the wilfulness issue nor defined "wilful" as it is used in the HRUS.[139] It remains to be seen whether this federal definition of wilfulness will be adopted by the state courts. Thus, what constitutes wilful or malicious conduct of a private landowner remains unclear and has been and will continue to be left to court interpretation.[140]

This uncertainty is cited by landowners in justifying their concerns that, should a recreational user get seriously injured on their property, the plaintiff need only allege wilful or malicious conduct on the part of the landowner and

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[134] HAW. REV. STAT. § 520-5(1) (1998).

[135] Viess v. Sea Enters. Corp., 634 F. Supp. 226, 231 (D. Haw. 1986).

[136] *See id.*

[137] *See* Covington v. United States, 916 F. Supp. 1511, 1521 (D. Haw. 1996) (citing Termini v. U.S., 963 F. 2d 1264, 1267 (9th Cir. 1992) (applying California's recreational use statute)).

[138] *See id.* at 1522.

[139] *See id.* at 1521.

[140] *See id.*

the case *will* go to trial.[141] A trial is a likely result because Hawai'i state courts are very reluctant to grant summary judgment unless the facts of the accident fall clearly inside the "four corners of the statute."[142] Further, courts generally tend to construe recreational use statutes strictly because they are in derogation of common law principles.[143] Thus, despite the fact that landowners may ultimately prevail if this "new" three-part definition of "wilful" is applied, they will still bear the court costs and attorneys fees of defending the suit to the point of termination (which typically will involve disputed issues of fact). Consequently, because their goal is to reduce both the duty of care owed to entrants and the possibility of mishaps on their property, landowners still have a greater incentive to avoid the potential losses in time and financial resources of defending themselves in litigation by continuing to discourage or bar entrants.[144]

One proposed solution to this problem has been to delete the words "wilful or malicious" altogether and instead add an "intent to injure" clause.[145] The underlying rationale of this approach is that unlike "wilful," the term "intent" and its derivatives seem to be relatively well defined.[146] Decisions under recreational use legislation in other states indicate that an intentional misconduct standard demands only a minimal duty of care.[147] In any event, the same lingering question of statutory interpretation would remain until *this* wording (i.e., "intent") is tested by a state court decision, leaving landowners with the same uncertainty they now face, and most likely resulting in the same reluctance to open their lands for fear of suit.

Another proposed solution to this problem is to grant absolute immunity to landowners by entirely deleting the exception to immunity relating to malicious or wilful failure to guard or warn.[148] This proposal has come before

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[141] *See* Interview with Gary Slovin, *supra* note 112.

[142] *Id.*

[143] *See Covington*, 916 F. Supp. at 1521.

[144] *See* N. Linda Goldstein, *Recreational Use Statutes-Time for Reform*, 3 PROB. & PROP. 6 (July/Aug. 1989).

[145] *See* Memorandum from Richard Stone, *supra* note 117, at 40.

[146] *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965).

[147] *See* Barrett, *supra* note 36, at 23. For example, one court held that the expression "any injury," contained in a section of its state recreational use statute stating that the landowner did not incur liability for "any injury" to person or property caused by an act or failure to act of another person using the land recreationally, encompassed the accidental shooting of the plaintiff by a hunter who was recreationally using the dfendant landowner's land. *See* Schwartz v. Zent, 448 N.E.2d 38, 39 (Ind. App. 1983).

[148] *See* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239, *supra* note 59, at 16.

the Legislature many times within the past ten years and died every time because of strong opposition from the plaintiff's bar.[149]

One difficulty with absolute immunity is that it ignores the fact that recreational use statutes are a result of a complex balancing test involving numerous political, societal, and psychological concerns.[150] So far, the people of Hawai'i, through the Legislature, have supported the underlying policies of recreational use legislation, recognizing a compromise of interests: the public gains greater recreational opportunities in exchange for less protection by the state's tort laws, and landowners gain immunity from liability in exchange for keeping their properties open to the public.[151] Because the malicious conduct standard is generally difficult to prove (the plaintiff must show that the landowner had actual knowledge, which means the landowner knew of a hazard, as opposed to constructive knowledge, which means that the landowner should have known of a hazard, and that the landowner wilfully failed to guard or warn against the dangerous condition), it can be argued that the HRUS already provides sufficient protection for landowners.[152] Further, even with absolute immunity, there is no guarantee that landowners would be more inclined to open their lands to the public than they currently are.[153]

Another possible, although not necessarily ideal, method to prevent *frivolous* lawsuits from being brought under the wilful and malicious conduct exception is to award legal costs to landowners not found liable under the statute. This proposal has so far been rejected by the legislature because of strong opposition from the plaintiff's bar under a due process argument.[154] That is, if the plaintiff has to pay the legal costs when they lose under a suit in which the HRUS is raised as a defense by the landowner, the opposite should occur and the defendant landowner pays if the plaintiff wins.[155]

While not directly on point as regards the issue of wilful and malicious conduct, a recent decision from the Hawai'i Intermediate Court of Appeals ("ICA") allowed use of the HRUS as an affirmative defense to claims of a

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[149] *See* Telephone Interview with Curt Cottrell, Program Director, *Na Ala Hele* (Jan. 25, 1999).

[150] *See* Alexander T. Pendleton, *Wisconsin's Recreational Use Statute*, 66 WIS. LAW. 14, 53 (May 1993).

[151] *See* HAW. REV. STAT. § 520-1 (1998).

[152] *See* Tina Burkhardt, *Landowner Liability* (visited Apr. 14, 1999) <http://www.greatoutdoors.com/imba/infoaction/library/trailissues/landliab.html>.

[153] *See* Interview with Robert S. Toyofuku, Consumer Lawyers of Hawai'i in Honolulu, Haw. (Feb. 9, 1999).

[154] *See, e.g., Hearing on H.B. 395 and H.B. 582 Before the Committee on Water and Land Use*, 20th Leg., Reg. Sess. (Feb. 9, 1999) (testimony of Robert Toyofuku, Consumer Advocates of Hawaii).

[155] *See id.*

landowner's duty to warn and duty to prevent.[156] In the case of *Atahan v. Muramoto*,[157] the visiting Atahan family parked their car on a vacant, unimproved parcel of land owned by Muramoto, walked across Muramoto's property to the beach, and then down the beach until they stopped to body surf in front of Makena La Perouse State Park.[158] Muramoto was aware that other beachgoers had parked their cars on his parcel for years.[159] However, he neither charged nor made any attempt to hinder or aid in such use.[160] Atahan was injured while body surfing and rendered quadriplegic.[161]

Atahan sued Muramoto alleging that he owed a duty to prevent them from parking their car on and walking over his lot to access the public beach or to warn them that being in the ocean fronting the vicinity of the Muramoto property was dangerous.[162] In granting summary judgment for Muramoto, Chief Judge Burns, writing for the majority of the ICA, focused its evaluation on section 520-4(2) of the HRUS,[163] stating:

> [Atahan] was neither 'an invitee or licensee to whom a duty of care is owed.' The duty to warn and the alleged duty to prevent both arise out of the 'duty of care.' It follows that [Atahan] was not an invitee or licensee to whom Muramoto owed a duty to prevent or warn. . . . We conclude that HRS chapter 520 abolishes any duty to prevent or warn that Muramoto may otherwise have owed to the Atahan family.[164]

Judge Acoba dissented in part to the majority opinion explaining that the language of the HRUS is clear that the land and water areas affected by the statute are those "owned" by the landowner.[165] However, he would have held that Muramoto owed Atahan no duty under the common law and would affirm summary judgment on that basis.[166]

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[156] *See* Atahan v. Muramoto, No. 96-0227(3), 1999 WL 353021, at *1 (Haw. App. as amended July 16, 1999).

[157] *See id.*

[158] *See id.* at *4.

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See id.* at *2.

[163] *See* HAW. REV. STAT. § 520-4(a)(2) (1998) ("Except as specifically recognized by or provided in section 520-6, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed.").

[164] *Atahan*, 1999 WL 353021, at *8.

[165] *See id.* at *11 (Acoba, J., dissenting).

[166] *See id.* at *19 (Acoba, J., dissenting). Indeed, some attorneys find it confusing that the ICA even analyzed Muramoto's liability at all because it could imply that once a landowner's property is used for access to the ocean, the landowner might conceivably be liable for any part of the ocean that a recreational user could access from their property. *See* Interview with Gary

If one concludes that the ICA analyzed the statute to mean that there is no duty even if the injury occurred in the ocean fronting Muramoto's property, landowners and their counsel can be assured that the intent of the HRUS is being upheld and no liability will attach. Since these were not the facts before the court, however, the opinion cannot be given much weight on that issue.[167] The Hawai'i Supreme Court, after initially granting certiorari to hear this case, dismissed the writ of certiorari, stating that it was "improvidently granted."[168] Thus, the state's highest court once again declined the opportunity to rule on the HRUS, although ICA opinions do carry considerable weight.[169]

B. The "Charge Exception"

Under the HRUS, charge is defined as "the admission price or fee asked in return for invitation or permission to enter or go upon the land."[170] The "charge exception" requires that liability be imposed:

> For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that

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Slovin, Partner, Goodsill, Anderson, Quinn, & Stifel via e-mail (Aug. 29, 1999). In this case, Mr. Muramoto was defending himself against an injury that didn't even occur on his property. This confusion reinforces the distrust landowners and their attorneys have regarding the protection afforded by the HRUS and attorneys will feel the obligation to tell their clients not to allow recreational access to their property. *See id.*

Other attorneys are finding comfort in the case as being very helpful to "passive landowners" who knowingly, but not intentionally allow their property to be used by beachgoers and the public. Interview with Benjamin Kudo, Partner, Dwyer, Imanaka, Schraff, Kudo, Meyer & Fujimoto via e-mail (Aug. 30, 1999). Many sugar and pineapple lands have for years been used by fishermen, campers, surfers, and others to park on and access beach areas. *See id.* This has been of considerable concern on the part of the agricultural companies who own these lands. *See id.* To have issued an opinion which curtailed the limited liability protection to landowners afforded by the HRUS would create a legal environment contrary to the legislative intent of the statute. *See id.* If the courts rule against landowners like Muramoto, the only alternative left to landowners is to fence off their properties. *See* Telephone Interview with John Price, counsel for defendant Muramoto (Sept. 2, 1999). Thus, to attorneys and landowners who view the case in this light, the ICA properly interpreted the statute and its goals to provide more public access, not less. *See id.*

[167] *See* Interview with Gary Slovin, *supra* note 112.

[168] *See* Telephone Interview with John Price, counsel for defendant Muramoto (Sept 15, 1999).

[169] *See id.* The supreme court may have decided that *Atahan* was not a suitable case to provide definitive guidance, given the common law tort aspects of the decision. At least one attorney, however, feels that the issues in the *Atahan* case need further legislative definition. *See id.* Rationalizing that most beach injury cases are not going to occur on a landowner's property, but rather after the recreational user has crossed the property to access the beach, defense counsel for Mr. Muramoto see this issue as likely to arise again. *See id.*

[170] HAW. REV. STAT. § 520-2 (1998).

> in the case of land leased to the state or a political subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.[171]

Hawai'i's charge exception provision is narrow in contrast to other states' approaches which provide that landowners may not escape liability where they receive "consideration" as a result of entry onto their property.[172] It speaks only to the explicit quid pro quo arrangement whereby a landowner conditions admission onto the land upon payment of a fee in contrast to other approaches that permit the finding of liability where the landowner obtains some less obvious benefit than a direct monetary fee from an entrant upon the land.[173] These distinctions are favorable for landowners because, in order to forfeit immunity, a landowner must directly charge people a fee for entry onto the land.[174] It is not enough for the landowner to have received a benefit in return for a third party's privilege to charge people.[175]

Although Hawai'i's narrowly written charge exception may give landowners some level of comfort, it is still unclear how a particular set of facts or an activist court might affect the outcome in a liability case.[176] For example, the HRUS does not address the situation of charges made by a group leading the hike other than the landowner.[177] As previously noted, the minimal charge asked by the Hawai'i Nature Center for their hikes across lands leased by the Nature Conservancy is an example of how landowners fear that this "charge" will put them in a different category of liability, even if they are not imposing the charge. Thus, landowners are likely to demand the additional protections of liability waiver, indemnity, and insurance from the visitors and/or group leaders.[178]

Indeed, a number of landowners in Hawai'i who continue to allow their lands to be used for recreational purposes handle the uncertainty surrounding

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[171] *Id.* § 520-5(2) (1998).

[172] Barret, *supra* note 36 at 11.

[173] *See* Viess v. Sea Enters. Corp., 634 F. Supp. 226, 229 (D. Haw. 1986).

[174] *See id.* at 230.

[175] *See id.* at 229. In *Viess*, there was an interrelationship of business entities linking two defendants through parent corporations. *See id.* The court specifically found that this type of corporate relationship did not raise an issue of fact as to the defendants' immunity under the charge exception of chapter 520. *See id.*

[176] *See* Interview with Suzanne Case, Asia/Pacific Regional Counsel, The Nature Conservancy via e-mail (Feb. 8, 1999 and Feb. 24, 1999).

[177] *See* HAW. REV. STAT. § 520-5(2) (1998). The statute does not exempt nominal charges to recover costs. Often, a nonprofit hiking group leader wants to offer a hike but has specific, nominal costs for gas, drinks, first aid, and the like. Unfortunately, charging a fee to recover these costs might limit the landowner's protections under the statute. *See* Interview with Suzanne Case, *supra* note 176.

[178] *See* Interview with Suzanne Case, *supra* note 176.

interpretation of the HRUS by asking users to sign waivers and/or obtain liability insurance.[179] Reliance on waivers, however, presents some risk to landowners as waivers are not always a valid defense in a court of law.[180] If waivers are to be relied upon, the Legislature needs to statutorily recognize the validity of a written waiver form to insure that litigation would not ensue if there was an injury notwithstanding the signed written waiver.[181]

For those user groups who can afford insurance, that option is a viable solution. However, many user groups cannot afford insurance premiums due to the large amount of insurance coverage that is often required.[182] For example, hiking clubs tend to use a particular trail only a limited number of times each year. Paying insurance premiums for several trails each used only four or five times a year would put such clubs in an untenable position.[183] Hunters are more likely to be able to afford the requested premiums because hunting areas are limited and the same area is thus used more frequently.[184] The cost of insurance premiums for these groups, however, can be just as out of reach.[185]

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[179] *See* Telephone Interview with Chuck Braden, former member of the O'ahu Pig Hunters Association (Apr. 10, 1999). For instance, a group of hunters who hunt on land located in the Manoa Valley on O'ahu owned by the Damon Estate is permitted to do so because every member of the group obtains individual liability insurance and additionally, signs a waiver of liability. *Id.*

[180] *See* Telephone Interview with Jim Mee, *supra* note 115:

> In waiver and release cases, there seems to always be some reason why the waiver gets thrown out. For example, plaintiffs assert that the waiver was not knowingly signed. Insurance companies don't want to insure because of concern over whether waivers are enforceable. About the only thing you can say [as a defendant landowner] is that you've put the person on notice and try to make an assumption of the risk type argument.

Id.

See also Telephone Interview with B. Ka'imiloa Chrisman, M.D., *supra* note 84. "Since there is no rock solid waiver law in Hawai'i, many landowners feel that waivers are not worth the paper they're written on." *Id.*

[181] *See* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239, *supra* note 59, at 16.

[182] *See* Telephone Interview with Pascual Dabis, *supra* note 126. For example, Bishop Estate is asking that the O'ahu Pig Hunters association obtain one million dollars worth of liability coverage if hunting groups are to regain access to their lands formerly leased to Wailua Sugar Company. *See id.*

[183] *See* Telephone Interview with Steve Brown, *supra* note 122.

[184] *See* Telephone Interview with Pascual Dabis, President, *supra* note 126. For example, currently the only private hunting area the O'ahu Pig Hunters Association has unrestricted access through is a rock quarry off of the H-3 Freeway on the windward (north) shore of O'ahu owned by the Queen Emma Estate. *See id.*

[185] *See* Telephone Interview with B. Ka'imiloa Chrisman, M.D., *supra* note 84. Insurance is difficult to obtain because companies "just don't want to write on small liability policies, and if they do, they want top dollar." *Id.*

In any event, these privately implemented measures do not always clear the way for trail use on private lands. For example, the statewide trail and access program, *Na Ala Hele*, has had the power (since its inception in 1988) to defend and indemnify landowners who open their lands for public use by using memoranda of agreement.[186] Many landowners have refused to enter into these types of arrangements with *Na Ala Hele*, however, because they do not have faith that the state will adequately defend them.[187] In addition, the state Legislature must approve all monetary awards going to an injured plaintiff who sues the state and many landowners feel that should the settlement be too large, the Legislature will simply refuse to approve the spending, thereby placing the burden back on the landowner.[188]

If the goal is for landowners to open their lands for public use, the Legislature may need to consider innovative ways to remove disincentives preventing landowners from doing so. While some landowners may want to open their lands to public use, the economic costs of maintaining open lands are high and charging fees for access and use under the HRUS eliminates the landowners legal liability protection. Thus, one way to remove disincentives for public use is to allow fees to be charged under certain conditions.[189] For example, Florida liability law provides continuing protection, even when a fee is charged, provided that the landowner meets certain criteria for wildlife habit management.[190]

If owners incur costs, and recreational users reap the benefits, perhaps there should be a way for the users to repay the owners. The Legislature could set a maximum dollar amount that a landowner could receive in a given period of time for the use of the land without losing the protection of the statute.[191] Wisconsin, for example, has a $500 per year cap on what a landowner may receive for the use of the property and still retain the protection of the statute.[192]

Further, the 1986 President's Commission on Americans Outdoors found that, often, landowners do not even recognize the potential value of their land

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[186] *See* HAW. REV. STAT. § 198D-7.5(a) (1998). "Agreements between the State and an owner may provide that the State will defend the owner from claims made against the owner by public user's of the owner's land. These agreements may also provide that the State will indemnify the owner for losses incurred due to public use." *Id.*

[187] *See* Interview with Curt Cottrell, Director of *Na Ala Hele*, in Honolulu, Haw. (Feb. 17, 1999).

[188] *See id. See also* HAW. REV. STAT. § 198D-7.5(c) (1998) "If the agreement provides for indemnification by the State, no judgment shall be executed against an owner until the legislature has reviewed and approved the judgment.").

[189] *See* PRESIDENT'S COMM'N ON AMS. OUTDOORS *supra* note 54, at 151.

[190] *See id.* at 150.

[191] *See* Burkhardt, *supra* note 152.

[192] *See id.*

for recreational use.[193] The Commission asserted that in times of economic pressure for agricultural uses, recreation may offer a way for private landowners to remain economically viable.[194] This is especially important in Hawai'i where there is an abundance of agricultural land that lies fallow since the exodus of the sugar and pineapple industries from the islands.[195] As landowners search for viable uses for this land, "eco-tourism" is becoming a much talked about alternative that would also help boost the state's sagging tourist economy.[196] The charge exception to the HRUS, however, may inhibit private landowners from even considering these alternatives.

Perhaps a statewide council of private landowners and recreational users could be created to define mutual goals for conservation of private resources, enhancement of recreational access, and monitoring conditions of use. Replacing the current fragmented attempts to expand recreational lands with a council of landowners and users would stimulate dialogue, provide a forum to voice concerns, and conceivably prevent unnecessary closures.[197]

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[193] *See* PRESIDENT'S COMM'N ON AMS. OUTDOORS, *supra* note 54, at 152.

[194] *See id.*

[195] *See* DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 12 (1994):

> [T]he growing of sugar cane and pineapple on plantation-sized acreage is in steep decline, and it may become precipitous in the near future. Increased outside agricultural competition, coupled with Hawai'i's relatively high wage scales, cost of living (particularly housing), and value of agricultural lands has driven thousands upon thousands of acres out of agricultural production over the past ten years.

Id.

[196] *See* Interview with Curt Cottrell, *supra* note 187. In fact, in October 1998, the Department of Land and Natural Resources, through the *Na Ala Hele* program, announced guidelines for a one year pilot project for recreational and commercial use of public hiking trails and to facilitate the development of ecotourism. *See* DEPARTMENT OF BUSINESS AND ECONOMIC DEVELOPMENT, ANNUAL REPORT: REPOSITIONING HAWAII'S VISITOR INDUSTRY PRODUCTS 34 (1998) [hereinafter 1998 DBEDT ANNUAL REPORT]. The project establishes a permitting process for tour operators which regulates the use of trails and the number of groups and persons allowed. *See id.*

[197] *See* TORT LAW STUDY GROUP: REPORT TO THE 1999 SESSION OF THE HAWAI'I STATE LEGISLATURE PURSUANT TO S.C.R. 256, H.D.1 (1997). The use of alternative dispute resolution techniques (i.e., mandatory settlement conferences, mediation, arbitration) might be one way to avoid costly litigation and yet provide a forum for recreational use plaintiffs should they be injured on private land. *See id.* at 164. A very high percentage of tort claims are already settled by voluntary settlement rather than by the judicial system. *See id.* Further, the alternative dispute resolution system is usually much less expensive than litigation and tends to result in a mutually agreeable resolution of a matter. *See id.*

C. The "House Guest" Exception

Hawai'i appears to be the only state in the country that has enacted a "house guest" exception in its recreational use statute.[198] The house guest exception imposes liability "[F]or injuries suffered by a house guest while on the owner's premises, even though the injuries were incurred by the house guest while engaged in one or more of the activities designated in section 520-2 [definition of recreational purpose]."[199] The rationale that owners probably "do not refrain from opening their land from fear of suits by social guests" was behind the exception's enactment.[200] Thus, landowners are liable for the injury suffered by a house guest, while the guest is engaging in a recreational activity, even if free of charge, and even if the injury was caused without the wilful conduct of the landowners.[201] In any event, homeowners' insurance policies generally would indemnify the owners should such lawsuits arise.[202]

V. THE DEFINITION OF "RECREATIONAL PURPOSE"

The HRUS applies to landowners who open their lands for a "recreational purpose."[203] Recreational purpose, as defined by HRUS, "includes but is not limited to any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites."[204] Notwithstanding this detailed definition, actual application of the statute remains unpredictable because it has not been tested in state court.[205]

Nationwide, the primary reason landowners fail to take advantage of the immunity afforded by recreational use statutes is a function of the way the statutes are applied by the courts.[206] In order to claim the protection of the statutes, an owner must wait until an injured person sues and then raise the defense of the statute, running the risk of incurring litigation expense before any determination is made by the court.[207] At present, there is no method for the owner to receive a conclusive decision as to whether the statute applies to

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198 *See* Memorandum from Richard Stone, *supra* note 117, at 33.

199 HAW. REV. STAT. § 520-5(3) (1998).

200 Memorandum from Richard Stone, *supra* note 117, at 33.

201 *See* ATTORNEY GENERAL, REPORT TO THE LEGISLATURE REGARDING SENATE CONCURRENT RESOLUTION NO. 239, *supra* note 59, at 12.

202 *See* Memorandum from Richard Stone, *supra* note 117, at 33.

203 HAW. REV. STAT. § 520-2 (1998).

204 *Id.*

205 *See* Telephone Interview with Benjamin Kudo, *supra* note 12.

206 *See* Goldstein, *supra* note 144, at 8.

207 *See* FLINK & SEARNS, *supra* note 127, at 285.

his or her land at the time he or she is considering whether to allow access to the land.[208] This is because the statute's applicability depends somewhat on the user, not the land per se.[209] Thus, an advance determination may not be possible.

However, one federal court decision, *Howard v. United States*,[210] from the District Court for the District of Hawai'i, focuses upon the landowner's intent for the use of the land, instead of the plaintiff's subjective reason for being there.[211] In that case plaintiff, a military wife, was injured by a floating boat dock while taking a sailing course offered on Hickam Air Force Base ("Hickam").[212] She tried to avoid application of the HRUS by arguing that, because she took the course to further her professional goals, she was on the premises for a business purpose and not a recreational one.[213] Hickam made its marina facilities available to U.S. Sailing, a private business entity that charged for the sailing classes.[214] Hickam holds its lands open to the military public, however, without charge.[215] In an opinion by Judge David A. Ezra, the court, after finding for the United States, declared that courts should not look to the subjective intent of the tort victim to determine whether to hold the landowner liable, but should instead focus upon the landowner's intent for the use of the land.[216]

It is very difficult for a private landowner to govern who goes onto their property and to monitor whether a person is there for a recreational purpose.[217] In *Howard*, the court declared:

> A focus upon the subjective intent of the person entering onto the land would cause the landowner's duty of care to vary depending upon a person's motivation at any given moment. If landowners were required to screen each individual entering the property to ensure that the person had the proper recreational purpose so that the HRUS applied, landowners would not open their property to the public at all, thus defeating the purpose of the statute.[218]

Federal decisions also indicate a willingness to apply the HRUS when the activity is sufficiently similar to a recreational purpose to fall under the

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[208] *See id.*

[209] *See id.*

[210] No. 95-00642, 1997 WL 1119274 (D. Haw. Jan. 3, 1997).

[211] *See id.* at *10.

[212] *See id.* at *2.

[213] *See id.* at *9.

[214] *See id.* at *3.

[215] *See id.*

[216] *See id.* at *10.

[217] *See* Telephone Interview with Benjamin Kudo, *supra* note 12.

[218] *See Howard*, 1997 WL1119274 at *10.

statute's umbrella.[219] For example, in *Palmer v. United States*,[220] a grandfather fell on pool stairs while chaperoning his grandchildren swimming at Tripler Army Medical Center ("TAMC") swimming pool.[221] The grandfather was not allowed to use the pool because he was not an employee.[222] He was, however, allowed to enter the facility at no charge to accompany his grandchildren, whose mother worked at TAMC.[223] Chief Judge Harold M. Fong, writing for the district court entered judgment for the United States, finding that the HRUS applies where a visitor combines a recreational purpose with a nonrecreational purpose.[224] The Ninth Circuit Court of Appeal, in upholding the lower court's decision, stated that the grandfather's behavior was consistent with relaxation and recreation and concluded that he was involved in a recreational activity.[225]

In some states with statutes similar to the HRUS, uncertainty over the definition of recreational purpose has resulted in express statutory provisions attempting to cover every conceivable recreational use imaginable.[226] In other states, there are statutes with very broad definitions of recreational purpose, such as in Wisconsin where "recreational activity" is defined as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure including practice or instruction in any such activity."[227]

In Hawai'i the phrase "not limited to" that is included under the HRUS may provide some level of comfort to landowners, especially if the list of activities is expanded while the "not limited to" phrasing is maintained.[228] Despite helpful statutory language and favorable federal decisions, however, when making the decision about opening their land to public use, landowners continue to feel that the HRUS has relatively limited usefulness because there are no state court decisions interpreting this "recreational purpose."[229]

Perhaps along with a clear definition of recreational purpose, the HRUS should include language addressing the responsibilities of the recreational user. For example, language from Montana's snowmobiler's statute reads, in part:

> A snowmobiler shall accept all legal responsibility for injury or damage of any kind to the extent that the injury or damage results from risks inherent in the

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[219] *See* Palmer v. United States, 945 F.2d. 1134 (9th Cir. 1991), *aff'g* 742 F. Supp. 1068. (D. Haw. 1990).

[220] 945 F.2d 1134 (9th Cir. 1991), *aff'g* 742 F. Supp. 1068 (D. Haw. 1990).

[221] *See id.*

[222] *See id.*

[223] *See id.*

[224] *See* Palmer v. United States, 742 F. Supp. 1068, 1071 (D. Haw. 1990).

[225] *See Palmer*, 945 F.2d at 1137.

[226] *See* Goldstein, *supra* note 144, at 9.

[227] Pendleton, *supra* note 150, at 16.

[228] *See* Memorandum from Richard Stone, *supra* note 117, at 22.

[229] *See* Telephone Interview with Jim Mee, *supra* note 115.

> sport of snowmobiling and has the duty to regulate conduct at all times so that injury to self or other persons or property that results from the risks inherent in the sport of snowmobiling is avoided.[230]

The underlying policy of such language encourages user responsibility which in turn may make landowners more comfortable in opening their land to the public.[231] Moreover, such language further supports the goal of the HRUS which is to increase land available for public use without increasing landowner liability.

VI. THE TROUBLE WITH "LAND"

Land classification is a notorious problem with recreational use statutes in most states.[232] Under the HRUS, "'[l]and' means land, roads, water, water courses, private ways and buildings, structures, machinery or equipment when attached to realty, other than lands owned by the government."[233]

A. What is Encompassed in the Term "Land" Under the HRUS?

Federal interpretation of the term "land" has been very favorable for landowners. Once again, however, the fact that the HRUS has never been tested in state court affects the analysis of the provisions of the statute. Looking to Hawai'i federal district court opinions in analyzing the definition of "land" is helpful but it must be remembered that the state courts are not bound by federal court decisions.[234]

In 1976, one of the earliest federal decisions in Hawai'i to apply the HRUS involved a plaintiff skydiver who fell into power lines erected by Hawai'i Electric Company ("HECO") across lands owned by Mokuleia Associates.[235] The plaintiff filed a complaint against HECO and other codefendants for the injuries she sustained by parachuting into an 11.5 KV power line.[236] HECO argued that an owner of an easement in gross was tantamount to the owner of land vis-a-vis a third party and should enjoy the rights and privileges of a

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[230] MONT. CODE ANN. § 23-2-654 (1997).

[231] *See* Burhardt, *supra* note 152.

[232] *See generally* Goldstein, *supra* note 144 at 9 (explaining that confusing precedent has developed concerning the types of land that are covered by recreational use statutes); Pendleton, *supra* note 150, at 14; Michael D. Lee, *The Protection of Children After* Ornelas v. Randolph: *A Proposed Amendment to California's Recreational Use Statute*, 25 PAC. L.J. 1131 (1994) and Thompson & Dettmer, *supra* note 34, at 726.

[233] HAW. REV. STAT. § 520-2 (1998).

[234] *See* Ides, *supra* note 95, at 20.

[235] *See* Brief for Defendant at 141, Dilorati v. Haas, Civil No. 73-3829 (D. Haw. 1975).

[236] *See id.*

landowner against third parties.[237] Hence, HECO contended, the provisions of the HRUS statutorily removed any duty on the part of HECO to keep its premises (poles and lines) safe for entry or use for recreational purposes.[238] Judge Nang of the District Court for the District of Hawai'i granted HECO's motion for summary judgment.[239] Thus, Hawai'i's federal courts has interpreted easements in gross to be included in the definition of "land" under the HRUS. Similarly, prescriptive easements have been interpreted by Hawai'i federal courts to be "land" to which the HRUS would be applicable if it were being used for recreational purposes.[240]

In a 1986 federal decision, *Viess v. Sea Enterprises, Corp.*,[241] Judge Martin Pence ruled that the HRUS relieved the owner of shoreline property above the high water mark from liability for injuries sustained by a swimmer using a "boogie board" in ocean waters where the owner imposed no charge upon the swimmer for access to the beach.[242] The court declared that, "it would be 'preposterous' to hold a landowner liable for injuries to anyone using the beach and ocean in front of their land, an area solely owned and controlled by the state and county, when under chapter 520, if they had owned and controlled that beach and water they would have no liability at all."[243] The court felt that the legislative intent was to relieve landowners from the obligation to constantly monitor anyone using beaches or ocean in front of their property.[244]

However, in an unreported Hawai'i circuit court case, *Chase v. State*,[245] a tourist family stopped to picnic and body surf in front of Whaler-on-Kaanapali-Beach-Condominium (the "Whaler") property on Maui, claiming that they were invited by the scenic beauty of the property, the nautical appeal of the Whaler's blue sailed catamaran, and the proximity of the Whaler's

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[237] *See id.* at 155.

[238] *See id.*

[239] *See id.* at 156 (Sept. 17, 1975 order granting summary judgment). Additionally, it is interesting that the plaintiff's attorney, under F.R.C.P. Rule 11, had to pay costs and $500 to the defendant property holders for filing a frivolous action. *See* Veiss v. Sea Enters. Corp., 634 F. Supp. 226, 228 n.2 (D. Haw. 1986).

[240] *See, e.g.*, Jones v. Halekulani Hotel, 557 F. 2d 1308 (9th Cir. 1977). In *Jones*, a minor dove from a sea wall on the Halekulani Hotel property into shallow water, fracturing his neck, and rendering him a quadriplegic. Since the sea wall had been used by the public as a walkway from 1917 to 1972, when the accident occurred, the hotel argued that an easement by prescription existed and the HRUS should apply. The hotel was granted summary judgment.

[241] 634 F. Supp. 226 (D. Haw. 1986).

[242] *See id.* at 228.

[243] *Id.* at 229.

[244] *See id.* at 231.

[245] *3 Personal Injury Judgments Hawai'i (Advocates Research Co.)*, at p. 1-4-90 (1989-1990).

nearby showers.[246] The husband was severely injured by a breaking wave and sought compensation for his injuries from the Whaler.[247] Whaler attempted to use the HRUS as a defense to the lawsuit.[248] Whaler denied liability, contending, among other things, that as a private owner, they had no duty to warn plaintiffs of a dangerous condition on the adjoining state beach and ocean, but if they were found to be in control of the state owned beach, that they should then be entitled to immunity under chapter 520.[249] State Circuit Court Judge Richard Komo denied Whaler's motion for summary judgment under chapter 520, and refused to give jury instructions offered by Whaler on HRUS immunity.[250] Plaintiff was awarded $440,000 in punitive damages in addition to past and future medical expenses, past and future wage loss, general damages, and damages to plaintiff's wife for loss of consortium.[251]

This decision may indicate that state courts are less sympathetic than the Hawai'i federal courts to landowner concerns. Hawai'i's courts, however, do support public access to the state's resources as a priority right.[252] From this, one would think that, in the *Whaler* case the landowner should have been allowed to use the HRUS as a defense so as not to place a "chilling effect" on landowners providing more access to members of the public.[253] On the other hand, in another unreported state circuit court resort case, the Napili Shores Apartments on Maui argued that it was not liable for a slip and fall accident in which plaintiff fractured his back.[254] Napili Shores contended that the path plaintiff was using when he fell was outside their property line and that they did not maintain or control it.[255] Napili Shores filed a motion for summary judgment on the grounds of no duty to warn and/or if it was conferred the status of property owners, it had no liability under chapter 520.[256] The court granted the motion.[257]

Thus, while the federal cases are somewhat illustrative, this brief sampling of state circuit court decisions illuminates the difficulty in predicting with any consistency how the state courts will interpret the statute. Unfortunately, this

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[246] *See id.*

[247] *See id.*

[248] *See id.*

[249] *See id.*

[250] *See id.*

[251] *See id.*

[252] *See* Interview with Benjamin Kudo, *supra* note 103.

[253] *Id.*

[254] *See* Mister v. Napili Point I Ass'n of Apartment Owners, *in 6 Personal Injury Judgments Hawai'i (Advocates Research Co.)*, at p. 11-9-96(a) (1995-1996).

[255] *See id.*

[256] *See id.*

[257] *See id.*

sort of ambiguity will continue to cause landowners to doubt the strength of the immunity that the HRUS can provide.

B. The Types of Lands Covered by the HRUS

Each state varies in its interpretation of how broad its recreational use statute will go with respect to what constitutes "premises" covered by the statute. Some states will follow closely the intent of the statute and include only those lands amenable to recreational use.[258] For example, under Louisiana's recreational use statute, the land must be undeveloped, nonresidential rural, or semi-rural land area in order to fall within the protection of the statute.[259] This rationale recognizes the difficulties inherent in supervising remote lands having recreational value, deeming that recreational use statutes were never meant to apply to lands that are susceptible to supervision.[260] Other states make a much broader interpretation and only consider whether a recreational activity had taken place on the land, regardless of how suitable the land was for recreational use.

1. Urban versus rural lands under the HRUS

The HRUS makes no distinction between improved and unimproved land, large or small parcels, or rural and urban recreational areas, therefore providing broad protection to landowners.[261] While the recreational activities listed in the HRUS tend to be those enjoyed in a more rural setting, the list is expressly noninclusive and includes activities that can be performed in urbanized settings, such as fishing and swimming.[262] Further, the HRUS' definition of land includes improvements to realty such as buildings and other structures.[263]

The type of lands covered by the HRUS, while broad, is thus left open to court interpretation and, similar to other parts of the statute previously

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[258] *See* Burkhardt, *supra* note 152.

[259] *See* Keelen v. State of Louisiana, 463 So. 2d 1287, 1290 (1985). Note that the 9th Circuit Court of Appeals, in upholding the District Court for the District of Hawai'i's opinion in *Palmer v. United States*, expressly declined to follow this Louisiana Supreme Court decision, holding that the Louisiana recreational use statute did not confer immunity for drowning in a swimming pool at a state park. *See Palmer*, 945 F.2d at 1136.

[260] *See, e.g.*, Tijerina v. Cornelius Christian Church, 539 P.2d 634, 637 (Ore. 1975). In *Tijerina*, the Oregon Supreme Court concluded that land classifications were to encompass only "landholdings which tend to have recreational value [but which are not] susceptible to adequate policing or correction of dangerous conditions." *Id.*

[261] *See* HAW. REV. STAT. § 520-2 (1998).

[262] *See id.*

[263] *See id.*

addressed, has implications for how the statute might be analyzed in the state courts. While courts in other states have looked at such factors as the amount of land owned by the defendant, the arrangement of land and its improvements, and the relative proximity of the land to a population center in analyzing the landowner's ability to maintain safe conditions on the property, it is difficult to apply these concepts directly to Hawai'i, given the unique nature of an island state.[264] Once again, Hawai'i courts have not ruled specifically on this issue, but the federal courts have provided a pro-landowner model for how the HRUS might be applied in state court.

For example, when a plaintiff tried to argue that the HRUS did not apply to a debris and litter-ridden piece of woods on a military base, Judge Rosenblatt writing for the District Court for the District of Hawai'i found that, "the statute does not create a qualitative factor as to what land can be deemed recreational and what cannot."[265] Further, the court declared, "the statute encompasses any land that is used for recreation rather than what some court may determine is recreational land."[266] Therefore, the court held that the HRUS precluded the defendant United States' liability.[267]

Additionally, in 1991, the Ninth Circuit Court of Appeals upheld a Hawai'i District Court decision when it ruled that the term "premises" as used in the HRUS even applied to urban swimming pools.[268] Because the state courts of Hawai'i had not spoken on the issue, the Ninth Circuit looked first to the language of the statute.[269] Noting that nothing in the statute limited its applicability to rural settings and that the HRUS specifically includes "swimming" as a recreational purpose, the court found that the argument that the HRUS does not apply to urban swimming pools had no support in the statute.[270] The court declared, "We see nothing in the language of Hawaii's statute that makes a distinction between urban and rural lands."[271] The court went on to say in dicta that, if the Legislature wished to deprive urban property holders of qualified immunity, it could have easily done so, noting that it was not the court's role to rewrite the plain language of a state statute.[272]

These decisions indicate that the federal courts broadly interpret the language of the statute. Despite these favorable federal court decisions, however, the fact remains that the statute has never been tested in state

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[264] *See* Barret, *supra* note 36, at 23.

[265] Stout v. United States, 696 F. Supp. 538, 539 (D. Haw. 1987).

[266] *Id.*

[267] *See id.*

[268] *See* Palmer v. United States, 945 F.2d 1134 (9th Cir. 1991), *aff'g* 742 F. Supp. 1068 (D. Haw. 1990).

[269] *See Palmer*, 945 F.2d at 1135.

[270] *See id.* at 1135-36.

[271] *Id.* at 1136.

[272] *See id.*

court.[273] Thus, the possibility of litigation looms large in the mind of private landowners.[274]

To help alleviate landowners' concerns about the uncertainty of state court interpretation of "premises," or indeed any other wording under the HRUS, a legislative intent statement might be included in the statute. Many recreational use statutes contain a legislative intent statement that articulates the underlying policy of encouraging private landowners to open their land to the public for recreational use.[275] The inclusion of a good legislative intent statement gives clear guidance to the courts indicating how the statute should be interpreted in order to honor this policy. Further, the legislative intent statement might include language indicating that, in the event of an ambiguity, the statute should be construed liberally in favor of the landowner if it is likely to promote increased public recreational opportunities.[276] For example, Wisconsin's recreational use statute contains the following language:

> The legislature intends by this act to limit the liability of property owners toward others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit. While it is not possible to specify in a statute every activity which might constitute a recreational activity, this act provides examples of the kinds of activities that are meant to be included, and the legislature intends that, where substantially similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability. The act is intended to overrule any previous Wisconsin supreme court decisions interpreting section 29.68 of the statutes if the decision is more restrictive than or inconsistent with the provisions of this act.[277]

The downside to such a statement of legislative intent is the very broad language in which it is written. This broad language is inconsistent with the detail to which the HRUS goes to define "recreational purpose."[278] It will be recalled that the statutory definition of recreational purpose is a long list of recreational pursuits, a list which, in itself, contains few language ambiguities.[279] Such broad language thus creates a serious potential for injustice because if a court follows the legislative intent statement correctly, it would have to determine whether the recreational activity at issue was

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[273] *See* Interview with Gary Slovin, *supra* note 112.

[274] *See id.*

[275] *See* Burkhardt, *supra* note 152.

[276] *See id.*

[277] Act of May 8, 1984, act 418, 1983 Wis. Laws 1846 (codified at WIS. STAT. §§ 23.115, 778.26, 895.52, 943.13(1) (1983-84)).

[278] *See* HAW. REV. STAT. § 520-2 (1998).

[279] *See id.*

substantially similar to those listed in the statute.[280] This is a superficial inquiry which could lead to wrong results.[281] A more correct inquiry would be whether the activity belongs to the type that the Legislature wants to promote by offering statutory immunity in return for allowing the public to use the land for these limited purposes.[282]

Further, the exemplary statement of legislative intent does not explain clearly the Legislature's goal in enacting recreational use legislation. A phrase explaining that the HRUS is intended to encourage greater public recreational use of private land by offering statutory immunity in return for public access could be useful information to the court.[283] Instead, since courts traditionally have interpreted recreational use legislation strictly against the landowner because it is in derogation of the common law, it is unlikely that courts will go beyond the superficial "recreational purpose" evaluation in order to reach the more principled inquiry of whether granting statutory immunity to the recreational activity at issue actually furthers the policy of the statute.[284] This practice of strict construction coupled with the lack of any explanation of legislative goals in enacting the statute could thus only increase the potential for misapplication of the statute.

2. *Governmental lands*

Because the government owns so much recreational land in the State of Hawai'i, governmental immunity under the HRUS will be briefly addressed. It is, however, beyond the scope of this article to discuss fully the implications for providing governmental immunity under the HRUS.[285]

The federal district courts for the District of Hawai'i have held that the United States, through the FTCA, enjoys immunity under the HRUS in the same manner and to the same extent as a private person.[286] An analogous argument can be made that the State may enjoy the same immunity arising out of a similar provision of the State Tort Liability Act,[287] which waives the State's sovereign immunity and provides that the state will be liable "in the same manner and to the same extent as a private person under similar

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[280] *See* Ford, *supra* note 9, at 504-505.

[281] *See id.*

[282] *See id.*

[283] *See id.* at 505.

[284] *See id.* at 505-06.

[285] *See* Memorandum from Richard Stone to *Na Ala Hele* regarding Government Landowner Liability For Recreational Use Injuries (Sept. 19, 1990) (on file with Curt Cottrell, Program Director, *Na Ala Hele*) for a more complete analysis of the issue.

[286] *See, e.g.*, Proud v. United States, 723 F.2d 705 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

[287] *See* HAW. REV. STAT. §§ 662-2 to -17 (1998).

circumstances."[288] This argument, however, has not yet been tested in or adopted by Hawai'i courts.[289]

One argument against including governmental land under the statute contends that the immunity given by the HRUS derogates common law by reducing the duty of care owed to one who is invited onto private land, and thus, the statute must be construed strictly in accord with its purpose.[290] Federal court decisions for the State of Hawai'i, however, seem to be construing the statute broadly, interpreting the enumeration of specific exclusions within the statute as an indication that the statute applies to all cases not specifically excluded from the statute.[291]

Another argument looks to the legislative history that indicates that the purpose of the 1965 Model Act was to encourage private landowners to provide free access to their lands in exchange for limited liability, in order to meet the growing demand for recreational land, which was not being met by government owned public lands.[292] Absent the exercise of its right of condemnation, the government is powerless to compel private landowners to open their property to recreational use.[293] Thus, according to this rationale, the grant of immunity was never meant to apply to public lands owned by the government that were already used for public recreation but instead, it was the "carrot" that legislators across the country were using to dangle before private landowners to encourage them to grant access to their property for recreational use.[294]

Hawai'i specifically added the exception of government lands when it adopted the 1965 Model Act in 1969.[295] Further, Hawai'i declined to adopt the 1979 Model Act that included governmental entities under its immunity.[296] Had the legislative purpose been the increase of accessibility of publicly owned lands, more direct methods were available.

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[288] *On Beach Safety: Balancing Public Responsibility and Recreation Before the Senate Committee on Judiciary*, 18th Legis., Reg. Sess. (Haw. 1995) (written testimony of Margery Bronster, Attorney General).

[289] *See id.*

[290] *See* Ford, *supra* note 9, at 505.

[291] *See, e.g.*, Palmer v. United States, 742 F. Supp. 1068, 1073 (D. Haw. 1990).

> The Hawai'i Recreational Use Statute is a statutory modification of the common law of torts and does not hold a landowner liable for simple negligence. . . . If the Hawai'i Legislature had wanted to provide for additional exceptions . . . it could have easily expressed such intention. . . . The enumeration of specific exclusions from a statute is an indication that the statute applies to *all* cases not specifically excluded.

Id. (emphasis added).

[292] *See Model Act*, *supra* note 10, at 150.

[293] *See* Thompson & Dettmer, *supra* note 34, at 727.

[294] *See id.*

[295] *See Model Act*, *supra* note 10, at 150.

[296] *See Model Act II*, *supra* note 49, at 107.

Unfortunately, there is very little legislative history available pertaining to the adoption of the HRUS. Other states, however, have declined to adopt governmental immunity because, when a recreational use statute is applied to publicly-owned and administered park areas, the statute clashes with legislative limitations on governmental immunity, applicable for example, to buildings and highways.[297] Furthermore, questions of fish and game licensing and taxes as "charges" present an additional interpretive hurdle if the statute is applied to public lands.[298]

Proponents of the above argument assert that if the Hawai'i state Legislature were to give the state and counties recreational immunity under the HRUS, the state would not take measures to keep the public shorelines and beaches safe.[299] In fact, the government would have no duty to maintain parks, buildings, playgrounds and roads safely if they happen to be used for recreational purposes.[300] If the Legislature does decide to grant recreational immunity to government lands, they urge, it should be clearly distinguished from the recreational use statute.[301]

The arguments for including government lands under the HRUS tend to reflect the growing concern among recreation providers that such a narrow statutory definition of land will discourage projects to provide better access to outdoor recreation facilities.[302] The state trail program, *Na Ala Hele*, believes that more trails could be opened to the public if the definition were expanded to include government lands.[303] The public policy arguments favoring this position include: promotion of economic benefits that result from recreation based tourism, promotion of healthy communities, enhancement of environmental quality, crime prevention, education and cultural enhancement, and a feeling of civic pride and social unity.[304] So far, bills to amend the statute proposing to include government lands have always died in the legislature.

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[297] *See* Thompson & Dettmer, *supra* note 34, at 727.

[298] *Id.*

[299] *See Hearing on H.B. 395 and H.B. 582 Before the Committee on Water and Land Use*, 20th Leg. (Feb. 9, 1999) (statement of Robert Toyofuku, Consumer Advocates of Hawaii).

[300] *See id.*

[301] *See id.* In a later interview conducted with Mr. Toyofuku that same day, he suggested that Act 190, which applies to beach access, might be a possible solution for trails. *See* Interview with Robert S. Toyofuku, *supra* note 153. Act 190 immunizes the counties for liability for beach accidents occurring in ocean waters adjacent to their beach parks when the county has posted appropriate warning signs that have been approved by the State Department of Land and Natural Resources. *See id.*

[302] *See* Interview with Curt Cottrell, *supra* note 187.

[303] *See id.*

[304] *See* PRESIDENT'S COMM'N ON AMS. OUTDOORS, *supra* note 54, at 13-21.

During the 1999 legislative session, several bills were introduced urging the amendment of chapter 520 to include government lands.[305] As in years past, there was a stalemate between those who opposed the amendment based on plaintiffs' rights and those who supported the amendment because it would provide much needed additional recreational areas.[306] A house draft of one of these bills was amended to extend immunity only to unimproved land owned by the state which is specifically used for trails and accesses.[307] Because of strong lobbying efforts by the plaintiff's bar, this compromise bill was passed to amend chapter 198D, pertaining to trails and accesses, instead of as an amendment to the HRUS.[308]

Contention regarding this bill existed, however, centering on language lobbied for by the plaintiffs' bar excluding all commercial uses on these state trails.[309] The opposing sides reached an agreement whereby this language was deleted from the bill.[310] As the state looks more and more to the possibility of eco-tourism as a viable alternative for a floundering tourist economy, this issue is likely to arise again.

VII. CONCLUSION

Thirty years after the adoption of the Hawai'i Recreational Use Statute, with its attendant high hopes of encouraging more private landowners to provide public access to their recreational lands, one thing remains clear – it is doubtful whether the statute has had any effect on landowner behavior in Hawai'i. Despite the fact that there may be other interests, such as privacy or moral concern for injuries to entrants, legal uncertainty remains high and that means that the economic incentives are just not there for landowners to open their lands.

In terms of public policy, the HRUS has yet to prove its wisdom. In one sense, it achieves the departure from the rigidities of common law landowner and occupier liability rules by attempting to distribute responsibility. In another sense, it merely adds another entrant category, the recreational user, to the common law classification scheme.

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[305] *See* S.B. 380, 20th Leg., Reg. Sess. (Haw. 1999); H.B. 395, 20th Leg., Reg. Sess. (Haw. 1999); S.B. 622, 20th Leg., Reg. Sess. (Haw. 1999); H.B. 1705, 20th Leg., Reg. Sess. (Haw. 1999); S.B. 965, 20th Leg., Reg. Sess. (Haw. 1999); H.B. 582, 20th Leg., Reg. Sess. (Haw. 1999).

[306] *See* Interview with Curt Cottrell, *supra* note 187.

[307] *See* H.B. 1587, 20th Leg, Reg. Sess. (Haw. 1999).

[308] *See* Interview with Curt Cottrell, *supra* note 11.

[309] *See id.*

[310] *See id. Na Ala Hele* has, however, begun a one year pilot project establishing guidelines for recreational and *commercial* use of public hiking trails. *See* 1998 DEBEDT ANNUAL REPORT, *supra* note 196, at 33.

While the Hawai'i Legislature may be able to look to how other states have dealt with the ambiguities in their recreational use legislation as models for "tightening up" the ambiguities inherent in the HRUS, the tendencies of a more litigious society, coupled with the uncertainty of state judicial interpretation, will continue to cause landowners in Hawai'i to doubt the protections afforded under the statute until a definitive ruling has been made by the state courts. Until then, many landowners will prefer to take their chances with the common law of trespass rather than open their lands to the public relying on the HRUS should anyone get injured on their property.

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The California Civil Rights Initiative: Why It's Here, Its Far Reaching Effects, and the Unique Situation in Hawai'i

I. INTRODUCTION

For nearly its entire history this country has been in a seemingly constant debate over racial classifications and their significance. Racial classifications can be seen as positive when giving a job to someone "less fortunate" and negative when used by the police for profiling purposes.[1] These same classifications are seen as negative when they keep potential jobs from qualified workers based on their race (i.e., based on their not being members of a "preferred race" or "protected class"), and as positive when they are used to provide equal opportunity.

This comment will analyze both sides of the argument regarding the controversy surrounding race based governmental classifications and explain recent developments in this debate by focusing on California's Proposition 209,[2] commonly referred to as the "California Civil Rights Initiative" ("CCRI").[3] The introduction gives a general overview of the CCRI, and takes a brief look at the surrounding arguments and legislation. Section II explores the question of why the CCRI was initiated, and why it eventually became law. The reasons behind the enactment of the CCRI can best be understood by considering what the people of California were trying to achieve, and what court rulings (nationally, as well as in California) led up to the people's decision to amend the California Constitution. Section III analyzes what the CCRI is, addressing its requirements while considering some common misconceptions relative to the CCRI. This section also discusses the current perspective of California and the nation with regard to the CCRI, as well as racial classifications generally.

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[1] *See Scoring Points*, WALL ST. J., Sept. 10, 1999, at W1 (discussing an "affirmative action" style program to be used in the SAT exams, and inquiring as to why "racial and class profiles that are considered an outrage when used by New Jersey state troopers become respectable when dressed up by the ETS?"). The ETS is the Educational Testing Service, the organization that is in charge of creating and organizing the SAT.

[2] *See* CAL. CONST. art I, § 31.

[3] Proposition 209 is also referred to as "Prop 209", and less frequently, "the initiative" and "section 31". This is because it was raised as a proposition, by initiative, and became an amendment to the California Constitution as article I, section 31. As a result, the term used for this section of the California Constitution changes depending upon the speaker or writer. For purposes of this paper, it will be referred to as the California Civil Rights Initiative ("CCRI"), however each opinion and article may use any one of the terms listed in this footnote. They all refer to the same text, section 31 of the California Constitution.

Section IV looks ahead and explores the direction in which the United States' law is moving with respect to racial classifications. This section discusses current national trends, with an analysis of potential effects on Hawai'i. This analysis must necessarily be individualized with respect to Hawai'i, because of its diverse ethnic community and unique political history. Section V presents a conclusion, and a brief look at the future regarding the state of racial classifications.

A majority of the California electorate passed the CCRI[4] on November 5, 1996.[5] The CCRI was passed by "a margin of 54 to 46 percent; of nearly 9 million Californians casting ballots, 4,736,180 voted in favor of the initiative and 3,986,196 voted against it".[6] The CCRI provides in relevant part:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[7]

There was no controversy surrounding the first part of the Proposition, that the state "shall not discriminate [on the basis of] race, sex, color, ethnicity, or national origin . . . ."[8] The controversy began regarding the second part of the Proposition, which bans "preferential treatment [given] to any individual or group on the basis of race, sex, color, ethnicity, or national origin . . . ."[9]

Groups on both sides of the issue presented well thought out arguments, the main points of which were included in the Ballot Pamphlet.[10] The Ballot Pamphlet was available to the California voters, and provided information both in support of, and in opposition to the Proposition, in order to enable the voters to make an informed decision. Supporters of the Proposition stated:

> Instead of equality, governments imposed quotas, preferences and set-asides. . . . 'REVERSE DISCRIMINATION' BASED ON RACE OR GENDER IS JUST PLAIN WRONG! . . . Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination! . . . The only honest and effective way to address inequality of opportunity is by making sure that all

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[4] CAL. CONST. art. I, § 31.

[5] *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997), *amended and superseded on denial of reh'g*, 122 F.3d 692, 697 (9th Cir. 1997).

[6] *Coalition for Econ. Equity*, 122 F.3d at 697.

[7] CAL. CONST. art. I, § 31(a).

[8] *Id.*

[9] *Id.*

[10] *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1393 (1997) (citing California Ballot Pamphlet: General Election 30 (1996)).

> California children are provided with the tools to compete in our society. And then let them succeed on a fair, color-blind, race-blind, gender-blind basis.[11]

Opponents of the Proposition stated:

> PROPOSITION 209 GOES TOO FAR. The initiative's language is so broad and misleading that it eliminates equal opportunity programs. . . . PROPOSITION 209 CREATES MORE DIVISION IN OUR COMMUNITIES. It is time to put an end to politicians trying to divide our communities for their own political gain. 'The initiative is a misguided effort that takes California down the road of division . . . it pits communities against communities and individuals against each other.'[12]

In response to the CCRI, the California Senate attempted to pass "softening" legislation in order to lessen the effects of the initiative that the California electorate voted into law.[13] The most recent bill in this series of legislation was enacted on July 19, 1999. That bill stated in part:

> [The CCRI's ban on preferential treatment] does not prevent governmental agencies from engaging in public sector outreach programs that may include focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions or in an educational institution.[14]

Although the Governor vetoed this bill, its contents and potential effects must be kept in mind when considering possible future changes. If the Governor should decide to sign a similar bill, or the senate passes the bill again under a different administration, there may yet be further changes to section 31 of the California Constitution.

II. WHY DID CALIFORNIA AMEND ITS CONSTITUTION?

A. National Case Law Prior to 1996

In order to understand why we have governmental racial classifications in place today, it is necessary to look at this country's history. Only by understanding where we have been, can we clearly see where we are going. National case law on the subject of racial classifications and preferences is extensive. Therefore, this comment primarily addresses the major United States Supreme Court opinions, with some illustrations of state and district case law on the subject.

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[11] *Id.* at 1397-99.

[12] *Id.* at 1400-02.

[13] *See generally* CONF. COMM. REP. NO. 44, Reg. Sess. (1999).

[14] 1999 BILL TEXT CA S.B. 44.

Beginning with the 1954 decision in *Brown v. Board of Education,*[15] the United States Supreme Court took its first step toward ending racial segregation. In *Brown*, the Court held that "separate but equal" was not appropriate or even possible in public education, due to potential stigmatization inherent in racial classifications.[16] The *Brown* decision effectively overruled *Plessy v. Ferguson,*[17] which had upheld racial segregation on trains, holding that such classifications were permissible as long as the accommodations were separate but equal.[18]

1. Regents of the University of California v. Bakke[19]

The problem of segregation still exists despite early litigation aimed at desegregating society. Today, despite *Brown*, people are still grouped together by racial distinctions. Some commentators argue that affirmative action policies, originally implemented to erase "badges of slavery"[20] only serve to perpetuate those badges and racial distinctions.[21] Others argue that affirmative action programs are the only way to free American society from such distinctions.[22] These differences of opinion are reflected in the vast array of decisions relating to the subject of racial classifications, and in the fervent dissents in some of those cases.[23]

The decision in *Bakke* is generally recognized as the beginning of the "limitations" imposed on affirmative action programs, and racial preferences.[24]

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[15] 347 U.S. 483 (1954) (overruling "separate but equal" standard for public schools). This was only the beginning, as most states ignored the mandate to end separate schools, and the problem of racial segregation was left to further (and extensive) litigation to correct the segregation and discrimination that continued even after this ruling. *See id.*

[16] *See id.*

[17] 163 U.S. 537 (1896).

[18] *See id.* (ruling that separate train cars for blacks and whites are acceptable as long as equal train service was provided to each). In that case, the segregation of a man 7/8 white and 1/8 black to a separate train car reserved for black people was held to be constitutional. *See id.*

[19] 438 U.S. 265 (1978) (plurality opinion).

[20] *See generally* The Civil Rights Cases, 109 U.S. 3 (1883) (badges of slavery are those incidents of discrimination, that arise from an attitude that one race is better than another).

[21] *See* Walter E. Williams, *False Civil Rights Vision and Contempt for Rule of Law*, 79 GEO. L.J. 1777 (1991). *See also* Walter E. Williams, *The False Civil Rights Vision*, 21 GA. L. REV. 1119 (1987) [hereinafter *False Civil Rights Vision*].

[22] *See* discussion *infra* section II.B.2.

[23] *See* Price v. Civil Service Comm'n, 604 P.2d 1365, 1383 (Cal. 1980) (Mosk, J., dissenting); DeRonde v. Regents of the Univ. of Cal., 625 P.2d 220 (Cal. 1981) (Mosk, J., dissenting).

[24] *See Bakke*, 438 U.S. 265 (1978) (plurality opinion) (ruling, in an extremely divided court, that (as expressed in Justice Powell's opinion) racial classifications are subject to strict scrutiny). There was no majority opinion in this case. Justice Powell's opinion was adopted as the Court's majority opinion. Justices White, Marshall, and Blackmun filed a separate

In *Bakke*, the plaintiff, who was white, sued the University alleging that the school's special admissions program[25] violated the Equal Protection Clause of the Fourteenth Amendment,[26] article 1, section 21 of the California Constitution,[27] and Section 601 of Title VI of the Civil Rights Act of 1964.[28] The parties disagreed as to whether the classification in the case was a "quota" or a "goal."[29] The Court stated that because both quotas and goals are lines drawn on the basis of race and ethnicity, the issue was reviewable under the Fourteenth Amendment, which extends to all persons, regardless of race.[30]

The Court ruled that in order to justify a racially suspect classification, the state must show "that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest."[31] In analyzing these factors, the Court held that the purposes and interests were substantial enough to support the classification.[32] The Court found that when the "State's distribution of benefits or imposition of burdens hinges on

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opinion concurring in part and dissenting in part. *See id.* at 324. Justice Stevens wrote a separate opinion in which Chief Justice Burger and Justices Stewart and Rehnquist joined. *See id.* at 324. Justices White, *See id.* at 379, Marshall, *See id.* at 387, and Blackmun, *See id.* at 402, each filed separate opinions. For a general explanation of the opinions, explaining who concurred and dissented regarding each issue, see generally, 8 WITKIN, SUMMARY OF CAL. LAW, *Const. Law* §779 (9th ed. 1988) (setting forth, in summary form, the complex maze of dissents and concurrences in the plurality opinion in *Bakke*).

[25] *See Bakke*, 438 U.S. at 272-76 (plurality opinion). The special admissions program required the school to consider whether the student met certain qualifications, which included economic disadvantage, educational disadvantage, and membership in a minority group. *See id.* If these criteria were met, the students' applications were separated from the others. *See id.* These students did not have to meet the 2.5 Grade Point Average ("GPA") cutoff that was required of other students. *See id.* The "special" applicants were not compared to the other applicants. *See id.*

[26] U.S. CONST. amend. XIV, § 1.

[27] CAL. CONST. art. I, § 21 (stating that special privileges and immunities shall not be granted which cannot be revoked by the legislature, and that no citizen shall be granted privileges or immunities that do not apply to all citizens).

[28] *See* 42 U.S.C. §2000d (stating that no person shall, on the basis of race, color, or national origin, be excluded from participation in, or denied the benefits of, or subjected to discrimination in any program or activity that receives federal financial assistance).

[29] *Bakke*, 438 U.S. at 288-89 (plurality opinion).

[30] *See id.* at 288.

[31] *Id.* at 305 (citations and internal marks omitted).

[32] As advanced by the parties, and enumerated by the Court, these purposes are:

> (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession . . . ; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Id. at 205-06 (internal marks omitted).

ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest."[33] The Court then determined that Bakke had failed to carry this burden.[34]

The United States Supreme Court reversed the decision of the Supreme Court of California and held that the school was not bound to admit Bakke, and the school was no longer enjoined from using any racial considerations in the admissions process.[35]

Since *Bakke*, the court has decided a series of cases which require increasingly narrower tailoring and stricter scrutiny of racial classifications.[36]

2. Wygant v. Jackson Board of Education[37]

Wygant involved a Fourteenth Amendment claim brought by a group of nonminority schoolteachers against their school board, alleging that they had been discriminated against because they were not given the same protection from layoffs as the minority teachers.[38] The United States Supreme Court reviewed the lower court's determination that the classification was justified by the need for minority role models. The Supreme Court reasoned that general societal discrimination was not enough to justify a racial classification, and stated that in order to justify such a classification, there must be evidence of actual discrimination.[39] The Court also stated that there was no logical ending point to the role model theory, which states that it is important to have minority teachers to serve as role models for minority students.[40] The Court also found that the role model theory bore no relationship to the harm caused

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[33] *Id.* at 320.

[34] *See id.*

[35] *See id.*

[36] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1985) (plurality opinion); City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989) (plurality opinion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[37] 476 U.S. 267 (1985) (plurality opinion).

[38] *See id.* at 270 (plurality opinion). The allegedly discriminatory policy stated that:

> In the event that it becomes necessary to reduce the number of teachers through layoff, . . . teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated.

Id.

[39] *See id.* at 276. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.*

[40] *See* discussion *infra* note 121 and accompanying text.

by prior discriminatory practices.[41] The Court expressed concern, because this same theory could be used to limit, as well as increase, the number of minority teachers.[42]

The Supreme Court held that in order for a governmental racial classification to be justified, it must have been instituted in order to correct actual present discrimination, and not just to remedy societal discrimination as a whole.[43]

3. City of Richmond v. J.A. Croson Company[44]

In *Croson*, the plaintiff alleged that a city ordinance requiring thirty percent minority representation in all construction contracts was unconstitutional on its face. That ordinance required "prime contractors to whom the city awarded construction contracts to subcontract at least one Minority Business Enterprise ("MBE")."[45] Plaintiff Croson was unable to find a MBE which could supply

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[41] *See id.*

[42] *See id.*

[43] *See id.* Justices O'Connor and White each filed concurring opinions, Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined, and Justice Stevens filed a dissenting opinion. *See id.* at 267. *See also supra* note 39 and accompanying text. Justice O'Connor emphasized that strict scrutiny should be applied to all racial classifications, and that:

> [t]he disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the *availability* of minorities in the *relevant labor pool* substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment.

Id. at 294 (O'Connor, J., concurring) (emphasis added). Justice White's concurrence expressed his view that none of the interests asserted by the board were enough to justify the racial classifications in the layoff policy. He emphasized that he could not "believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force." *Id.* at 295 (White, J., concurring). In this opinion, Justice White did not go so far as to say that we should not consider race at all, but concludes that a classification based solely on race is not constitutionally justified. *See id.* (White, J., concurring). Justice Marshall read the Court's decisions as sustaining affirmative action from attack, and concluded that protection from layoff is a permissible reason for preserving minority proportions at the school. *See id.* at 302 (Marshall, J., concurring). Justice Stevens reasoned that while the Equal Protection Clause provides an absolute bar to the use of race in many governmental contexts, race is not always an irrelevant factor in governmental decision making. *See id.* at 313-14 (Stevens, J., dissenting).

[44] 488 U.S. 469 (1989) (plurality opinion).

[45] *Id.* at 477-78. Under this plan, a MBE was defined as a business that was at least 51% minority owned and controlled. In order to fulfill the 30% requirement in this project, a minority contractor would have had to supply the fixtures, which made up 75% of the contract. *See id.* at 478, 482.

a bid that would fit within the price range of the bid Croson had submitted.[46] Croson applied to the city for 1) waiver of the requirement, or 2) permission to raise the contract price, since the only available MBE's price was substantially higher than any other contractor's.[47] These requests were denied, and the city decided to re-bid the project.[48] Croson subsequently brought suit against the city.

The Supreme Court in *Croson* applied the "strict scrutiny" standard,[49] holding that it must be applied to action by State and local governments.[50] The Court stated that the city did not show a compelling governmental interest in imposing the thirty percent requirement, nor did it show that the requirement was narrowly tailored as the least drastic alternative necessary to remedy the effects of any actual discrimination.[51]

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[46] *See id.* at 482-83.

[47] *See id.* at 483.

[48] *See id.*

[49] Strict scrutiny requires: 1) that the classification be instituted in order to meet a compelling governmental interest, and 2) that it be narrowly tailored (otherwise known as the "least drastic alternative") to meet that purpose. *See id.* at 493-95; Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).

[50] *See Croson*, 488 U.S. at 471-72.

[51] The Court analyzed whether any actual discrimination was being remedied, and found that there was no factual evidence of past discrimination on which to justify a remedy based upon racial classifications. *See id.* Justice Stevens concurred in part and in the judgment, emphasizing that he was not of the opinion that a racial classification should only be used as a remedy for a past wrong, but stated that he did agree with the court's reasoning for why the ordinance would not suffice as a remedy for past discrimination. *See id.* at 511 (Stevens, J., concurring in part and in judgment). Justice Kennedy agreed with the opinion except insofar as it examined the congressional power to grant preferences. *See id.* at 518-20 (Kennedy, J., concurring in part and in judgment). Justice Kennedy stated that "evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action. . . ." *Id.* (Kennedy, J., concurring in part and in judgment). Justice Scalia concurred in the judgment, and emphasized that he agreed with the analysis that strict scrutiny should be applied to all governmentally imposed racial classifications, but disagreed with "O'Connor's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order . . . 'to ameliorate the effects of past discrimination.'" *Id.* at 520 (Scalia, J., concurring in judgment). Justices Marshall, Brennan, and Blackmun dissented in this case, as they did in *Wygant*. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1985) (Marshall, Brennan, Blackmun, JJ., dissenting). The dissenting justices suggested that "intermediate scrutiny" should have been applied, and under that test, the MBE program was valid and constitutional. *See id.* at 295-313 (Marshall, Brennan, Blackmun, JJ., dissenting) (arguing in favor of racial classifications).

4. Adarand Constructors, Inc. v. Pena[52]

Adarand is the controlling law in the nation on the subject of governmental classifications based on race. The Court addressed this issue as it applies to federal action as well as state action. In *Adarand*[53] the Court overruled its holding in *Metro Broadcasting v. FCC*,[54] thus solidifying the strict scrutiny test for all racial classifications. *Metro* held that benign racial classifications were subject to intermediate scrutiny[55] without setting forth "whether a racial classification should be deemed 'benign,' other than to express 'confidence that an examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications.'"[56]

In *Adarand*, the Court was disturbed by *Metro's* departure from precedent, and was perplexed by the lack of a bright line rule by which to determine whether or not a classification is benign.[57] The United States Supreme Court in *Adarand* held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[58]

Separate concurrences were filed by Justices Scalia and Thomas. Justice Thomas emphasized that "there is a 'moral and constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on

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[52] 515 U.S. 200 (1995).

[53] *Id.*

[54] 497 U.S. 547 (1990). *Metro Broadcasting* involved a 5th Amendment claim regarding race-based policies. *See id.* "'[B]enign' federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny." *Adarand*, 515 U.S. at 225 (citing *Metro Broadcasting*, 497 U.S. at 564-65 (alterations in original)).

[55] Intermediate scrutiny requires that the classification be narrowly tailored to meet a legitimate governmental interest. This differs from the strict scrutiny applied by the Court in *Adarand*. *Compare* Metro Broadcasting v. FCC, 497 U.S. 547 (1990) *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[56] *Adarand*, 515 U.S. at 225 (citing *Metro*, 497 U.S. at 564-65).

[57] *See Adarand*, 515 U.S. at 225-27. *See also id.* at 239 (Scalia, J., concurring) (explaining that he concurs with the judgment "except insofar as it may be inconsistent with [his view that] . . . government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."). In *Adarand*, the plaintiff contractor brought suit challenging the validity of a subcontracting clause which encouraged and rewarded preferences given to "socially and economically disadvantaged individuals." *Id.* at 205. In the clause, minority groups were presumed to be economically and socially disadvantaged. As a result, Adarand, who was the low bidder, was not awarded the contract, instead the contract was awarded to Gonzales, who was certified as a disadvantaged business enterprise. *See id.* at 209-10.

[58] *Id.* at 227.

the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[59] Justices Ginsburg, Stevens, Souter, and Breyer all dissented,[60] as they had agreed with the holding in *Metro. Adarand* extended the strict scrutiny test by applying it to federal governmental classifications based on race.[61] Before *Adarand* the Court had only held the strict scrutiny test to apply to state action.[62]

Throughout these cases, the Court has been moving steadily toward the elimination of racial classifications. Even so, the Court appears reluctant to eliminate them entirely as California has done.[63] Instead, the Court has determined that there are times when a racial classification is justified (e.g., remedying present discrimination), but requires those classifications to pass the highest level of judicial scrutiny.

B. National Opinions For and Against Racially Based Preferences and Classifications[64]

The CCRI become popularly known as "California's anti-affirmative action law."[65] In order to have a meaningful discussion on affirmative action, it is

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[59] *Id.* at 240 (Thomas, J., concurring in part and concurring in judgment). Justice Thomas also stated that there are no benign racial categorizations, and suggested that affirmative action programs stigmatize the class that they are to benefit, and provoke resentment among the classes that are excluded by such categorizations. *See id.* at 241 (Thomas, J., concurring in part and concurring in judgment). The concurrence concluded by stating that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." *Id.* at 241 (Thomas, J., concurring in part and concurring in judgment).

[60] *See id.* at 271 (Ginsburg, Breyer, JJ., dissenting).

[61] *See Adarand*, 515 U.S. at 227.

[62] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion); *Adarand*, 515 U.S. at 271 (Ginsburg, Breyer, JJ., dissenting).

[63] *See* CAL. CONST. art. I, § 31. The United States Supreme Court, most likely in an effort to stay away from deciding on the issue of the constitutionality of eliminating all preferences, declined to grant certiorari in the leading case regarding the constitutionality of the CCRI in *Coalition for Economic Equity v. Wilson*, 522 U.S. 963 (1997) (denying certiorari).

[64] In order to utilize a common terminology throughout this comment, and as there exist myriad terms which may be used when referring to one's race/color/national origin, all Caucasians are referred to as "whites" and all African-Americans are referred to as "blacks" herein.

[65] The affirmative action label is the way that the majority of people differentiate between the CCRI and the multitudes of bills and laws being proposed, passed, vetoed, re-proposed, and occasionally, made into law. In order to determine whether this measure is really anti-affirmative action, consider the definitions of affirmative action discussed in this section, as well as the discussion *infra* section III.

important to first have a working definition of the term.[66] Affirmative action has been defined as "public or private actions or programs which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups."[67] "These actions or programs are 'designed to redress past unlawful discrimination, or its present effects against women or racial and ethnic minorities.'"[68]

Professor David B. Oppenheimer[69] divides affirmative action into five models. These are:

> Strict quotas favoring women and minorities (Model I); preference systems in which women or minorities are given some preference over white men (Model II); self-examination plans in which the failure to reach expected goals within expected periods of time triggers self-study, to determine whether discrimination is interfering with a decisionmaking process (Model III); outreach plans in which attempts are made to include more women and minorities within the pool of persons from which selections are made (Model IV); and, affirmative commitments not to discriminate (Model V).[70]

The term affirmative action, for the purposes of this comment, shall include a combination of these models. Affirmative action, as used herein, shall mean programs granting preferential treatment to a person based solely on their race or gender. Unless otherwise so stated, affirmative action in this comment shall not include preferential treatment based on such distinctions as socio-economic or educational factors.

The basic arguments regarding the issue of affirmative action, separated into groups according to those in support of affirmative action, and those in opposition to it, are discussed below.

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[66] The United States Supreme Court points out that:

> [the] concept of 'discrimination,' like the phrase 'equal protection of the laws' is susceptible to varying interpretations, for as Mr. Justice Holmes declared, '[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'

Univ. of Cal. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (plurality opinion) (citing Towne v. Eisner, 245 U.S. 418, 425 (1918) (alterations in original)).

[67] Russell L. Jones, *Affirmative Action: Should We or Shouldn't We?*, 23 S.U. L. REV. 133, 134 (1996) (citing James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment; Economic, Legal, and Political Realities*, 70 IOWA L. REV. 365 (1985)).

[68] Jones, *supra* note 67, at 134 (citing Michael K. Braswell et al., *Affirmative Action: An Assessment of its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365 (1993) (internal quotation marks omitted)).

[69] Professor at Golden Gate University School of Law. *See* Jones, *supra* note 67, at 134.

[70] Jones, *supra* note 67, at 134.

1. The Supporters' Arguments[71]

The arguments for affirmative action are numerous. One argument states that everyone is racist, so programs are necessary to combat our natural tendency to discriminate.[72] Another argument is that preferential treatment is necessary to remedy past and current discrimination.[73] A further argument asserts: "[a]ffirmative action is a vital tool for ensuring that all Californians and all Americans have access to equal opportunities in education, employment, and public contracting."[74] Finally, supporters argue the benefits of diversity in the workplace and in schools outweigh any costs that may exist.[75]

The supporters argue from many different foci. This comment addresses the two main points which are most frequently raised in favor of affirmative action.[76] These are: (1) that such programs are necessary to remedy the effects of past discrimination, and (2) that the benefits of diversity in the workplace and in schools outweigh any potential costs.[77]

The argument that affirmative action is necessary to remedy past discrimination can best be seen in the Supreme Court cases analyzed in this comment.[78]

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[71] *See generally* Jerome Mccristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994) (exploring and analyzing possible reasons why society tries to create a colorblind world, and the feasibility of such a world); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994) (setting out and discussing the different arguments in the affirmative action debate); Michael E. Rosman, *Race-Conscious Admissions in Academia and Race-Neutral Alternatives*, 1-FALL NEXUS: J. OPINION 66 (1996) (analyzing the 'narrow tailoring' aspect of cases that focused on racial preferences); Daniel P. Tokaji, *The Club: Asian Americans and Affirmative Action* 1-FALL NEXUS: J. OPINION 47 (1996) (arguing that Asian Americans should not be used as an example of a minority that rose to success in the American way of life).

[72] *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Lawrence's theory is that everyone is at least unconsciously racist. Lawrence's article began by discussing *Washington v. Davis*, 42 U.S. 229 (1976), in response to the requirement set forth in Davis that there be actual discriminatory intent. *See id.*

[73] *See* Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

[74] Gwendolyn Yip & Karen Narasaki, *Affirming the California Experience with Affirmative Action*, 1-FALL NEXUS: J. OPINION 22, 22 (1996).

[75] *See When Victims Happen to be Black Neoconservatives*, 105 HARV. L. REV. 773 (1992) (book review).

[76] For an analysis supporting affirmative action that addresses the various arguments against affirmative action, see Morrison, *supra* note 71.

[77] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion).

[78] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1985) (plurality opinion); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). *See also* discussion *supra* at section II.A.

The Court has consistently held that one of the requirements of the strict scrutiny test is a compelling state interest in any governmental classifications based on race.[79] This requirement is satisfied if the racially based classification is imposed in order to remedy the effects of actual current discrimination, as opposed to merely remedying the effects of general societal discrimination.[80] However, proponents of affirmative action often argue the need to remedy effects of past general societal discrimination, as well as current discrimination.[81]

Arguing against the possibility of colorblindness, Jerome Mccristal Culp, Jr.[82] claims that "to assume that ignoring race in making social policy will bring about justice or achieve morality is legal fantasy."[83] Mccristal Culp Jr. argues that the colorblind principle advocates "a racialized status quo that leaves black people and other racial minorities in an unequal position."[84] According to one commentator, not only will colorblind remedies fail, but their implementation will "eliminate those programs which are vital to serve compelling interests, like the elimination of past discrimination. . . . Far from ending discrimination, Proposition 209 will perpetuate it."[85]

Another commentator argues for the benefits of a racially diverse work and education environment while discussing the requirement that race neutral remedies be explored before adopting race conscious ones.[86] This argument can be seen in case law as well. For example, in *Bakke*, "Justice Powell asserted that achieving the educational benefits that flow from a diverse student body was a 'compelling' state interest that permitted the Davis Medical

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[79] The strict scrutiny test is to be applied, according to *Adarand*, in federal as well as state cases. *See Adarand*, 515 U.S. at 227.

[80] *See Wygant*, 476 U.S. at 267; *Croson*, 488 U.S. at 471-72; *Adarand*, 515 U.S. at 225. *See* discussions *supra* section II.B, section II.A.2.

[81] *See, e.g.*, Mccristal Culp, Jr., *supra* note 71; Tokaji, *supra* note 71; Williams, *supra* note 73.

[82] Professor of Law and Director of the John M. Olin Program in Law and Economics, Duke University.

[83] Mccristal Culp, Jr., *supra* note 71, at 162-63.

[84] *Id.* at 167. Mccristal Culp, Jr. then explains that "racial status quo" means "the economic reality that African Americans are twice as likely to be unemployed and are more likely to be fired than are white Americans." *Id.* It is apparent that statistics and polls (which are necessarily subjective) and other numerical information seem to be based upon the perspective of the person analyzing the data. *See id.* For statistics showing a contrary view, see generally *False Civil Rights Vision*, *supra* note 21 (arguing that affirmative action adversely affects those it purports to help, and that the state of minorities in this country is not as those supporting affirmative action assert).

[85] Tokaji, *supra* note 71, at 59-60.

[86] *See* Rosman, *supra* note 71, at 67.

School to consider race as a 'plus' factor . . . that would increase the educational experience . . . ."[87]

2. The Opposition's Arguments[88]

Opponents of affirmative action and race-based classifications offer several main arguments. Central is the concept that:

> Affirmative action is not based on individuals, but on groups. Affirmative action is not based on merit. Affirmative action leads to racial politics and backlash in the form of white extremists. Affirmative action stigmatizes its intended "beneficiaries." Affirmative action is social engineering, demanding equal results rather than equal opportunity. Affirmative action victimizes innocent (white) workers.[89]

One argument against affirmative action is that it stigmatizes its intended "beneficiaries" and victimizes innocent (white) workers. The opposition argues racial quotas are a "zero-sum game," where one person's gain necessarily requires another person to lose.[90] Just as blacks faced a reduced opportunity when government supported restrictions in favor of whites, so are whites now faced with a reduced opportunity when government supports restrictions in favor of blacks.[91]

A second argument put forth in opposition to affirmative action is that it is not based on merit, and demands equal results rather than equal opportunity.

The "equal opportunity" theory is based on the tendency of the courts to look at only the "effect" rather than the cause. It emphasizes that the focus is on results rather than opportunity.[92]

> What theory allows us to say that a race or ethnic group is underrepresented in one activity or another? More concretely, what logic permits us to say whether there is the 'right' or 'wrong' number of blacks employed as college professors,

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[87] *Id.* at 69.

[88] *See generally* Richard A. Posner, *The Efficiency and The Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) (concluding that Title VII cannot be defended on strictly economic grounds); *False Civil Rights Vision*, *supra* note 21 (arguing that factors other than race enter into a person's career and life choices and contending that a person's career choices do not always fall along racial lines, and that quotas are a zero sum game where no one wins); Christopher T. Wonnell, *Was the Corruption of Civil Rights Law Inevitable?*, 31 SAN DIEGO L. REV. 269 (1994) (examining changes in antidiscrimination laws).

[89] Morrison, *supra* note 71, at 314.

[90] *False Civil Rights Vision*, *supra* note 21, at 1128-29.

[91] *See id.* at 1127.

[92] *See id.* at 1119-26.

> engineers, hockey or basketball players? What is the 'right' number of blacks on death row, or serving as justices on the Supreme Court?[93]

Professor Williams challenges the idea that people of each race will necessarily look for jobs, schools, or activities in a manner directly proportional to their representation in the community.[94]

C. California Case Law and Opinions Prior to 1996

During this period, the main litigation in California in the area of racial preferences varied only slightly from the United States Supreme Court cases. The court's decisions initially moved in favor of a stricter view, and subsequently toward a more lenient one.

1. Price v. Civil Service Commission of Sacramento County[95]

In 1980, California's District Attorney challenged Sacramento County's race based preferential hiring treatment which was allegedly instituted in order to remedy past discriminatory employment practices. The trial court enjoined the program, and stated that when the government attempts to influence (i.e., increase) the proportion of minority workers through ratios or goals (i.e., quotas), the constitutional rights of the nonminorities are violated.[96] The trial court decided this rule should be applied even in situations where the program was instituted in order to remedy past discrimination.[97]

The Supreme Court of California reversed the trial court's decision, and held that "[t]he *Webber* and *Bakke* decisions teach that neither the pertinent antidiscrimination enactments nor the constitutional equal protection guarantee may properly be interpreted to prohibit a governmental employer from *voluntarily* implementing a *reasonable* race-conscious hiring program to remedy the effects of the *employer's own* past discriminatory practices."[98] The court determined that the hiring preference complied with both the federal and the state equal protection clauses.[99] The opinion concluded by determining that the quota was a necessary step toward equality.[100]

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[93] *Id.* at 1126.
[94] *See id.*
[95] 604 P.2d 1365 (Cal. 1980) (en banc).
[96] *See id.* at 1367.
[97] *See id.*
[98] *Id.* at 1367 (emphasis added).
[99] *See id.* at 1381-82.
[100] *See id.* at 1383.

In his dissent, Justice Mosk referred to Justice Rehnquist's dissent from *United States Steelworkers of America v. Weber*,[101] and stated that the majority "construe[s] Equality of all persons regardless of race to mean Preference for persons of some races over others; and a hiring program which compels compliance by a reluctant district attorney is described as voluntary."[102] Justice Mosk concluded that it is impossible to achieve equality by inequality; now those who once wanted equality are being seen as "more equal" than everyone else.[103]

Justice Mosk emphasized that the argument for equality of the races (put forth in order to end anti-minority racism) and the argument for preference of one race over another (supposedly in order to end anti-minority racism) are mutually exclusive and cannot both be justified by using the same document (the Constitution).[104] Justice Mosk continued to remain faithful to his "colorblind" stance on the issue of affirmative action throughout his dissents in later cases.[105]

2. DeRonde v. Regents of the University of California[106]

In *DeRonde*, a white male applicant brought suit against the state university law school, alleging discriminatory admissions procedures.[107] The University of California at Davis considered "ethnic minority status" as one of six factors for admission.[108] The California Supreme Court in *DeRonde* found that the

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[101] 443 U.S. 193, 219 (1979) (holding that the affirmative action plan was permissible because it did not require the discharge of white workers and their replacement with black workers).

[102] *Price*, 604 P.2d at 1383 (Mosk, J., dissenting).

[103] *See id.* at 1385 (Mosk, J. dissenting).

[104] *See id.* at 1383-85 (Mosk, J. dissenting). Judge Mosk states:

> [D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.

Id.

[105] *See, e.g.*, DeRonde v. Regents of the Univ. of Cal., 625 P.2d 220 (Cal. 1981) (Mosk, J., dissenting).

[106] 625 P.2d 220 (Cal. 1981).

[107] *See id.* at 221.

[108] *See id.* at 222-23. The other five factors were "(1) growth, maturity, and commitment to law study . . . (2) factors which, while no longer present, had affected previous academic grades . . . (3) wide discrepancies between grades and test scores where there was indicated evidence of substantial ability and motivation, (4) rigor of undergraduate studies, (5) economic disadvantage." *Id.* at 222-23.

University placed "considerable weight upon racial or ethnic factors in determining the composition of its entering law classes. Yet nothing in *Bakke* prohibits such a practice, so long as individualized personal consideration is given to the varied qualifications of each applicant."[109] The court then used *Price v. Civil Service Commission of Sacramento County*[110] to justify upholding the affirmative action program in order to remedy underrepresentation. The court concluded that "[a] university requires a measure of 'elbow room' within which to perform its functions."[111]

Justice Mosk dissented once again, claiming the court had moved far away from the basic principles of equal protection in *Price*,[112] to the point where it was no surprise that the court would accept any racially conscious program in public education.[113]

DeRonde upheld the view that race may be used as a plus factor in education.[114] The disparity between the California Supreme Court's decision that race is a permissible consideration, and the lower court's opinion that the university placed impermissible weight on the applicant's race, highlights the difficulty the courts have in reconciling the views on either side of the affirmative action debate.

3. Hayworth v. City of Oakland[115]

In *Hayworth*, white firefighters brought suit against the city, claiming the challenged program discriminated against them as Caucasians, because it permitted vacancies to go unfilled in order to promote minorities. The court of appeals held that even though the city may have acted in good faith, the result was unchanged, and the city's discrimination against the white fire

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[109] *Id.* at 227.

[110] 604 P.2d 1365 (1980) (en banc). *See* discussion *supra* section II.C.1.

[111] *DeRonde*, 625 P.2d at 229.

[112] *See Price*, 604 P.2d at 1383 (Mosk, J. dissenting).

[113] *See DeRonde*, 625 P.2d at 229, (Mosk, J. dissenting). Justice Mosk compared the *DeRonde* decision of this court to the revival of "[t]he indefensible practices of the pre-*Brown*[*v. Board of Education*, 349 U.S. 294 (1955)] days when skin pigmentation and ethnicity were the qualifications that determined a child's school." *Id.* Justice Mosk revisited his "colorblind" perspective, concluding that one cannot consider race and promote equality at the same time. *See id.* According to Justice Mosk, an impermissible consideration of race is fundamentally different than a permissible consideration of an adversity overcome. *See id.* at 230. He stated, "[a]ny court that would stray so far from basic principles of constitutional equal protection as to approve a rigid racial quota system in public employment can be expected to accept any program of race consciousness in public education." *Id.* at 229 (Mosk, J., dissenting) (citations omitted).

[114] *See id.* at 228.

[115] 129 Cal. App. 3d 723 (1982).

fighters violated their constitutional rights.[116] The court then remanded the case for a determination of whether the promotions would have been made without the quota arrangement.[117]

The court in *Hayworth* seems to be moving toward a stricter requirement for racially based preferences. This is a marked change from *DeRonde*, which was decided only a year earlier.

4. Hiatt v. City of Berkeley[118]

In *Hiatt*, employees brought suit against the city, claiming the city's promotion program was discriminatory.[119] This case is similar to *Hayworth*. The *Hiatt* court entered into a detailed analysis of the first requirement of strict scrutiny.[120] The court stated there was no evidence of any compelling governmental interest, and further found that:

> it stretches any imagination to assume or imply that a firefighter is better suited to his job just because he or she belongs to a certain race or sex[121] or that a minority citizen would prefer a minority fireman to put out a fire at his or her house or that a minority employee of the fire department would, of necessity, establish better rapport with minority communities.[122]

The court here took a colorblind approach, but left open the possibility that there may be areas in which such a preference could be valid.[123]

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[116] *See id.* at 732 (explaining that the issue of good faith would, however, be relevant in terms of remedies, and that the interests of those already promoted must be considered when determining relief).

[117] *See id.* at 733.

[118] 130 Cal. App. 3d 298 (1982).

[119] *See id.* at 304.

[120] *See id.* at 309. The "strict scrutiny" standard, set forth in *Bakke*, states that to meet strict scrutiny there must be 1) a compelling governmental interest, and 2) the action taken must be the least drastic measure for the circumstances. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305-06, 319-20 (1978).

[121] This argument, that color makes a difference in the performance of one's job, was originally used in promoting only whites, in the days before desegregation, and before *Brown v. Board of Education*, 349 U.S. 294 (1955), and is now used to justify quotas in admissions to colleges and universities, arguing the need for minority mentors and role models in the community. *See generally,* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model*, 89 MICH. L. REV. 122, 1226-31 (1991) (arguing token role model is a job few would want); Morrison, *supra* note 71 (discussing "tokenism" and "role models").

[122] *Hiatt*, 130 Cal. App. 3d at 310-11.

[123] *See id.* at 313. The *Hiatt* court also stated that:

> [t]he Equal Employment Opportunity Commission (EEOC) whose interpretations are entitled to great deference, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial

Notwithstanding the loophole regarding the possibility of preferences in other areas, the *Hiatt* decision is in many ways contradictory with *DeRonde*. The two cases could potentially be reconciled by focusing on that *DeRonde* was an educational admissions program, and *Hiatt* was a hiring preference. The court was apparently more comfortable considering race in education than in employment.

D. Analysis of National and California Law Prior to 1996

As can be seen in the case law stemming from *Bakke* to *Adarand*, the United States Supreme Court views racial classifications as inherently suspect and has held that they are to be reviewed under strict judicial scrutiny. The only changes that have taken place (with the exception of the United States Supreme Court's ruling in *Metro*, which has since been overruled) involve increasing the scope of the strict scrutiny test.[124] Currently the test applies to all racial classifications, benign or invidious, state or federal. In contrast, the California Supreme Court changed its reasoning as each new case came along.[125] If nothing else, the CCRI provided California courts with a consistent rule to follow.

III. WHAT IS THE CCRI, AND WHERE IS CALIFORNIA NOW, RELATIVE TO THE COUNTRY?

A. What is the CCRI?

The CCRI has been described as many things, but is most commonly known as "the California anti-affirmative action law." As discussed has been discussed in this comment,[126] this viewpoint is not entirely accurate. There are

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discrimination against nonwhites, holding that to proceed otherwise would constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment of any group protected by Title VII, including Caucasians.

Id. at 317 (internal marks ommitted).

[124] Compare *Bakke*, 438 U.S. at 305 (plurality opinion), holding that the purpose or interest involved be both constitutionally permissible and substantial, as well as necessary to the accomplishment of its purpose, with *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 471-72 (1989) (plurality opinion), holding that strict scrutiny applied to action by state and local governments where racial classifications are involved, and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), holding that the strict scrutiny standard applied to federal as well as state action.

[125] See discussion *supra* section II.C.4 regarding the difficulty of reconciling *DeRonde* and *Hiatt*.

[126] See discussion *supra* section I.B. regarding the term "affirmative action."

many different forms of affirmative action, not all of them based on distinctions of gender and race. This comment focuses on race-based forms of affirmative action, but it is important to remember that this one subsection does not encompass the whole. The CCRI prevents the state from discriminating against, or granting preferences to anyone based on their race, sex, color, ethnicity, or national origin, in the operation of public employment, public education, and public contracting.[127] The prohibition against discrimination does not extend to private enterprises and prohibits discrimination of every kind.[128]

The CCRI is often misunderstood and misconstrued, and many readers and commentators interpret it as permitting or prohibiting action that it does not. This section seeks to clarify some of these areas in order to create a foundation of understanding upon which valid opinions, either for or against the CCRI, can be formed.

Litigation in regard to the CCRI was beginning even as the proposition was being given a ballot title. In *Lungren v. Superior Court of Sacramento County*[129] the California Attorney General sought to vacate the judgment of the superior court, which directed the revision of the ballot title of the CCRI.[130] Opponents of the CCRI alleged that the purpose of Proposition 209 was to prevent affirmative action by state and local government, thus the ballot title was misleading.[131] *Lungren* held that the ballot title[132] was nearly a verbatim recital of the text of the initiative, and could hardly be seen as deceptive to the public.[133] With regard to the opponents' challenge that the ballot title should reflect the measure's underlying objective to eliminate affirmative action, the court found that the term "affirmative action" was subject to a vast array of interpretations, and it was not misleading to exclude it from the ballot title.[134] The term "affirmative action" carries with it many different meanings, among which are preferences, assistance, and opportunity provided on the basis of a

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[127] *See* CAL. CONST. art. I, § 31.

[128] See Anna Maria Sistare-Meyer v. YMCA of Metro. L.A., 58 Cal. App. 4th 10 (1997), discussed *infra* section III.C.

[129] 48 Cal. App. 4th 435 (Cal. Ct. App. 1996).

[130] *See id.*

[131] *See id.*

[132] The ballot was entitled, "Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment." *Id.* at 438.

[133] *See Lungren*, 48 Cal. App. 4th at 442.

[134] *See id.* at 442-43. "[T]he term 'affirmative action' is rarely defined so as to form a common base for intelligent discourse. . . . We cannot fault the Attorney General for refraining from the use of such an amorphous, value-laden term in the ballot title and ballot label." *Id.* at 442-43.

seemingly infinite number of factors. The only preferences prohibited by the CCRI are those involving race[135] and gender.[136]

Another major misconception is that the CCRI allows a return to the racist policies of the past, when non-minorities were preferred over minorities,[137] as opposed to the asserted policies of today, where minorities are preferred over non-minorities in some instances of racial preferences advanced under affirmative action.[138] Gwendolyn Yip and Karen Narasaki in their article stated that the use of the term "preferential treatment" is vague and misleading, and asked "[a]re we to believe that court-upheld remedies to undo the effects of racism and sexism – such as affirmative action – constitute impermissible 'preferential treatment,' but that persistent 'old boys' networks' do not?"[139] This is an example of an interpretation of the CCRI which does not accurately reflect the text of the law. The assertion that "old boys networks" remain permissible would suggest certain racial preferences are permissible under the CCRI. On the contrary, the CCRI prohibits all discrimination and all preferential treatment.[140] If Ms. Yip and Ms. Narasaki were able to find a decision using the CCRI to uphold an "old boys' network," (which most likely means "preferences given to white males") they did not so state in their article. The elimination of preferences and the continued ban on discrimination applies to all, without regard to the color of the skin or the gender of the individual. Whether this is a step forward or a step backward, it is nevertheless the text of the law.[141]

This comment has only addressed section 31(a)[142] thus far. The CCRI encompasses section 31(a-h) of the California Constitution.[143] Section 31(b) has not been subject to much interpretation, as it states that the section applies only to action taken after its effective date.[144] Section 31(c) on the other hand, has been misinterpreted as permitting sexual discrimination.[145] This section provides that bona fide qualifications based on sex, which are reasonably

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[135] This term shall be used to include ethnicity, national origin, and color, for purposes of this analysis.

[136] *See generally Lungren*, 48 Cal. App. 4th at 442-43 (holding that the ballot title was practically verbatim the text of the bill, and therefore was proper).

[137] *See, e.g.*, Plessy v. Ferguson 163 U.S. 537 (1896) (ruling that separate train cars for blacks and whites are acceptable as long as they provide equal train service to each). In that case, the segregation of a man who was 7/8 white and 1/8 black to a separate train car reserved for black people was held to be constitutional. *See id.*

[138] *See supra* notes 95-125 and accompanying text.

[139] Yip & Narasaki, *supra* note 74 at 23.

[140] *See* CAL. CONST. art. I, § 31.

[141] *See id.*

[142] *See id.* § 31(a).

[143] *See id.* § 31.

[144] *See id.* § 31(b).

[145] *See id.* § 31(c).

necessary, are permitted.[146] This section begs the question, then: what is a "bona fide qualification based on sex?" Eugene Volokh addresses this question in an article published in the UCLA Law Review.[147] The provision for some qualification was necessary in order to avoid the bar of all sex-based classifications; for example, sex-segregated bathrooms, girls' sports teams, boys' sports teams, dormitory roommate assignments based on sex, and the ban on male prison guards searching female inmates.[148] A bona fide qualification based on sex is not a novel idea put forth through the CCRI, but is also a part of Title VII.[149] In Title VII, as in the CCRI, this provision allowing bona fide qualifications based on sex applies to education as well as employment.[150]

Professor Volkoh has stated that these bona-fide qualifications cannot be based on generalizations. If used in hiring or admissions they "must relate to a person's ability to perform a particular task, not to general desires to use the hiring decision to accomplish a broader social goal."[151] In this context, one misinterpretation of the CCRI is that it would "permit intentional gender discrimination in areas where it has not been allowed."[152]

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[146] *See* Volokh *supra* note 10, at 1360; CAL. CONST. art. I, § 31(c). "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(c).

[147] *See* Volokh *supra* note 10. Mr. Volkoh, acting professor, UCLA Law School, was a legal advisor to the pro-CCRI campaign, and participated in the initiative's drafting. He states that his purpose in writing this article was to "describe what the initiative actually requires, uninfluenced by any desire to enact the initiative or to defeat it." *Id.* at 1336 n.2 (suggesting that the initiative should be read narrowly).

[148] *See id.* at 1360 (clarifying what sex-classifications are allowed, and necessary).

[149] Title VII states:

> Notwithstanding any other provision of this title, (1) it *shall not be an unlawful employment practice* for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances *where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary* to the normal operation of that particular business or enterprise . . .

42 U.S.C. § 2000e-2(e)(1) (1998) (emphasis added); *cf.* CAL. CONST. art. I, § 31(c).

[150] *See* 42 U.S.C. § 2000e-2(e)(1). *See also* CAL. CONST. art. I, § 31(c).

[151] Volokh, *supra* note 10, at 1369 (clarifying what sex-classifications are allowed, and necessary).

[152] Yip & Narasaki, *supra* note 74, at 24. "Moreover there is a qualitative difference between having an exemption for certain gender classifications in the context of an anti-discrimination statute, and having any such exemption (let alone the broad one proposed) in a bill that prohibits any gender-conscious, affirmative action to fight sex discrimination." *Id.* Ms. Yip and Ms. Narasaki are of the view that preferring men over women is improper discrimination, but

The remaining sections of the CCRI are fairly self explanatory, stating that: (1) all consent decrees or orders in force at the time of the adoption of the CCRI will remain in effect,[153] (2) the CCRI shall not be interpreted as prohibiting any action that must be maintained in order to prevent a loss of federal funds,[154] (3) a definition of "State,"[155] (4) the remedies available will be the same regardless of race,[156] (5) the section is self executing and severable.[157]

B. Current Legislation, and Attempts to Alter the CCRI

On December 7, 1998, Senator Polanco introduced Senate Bill No. 44.[158] This bill was enrolled on July 19, 1999.[159] The intention of the bill was to clarify that the CCRI does not prevent outreach and recruitment of minority groups and women by the government.[160] The important language here is the

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preferring women to men is not. *See id.* at 24. Their argument coincides with the idea that a rule preferring whites would be discriminatory, but one preferring blacks (or any other minority) would not be. It has been asserted by those who oppose affirmative action that any preference based on race is discrimination. *See, e.g., False Civil Rights Vision, supra* note 21; Price v. Civil Service Comm'n, 604 P.2d 1365, 1383 (Cal. 1980) (en banc) (Mosk, J., dissenting); DeRonde v. Regents of the Univ. of Cal., 625 P.2d 220, 229 (Cal. 1981) (Mosk, J., dissenting). The question would therefore become not whether a racial preference is discriminatory, but whether it is a form of discrimination that is considered permissible by the courts and the Constitution. *See also, False Civil Rights Vision, supra* note 21; *Price*, 604 P.2d at 1383 (Mosk, J., dissenting); *DeRonde*, 625 P.2d at 229 (Mosk, J., dissenting).

[153] *See* CAL. CONST. art. I, § 31(d). *See, e.g.*, Board of Educ., San Diego Unified Sch. Dist. v. Superior Court, 61 Cal. App. 4th 411 (1998) (examining the end of a school integration plan that continued long after the CCRI was enacted).

[154] *See* CAL. CONST. art. I § 31(e). According to Eugene Volkoh, this section was added to "foreclose any possible campaign argument that 'the CCRI would cost California voters $X million in federal money' based on some program that opponents might have unearthed." Volokh, *supra* note 10, at 1386.

[155] *See* CAL. CONST. art. I, § 31(f).

[156] *See id.* § 31(g).

[157] A detailed analysis of these sections is beyond the scope of this Comment. For further information see Volokh, *supra* note 10, at 1338.

[158] 1999 BILL TEXT CA S.B. 44.

[159] *See* 1999 BILL TRACKING CA S.B. 44.

[160] 1999 BILL TEXT CA S.B. 44, states:

> It is the intent of the Legislature to reaffirm diversity as a public policy goal in public education and employment. . . . The legislature finds that this prohibition [on race and gender preferences in the CCRI] does not prevent governmental agencies form engaging in public sector outreach programs that may include, but *are not limited to*, focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions...or in an educational institution. ...[This bill would] allow public sector employers and educational institutions to conduct outreach efforts with a goal of

permission given to "recruitment" efforts.[161] When deciding whether to sign the bill the Governor had to determine if recruitment efforts were permitted by the CCRI, and if he could approve the bill and still uphold the will of the California electorate.[162] Outreach and recruitment based on socio-economic, geographical and educational factors are still permissible within the CCRI. The only "outreach and recruitment" efforts or "preferences"[163] that are prevented in the CCRI are those based on race or gender.[164]

Governor Davis vetoed this bill on July 28, 1999.[165] The Governor reasoned that Senate Bill No. 44 violated provisions of the CCRI.[166] He appeared unwilling to allow the legislature to overrule the will of the people.[167] He then revisited several non-race-based solutions that he had proposed in the past,[168] and stated his intention to form a Task Force on Diversity and Outreach to find constitutionally permissible ways of conducting outreach.[169]

A number of those who opposed the CCRI were strongly in support of Senate Bill No. 44.[170] This can be seen in the numerous memoranda filed in support of the bill and in opposition to the CCRI.[171] The group "Black Women Organized for Political Action" stated that it "remains committed to supporting legislation that serves to combat the egregious effects brought on by Proposi-

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increased diversity, thereby allowing underrepresented individuals to compete for opportunities in education and employment.

Id. (emphasis added).

[161] *See* 1999 BILL TRACKING CA S.B. 44.

[162] *See* Veto Letter from Governor Gray Davis, to the California State Legislature (July 28, 1999) (on file with the author).

[163] By grouping these principles together, I do mean to suggest that they are all prevented by the CCRI. An outreach program directed either at the public generally, or implemented on a basis that did not consider race or gender, would be permissible within the CCRI.

[164] *See* CAL. CONST. art. I, § 31.

[165] *See* Veto Letter from Governor Gray Davis, *supra* note 162.

[166] *See id.*

[167] *See id.*

[168] Governor Davis stated:

> As a longtime advocate for diversity in the workforce, I am convinced that outreach programs can be fashioned that are constitutionally permissible, based on socio-economic status, geographic area or other non-race-based characteristics. For example, I proposed in my inaugural address that every high school student who finishes in the top 4 percent [sic] in their high school will be admitted to the University of California.

Id.

[169] This was not the first attempt to modify the CCRI. For prior related legislation, see generally, CONF. COMM. REP. NO. 44, Reg. Sess. (1999).

[170] *See* List of Memoranda in Support and Opposition of Senate Bill 44. (memoranda from groups which wrote Senator Polanco to express their support of Senate Bill no. 44) (on file with the author) [hereinafter Memoranda].

[171] *See id.*

tion 209. We believe your legislation is a step in this direction."[172] Another example is the support of the group "Professional Hispanics in Energy." They took the position that "[w]ith the devastating blow minorities, women and disabled veterans received from Proposition 209, it is all too apparent that diversity will cease to exist in the operation of public employment, public education, and public contracting, unless there is a mechanism to actively reach out to these underrepresented minorities."[173]

Other commentators levied their opinions as well. The media's general stance was that Senate Bill No. 44 was a "relatively innocuous measure" that did not affect the CCRI.[174] Senator Polanco stated that the CCRI did not mention outreach, and that legal opinions have concluded that outreach is permissible within the CCRI.[175] After vetoing the bill, the Governor was criticized by the attorney for Equal Rights Advocates who said: "[t]his is outrageous. He is not a civil rights[176] Governor in my group or anybody else's book that I know of."[177] The Governor's veto was also criticized by Assembly Speaker Antonio Villaraigosa (D-Los Angeles), who said, "I think most people thought that it was pretty noncontroversial [sic]. This is outreach. It is not quotas. It is just outreach to communities that are under-represented."[178]

The California Legislature is apparently determined to persist in its efforts to pass a measure that would change the CCRI to allow race and gender based outreach programs. Undoubtedly, another bill will be introduced. If Governor Davis remains committed to upholding the will of the voters, such a bill will again be vetoed.

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[172] Memoranda of Black Women Organized for Political Action, in support of Senate Bill 44. (on file with the author). *See also supra* note 170 and accompanying text.

[173] Memoranda of Professional Hispanics in Energy, in support of Senate Bill 44. (on file with the author). *See also supra* note 168 and accompanying text.

[174] *See Davis' Twisting Path*, L.A. TIMES, July 30, 1999, at B1.

[175] *See* 1999 BILL TRACKING CA S.B. 44.

[176] Black's Law Dictionary defines civil rights as synonymous with civil liberties. Civil liberties: "Personal, natural rights guaranteed and protected by the Constitution; e.g., freedom of speech, press, freedom from discrimination, etc. Body of law dealing with natural liberties, shorn of excesses which invade the equal rights of others. Constitutionally, they are restraints on government." BLACK'S LAW DICTIONARY 246 (6th ed. 1990).

[177] David Lesher, *California and the West; Davis Rejects Gender, Racal Hiring Efforts; Bias: Angering Civil Rights Activists, He Says Even Nonbinding Outreach Programs for Women and Minorities Violate Prop. 209*, L.A. TIMES, July 29, 1999, at A3.

[178] *Id.*

C. California Case Law After 1996

1. Coalition for Economic Equity v. Wilson[179]

A number of plaintiffs, whose basic claim was that the CCRI violated the Fourteenth Amendment of the United States Constitution, brought a claim challenging the constitutionality of the CCRI.[180] Their claim also alleged the CCRI was "void under the Supremacy Clause because it conflicts with Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Educational Amendments of 1972."[181]

The United States Court of Appeals in *Coalition for Economic Equity* reasoned that "[a]s a matter of "conventional" equal protection analysis there is simply no doubt that Proposition 209 is constitutional . . . . The central purpose of the Equal Protection Clause is the prevention of official conduct discriminating on the basis of race."[182] The court then followed a series of steps in determining whether the Equal Protection Clause was violated. First, the court considered in what manner people were classified, if at all, under the CCRI. The court found not only does the CCRI not classify individuals by race or gender but that it prohibits such classifications altogether.[183]

Next, the court determined whether a statewide ballot initiative could "deny equal protection to members of a group that constitutes a majority of the electorate that enacted it . . . [and whether it is] possible for a majority of the voters to impermissibly stack the political deck against itself."[184] The court answered this question by finally determining "it would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State had violated it."[185]

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[179] 122 F.3d 692 (9th Cir. 1997).

[180] *See id.*

[181] *Id.* at 697.

[182] *Id.* at 701 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).

[183] *See Coalition for Econ. Equity*, 122 F.3d at 709 (determining that the Equal Protection Clause was not violated).

[184] *Id.* at 704 (noting that minorities and women make up a majority of the California electorate).

[185] *Id.* at 709 (citing Crawford v. Board of Educ. of City of L.A., 458 U.S. 535 (1982)). *See also Coalition for Econ. Equity*, 122 F.3d at 709 n.18 ("To the extent that Proposition 209 prohibits race and gender preferences to a greater degree than the Equal Protection Clause it *provides greater protection* to members of the gender and races otherwise burdened by the preference." *Id.* (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 73, 81 (1979) (emphasis added)).

The court ultimately held that the CCRI was constitutional, upheld the initiative, and denied the suggestion for rehearing en banc.[186] All petitions for stays and rehearings and certiorari were denied.[187]

2. Anna Maria Sistare-Meyer v. YMCA of Metropolitan Los Angeles[188]

One of the early cases following the *Coalition for Econ. Equity* decision was *Anna Maria Sistare Meyer v. YMCA of Metropolitan Los Angeles.*[189] *Sistare-Meyer* established some of the limitations in the CCRI. An independent contractor (Anna Maria) brought suit against the Young Mens Christian Association ("YMCA") claiming she was terminated because of her race.[190] The Court of Appeal for the Second District of California began by interpreting the voters' intent in enacting the CCRI. The court stated that "[t]he plain language of Proposition 209 indicates that it was intended to enhance the antidiscrimination provisions . . . by prohibiting certain forms of preferential treatment by the state."[191]

In so holding, the court clarified the line which had already been drawn (in the text of the CCRI[192]) regarding private action and state action. While a state contractor is barred from granting preferential treatment based on race, sex, color, ethnicity, or national origin, private contractors remain unaffected.[193]

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[186] *See Coalition for Econ. Equity*, 122 F.3d 709-11.

[187] *See id.* Apparently this was an issue that the United States Supreme Court did not want to determine, likely because they did not want to create national law, but were content to leave California to interpret the constitutionality of the CCRI as it chose. *See* Coalition for Econ. Equity v. Wilson, 522 U.S. 963 (1997) (denying certiorari).

[188] 58 Cal. App. 4th 10 (1997).

[189] 58 Cal. App. 4th 10 (1997).

[190] *See id.* Anna Maria's claim stated, in relevant part, that the CCRI prohibited discrimination by the state against independent contractors. *See id.* at 12-13. In 1991 she entered into an employment contract with the YMCA, that could be terminated with one week's notice. The causes of action asserted with regard to the termination of this contract were: "for racial discrimination in violation of Government Code section 12940, wrongful discharge in violation of public policy, breach of the implied covenant of good faith and fair dealing, and defamation. The complaint alleged that the respondents terminated her contract because she is Caucasian." *Id.* at 12.

[191] *Id.* at 18 (emphasis added).

[192] *See id.* (discussing the CCRI). The CCRI states: "*The State* shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or *public* contracting." CAL. CONST. art. 1, § 31 (emphasis added).

[193] *See Sistare-Meyer*, 58 Cal. App. 4th at 18.

3. Kidd v. State[194]

In *Kidd v. State*, a California court had the opportunity to examine a case in which the plaintiff claimed the state's "supplemental certification"[195] affirmative action policy was discriminatory.[196] The court first determined the type of "affirmative action" addressed in the instant case, stating:

> [t]he term "affirmative action" often leads to unnecessary confusion and misunderstanding because of a failure in advance to agree upon or assume a definition for it . . . . It can be defined in this case as . . . a preference for persons with lower objectively ascertained qualifications, to the corresponding exclusion of persons better qualified.[197]

The court then proceeded to examine the relevant law surrounding the claim. Before addressing the CCRI, the court referenced article VII, section 1(b) of the state constitution which mandates a merit based promotion and appointment system.[198] This section of the constitution was clarified by Government Code section 19057.1 which reiterates the mandate of merit based appointments, reserved for those with the top three overall scores on the examination.[199] In this regard, the court held that the state's system was in violation of the constitution.[200]

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[194] 62 Cal. App. 4th 386 (1998).

[195] *Id.* at 393. Supplemental certification allows "certain minority and female applicants for positions in the state civil service to be considered for employment even though they did not place in the top three ranks of the list of eligible candidates." *Id.*

[196] *See id.* at 391-92.

[197] *Id.* (citing Dawn v. State Personnel Bd. 91 Cal. App. 3d 588, 593 (1979)). An explanation of the ambiguity within the term "affirmative action" (with reference to the CCRI only, as undoubtedly many other courts have noted the various meanings and connotations attached to the term) was first pointed out by the court in *Lungren v. Superior Court of Sacramento County*, 48 Cal. App. 4th 435 (1996). The observations in *Lungren* have been cited in subsequent cases regarding the CCRI, most notably, *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). See also discussion *supra* section II, for an explanation the different types of affirmative action and the arguments surrounding each.

[198] *See Kidd*, 62 Cal. App. 4th at 392 (citing CAL. CONST. art. VII, §1(b)). "In civil service permanent appointment and promotion *shall* be made under a general system based on merit ascertained by competitive examination." *Id.* (emphasis added).

[199] [F]or any open employment list, there shall be certified to the appointing power the names and addresses of all those eligibles whose scores, at time of certification, represent the three highest ranks on the employment list of the class, and who have indicated their willingness to accept appointment under the conditions of employment specified.

Kidd, 62 Cal. App. 4th at 393 (alterations in original) (citing Gov. Code, §19057.1).

[200] The court also went on to point out that the system of appointment was based on merit, and stated that "[b]ecause defendants have been unable to convince us that "'merit' is defined by one's sex or by the color of one's skin, we can only conclude plaintiff's claim is not frivolous." *Id.* at 400 (in response to defendants' allegation that the plaintiff's claim was frivolous and moot).

The court then went on to address the issue of the alleged violation of the CCRI. The court stated that the language of the CCRI was clear, and the voters' intent to eliminate preferential programs such as supplemental certification was indisputable.[201] The court also noted that the CCRI has already withstood constitutional challenge,[202] and prohibits "state discrimination against or preferential treatment to any person on account of race or gender."[203] Based on this analysis, the court held[204] that the supplemental certification program "violates the California Constitution and statutes. By utilizing supplemental certification to offer positions to minority and female applicants who ranked below [the plaintiffs] . . . the defendants violated plaintiffs' constitutional and statutory rights . . ."[205]

The defendants were subsequently enjoined from implementing the policy of "supplemental certification" as the court held that the policy was in direct violation of the California Constitution.

4. Voter Intent and Purpose in Enacting the CCRI

The reason the California voters decided to enact the CCRI is at this point little more than speculation. In order to answer similar questions, courts often look to the ballot materials that were presented to the voters.[206] This is because the courts presume that the electorate made their final decision based upon these materials.[207] Courts will likely continue to look at the words of the ballot, and consider the growing body of case law in interpreting the CCRI. In determining the voters' intent at the time, the only assumption safe to make

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[201] *See id.* The court also stated that there cannot be "any dispute the clear intent of the voters was to outlaw preferential programs such as supplemental certification." *Id.* at 407.

[202] *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

[203] *Kidd*, 62 Cal. App. 4th at 407 (citing Coalition for Econ. Equity, 122 F.3d at 709).

[204] Although the court held that the plaintiffs were entitled to equitable relief, they determined that an order requiring that defendants discharge the employees who were hired according to the supplemental certification policy was not proper relief. *See id.* at 410. The decision in *Kidd* was based on three lines of reasoning, in which the third issue seems to have been dispositive for the court. *See id.* The court stated that:

> First, plaintiffs abandoned their request at oral argument . . . . Second, the record fails to establish that those hired through supplemental certification have been joined in this action . . . . Third, we do not believe that removal of persons appointed pursuant to an illegal selective certification program is a proper remedy in a reverse discrimination case.

Id.

[205] *Id.*

[206] *See id.* at 407; *see, e.g.*, Volkoh, *supra* note 10, at 1338 n.5.

[207] *See* Volokh, *supra* note 10, at 1338, n.5 (citing Western Telecom, Inc. v. California State Lottery, 13 Cal. 4th 475, 595 (1996); People v. Superior Court (Romero), 13 Cal. 4th 497, 528 (1996) (courts may look to the ballot materials to determine voter intent)). Volkoh also notes that courts will consider pre-election materials such as newspapers, etc. *See id.*

is the one which is obvious from the vote - the people of California wished to eliminate all preferences by the State based on gender and race.

A majority of the electorate of California are women and minorities.[208] If these groups were opposed to the CCRI they had the opportunity to vote against it. Without at least a fair amount of either support or lack of concern from these groups, the initiative could not have become law. Judging from the numerous memoranda filed in support of Senate Bill 44 (legislation aimed at softening the effects of the CCRI), they were anything but apathetic regarding the issue.[209] Whatever the individual reasons, it appears that the California electorate wanted to work and learn without the government inquiring into their gender, race, ethnicity, color, or national origin.

IV. WHAT NEXT? THE FUTURE OF RACIAL PREFERENCES: TRENDS NATIONALLY AND THEIR EFFECT ON HAWAI'I

A. Where is the Country Heading Regarding Racial Classifications?

With *Adarand*, the United States Supreme Court took another step away from strict racial classifications and moved closer to the colorblind vision of the United States Constitution.[210] The Court is still far away from a move similar to the one enacted in California. Proposition 209 was a sudden change, and there will almost certainly be a necessary adjustment period. Programs like the ones suggested by Governor Davis will likely be a positive step in the state's adjustment.[211] If the country gives California enough time to become accustomed to its new policy, and to begin to act and react in a colorblind manner, the CCRI may be the beginning of the end of racial preferences. If, however, California's elimination of preferences based on race is deemed a failure because people failed to instantaneously adjust, or if California's solution is not found to be feasible, then this could mark the end of the beginning of a colorblind nation.

California's legislature will most certainly keep trying to pass legislation to alter the CCRI. The success or failure of this effort will depend upon California's current administration's faithfulness to voter intent, and the citizens' desire to keep their amendment intact.

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[208] *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997).

[209] *See* Memoranda, *supra* note 170. *See also supra* notes 169-77 and accompanying text.

[210] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)

[211] For a detailed statement of the Governor's plan, see *supra* note 166 and accompanying text.

B. Potential Effect on Hawai'i

The situation in Hawai'i, with regard to racial preferences, is complex.[212] Some feel preferences given to Native Hawaiians[213] are racial preferences,[214] others believe them to be political preferences, similar to those given to Native Americans.[215] This distinction is central to *Rice v. Cayetano*,[216] a case recently

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[212] For a statute expressing the attitudes of the Hawaiian people, and the mindset with which decisions at all levels may be made, see generally HAW. REV. STAT. §5-7.5 (1998) (explaining the Aloha Spirit and the words that may be used in the contemplation thereof).

> "Aloha Spirit" is the coordination of heart and mind within each person.... Each person must think and emote good feelings to others.... In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, Governor, lieutenant Governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit."

Id.

[213] *See* Brief for the Hawai'i Congressional Delegation as Amicus Curiae Supporting Respondent at 13, n.18, Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998), *cert. granted*, 526 U.S. 1016 (1999), *rev'd*, 528 U.S. 495 (2000), *vacated* 527 U.S. 1061 (2000).

> 'The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.' Hawaiian Homes Commission Act, 1920, §201, 42 Stat. 108 (1921). When capitalized, the term 'Native Hawaiian' is commonly used in Federal statutes to refer to any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawaii.' Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

Id. (citations in original); See also *Rice v. Cayetano*, 146 F.3d at 1076, n.1 stating:

> 'Hawaiian' means 'any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii," and 'native Hawaiian' means 'any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.'

Id. (citing HAW. REV. STAT. §10-2(1995)).

[214] *See generally* Stuart Minor Benjamin, *Equal Protection and The Special Relationship: the Case of Native Hawaiians*, 106 YALE L.J. 537 (1996) (arguing that Native Hawaiians cannot avail themselves of a trust relationship similar to that of the Native Americans, as they are not a tribe).

[215] *See generally* Jon Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998). A strong argument supporting recognition of the trust relationship between the United States and Hawai'i is set forth in this article by Jon Van Dyke, Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa; B.A., Yale University; J.D., Harvard Law School.

[216] 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000), *vacated* 527 U.S. 1061 (2000).

decided by the United States Supreme Court.[217] There, plaintiff Freddy Rice (who lived in Hawai'i all of his life), argued that the restrictions on voter eligibility in an election for administrators of the Office of Hawaiian Affairs[218] to those residents of Hawai'i with certain ancestral backgrounds violated his constitutional rights.[219] The Supreme Court heard oral arguments in this case on October 6, 1999, and a decision was filed on February 23, 2000.[220]

Before discussing *Rice*, it is necessary to have an understanding of the historical perspective from which the distinction between native and non-Native Hawaiians arose. Without any knowledge of Hawai'i's history, an educated opinion on the *Rice* case would be difficult, if not impossible, to reach. A brief account of the history of Hawai'i is available in the *Rice* opinion, and a detailed but abbreviated history is set forth in the 1993 Apology Resolution. The Apology Resolution was enacted to "acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii."[221]

1. A brief history of modern Hawai'i

Life in Hawai'i was tied to the land. Hawai'i was originally composed of eight separate kingdoms, with a high chief controlling one area.[222] The land unit that affected the people on a daily basis was the *ahupua'a* which were wedges of land, divided from mountains to the sea.[223]

British Captain James Cook, the first European to come to in Hawai'i, arrived in 1778. Prior to this time, the Hawaiians were self sufficient, with their own government, language, and religion, living in a society based on

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[217] *See id.*

[218] The Office of Hawaiian Affairs was organized in the 1978 Hawaii Constitutional Convention in order to facilitate the administration of the trust. *See* discussion *infra* notes 240-42 and accompanying text.

[219] *See id.*

[220] Rice v. Cayetano, 528 U.S. 495 (2000).

[221] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-130, 107 Stat. 1510 (1993) [hereinafter Apology Resolution].

[222] *See* NATIVE HAWAIIAN RIGHTS HANDBOOK 3 (Melody Kapilialoha MacKenzie ed., 1991).

[223] *See id.* at 3, 4 (citing *In re* Boundaries of Pulehunui, 4 Haw. 239-41, 242 (1972)). The *ahupua'a* are described as a land division that gave the chief and people "a fishery residence at the warm seaside together with the products of the high lands such as fuel, canoe timber, mountain birds, and the right-of-way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes form sea soil to mountainside or top." NATIVE HAWAIIAN RIGHTS HANDBOOK *supra* note 222 at 3, 4.

communal land tenure.[224] King Kamehameha, the first king of a united Hawai'i, consolidated the island kingdom in 1810.[225]

The United States recognized Hawai'i's independence as a sovereign nation. This is evidenced through the complete diplomatic recognition of the government and treaties which were entered into between 1826 until 1893.[226] On January 14, 1893, John L. Stevens, the United States Minister to Hawai'i, conspired to overthrow the Government of Hawai'i.[227] In pursuing this goal he and naval representatives of the United States caused naval forces to invade Hawai'i on January 16, 1893 in order to intimidate Queen Liliuokalani. They succeeded in doing so.[228]

In 1893 a committee of sugar planters from Europe and America proclaimed the establishment of a provisional government.[229] Queen Liliuokalani then yielded her authority to the United States, as the better choice over the provisional government.[230] When making her choice she stated "I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall . . . reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands."[231]

On February 1, 1893, the United States Minister proclaimed Hawai'i to be a protectorate of the United States.[232] As a result of these actions, and following an investigation by then President Grover Cleveland and former Congressman James Blount, the United States Minister to Hawai'i was recalled from his position and the military commander of the United States armed forces in Hawai'i was disciplined and forced to resign.[233] Although President Cleveland called for a restoration of the Hawaiian Monarchy, the Provisional Government resisted and declared itself to be the Republic of Hawai'i on July 4, 1894.[234]

There then was a change in the federal administration, and President William McKinley took office.[235] The Republic of Hawai'i ceded sovereignty and 1,800,000 acres of crown, government and public lands to the United

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[224] *See* Apology Resolution, *supra* note 221.

[225] *See* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 222, at 5.

[226] *See* Apology Resolution, *supra* note 221. *See also* Rice v. Cayetano, 528 U.S. 495, 504 (2000).

[227] *See* Apology Resolution, *supra* note 221.

[228] *See id.*

[229] *See id.*

[230] *See id.*

[231] *Id.*

[232] *See id.*

[233] *See id.*

[234] *See id.*

[235] *See id.*

States, which the United States accepted in the Annexation Act of 1898.[236] In 1900, Congress passed the Organic Act, establishing Hawai'i as a territory.[237] In 1920, the Hawaiian Homes Commission Act "set aside some 200,000 acres of public lands as 'available lands' for nominal price leases to 'native Hawaiians.'"[238] Hawai'i became a state on August 21, 1959.[239] No benefits from these acts and provisions, however, actually went to the Native Hawaiians until 1978 when the State constitution was amended to establish the Office of Hawaiian Affairs (OHA).[240] OHA, among other functions, distributes those benefits. Only those who are "Native Hawaiian" are permitted to vote in OHA elections, and receive the benefits from the trust.[241]

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[236] *See* Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998), *rev'd* 528 U.S. 495, *vacated* 527 U.S. 1061 (2000). "The Annexation Act provided that all revenues from the public lands were to be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes." *Id.* at 1077.

[237] The Organic Act provided:

> [E]xcept as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation . . . shall be and remain in the possession, use, and control of the government of the Territory of Hawaii and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or the Governor of Hawaii.

NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 222, at 15 (citing Act of April 30, 1900, ch.339, §91, 31 Stat. 141, 159).

[238] *Rice*, 146 F.3d at 1077; *see also* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 222 at 17 (explaining the background and provisions of the Hawaiian Homes Commission Act).

[239] The Native Hawaiians have challenged the propriety of the vote for statehood, as well as the propriety of the annexation. The people of Hawai'i never voted on whether they wanted annexation by the United States, and petitions (from 21,269 people) were sent to Washington to oppose annexation. Also, in the vote in favor of statehood, the two issues on which to vote were: 1) become a state; 2) stay a territory. *See* Van Dyke, *supra* note 215 at 103-04, n.61.

It is argued that the choice to become independent should have been offered as well. *See id.* An additional argument is that so many non-Hawaiians were living in Hawai'i at the time that the validity of the vote in favor of statehood is highly suspect. *See id.* (explaining the improprieties surrounding the choices for annexation and statehood, and determining that the Native Hawaiians are a political rather than a racial group).

[240] The Office of Hawaiian Affairs was "created to hold title to §5(b) property . . . in trust and manage it for Native Hawaiians and Hawaiians." *Rice*, 146 F.3d at 1077.

[241] For the purposes of OHA this means that:

> Only persons who are at least one-half Hawaiian are eligible to receive homestead leases from the Department of Hawaiian Home Lands. At least four of the nine members of the Hawaiian Homes Commission must be at least one-fourth Hawaiian. All nine members of the Board of Trustees of the OHA must be of Hawaiian ancestry, and only persons of Hawaiian ancestry can vote in the elections every two years to select Trustees. In 1980, the Hawai'i Legislature determined that OHA should receive 20% of the revenues generated from the ceded lands held in trust by the State of Hawai'i. Although substantial disputes remain regarding how much revenue OHA is owed, this revenue stream has already allowed OHA to accumulate more than $ 300,000,000 in funds.

2. Rice v. Cayetano: *the Ninth Circuit opinion*[242]

Freddy Rice had lived in Hawai'i his entire life. Although he was able to trace his ancestry in Hawai'i to prior to 1893, he was Caucasian and therefore not eligible to vote in the OHA elections, or receive benefits therefrom.[243] In 1996 Rice applied to vote in an OHA election, and was rejected because he was not Hawaiian.[244] He then brought this action alleging Fourteenth and Fifteenth Amendment violations.[245] The United States Court of Appeals for the Ninth Circuit held that the right to vote in OHA elections was not based upon a racial preference, but rather a trust relationship between Hawai'i and the United States.[246] The court additionally found that OHA: 1) performed no governmental functions, and 2) did not benefit Rice in any way.[247] The United States Court of Appeals for the Ninth Circuit addressed the Fourteenth and Fifteenth Amendment claims in separate sections of the opinion.[248]

Regarding his Fifteenth Amendment claim, Rice's basic assertion was that the racial restriction violated his right to vote under the United States Constitution, and would fail the strict scrutiny test under *Adarand*.[249] The court determined that the right to vote in OHA elections is "not a racial classification, but a legal one based on who are beneficiaries of the trusts in a special purpose, disproportionate impact election."[250] The court then stated that the constitutionality of the trusts was not at issue in this case.[251]

The court viewed the purpose of the election as dispositive in their determination of whether there was an improper racial classification.[252] The court stated that the "vote is for a limited purpose of electing trustees who have no general governmental powers and perform no general governmental purposes."[253] Based on this rationale, and a consideration of the history of

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Van Dyke, *supra* note 215, at 109.

[242] Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998), *cert. granted* 526 U.S. 1016 (1999), *rev'd* 528 U.S. 495 (2000), *vacated* 527 U.S. 1061 (2000).

[243] *See id.* at 1078 (explaining the history of the Rice family).

[244] *See id.* at 1075.

[245] *See id.* at 1078.

[246] *See id.* at 1082.

[247] *See id.*

[248] *See id.*

[249] *See id.* at 1075.

[250] *Id.* at 1078.

[251] *See id.* at 1075.

[252] *See id.* at 1078.

[253] *Id.* The court stated that the vote did not affect Rice, therefore he suffered no injury. *See id.* The court then reasoned that, with regard to water districts, limited voting eligibility was upheld in *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719 (1973). In *Rice*, the court stated that since "elections may be held for special purposes and voter qualifications that might

Hawai'i and the purposes of the trust,[254] the court found that there was no Fifteenth Amendment violation.[255]

In his Fourteenth Amendment claim, Rice asserted that the restriction on voter eligibility was a racial one, which violates and must pass the strict scrutiny test set forth in *Adarand*.[256] The court analogized the voting rights to those in *Salyer*, and stated that "even if the voting restriction must be subjected to strict judicial scrutiny because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship . . . ."[257] The court held that there was no Fourteenth Amendment violation, and affirmed the ruling of the district court.[258]

3. The United States Supreme Court opinion

The United States Supreme Court granted certiorari and heard oral arguments on October 6, 1999. The Court handed down its decision on February 23, 2000.[259] The Supreme Court held "Hawaii's denial of petitioner's right to vote to be a clear violation of the Fifteenth Amendment."[260]

Although the Court had before it Fourteenth Amendment, Fifteenth Amendment, and political status issues, it decided the case solely on the Fifteenth Amendment claim,[261] narrowly construing its holding. Had the court ruled in favor of Rice on the Fourteenth Amendment claim, the effects of the Court's decision would necessarily extend to all preferences, rather than only those involving voting rights.[262] Analyzing the Court's opinion, one may

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otherwise be invalid may survive when the limit eligible voters to those who are disproportionately affected and the government agency does not perform fundamentally governmental functions." *Rice*, 146 F.3d at 1080. This argument was addressed in the oral arguments in this case at the Supreme Court. *See* Yasmin Anwar, *Great Day for Plaintiff, Worrisome for Others*, HONOLULU ADVERTISER, Oct. 7, 1999, at A7.

[254] The trust exists for the betterment of Native Hawaiians. *See Rice*, 146 F.3d at 1077 (citing Admission Act §5(f)).

[255] *See id.* at 1075.

[256] *See id.*

[257] *Id.* at 1082. In *Salyer* the court allowed a voting classification that distinguished between those who owned land which would be affected, and those who had no immediate interest in the outcome of the vote. *See* Salyer Land Co. v. Tulare Water Dist, 410 U.S. 719 (1973).

[258] *See Rice*, 146 F.3d at 1078 (the court declined to address Rice's claim that the restriction violates the Anti-Nobility Clauses of the United States Constitution because that issue was raised for the first time on appeal).

[259] Rice v. Cayetano, 528 U.S. 495 (2000).

[260] *Id.* at 499.

[261] *See id.* According to the Court the issue in this case was whether Rice could be barred from voting for OHA trustees solely because he was not Hawaiian. *See id.*

[262] A holding that the "Hawaiian" classification was a racial one under the Fourteenth Amendment would have subjected all relevant programs to strict scrutiny under *Adarand*, and

glimpse the effects it will have in Hawai'i, and what the potential positions may be for bringing or defending against future challenges of preferences for Hawaiians.

The Court began with an admittedly brief account of Hawai'i's history in order to establish the proper perspective from which to view the issues in this case.[263] In its discussion of Hawai'i's history the Court noted that with admission to the Union, "the United States granted Hawaii title to all public lands and public property within the boundaries of the State, save those which the Federal government retained for its own use."[264] This land grant included 200,000 acres under the Hawaiian Homes Commission Act ("HHCA") as well as 1.2 million additional acres.[265] Such land was to be held as a public trust and was

> to be managed and disposed of for one or more of five purposes: [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownersip on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.[266]

OHA is charged, by constitutional mandate, with fulfilling the second of these five purposes, the "betterment of native Hawaiians."[267]

The Supreme Court's decision was based upon a finding of: (1) state action;[268] (2) that uses ancestry as a proxy for a racial classification;[269] and (3) in order to exclude a portion of the population from voting based on such

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would have extended much farther than the voter eligibility issues involved in this case. *See* Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).

[263] *See Rice*, 528 U.S. at 500-06. The Court stated that Rice was a citizen of Hawai'i, and was "thus himself a Hawaiian in a well- accepted sense of the term . . ." *Id.* at 499. This statement is entirely accurate when considered from the viewpoint of one who resides outside of Hawai'i. However, for those who live in Hawai'i "Hawaiian" does not mean "citizen of the state" as "Californian" or "Pennsylvanian" would. Rather, the term in the islands is generally accepted to mean one who is a member of those peoples who inhabited the islands before 1778, as provided by statute. *See* HAW. REV. STAT. § 10-2 (1995).

[264] *Rice*, 528 U.S. at 507 (citing Admission Act, Pub. L. 86-3, §§ 4, 7, 73 Stat. 5, 7; HAW. CONST. art. XII, §§ 1-3).

[265] *See id.* (citing Brief for United States as Amicus Curiae 4).

[266] *Id.* at 508 (alterations in original).

[267] Admission Act § 5(f); HAW. REV. STAT. § 10-3 (1995); HAW. CONST. art. XII, § 5. The constitutionality of OHA has not been called into dispute in this case. *See Rice*, 146 F.3d at 1079. However, questions as to its function and scope have been raised in the past, and will likely be raised again in light of the Supreme Court's stance in *Rice*. *See, e.g.*, Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993).

[268] *See Rice*, 528 U.S. at 515-17.

[269] *See id.* at 513-18.

classification.[270] The Court determined that OHA was an agency of the State, and the classification therefore constituted state action.[271] The Court based its finding in part on the 1978 Constitutional Convention Standing Committee Report which stated "[t]he committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although *it will assume the status of a state agency.*"[272] The Court went on to point out that although OHA is in a unique position, it is nevertheless a state agency, and actions taken by it therefore constitute state action.[273] The Fifteenth Amendment is "binding on the National Government, the States, and their *political subdivisions*, [the Fifeenth Amendment] controls the case."[274]

As a finding of state action does not necessarily render a classification unconstitutional, the Court next determined whether the action in this case was permissible state action. The Court began its analysis with the well-established principle that voting restrictions based on race constitute impermissible state action.[275] It then found that ancestry could be used as a proxy for race, and was used as such a proxy here.[276]

Defending the voting restriction, the State had contended that the classification was not racial but political, similar to the political status granted to Native Americans.[277] The Court first addressed the issue of whether the Hawaiian limitation constituted a racial classification by noting that the Ninth Circuit Court of Appeals held that the classification was facially racial.[278] The district court had justified this classification by finding a recognized guardian-ward relationship between the United States and the native Hawaiians.[279]

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[270] *See id.* at 515-17.

[271] *See id.* at 507-10, 515-22.

[272] *Id.* at 521 (emphasis added).

[273] *See id.*

[274] *Id.* at 497.

[275] *See id.* at 511-14 (emphasizing the variety and persistence of voting restrictions) (citing South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966); Louisiana v. United States, 380 U.S. 145 (1965) (interpretation tests); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (racial gerrymandering); United States v. Thomas, 362 U.S. 58 (1960) (per curiam) (registration challenges); Terry v. Adams, 345 U.S. 461 (1953) (white primary); Smith v. Allwright, 321 U.S. 649 (1944) (white primary); Lane v. Wilson, 307 U.S. 268 (1939) ("procedural hurdles"); Myers v. Anderson 238 U.S. 368 (1915) (grandfather clause)).

[276] *See Rice*, 528 U.S. at 513-14.

[277] *See id.* at 515-18.

[278] *See id.* at 511.

[279] *See id. But see* Van Dyke, *supra* note 215 at 119 (referencing Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982)):

> The state and federal courts in Hawaii, as well as the United States Court of Appeals for the Ninth Circuit, have applied the *Mancari* approach broadly to cover all native people, and have consistently ruled that separate and preferential programs for Native Hawaiians

Before addressing whether a valid political relationship existed which would only need to survive a rational basis standard of review,[280] the Court considered the purpose and command of the Fifteenth Amendment.[281] Although the amendment was originally enacted to protect the voting rights of emancipated slaves, according to the Court, "the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The [Fifteenth] Amendment grants protection to all persons, not just members of a particular race."[282] The Court then determined "'racial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'"[283] Here, the purpose of the statutory classification was to recognize Hawaiians as a distinct group. "The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose."[284]

In support of its conclusion that the statute represented a racial distinction, the Court referenced the Senate Standing Committee Reports and the Conference Committee Reports, which stated that "[t]he word 'peoples' has been substituted for 'races' in the definition of 'Hawaiian.' Again, your Committee wishes to emphasize that this substitution is merely technical and that 'peoples' does mean 'races.'"[285] This was persuasive in the Court's determination that the OHA restrictions on voter eligibility deny the right to vote on the basis of race.

The State countered that the voting restriction must only pass a rational basis review, and is valid under either *Morton v. Mancari*[286] or *Salyer Land Co. v. Tulare Lake Basin Storage District*.[287] *Mancari* involved a hiring preference among Native Americans. This preference was subject to rational basis review, as the status of Native Americans has been determined to be political rather than racial.[288] The Court was unpersuaded by this contention, and called it "the most far reaching of the State's arguments."[289] While the

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are "political" rather than "racial" and thus must be evaluated under the "rational basis" level of judicial scrutiny that applies to other native people.

Id.

[280] *See* Morton v. Mancari, 417 U.S. 535 (1974).

[281] *See Rice*, 528 U.S. at 511-14.

[282] *Id.* at 512.

[283] *Id.* at 515 (alterations in original).

[284] *Id.* (the legislation referred to by the Court is that which defines and distinguishes Hawaiians from Native Hawaiians). *See also* HAW. REV. STAT. § 10-2 (1995).

[285] *Id.* (citing STAND. COMM. REP. No. 734 at 1350, 1353-54; CONF. COMM. REP. No. 77 at 998, 999).

[286] 417 U.S. 535 (1974) (holding that the vote could be limited to Native Americans).

[287] 410 U.S. 719 (1973) (holding that the vote could be limited to only those who would be affected by it).

[288] *See Rice*, 528 U.S. at 519 (citing Morton v. Mancari, 417 U.S. at 553-555).

[289] *Id.* at 518.

Court specifically did not overturn *Mancari,* it distinguished the issue there from that in *Rice.*[290] The Court concluded that "[i]t does not follow from *Mancari,* however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."[291] While there exist instances in which a voting restriction was held permissible, those restrictions were the "internal affair of a quasi-sovereign" whereas in the present case the restriction is "the affair of the State of Hawaii."[292]

Unlike *Rice* and *Mancari, Salyer* involved a voting restriction that did not utilize racial classifications.[293] The classification in *Salyer* limited the voter eligibility to only those who would be affected by it.[294] The Court declined to accept the Salyer analogy, saying only that "it is far from clear that the *Salyer* line of cases would be at all applicable to statewide elections for an agency with the powers and responsibilities of OHA."[295] The Court also stated that it is not clear that the vote in *Rice* is limited to only the beneficiaries, noting that the "State permits both 'native Hawaiians' and 'Hawaiians' to vote for the office of trustee."[296]

Based upon these considerations the Court determined that the classification was a racial one used to exclude a portion of the population from voting.[297] In that regard the Court declared that "all citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others."[298] After determining that the voting restriction here violated the Fifteenth Amendment, the Court advised Hawai'i that "it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points

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[290] *See id.* at 518-19.

[291] *Id.* at 520. The Court specifically stated that "Congress may not authorize a State to create a voting scheme of this sort." *Id.*

[292] *Id.* at 520. See also *supra* notes 266-76 and accompanying text discussing the Court's finding of state action. There has been much response to this particular aspect of the Court's opinion, with the OHA trustees seeking to become an independent agency. *See* Pat Omandam, *OHA Looks to Remake Itself,* HONOLULU STAR BULL., Mar. 11, 2000, at A1.

[293] *See* Salyer Land Co. v. Tulare Water Dist. 410 U.S. 719 (1973). *See also supra* note 253 and accompanying text.

[294] *See id.* (determining that voter eligibility could be restricted on the basis of whether the individual would be affected by it). *See also supra* notes 252-55 and accompanying text.

[295] *Rice,* 528 U.S. at 522. This determination of determination of *Salyer's* inapplicability likely rests on the scope of the election involved in *Rice* (statewide) as opposed to the limited scope involved in *Salyer* (water district). *See id.* Additionally, *Salyer* did not involve racial classifications, which are subject to stricter scrutiny than other types of classifications.

[296] *Id.* at 499.

[297] *See id.* at 514-17.

[298] *Id.* at 523.

is this principle: The Constitution of the United States, too, has become the heritage of all of the citizens of Hawaii."[299]

4. The concurrence

Justices Breyer and Souter concurred in the result.[300] The concurring Justices would have found that the Native American analogy put forth by the State was invalid because: "(1) there is no 'trust' for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe."[301] The concurrence here would have limited the possibility of a political rather than a racial distinction for Native Hawaiians to those in federally recognized 'tribes.'[302]

Additionally, the concurrence noted that the 1.2 million acres of land referred to in the Admission Act are to benefit all of Hawai'i's citizens.[303] The majority did not address the issue of who the beneficiaries of the land trust are or whether it is indeed a trust. Although this issue was potentially before the Court when addressing the *Salyer* analogy, the majority did not find it necessary to determine beneficiary status to decide this case. Moreover, the concurrence did not focus on beneficiary status, but on whether the Native Hawaiians can be said to be members of "tribes."

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[299] *Id.*

[300] *See id.* (Breyer, Souter, JJ., concurring in result).

[301] *Id.*

[302] *See id.* According to Stuart Minor Benjamin, J.D., Yale Law School, 1991, Professor, University of San Diego, the only way for Hawai'i to keep its programs for the benefit of Native Hawaiians intact would be for the Native Hawaiians to assume tribal status, as the Native Americans have. *See* Benjamin, *supra* note 214. That article was previously the leading authority on the status of Native Hawaiian people under federal law. *But see* Van Dyke, *supra* note 215, at 98-101 (stating that Professor Benjamin's article, although heavily footnoted, contains fundamental errors in analysis.) Those errors in analysis are addressed and overcome by Professor Van Dyke, a detailed discussion of which is beyond the scope of this Comment. For a more in depth look at the "tribal" status of Native Hawaiians, and an analysis of the "political status" issues, see generally, Van Dyke, *supra* note 215. *See also id.* at 212 which states that the term "tribe" is actually quite ill defined, and "has been malleable and elusive over the years. The leading legal treatise on Indian law states that 'the term tribe has no universal legal definition.'" *Id.* (citing Felix S. Cohen's Handbook of Federal Indian Law 3 (Rennard Strickland et al. eds., 1982)). Van Dyke also explained that "the framers of the Constitution did recognize that individual Indians should be treated differently from other persons without regard to whether they were in 'tribes.'" *Id.*

[303] *See Rice*, 528 U.S. at 525 (Breyer, Souter, JJ., concurring in result). *See also* Admission Act § 5(f) ('the betterment of native Hawaiians' is only one of five stated purposes of the land trust).

5. The dissent

The dissent, authored by Justice Stevens, and joined by Justice Ginsburg, dismissed the majority's holding, by countering that it "rest[ed] largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii."[304] The dissent claimed that upholding the voting restriction would have been in keeping with three principles:

> [1] the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians . . . [2] there exists in this case the State's own fiduciary responsibility – arising from its establishment of a public trust - for administering assets granted it by the Federal Government in part for the benefit of native Hawaiians . . . [3] even if one were to ignore the more than two centuries of Indian law precedent and practice on which this case follows, there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs and to preserve a distinct and vibrant culture[.][305]

The dissenting Justices would have analogized to Indian law, and considered the history of Hawai'i in finding a trust relationship between the United States and the native Hawaiians (and arguably Hawaiians as well).[306]

The local reactions to the decision in *Rice* have moved across a broad spectrum, ranging from greater determination to join together for sovereignty,[307] to calls for civil disobedience,[308] to confusion over what the next steps will be.[309] At this time the far reaching effects of the ruling in *Rice*

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[304] *Rice*, 528 U.S. at 527-28 (Stevens, J., dissenting).

[305] *Id.* at 529 (Stevens, J., dissenting).

[306] *See id.* at 533-35 (Stevens, J., dissenting).

[307] *See* Karen Blakeman, *Protest Targets UH Board, Hawaiian Activists Push Ceded Lands, Other Issues*, HONOLULU ADVERTISER, Mar. 6, 2000, at A1; Tanya Bricking, *Rice Ruling Prompts Third-Party Effort*, HONOLULU ADVERTISER, Mar. 8, 2000, at B1; Tanya Bricking & Scott Ishikawa, *Hawaiians Solid on OHA, Senate Hears Pleas for Unity, Patience*, HONOLULU ADVERTISER, Mar. 2, 2000, at B1; John Flanagan, *It's Time for Hawaiian Unity*, HONOLULU STAR BULL., Mar. 4, 2000, at B1; Scott Ishikawa & Jan TenBruggencate, *Hearings Convey Hawaiian Anger*, HONOLULU ADVERTISER, Feb. 27, 2000, at A1.

[308] *See* Pat Omandam, *Despite Deal, Hawaiians Plan Civil Disobedience*, HONOLULU ADVERTISER, Mar. 3, 2000, at A1; Walter Wright, *Trustees Won't Budge; Hee Seeks Discussion, OHA's Trask Urges Civil Disobedience*, HONOLULU ADVERTISER, Feb. 25, 2000, at A1.

[309] *See* Tanya Bricking, *OHA Hires Law Firm to Take Issue Forward*, HONOLULU ADVERTISER, Feb. 29, 2000, at A1; Pat Omandam, *State, OHA Looking for Ways to Return to 'Collaborative Path'*, HONOLULU STAR BULL., Mar. 2, 2000, at A1; Walter Wright, *Governor May Let Trustees Stay*, HONOLULU ADVERTISER, Mar. 2, 2000, at A1; Walter Wright, *OHA, Cayetano Ask for Court's Help*, HONOLULU ADVERTISER, Mar. 3, 2000, at A1.

are unclear. Certainly litigation will increase[310] as parties on all sides of the issue try to determine where to go from here.

V. CONCLUSION

This comment has addressed various conflicting views and opinions regarding racial preferences. The issue of what constitutes a permissible racial preference moved to the forefront in Hawai'i with the Supreme Court's decision in *Rice*.[311] The necessity of comparing these opinions is itself evidence that there are still preferences, assumptions, and decisions made based on gender and race in this country. The question for the courts and legislatures is whether affirmative action is the way to fix this problem. Some would say we need preferences in order to eliminate them, others would say we need to get rid of all classifications in order to move toward a color blind society. Still others would say that we should accept society, with all of its preconceptions and misconceptions, as it is.

This is the time to evaluate current attempts to find a solution to the controversy regarding preferences. It may be necessary to search for a new solution. A look at the past, and at the present, with consideration to the mistakes made, the problems encountered, and the actual causes of those problems, will provide a good place to start.

Anna Larsen[312]

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[310] *See* Christine Donnelly, *Lawyer: Rice's Win Will Mean More Suits, Attorney Goemans Says He'll Use the Supreme Court Ruling to Attack Native Hawaiian Benefits*, HONOLULU STAR BULL., Feb. 24, 2000, at A1.

[311] Rice v. Cayetano, 528 U.S. 495 (2000).

[312] Class of 2001, William S. Richardson School of Law.

1999 Hawai'i Legislation Update

I. INTRODUCTION

This legislative update contains summaries of various acts passed by the Hawai'i State Legislature during the 1999 Session. Several factors were considered in the selection of legislative acts. First, a review of the 306 acts passed by the Legislature was executed to select possibilities that may be of interest to practicing attorneys. Review of a *Honolulu Advertiser* article dated May 5, 1999 that highlighted various acts also presented possibilities for selections based on public interest. Selections also were made based on the various areas of law to create an overall balance of topics.

II. LEGISLATION

A. Criminal Law

1. Sentencing involving a minor witnessing domestic violence

The 1999 Legislature amended and added a new section to Hawai'i Revised Statutes ("HRS") Chapter 706[1] in response to its finding that children are at a high risk of suffering abuse in homes where domestic violence is present.[2] The Legislature found that children who witness domestic violence are at a greater risk to suffer potential mental and emotional harm.[3] The new legislation requires the court to consider whether the abuse took place in the presence of a minor.[4] When determining the sentence of someone involved in abuse of a family or household member, the court needs to consider factors under section 706-606 in addition to the individual's participation in the abuse.[5] The additional factors the judge must consider under the new amendment include: a conviction or an attempt to commit abuse of a family or a household member by the defendant; whether the defendant committed the offense in the presence of a minor; and whether the defendant is a family

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[1] HAW. REV. STAT. CH. 706 (1999). This chapter pertains to the disposition of convicted defendants. *See id.*

[2] *See* Act 268, §1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 839.

[3] *See id.*

[4] *See id.*

[5] HAW. REV. STAT. § 706-606 (1999). Factors the court needs to consider when determining sentencing include the nature and circumstances of the offense, the defendant's past criminal history, the seriousness of the offense and the relationship to providing justice, possibility of deterrence from future acts and public safety. *See id.*

or household member or has been either the minor or the victim of the offense.[6]

The amendment also defines terms used in Chapter 706.[7] The definition of the term "family or household member" is identical to the definition in HRS section 709-906.[8] An action constituting an "offense," under the new sections would be any violation of HRS sections 707-710,[9] 707-711,[10] 707-730,[11] 707-731,[12] 707-732[13] and 709-906.[14] "In the presence of a minor" means an offense which occurs within the actual physical presence of a child, or when the defendant knows a child is present who may hear or see the offense.[15] An offense which occurs "in the presence of a minor" as defined by the statute triggers the imposition of stiffer penalties.[16]

2. Extending imprisonment term for repeat violent and sexual offenders

The Legislature added a new section to HRS Chapter 706[17] which enhances sentencing for repeat violent and sexual offenders.[18] A defendant's sentence of imprisonment, as defined in section 706-661,[19] shall be extended if the defendant is convicted of an offense under the listed sections of 706,[20] or is

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[6] *See* §2, 1999 Haw. Sess. Laws at 839.

[7] *See id.*

[8] *See* HAW. REV. STAT. § 709-906 (1999). The statute defines "family or household members" as "spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit." *Id.*

[9] *Id.* § 707-710(1) (defining "offense" pertaining to assault in the first degree).

[10] *Id.* § 707-711 (defining "offense" pertaining to assault in the second degree).

[11] *Id.* § 707-730 (defining "offense" pertaining to sexual assault in the first degree).

[12] *Id.* § 707-731 (defining "offense" pertaining to sexual assault in the second degree).

[13] HAW. REV. STAT. § 707-732 (defining "offense" pertaining to sexual assault in the third degree).

[14] *Id.* § 709-906 (describing "offense" pertaining to abuse of family and household members).

[15] *See* Act 268, §2(2), 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 839.

[16] *See* Act 268, 1999 Haw. Sess. Laws at 839.

[17] HAW. REV. STAT. CH. 706 (1999). Chapter 706 applies to the disposition of convicted defendants. *See id.*

[18] *See* Act 286, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 905-06.

[19] HAW. REV. STAT. § 706-661 (1999) (discussing sentencing of imprisonment for a felony). The maximum length of prison time for a class A felony is life, twenty years for a class B felony, and ten years for a class C felony. *See id.* The minimum time to be served is to be determined by the Hawai'i paroling authority pursuant to HRS section 706-669 procedures. *See id.*

[20] Possible offenses by a defendant that may trigger a longer prison sentence: HAW. REV. STAT. § 707-701.5 (1999) (murder in the second degree); HAW. REV. STAT. § 707-702 (1999)

convicted of three prior and separate convictions of a listed offense,[21] or is convicted of a federal violation or violation of another state law that is comparable with an offense enumerated under Hawai'i law.[22] In determining if a defendant's conviction will be considered a prior offense, the court will review whether the offense falls within the specific time frames set out under section 1 of Act 286.[23]

Act 286 amended the sentencing provisions in HRS section 706-661.[24] The legislation broadens the terms and length for sentencing for commission of specified felonies under HRS section 706-662.[25] The first addition to HRS section 706-661 is for a defendant who is convicted for murder in the second degree. When the case is designated as one under HRS section 706-662, the court will impose a life sentence without the possibility of parole as the maximum length of imprisonment pursuant to HRS section 706-661.[26] For a class A, B, or C felony, the act broadens the term for imprisonment by adding

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(manslaughter); HAW. REV. STAT. § 707-730 (1999) (sexual assault in the first degree); HAW. REV. STAT. § 707-731 (1999) (sexual assault in the second degree); HAW. REV. STAT § 707-732 (1999) (sexual assault in the third degree); HAW. REV. STAT § 707-733.5 (1999) (continuous sexual assault of a minor under the age of 14 years); HAW. REV. STAT. § 707-750 (1999) (promoting child abuse in the first degree); HAW. REV. STAT. § 708-840 (1999) (robbery in the first degree).

[21] HAW. REV. STAT. § 707-701.5 (1999) (murder in the second degree); HAW. REV. STAT. § 707-702 (1999) (manslaughter); HAW. REV. STAT. § 707-730 (1999) (sexual assault in the first degree); HAW. REV. STAT. § 707-731 (1999) (sexual assault in the second degree); HAW. REV. STAT. § 707-732 (1999) (sexual assault in the third degree); HAW. REV. STAT. § 707-733.5 (1999) (continuous sexual assault of a minor under the age of fourteen years); HAW. REV. STAT. § 707-750 (1999) (promoting child abuse in the first degree); HAW. REV. STAT. § 708-840 (1999) (robbery in the first degree).

[22] *See supra* note 20.

[23] Act 286, §1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 905-96. An offense that occurred within the past 20 years will be considered a prior conviction under HRS section 707-701.5, 707-702, 707-730, 707-733.5, 707-750 or 708-840. *See id.* Under HRS section 707-710 or 707-731, if the offense occurred within the past 10 years, it will be considered a prior conviction. *See id.* If the offense falls within the past five years under HRS § 707-11 or 707-732, it will be determined a prior offense. *See id.* For HRS section 707-701.5, 707-702, 707-710, 707-711, 707-730, 707-731, 707-732, 707-733.5, 707-750, or 708-840, an offense is considered a prior conviction if the offense occurred within the maximum term of imprisonment possible under the appropriate jurisdiction, federal law or another state law. *See id.*

[24] *See id.* Section 706-661 of HRS discusses sentencing of imprisonment for a felony. HAW. REV. STAT. § 706-661 (1999).

[25] *See* Act 286, §2, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 905-06.

[26] *See id.* Prior to the amendment, under HRS section 706-661, there was no provision for sentencing for second degree murder. *See* HAW. REV. STAT. § 706-661.

"indeterminate" before the term of imprisonment.[27] This gives the Hawai'i paroling authority more power to independently determine the minimum length of imprisonment for each individual who is convicted for any of the class felonies.[28]

3. Sentencing for evasion and failure to file tax return

The Legislature added probation as a possible penalty for both tax evasion and willful failure to file a tax return.[29] Permitting probation as a lighter penalty allows the court to consider the relevant facts of each case to determine appropriate sentencing for the situation.[30] Probation also was added to the possible penalties for willfully assisting or providing support in the preparation or presentation of fraudulent tax material.[31] This could be construed as encouraging tax evasion because of the possibility of receiving only a minor penalty. However, this legislation seems to be intended to provide the court with more flexibility to determine an appropriate penalty for the specific incident in question based on the particular facts involved.

4. Waiver of jurisdiction relating to minors

The Legislature amended HRS section 571-22[32] regarding the waiver of jurisdiction standards for minors. Prior to the change, a court could waive jurisdiction after a hearing was held, but this legislation now imposes an

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[27] "Indeterminate" is defined as that which is uncertain, or not particularly designated. BLACK'S LAW DICTIONARY 771 (6th ed. 1990).

[28] *See* Act 286, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 905-06. Prior to the amendments, under HRS section 706-661, the maximum length of prison time for a class A felony was life, for a class B felony the maximum length of prison time was 20 years and ten years for a class C felony. *See id.*

[29] *See* Act 303, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 933-34. Under HRS section 231-34, other listed penalties for tax evasion are either a fine of not more than $100,000 or a prison term of not more than five years, or both. *See id.* Under HRS section 231-35, other listed penalties for a person's willful failure to file tax return are a fine of not more than $25,000, or a prison term of not more than one year, or both. *See id.*

[30] Act 303, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 933-34.

[31] *See* Act 303, § 3(b), 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 934. Under HRS section 231-36, other listed penalties for a person found guilty of a class C felony for assisting another to file a fraudulent tax return include a fine of not more than $100,000 or a prison term of not more than three years or both. *See* HAW. REV. STAT. § 231-36. If the person is found guilty of a misdemeanor violation, then the possible fine is reduced to $2,000 and possible term of imprisonment is reduced to no more than one year with the possibility of receiving both. *See id.*

[32] HAW. REV. STAT. § 571-22 (1997). This section pertains to waiver of juvenile jurisdiction and transfer of juvenile matters to another court. *See id.*

additional requirement of conducting a full investigation into the matter in addition to holding a hearing.[33] The court also can waive jurisdiction for other felony charges that arise from the same incident for which the minor is charged with under subsection (j)[34] if the court previously waived their jurisdiction under subsection (b) or (d).[35] Due to this change, more effort will need to be expended before a court is allowed to treat minors as adults.[36]

B. Employment

1. Breastfeeding in the workplace

The Legislature created a new HRS Chapter entitled "Breastfeeding"[37] to provide greater protection for women who breastfeed their children. This new section prohibits an employer from disallowing an employee to express breastmilk during any break or meal period.[38]

The Legislature recognized that women with young children constitute the fastest growing group in the current labor force.[39] Many of these women are returning to work when their children are approximately three months old.[40] This legislation is intended to promote breastfeeding based on information from the American Academy of Pediatrics which recommends that women continue to breastfeed their child for at least the first twelve months of their child's life.[41] The American Academy of Pediatrics suggests that mothers make arrangements to express their breastmilk at work to ensure the child has breastmilk while away from the mother.[42] Therefore, the purpose of this legislation is to prevent employers from discriminating against women who express breastmilk in the workplace.[43]

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[33] *See* Act 139, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 449-51.

[34] *See id.*

[35] *See* HAW. REV. STAT. § 571-22 (1997). The court may waive jurisdiction for a minor under subsections (b) or (d) when the court has conducted a full investigation and held a hearing. *See id.*

[36] *See* Act 139, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 449-51.

[37] *See* Act 172, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 587-88.

[38] *See id.* §2.

[39] *See id.* §1.

[40] *See id.*

[41] *See id.*

[42] *See* Act 172, § 1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 587-88.

[43] *See id.*

In addition, HRS section 378-2[44] lists various unlawful discriminatory employment practices. The section was amended by including an employer's "refusal to hire or employ, or to bar or discharge from employment, or withhold pay, demote, or penalize a lactating employee" as an unlawful discriminatory practice by an employer.[45]

2. Procedures for drug and alcohol abuse testing of prospective employees

The Legislature added a new sub-section to HRS Chapter 329B[46] establishing provisions regarding the administration of pre-employment substance abuse tests, testing procedures and confidentiality of test results.[47] The amendment makes it easier for employers to pre-screen potential employees by allowing the use of portable substance abuse on-site tests if the tests comply with the provisions under the statute.[48] If the results of the test are valid, an employer may use finding of drugs, alcohol, or metabolites of drugs as a basis to deny employment or any employment benefit.[49] However, the employer must submit the sample to a testing laboratory that is licensed or approved by the Department of Health to confirm the results, which are reviewed by a licensed medical review officer.[50]

The Legislature also amended HRS section 329B-2[51] by adding a new definition for "substance abuse on-site screening test" which elaborates on the definition for "substance abuse test."[52] The new definition describes the

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[44] HAW. REV. STAT. § 378-2 (1999). This section provides definitions pertaining to unlawful discriminatory practices. *See id.*

[45] Act 172, §3, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 587-88.

[46] HAW. REV. STAT. CH. 329B (1996 & Supp. 1998). This section applies to substance abuse testing procedures being used throughout the State. *See id.* Exceptions where the testing procedures do not apply are those listed under HRS section 329B-2.5 which include:

(1) Toxicology tests used in direct clinical management of patients;

(2) Tests for alcohol under chapter 286 or chapter 291;

(3) Tests made pursuant to subpart C of Mandatory Guidelines for Federal Workplace Drug Testing Programs (53 Federal Register 11986); and

(4) Substance abuse testing of individuals under the supervision or custody of the judiciary, the department of public safety, the Hawaii Paroling authority, and the office of youth services.

Id.

[47] *See* Act 206, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 681-83.

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] HAW. REV. STAT. § 329B-2 (1996). This section pertains to substance abuse testing used throughout the State. *See id.*

[52] *See* Act 206, §1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 681-83. The old definition of "substance abuse test" was amended from allowing any testing

requirements for the portable test that employers may use to detect the presence of drugs, alcohol, or metabolites of drugs in collected body fluids of a prospective employee.[53] Under the new definition, an acceptable "substance abuse on-site screening test" is one that is portable, meets the United States Food and Drug Administration requirements for commercial distribution, and has the director of health's approval.[54]

C. Evidence

1. Use of victim's past behavior as evidence in civil action for sexual offenses or sexual harassment

The Legislature amended the Hawai'i Rules of Evidence pertaining to the use of a victim's past behavior in civil cases to conform to the current "rape shield laws."[55] The intent of the Legislature is to provide the same type of protection in civil cases as those granted for criminal cases to women and children who are victims of a sexual offense or harassment.[56]

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procedure designed to take and analyze bodily fluids or material from the body to a test that is portable and is approved under the new terms. *See* HAW. REV. STAT. § 329B-2 (1996).

[53] *See* Act 206, §2, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 681-83.

[54] *See id.*

[55] *See* HAW. R. EVID. 412 (1994). Prior to the amendment, Rule 412 stated:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual assault is not admissible to prove the character of the victim in order to show action in conformity therewith.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual assault, evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence is not admissible to prove the character of the victim in order to show action in conformity therewith, unless such evidence is:

(1) Admitted in accordance with subsection

(c)(1) and (2) and is constitutionally required to be admitted; or

(2) Admitted in accordance with subsection

(c) and is evidence of:

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual assault is alleged.

See id. Rule 412 pertains to sexual assault cases and determining the relevance and admissibility of information regarding a victim's past behavior. *See id.*

[56] *See* Act 89, §1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 175-77.

The first change to Hawai'i Rules of Evidence 412[57] eliminates the term "assault" and replaces it with the term "offense."[58] The Legislature intended to broaden the scope of sexual conduct covered by this provision to lessen the use of the victim's past behavior.[59]

The second change the Legislature made to Rule 412 addresses civil actions.[60] Prior to the amendment, this rule did not specifically apply to civil cases.[61] To provide greater protection to victims of a sexual offense or harassment in *both* criminal and civil cases, the Legislature added a provision concerning evidence pertaining to opinion, reputation and a victim's specific sexual conduct. This evidence cannot be admitted by the defendant to prove the plaintiff consented to the incident in question.[62] However, evidence of the victim's past sexual behavior may be admitted to prove the plaintiff's prior sexual relations with the defendant.[63] Furthermore, once the plaintiff or a witness of the plaintiff, introduces evidence regarding the plaintiff's past sexual relations, the defendant will be allowed to rebut that evidence and attack the plaintiff's credibility during cross-examination.[64]

D. Family Law

1. Disclosure of information by the Department of Human Services

The Legislature amended HRS section 346-10[65] to allow the Department of Human Services to disclose reports and records regarding abuse or neglect of a child in limited circumstances.[66] HRS section 346-10 limits the individuals allowed to receive the confidential information to those who are authorized by the State or the United States,[67] such as police departments, prosecutors' offices, the attorney general's office, or any other state, county, or federal

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[57] *See* HAW. R. EVID. 412.

[58] *See* Act 89, §2, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 175-77.

[59] *See id.* §1

[60] *See id.* §2.

[61] *See* HAW. R. EVID. 412. Prior to the amendment, the rule discussed its applicability to issues of criminal cases only. *See supra* note 55 for text of Rule 412.

[62] *See* Act 89, §2, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 175-77.

[63] *See id.*

[64] *See id.*

[65] HAW. REV. STAT. § 346-10 (1999). This statute discusses Department of Human Services responsibility to protect confidential information regarding abuse or neglect of children from disclosure.

[66] *See* Act 34, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 39-40. Disclosure is allowed to the extent possible under HRS section 350-1.4, to be discussed *infra*.

[67] *See id.* §1(a)(1), 1999 Haw. Sess. Laws at 39.

agency.[68] Other entities allowed to receive confidential information include banks, financial institutions, or any other payor of a public assistance warrant or checks.[69] The individual receiving the confidential information must be acting within the scope of their employment, and the request must relate to their official duties.[70] One example of a valid request for information would be a request concerning the "administration of any form of public assistance, medical assistance, food stamps, or social services."[71] This amendment gives the Department of Human Services the authority to adopt new rules in order to comply in a timely manner with changes made to any federal law or regulation regarding policies for disclosure of records.[72]

The confidentiality provision of HRS section 350-1.4[73] also was amended by the Legislature. This provision allows the Director of Human Services to adopt rules necessary to comply in a timely manner with changes made by any federal statute or regulation regarding confidentiality guidelines governing disclosure of child abuse or neglect information.[74]

2. Violations of a restraining and protective order

Act 200 amended provisions relating to family court temporary restraining and protective orders.[75] The Legislature inserted "knowing"[76] or "intentional"[77] to HRS section 586-4[78] to make its requirements consistent with a misdemeanor violation under HRS section 586-11.[79]

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[68] *See id.* §1(a)(2), 1999 Haw. Sess. Laws at 39.

[69] *See id.* §1(a)(4), 1999 Haw. Sess. Laws at 39.

[70] *See* STAND. COMM. REP. No. 459, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1134. Disclosure of information is limited to persons authorized to receive information.

[71] *See* Act 34, §1(a)(1), 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 39-40.

[72] Justification sheet dated October 2, 1998. Due to numerous changes to various statutes and regulations regarding social services, the adjustment in policy provides the Department of Human Services with flexibility in adopting rules to enable the state to comply with federal laws in a timely manner. *See id.*

[73] HAW. REV. STAT. § 350-1.4 (1999) (discussing confidentiality of reports).

[74] *See* Act 34, §2(a), 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 40.

[75] *See* Act 200, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 669-73.

[76] "Knowingly" is defined as "with knowledge; consciously; intelligently; willfully; intentionally". BLACK'S LAW DICTIONARY, *supra* note 27, at 872.

[77] "Intention" is the "determination to act in a certain way or to do a certain thing." *Id.*

[78] HAW. REV. STAT. § 586-4 (1997 & Supp. 1998). This section discusses the procedure for obtaining temporary restraining orders issued by the family court. *See id.*

[79] *See id.* This section establishes penalties for violations of a protection order issued by the family court. *See id.*

Act 200 also provides for additional sentencing under HRS section 586-11 for a person who is found to have violated an order for protection.[80] Persons convicted under the amended HRS section 586-11 are now required to attend a domestic violence intervention program in addition to any other punishment ordered by the court.[81]

The Legislature also amended fines and sentencing provisions under HRS section 586-11 for first, second, and subsequent convictions to impose additional penalties on offenders.[82] The amount of fines will vary depending upon whether the person is convicted of non-domestic or domestic abuse.[83] The court may order a defendant who is convicted for the first time for a violation of an order for protection for non-domestic abuse, in addition to imprisonment, a fine of not more than $150.[84] If the violation involves domestic abuse, the court will impose an additional fine that will be no less than $150 but no more than $500.[85]

For subsequent non-domestic abuse violations, the court can fine a defendant of a sum no more than $250, in addition to any mandatory jail sentence.[86] The fine for a subsequent domestic abuse violation is no less than $250 but no more than $1,000.[87] The amount of the fine and term of prison sentence increase if the violations relate to the same protection order.[88] Any fines the court collects under these new provisions are to be deposited into a special account established under section 601-3.6 to be used to fund programs and grants related to services regarding spouse or child abuse.[89]

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[80] *See* Act 200, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 670.

[81] *See id.*

[82] *See* Act 200, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 670-71.

[83] *See id.* §2, 1999 Haw. Sess. Laws 670-71. 1999 HRS section 586-1 defines "domestic abuse" as:

> (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault, extreme psychological abuse or malicious property damage between family or household members; or
>
> (2) Any act which would constitute an offense under section 709-906, or under part V or VI of Chapter 707 committed against a minor family or household member by an adult family or household member.

HAW. REV. STAT. § 586-1 (1997).

[84] *See id.* §2(a)(1)(A), 1999 Haw. Sess. Laws at 670.

[85] *See id.* §2(a)(1)(B), 1999 Haw. Sess. Laws at 670.

[86] *See id.* §2(a)(2)(A), 1999 Haw. Sess. Laws at 670.

[87] *See id.* §2(a)(2)(B), 1999 Haw. Sess. Laws at 670.

[88] *See id.*

[89] HAW. REV. STAT. § 601-3.6 (a), (b) (1995). This section establishes a special account entitled "spouse and child abuse special account" for use by the judiciary to provide for intervention or prevention programs. *See id.*

Similarly, Act 200 also provides for additional sentencing under the amended section 586-10[90] for violators of a restraining order.[91] Defendants are also required to attend a domestic violence intervention program in addition to any other provision ordered by the court.[92]

Comparable to the increased sentencing the defendant may receive under HRS section 580-11,[93] the court can impose upon the defendant additional fines depending upon the conviction under HRS section 580-10.[94] The defendant will be ordered by the court to begin serving his prison term upon his conviction and sentencing but the court may exercise its discretion to stay the "imposition of the sentence if special circumstances exist."[95]

3. Guardianship proceedings

The Legislature amended the guardianship proceedings notice provision under HRS section 560:5-309.[96] Act 298 provides that the court may waive for good cause, petitioner's requirement to provide notice to any person involved in the proceeding other than the ward.[97] A showing that reasonable efforts have been made but failed to discover the identity and address of the person to be served will satisfy this requirement.[98] The Legislature asserted that additional efforts to contact the person whose notice is being waived are

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[90] Act 200, §1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 669-73. Under HRS section 586-10, the court can order additional sentencing for a defendant who violates a restraining order. *See* HAW. REV. STAT. § 586-10 (1997 & Supp. 1998).

[91] Act 200, §3, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 669-73.

[92] *See id.*

[93] HAW. REV. STAT. § 586-11 (1999). Under this section, the court may order additional sentencing (increased jail time or higher fines) for a defendant who violates an order for protection upon consideration of whether the offense involved domestic abuse and the number of convictions.

[94] *See* Act 200, §3, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 669-73. The fine for a first conviction of violation of a restraining order is no less than $150 but no more than $500. *See id.* The fines for the second or any subsequent convictions are no less than $250 but no more than $1,000. *See id.* For both situations, the court will not order the defendant to pay the fine unless he has the ability to do so. *See id.*

[95] *See id.*

[96] HAW. REV. STAT. § 560:5-309 (1997 & Supp. 1998). This section outlines guidelines for providing notice in guardianship proceedings and details who needs to be served as well as the proper service procedure. *See id.*

[97] Act 298, §1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 919-20. Notice can be waived to persons under subsection (a)(1) "the ward or the person concerning whom the proceeding has been commenced and the ward's or person's spouse, legal parents, and adult children." HAW. REV. STAT. § 560:5-309 (1997 & Supp. 1998). If no person under subsection (a)(1) is notified, then persons whom notice can be waived under subsection (3) are at least one of the ward's or person's closest adult relatives if found. *See id.*

[98] *See* Act 298, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 919-20.

not necessary because that person has shown a lack of concern and interest in the proceedings.[99] Therefore, to avoid having their notice waived, the person concerned with the situation or with interest in the proceeding has the responsibility to become involved in the guardianship proceedings and should make efforts to identify themselves to the court.[100]

E. Government

1. Costs for search and rescue operations

The Legislature provided the State with a means to recover all or part of the search and rescue costs incurred during rescues of persons who consciously ignore governmental warnings posted at various places around the islands.[101] According to the Legislature, search and rescue efforts not only strain the state's limited financial resources, but also constitute a significant risk of serious injury or death for the rescuers in their attempts to save people who were warned of the dangers, but chose to ignore them.[102]

Act 66 adds a new HRS chapter entitled "Search and Rescue Reimbursement Act."[103] The first section of the new chapter provides definitions of terms used within the chapter.[104] The legislation also lists the search and rescue reimbursable expenses which a "government entity or any person or private entity" may recover.[105] "Reimbursable expenses" include any and all actual hourly wages, salaries, and employment-related benefits of people helping with the search and rescue operation, costs of equipment used, and fuel costs.[106] The Legislature included a generalized category of "any and all other expenses relating to a search and rescue operation" to cover any remaining costs that were not specifically enumerated.[107]

Section two provides guidelines regarding how the court is to determine who may be held liable for reimbursement.[108] The section lists three parties

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[99] *See id.*

[100] *See id.*

[101] *See* Search & Rescue Reimbursement Act (Act 66), 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 96-97.

[102] *See id.*

[103] *See id.*

[104] *See id.* §1, 1999 Haw. Sess. Laws at 96. This section defines "government entity" as any federal, state, or county department, unit or agency. A "warning or notice" is any posted sign issued by any government entity. *See id.*

[105] *Id.*

[106] Search & Rescue Reimbursement Act (Act 66), § 1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 96-97.

[107] *Id.* §2, 1999 Haw. Sess. Laws at 96.

[108] *See id.*

from whom the government entity can seek reimbursement: (1) the individual who needed search or rescue services, which includes the individual's estate, the individual's guardians or custodians, or any other party who takes responsibility for the person's safety; (2) someone who benefited by being rescued from the search or rescue operation; or (3) the party who put the individual in danger and therefore caused the need for a search or rescue operation.[109]

Under Act 66, the government entity may seek reimbursement only if the search was caused by the rescued's negligent act or failure to pay attention to personal safety.[110] Similarly, liability may attach to the rescued for the intentional disregard of warning signs or posted notices.[111]

The last section allows a government entity that is seeking reimbursement for costs incurred to bring its action in "any court of competent jurisdiction."[112] The government entity has the option to bring suit in court as long as it is not seeking more than the total amount of expenses of the rescue or search, regardless of what party owes the money.[113]

2. Meetings of state and county boards

The Legislature amended the public agency meeting and record provision of HRS section 92-5[114] to give authorization to a board to hold closed meetings to discuss and make decisions based on confidential information.[115] Closed meetings conflict with the general purpose stated in HRS section 92-1,[116] which opens meetings to public participation in forming public policy and providing information about the various government agencies activities.[117] However, the Legislature decided to create a limited exception to the open meeting requirement to allow closed meetings in special circumstances and "to

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[109] *See id.*

[110] *See id.*

[111] *See* Search & Rescue Reimbursement Act (Act 66), § 2, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 96, 97.

[112] *Id.* §3, 1999 Haw. Sess. Laws at 97.

[113] *See id.*

[114] HAW. REV. STAT. § 92-5 (1996 & Supp. 1999). This section discusses exceptions where a state or county board has the discretion to hold a closed meeting. *See id.*

[115] Act 49, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 57. Closed meetings may be based on discussions of confidential material such as personal information of those seeking professional or vocational licenses or matters such as hiring, dismissal, disciplinary action against an officer or employee, matters concerning the board members, and matters relating to public safety or security. *See id.*

[116] HAW. REV. STAT. § 92-1 (1996 & Supp. 1999). This section provides the intent and purpose of holding board meetings open to the public whenever possible. *See id.*

[117] *See id.*

maintain the confidentiality of protected information when it is brought before a state or county board."[118]

3. Landowner liability

The new landowner liability section[119] of HRS Chapter 198D is intended to provide some relief to the State from liability for injuries that result from an individual's use of unimproved state land.[120] The intent of creating the additional section is to release the State from responsibility for accidents occurring on unimproved areas because the State has not taken any action to make alterations and improvements to the area.[121] The State is released from liability if the area involved is an unimproved parcel of land that is under State ownership and control.[122] The Legislature contemplated that by providing this immunity to the State, the State would be encouraged to open more public trails and accesses for general use.[123]

F. Health

1. Physician assistants amendments

The Physician Assistants amendment[124] added two new definitions to HRS section 329-1.[125] The old version of the act defined a physician assistant as a "person licensed under section 453-5.3."[126] The new legislation further describes a physician assistant as someone who is able:

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[118] SEN. STAND. COMM. REP. NO. 1216, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1487. Pursuant to HRS section 92-1, a special circumstance for holding a closed meeting may include an executory meeting if a vote has been taken at an open meeting where two thirds of the members were present at the meeting and the meeting is publicly announced. *See id.*

[119] Act 106, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 374.

[120] *See id.* If the injury is the result of the State's gross negligence, the State will not be immune from liability. *See id.*

[121] *See* Act 106, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 374.

[122] *See id.*

[123] *See* STAND. COMM. REP. No. 972, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1357.

[124] Act 90, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 177-80.

[125] HAW. REV. STAT. § 329-1 (1996 & Supp. 1998). Section 329-1 provides definitions for terms used within Chapter 329 which pertains to the Uniform Controlled Substances Act. *See id.*

[126] Act 90, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 177-80. HRS section 453-5.3 provides requirements for certification that will now be for licensing. *See id.*

> [t]o administer, prescribe or dispense a controlled substance under the authority and supervision of a physician registered under HRS section 329-33, but who is not authorized to request, receive or sign for professional controlled substance samples.[127]

Prior to this act, a physician assistant needed to be certified under HRS section 453-5.3.[128] The Legislature found that changing the term "certification" to "licensed" when referring to a physician assistant more accurately reflects physician assistants' training and knowledge.[129] Generally, a "license", as opposed to a "certificate" indicates that the individual has more training and knowledge in the practicing area.[130] However, in this case, the change in terminology will match the existing training and educational requirements for physician assistants and will have little effect on the quality and type of services being provided to the public.[131] Furthermore, the amendment defines a "supervising physician" as someone who is: "[l]icensed to practice medicine in the State and registered under [HRS] section 329-33, who supervises a physician assistant and retains full professional and legal responsibility for the performance of the supervised physician assistant and the care and treatment of the patient."[132]

The amendment also requires persons filling out prescriptions to provide the name, signature, and special assigned code number of the physician assistant, as well as the Drug Enforcement Agency ("DEA") registration number of the supervising physician.[133] This information must be stamped, typed, or

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[127] *See id.* HRS section 329-33 provides the process and guidelines for registration with the department of public safety for a person who handles controlled substances. *See id.*

[128] HAW. REV. STAT. § 453-5.3 (1998). A certified physician assistant is a person who has training and does limited diagnostic or therapeutic procedures other than someone who has been given a temporary license under HRS section 453-3. *See id.* The state will certify a person as a physician assistant once the person meets the educational standards which are graduation from a board approved training program, passing of the national certification exam, as well as obtaining the appropriate on the job training. *See id.*

[129] *See* STAND. COMM. REP. No. 549, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1173.

[130] *See* GEORGE J. ANNAS ET AL., THE RIGHTS OF DOCTORS, NURSES AND ALLIED HEALTH PROFESSIONALS 45 (1981).

[131] *See* STAND. COMM. REP. No. 549, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1173. The Legislature found that certified physician assistants in Hawai'i are essentially licensed. *See id.*

[132] Act 90, §1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 177. Under HRS section 329-33, licensing relates to physician assistants because it discusses the necessary registration of an applicant in order to be able to dispense, prescribe or distribute controlled substances. *See* HAW. REV. STAT. § 329-33 (1996).

[133] *See* Act 90, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 177.

handwritten on the prescription of any controlled substance.[134] Additional information must be added when the prescription is in written form.[135] All written prescriptions must have the supervising physician and the physician assistant's name, address and phone number, as well as the signature of the physician assistant and initials of the supervising physician.[136]

G. Miscellaneous

1. Driving under the influence with a child in vehicle

The Legislature amended HRS section 291-4[137] and established additional penalties for driving under the influence of intoxicating liquor while having a passenger who is less than fifteen years of age in or on the vehicle.[138] This amendment responds to the Legislature's finding that the number of collisions involving child passengers is rising.[139] Thus, to dissuade people from drinking and driving, and in an attempt to reduce the number of accidents involving minors and intoxicated people, the legislation allows the court to impose harsher penalties for this offense.[140] The amendment provides an additional mandatory fine of $500, as well as an additional forty-eight hour prison term for any individual, eighteen years or older, that is convicted under this revision.[141]

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[134] *See id.*

[135] *See id.*

[136] *See id.*

[137] HAW. REV. STAT. § 291-4 (1998). This section defines the offense driving under the influence of intoxicating liquor and establishes the sentencing guidelines for the offense. *See id.*

[138] *See* Act 78, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 131-32.

[139] *See id.* §1, Haw. Sess. Laws 131-32.

[140] *See* Act 78, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 131-32.

[141] *See id.* §2, 1999 Haw. Sess. Laws 131-32. Under HRS section 294-4, an individual will be sentenced depending upon the number of previous offenses. In addition to the mandatory fine and imprisonment for having a minor passenger, an individual will be sentenced to participate in a fourteen-hour alcohol abuse rehabilitation program as well as an immediate suspension of their driving license and either community service, imprisonment, or a fine upon their first offense of driving under the influence of intoxicating liquor. *See* HAW. REV. STAT. § 294-4 (1998). For subsequent offenses, the individual will face a longer suspension period of their license and more hours of community service, imprisonment and/or fines increasing the mandatory fines and terms of imprisonment because a minor was a passenger in the vehicle. *See id.*

2. Suspension or revocation of liquor licenses

The Legislature amended HRS section 281-61[142] to provide the liquor commission with the option to revoke, suspend, or place conditions or restrictions upon any liquor license issued under HRS Chapter 281.[143] The Legislature affords the commission with this power so efforts can be made to prevent undesirable activities from occurring on the licensed location or areas under the licensee's control that could present problems to the public.[144] The undesirable activities are not limited to crimes, but also include actions that could pose potential problems to the "health, safety, and welfare of the public."[145] The Legislature also amended HRS section 281-61(b)[146] to include assault as another example of the unwanted criminal activity that could present potential problems for licensed locations.[147]

3. Liability for coercion into prostitution

The Legislature enacted Act 203, which establishes civil liability for coercing another into prostitution or coercing him or her to remain in the business.[148] The Legislature created this section to address its finding that victims of prostitution suffer lasting financial, physical and emotional damage resulting by those who promote prostitution.[149] By establishing a civil cause of action for persons who have been victims of such coercion, the Legislature provides individuals with an opportunity to recover expenses such as loss of past or future income or loss of earning capacity.[150] Typically the criminal system is the means to obtain justice against those who coerce others into prostitution. However, the Legislature recognized that the civil justice system can and should also be available to assist in compensating victims for their

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[142] HAW. REV. STAT. § 281-61, (1996). This section discusses renewal of licenses for intoxicating liquor. *See id.*

[143] *See* Act 39, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 46.

[144] *See id.*

[145] *See id.*

[146] HAW. REV. STAT. § 281-61 (b) (1996). The Legislature is concerned with troublesome activities that present problems for the surrounding communities of premises that have liquor licenses. Examples of activities the commission wishes to eliminate are those:

> [t]hat are potentially injurious to the health, safety, and welfare of the public including but not limited to criminal activity, including drug dealing, drug use, or prostitution, upon petition of the administrator of the appropriate county agency, proper notice to the licensee, and a hearing before the commission pursuant to chapter 91.

Id.

[147] *See* Act 39, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 46.

[148] *See* Act 203, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 677-79.

[149] *See id.*

[150] *See id.* §5, 1999 Haw. Sess. Laws at 678.

suffering.[151] The Legislature intended this act to hinder efforts to coerce others into prostitution, as well as to hold those who would normally profit from prostitution liable, and thus provide compensation for any harm caused by their actions.[152]

The legislation creates a new chapter entitled "Liability for Coercion into Prostitution" which commences with definitions of terms used within the statute.[153] Someone who coerces another is one who uses or threatens to "use any form of domination, restrain, or control" to achieve the ultimate goal of having another participate or remain in prostitution and surrender at least some money earned through the business.[154] Coercion exists if, upon review of the entire situation, the facts supports the claim that an individual was being forced to participate or remain in prostitution.[155] For this chapter, the Legislature used the definition of prostitution found in HRS section 712-1200.[156] Someone will be found accountable for promoting prostitution if they meet the definition provided in HRS section 712-1202 for first degree promotion of prostitution[157] or in HRS section 712-1203 for second degree promotion of prostitution.[158]

A person who files suit for coercion into prostitution will have several choices of parties against whom they have a cause of action.[159] An example

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[151] *See id.*

[152] *See id.* 1999 Haw. Sess. Laws at 678.

[153] *See* Act 203, § 2, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 677, 678.

[154] *See id.*

[155] *See id.*

[156] HAW. REV. STAT. § 712-1200 (1999). Under this section of the Hawai'i Penal Code, prostitution is the act of a person who "engages in, or agrees or offers to engage in, sexual conduct with another person for a fee." *Id.*

[157] *See id.* § 712-1202. A person will be found guilty of first degree promotion of prostitution if they knowingly force a person to solicit themselves or receive profits from their participation in prostitution or if the individual being forced into prostitution. Person must be forced via "criminal coercion". *See id.*

[158] *See id.* § 712-1203. A person will be found guilty of second degree promotion of prostitution if they knowingly gain profits from people engaging in prostitution, whether it is from "managing, supervising, controlling or owning" a prostitution house or from a business with two or more prostitutes who are eighteen years old or less. *See id.*

[159] *See* Act 203, § 3, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 677-79. The individual may choose to exercise their right to bring a suit against a person who:

(1) Coerced the individual into prostitution;

(2) Coerced the individual to remain in prostitution;

(3) Used coercion to collect or receive any of the individual's earnings derived from prostitution; or

(4) Hired, or attempted to hire the individual to engage in prostitution, when a reasonable person would believe the individual was coerced into prostitution by another person.

Id.

of such a defendant would be the actual person who coerced the plaintiff to enter into prostitution or remain in the business, or any person who used coercion to obtain profits from the plaintiff.[160]

Act 203 also provides guidelines for the types of evidence that plaintiffs may use to support a claim of liability for coercion of prostitution.[161] The list is extensive but not exclusive to the types enumerated in the statute.[162] Along with guidelines for evidence, the act defines the damages a victim may recover.[163] The victim may seek to recover both economic and non-economic damages that are "proximately caused by coercion into prostitution;" "exemplary damages," "reasonable attorney's fees;" and costs of bringing the suit which would include fees for any expert testimony.[164]

The Legislature provided the court with the discretion to determine whether two or more victims seeking to recover under this new cause of action may join together as plaintiffs to bring one suit.[165] The court also has the discretion to join two defendants in one action.[166]

The Act bars an individual's coercion into prostitution claim if it is brought more than two years after the alleged incident.[167] But, if the victim is a minor, or if there is an ongoing criminal investigation against the defendant, the act allows the statute of limitation to be tolled.[168] Regardless of the remedies provided under this new section, a person retains the right to bring other

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[160] *See id.*

[161] *See id.* § 4, 1999 Haw. Sess. Laws at 677. The evidence that may be used is:

(1) Physical force or threats of physical force; (2) Physical or mental torture; (3) Leading an individual to believe that the individual will be protected from violence or arrest; (4) Kidnapping; (5) Blackmail; (6) Extortion; (7) Threat of criminal prosecution for any violation of the law; (8) Threat of interference with parental rights; (9) Restriction or interference with speech or communication with others; (10) Isolation; (11) Exploitation of pornographic performance; (12) Interference with opportunities for education; (13) Destroying property of the individual; (14) Restriction of movement; or (15) In the case of a person coerced while a minor: (a) Exploiting needs for food, shelter, safety, affection, or intimate relationship; (b) Exploiting a condition of developmental disability, cognitive limitation, affective disorder, or substance dependency; (c) Promise of legal benefit, such as posting bail, procuring an attorney, protecting from arrest, or promising unionization; (d) Promise of financial rewards; or (e) Defining the terms of an individual's employment or working conditions in a manner that is likely to lead to the individual's use in prostitution.

Id.

[162] *See id.*

[163] *See id.* § 5, 1999 Haw. Sess. Laws at 678.

[164] *See* Act 203, § 5, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 677, 678.

[165] *See id.* § 6, 1999 Haw. Sess. Laws at 678.

[166] *See id.*

[167] *See id.* § 7, 1999 Haw. Sess. Laws at 678.

[168] *See id.* §§ 7-8, 1999 Haw. Sess. Laws at 678.

actions allowed under other HRS provisions, and this chapter does not limit the liability of any person.[169]

4. Reverse Mortgages

The new section of HRS Chapter 506[170] provides a definition and requirements for reverse mortgage loans.[171] The amendment defines a reverse mortgage loan as:

> [a] loan made to a borrower wherein the committed principle amount is secured by a mortgage on residential property owned by the borrower and which is due upon sale of the property securing the loan, or upon the death of the last surviving borrower, or upon the borrower terminating use of the real property as the principal residence, or upon the borrower's default.[172]

A reverse mortgage is a loan that provides an individual with a cash loan based upon the equity of their home and does not require repayment until a future time.[173] The Legislature found that additional counseling is necessary during the reverse mortgage application process to protect vulnerable individuals, specifically elderly homeowners.[174] The amendment requires lenders to refer borrowers to a counseling program before they receive the financing.[175] Upon completion of counseling, the person seeking the loan should be well informed and be able to make a rational decision.[176] A lender may approve a reverse

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[169] *See* Act 203, § 9, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 677, 678.

[170] HAW. REV. STAT. CH. 506 (1993 & Supp. 1998). This chapter applies to mortgages of real property or fixtures. *See id.*

[171] *See* Act 50, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 58.

[172] *See id.* §506(c), 1999 Haw. Sess. Laws at 58. A reverse mortgage loan does not include a loan that is:

(1) Insured by the United States Department of Housing and Urban Development;

(2) Intended for sale to the Federal National Mortgage Association (also known as "Fannie Mae") or to the Federal Home Loan Mortgage Corporation (also known as "Freddie Mac"); or

(3) For which mortgage counseling is required under other state or federal laws.

Id.

[173] *See* STAND. COMM. REP. No. 1470, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1590.

[174] *See* STAND. COMM. REP. No. 1470, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1590. The Legislature found that the elderly are using reverse mortgage financing in increasing numbers and may be at higher risk in making a regretful choice because of lack of information. *See id.*

[175] *See* Act 50, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 58.

[176] *See* STAND. COMM. REP. No. 1470, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1590.

mortgage only after the applicant completes the counseling and the lender receives a certificate proving completion.[177]

5. Telemarketing fraud

Act 170,[178] establishes a new chapter pertaining to the prevention of telemarketing fraud.[179] The Legislature found that there is a need to control fraudulent telemarketing activity in Hawai'i.[180] Although it is difficult to find and prosecute fraudulent telemarketers, the Legislature wanted to protect vulnerable persons from becoming victims.[181] This legislation is intended to prevent fraudulent misuse of telemarketing programs that deceive innocent consumers, rather than to punish businesses who commit minor violations.[182] The new chapter characterizes fraudulent telemarketers as individuals who knowingly use unfair practices and deceptive acts to take money away from individuals under false pretenses.[183] This legislation provides the means to hold fraudulent telemarketers responsible for their actions.[184]

Under this new HRS section, the soliciting party is required to follow set procedures when making telephone calls to consumers.[185] Failure to follow the required procedures is a violation of this chapter, and thus may result in liability for telemarketing fraud.[186] Under the new section, a soliciting party must not only disclose basic information about the product and company, but also are required to inform the consumer of all conditions and restrictions of the purchase agreement, terms and conditions, and any additional costs to receive prizes.[187]

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[177] *See* §1(a), 1999 Haw. Sess. Laws at 57-8.

[178] Telemarketing Fraud Prevention Act (Act 170), 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 577-82 (1999).

[179] *See id.*

[180] *See id.*

[181] *See* SEN. STAND. COMM. REP. No. 860, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 HAW. SEN. J. 1305-06. The elderly and the mentally deficient are examples of individuals the Legislature wanted to protect. *See id.*

[182] *See id.*

[183] *See* Telemarketing Fraud Prevention Act, 1999 Haw. Sess. Laws at 577-82.

[184] *See id.*

[185] *See id.* For example, the solicitor must disclose the purpose of the call, the name and company the caller represents and the goods and services being promoted to the caller within the range of the first three minutes of a call. *See id.* § 2(1).

[186] *See* Act 170, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 577-82 (1999).

[187] *See id.* §2. Before payment is received, the consumer needs to be informed about the total costs and quantity of goods or services purchased, any policies concerning refunds, cancellation or exchanges and odds to win prizes. *See id.*

Furthermore, this new HRS section requires the solicitor to follow strict procedures regarding record keeping practices.[188] The solicitor must keep accurate records of potential customers.[189] Listings must include the solicitor's name and any employee under that person, the business promoted, scripts used by any solicitor, any materials supporting claims being made about products or services promoted, as well as information pertaining to the consumer such as any transactions, purchases, or agreements with those buying goods or services.[190] The record keeping provision also requires the solicitor to keep accurate lists of those who do not wish to be contacted again pursuant to the standards set forth in 47 C.F.R. section 64.1200(e)(2).[191]

There are several exceptions listed of those who are not bound to follow the requirements in this chapter.[192] Some of the exceptions include: a person calling for political or religious reasons, a person involved with securities who is registered with the State, and any financial institution who has the authorization to receive deposits.[193]

This new HRS section also provides that any contract or agreement that is based on telemarketing activity and is found to violate the requirements for a legitimate telemarketing business will not be enforceable against the consumer.[194] The court will not only determine the contract or agreement voidable, but also the debts of the individual that arise from the invalid contract will not be considered appropriate information to report to a credit-reporting agency.[195]

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[188] *See id.* §4. Under section 4, the telephone solicitor is required to keep accurate records with the listed information of their activity and have those records produced upon demand to any governmental agency who has authority to request information and enforce this provision. *See id.*

[189] *See id.*

[190] *See id.*

[191] *See* Act 170, § 3(7)(A), 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 577-82 (1999).

47 C.F.R. section 64.1200 provides guidelines a solicitor must follow in maintaining lists of people who do not wish to receive calls. *See* 47 C.F.R. § 64.1200 (1998). The solicitor or company promoting the solicitation must have a written policy for handling people who do not wish to receive calls, they must provide training and inform any employee of the procedures, as well as keep accurate lists and maintain these lists so they are current. *See id.* Once a caller is placed on the "wish not to be called" list, the solicitor cannot contact the caller for ten years from the date of the request. *See id.*

[192] *See* §5, 1999 Haw. Sess. Laws at 581-82.

[193] *See id.* Other exceptions include: a person authorized and licensed to sell insurance, a person associated with higher education, a person who is promoting a catalog which has no less than fifteen pages, has more than one hundred thousand in circulation and is produced at least four times a year, any political subdivision of the United States or any state of the United States, a person associated with cable provider, and real estate agency or travel agency. *See id.*

[194] *See id.* §8.

[195] *See id.*

Options provided for fraudulent telemarketing include the consumer's option of returning the goods or canceling services up to seven days after initial receipt.[196] The provider of the goods or services must send the consumer a full refund no later than thirty days after receiving the returned goods or notice of cancellation of services.[197] The relief provided by the legislation does not invalidate any other additional relief that is available to the consumer under the common law, or other state or federal statutes or rules.[198] For example, under the United States Code, the attorney general of any state can institute a civil action if the attorney general believes the citizens of the state have been harmed and injured by a telemarketing scheme.[199] The attorney general acting on behalf of the residents of that particular state can ask the telemarketer to comply with the regulations set forth by the Legislature as well as seek compensation for any damages incurred.[200] The private citizen also is provided with a remedy under the United States Code.[201] An individual who has been harmed by a telemarketing plan may bring a civil suit in an appropriate United States district court, on behalf of themselves.[202] The suit needs to be brought within "three years after the discovery of the violation"[203] and "the amount in controversy must exceed the sum or value of $50,000 in actual damages for each person adversely affected."[204]

Renee Furuta[205]

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[196] *See id.*

[197] *See* Act 170, § 8. 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 577-82 (1999).

[198] *See id.* §7.

[199] *See* 15 U.S.C.A. § 6103 (West 1998).

[200] *See id.*

[201] *See id.*

[202] *See id.*

[203] *See id.*

[204] *See id.*

[205] Class of 2001, William S. Richardson School of Law.

Hawai'i 2000 Report Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions

I. PREFACE

This Hawai'i 2000 Report Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions[1] ("*Hawai'i 2000 Report*") is presented by the Opinion Committee ("Committee")[2] of the Real Property and Financial Services Section ("Section") of the Hawai'i State Bar Association, as an addendum to the *Accord* and the *Report* which are described below. The *Hawai'i 2000 Report* follows – and supersedes – a prior product of a similar committee (chaired by Raymond S. Iwamoto) of the Section: *Borrower's Counsel's Opinions to Lenders* ("*1987 Article*").[3]

The *1987 Article* articulated principles and standards used by Hawai'i practitioners in giving and accepting legal opinions in Mortgage Loan Transactions. The *1987 Article* is consistent with more detailed work later performed by committees representing national associations of lawyers. In 1991, the Section of Business Law of the American Bar Association published the *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association.*[4] That publication includes a Foreword[5], a Legal Opinion Accord ("*Accord*")[6] with Commentary

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[1] Transactions, or those portions of transactions, involving a security interest in real property.

[2] Chair: Jon M.H. Pang, Esq.; Co-Reporters: Trevor A. Brown, Esq. and Danton S. Wong, Esq.; Members: Gail O. Ayabe, Esq., Wesley Y.S. Chang, Esq., Deborah J.M. Chun, Esq., Daniel Devaney IV, Esq., Nancy N. Grekin, Esq., Michelle C. Imata, Esq., Raymond S. Iwamoto, Esq., Diane S. Kishimoto, Esq., and William W.L. Yuen, Esq.

The members of the Committee do not feel that the title of "Reporter" does justice to the work of Trevor A. Brown, Esq. and Danton S. Wong, Esq. Their compilation of the products and comments contributed by the Committee involved a tremendous amount of effort and analysis. The Committee members extend their appreciation to Danton and Trevor for undertaking the primary drafting of this product.

[3] *See* Ad hoc Committee, Real Property and Financial Services Section, Hawai'i State Bar Association, *Borrower's Counsel's Opinions to Lenders*, 20 HAW. BAR J. 129 (1987).

[4] *See* Committee on Legal Opinions, Section of Business Law, American Bar Association, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991); *reprinted in* 29 REAL PROP. PROB. & TR. J. 487 (1994).

[5] *See id.* at 169.

[6] *See id.* at 173.

("*Commentary*"),[7] an Illustrative Opinion Letter[8] and Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions ("*Guidelines*").[9] Because the *Accord* expressly excludes certain legal opinion issues involving liens on real property,[10] the *Accord* was supplemented and adapted to Mortgage Loan Transactions in 1994 by a Joint Drafting Committee of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers in the *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions.*[11] In 1998, the Committee on Legal Opinions of the American Bar Association's Section of Business Law stated principles, which provide guidance for all opinion letters, including those that do not reference the *Accord.*[12]

The *Hawai'i 2000 Report*: (i) utilizes the work that has been done since the *1987 Article* to make recommendations regarding a form of opinion letter; (ii) endorses the *Principles* as an accurate statement of Hawai'i practice; (iii) addresses certain Hawai'i specific issues; and (iv) rearticulates important Hawai'i practice standards for opinion letters.[13]

The *Hawai'i 2000 Report* represents the consensus of the members of this Committee; however, it does not necessarily reflect the views of any particular member of the Committee. This *Hawai'i 2000 Report* has been approved by the Section, but it has not been adopted or approved by the Hawai'i State Bar Association. Neither the Section nor this Committee promise that the *Hawai'i 2000 Report* is free from error when published; therefore, readers are urged to verify all analysis contained herein.

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[7] *See id.* at 173.

[8] *See id.* at 221.

[9] *See id.* at 224.

[10] *See supra* note 4, at 215, § 19(h).

[11] *See* Subcommittee on Adaptation of the Legal Opinion Accord of the American Bar Association Section of Business Law, Committee on Legal Opinions in Real Estate Transactions, Section of Real Property, Probate and Trust Law, American Bar Association; and the American College of Real Estate Lawyers Attorneys' Opinions Committee, *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions*, 29 REAL PROP. PROB. & TR. J. 569 (1994) [hereinafter "*Report*"].

[12] *See* Committee on Legal Opinions, Section of Business Law, American Bar Association, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter "*Principles*"].

[13] Other state bar associations have undertaken similar opinion projects in light of the national work reflected in the *Accord* and the *Report*. Particularly helpful to the Committee have been the approach and format of: Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, State Bar of Texas, *1996 Texas Supplement Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions* (1996).

II. RECOMMENDATION AND ENDORSEMENT

The Committee recommends that lawyers in Hawai'i – by express reference – adopt and incorporate the *Accord* and the *Report* into their opinion letters in Mortgage Loan Transactions. In addition, although the Foreword, *Commentary*, Illustrative Opinion Letter and *Guidelines* accompanying the *Accord* are not officially a part of the *Accord* itself, the Committee recommends that lawyers in Hawai'i consult those accompanying materials as a reference and practice aid. As supplemented by the *Report*, the *Accord* offers lawyers an opportunity to prepare an opinion letter for a Mortgage Loan Transaction with a nationally uniform format, contributing to efficiency and cost effectiveness in the opinion process. The Committee also believes that by incorporating the *Accord* and the *Report*, an Opinion Giver (the term used in the *Accord* for the opining lawyer) has the basics of an opinion letter for a Mortgage Loan Transaction that will be mutually acceptable in format to both the Opinion Giver and the Opinion Recipient (the term used in the *Accord* for the mortgagee). Further, the Committee believes that Hawai'i practice generally conforms to the principles and standards reflected in the *Accord* and the *Report*. Finally, the Committee believes that the *Accord* and the *Report* reflect an appropriate balance – for many transactions – of the costs and benefits of addressing particular issues through third party opinion letters.

The Committee also endorses the *Principles*[14] as an accurate statement of selected aspects of customary Hawai'i practice for all opinion letters including those that do not reference the *Accord* or the *Report*.

III. SAMPLE OPINION LETTER

Attached as Appendix 1 is a sample opinion letter ("sample Opinion Letter") based on the *Accord*, the *Report*, and this *Hawai'i 2000 Report*. The sample Opinion Letter also contains commentary to assist members of the Hawai'i Bar in increasing their familiarity with the *Accord* and the *Report* and to illustrate how Hawai'i practice conforms to the principles in the *Accord* and the *Report*.[15]

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[14] *See Principles*, *supra* note 12.

[15] This *Hawai'i 2000 Report* focuses on the *Accord* and the *Report* which provide for Opinion Givers to expressly incorporate by reference certain standards and terms in their opinion letters. *See* Committee on Legal Opinions, *supra* note 4, at § 22; *Report*, *supra* note 11, at ¶ 20. Other recent work by national and local bar associations articulate practice standards and guidelines for opinion letters whether or not such opinion letters make reference to the associations' work. *See, e.g.*, *Principles*, *supra* note 12, at 831; TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter "*Closing Opinions*"]. The *Hawai'i 2000 Report* provides selected commentary on Hawai'i opinion letter

The sample Opinion Letter incorporates by reference the *Accord* and the *Report*. This means that numerous definitions, opinions, assumptions, qualifications, limitations and exclusions are incorporated into the sample Opinion Letter, without expressly setting out such items. This "short form" approach eliminates unnecessary negotiations regarding the precise wording of the basic provisions of the opinion letter and allows for a concise opinion letter. These goals, and the resulting cost savings to clients, are a central purpose of the *Accord* and the *Report*.

One disadvantage of the "short form" approach is that it requires the Opinion Giver and the Opinion Recipient to be familiar with the detailed work reflected in the *Accord* and the *Report*. The Committee nonetheless believes that the advantages of the "short form" approach outweigh the disadvantages. In addition, the 1999 publication of the Inclusive Real Estate Secured Transaction Opinion Report,[16] that includes an annotated "long form" *Accord/Report* opinion letter, can dramatically facilitate the process of becoming familiar with the *Accord* and the *Report*. The sample "long form" opinion letter of the Inclusive Real Estate Secured Transaction Opinion Report includes within its text the definitions, assumptions, qualifications, limitations, and exclusions, that are implied in an *Accord/Report* "short form" opinion letter. The Committee commends the Inclusive Real Estate Secured Transaction Opinion Report to Hawai'i lawyers as a valuable aid in drafting opinion letters and in becoming familiar with the *Accord* and the *Report*.

IV. HAWAI'I ISSUES

Appendix 2 contains a discussion of Hawai'i law on several issues that frequently arise in commercial Mortgage Loan Transactions. After summarizing Hawai'i law on a particular issue, the Committee provides a comment on how the issue should be handled in the Opinion Letter process. The analysis in Appendix 2 is current as of November 1, 2000. Opinion Givers are cautioned to update their analysis through the date of their Opinion Letters.

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principles and practices, and endorses the *Principles* as applicable to all opinion letters. The *Hawai'i 2000 Report* does not attempt a comprehensive statement of Hawai'i opinion letter practice for non-*Accord* opinions. *Cf. Closing Opinions*, 53 BUS. LAW. at 592.

[16] *See* Subcommittee on Creation of an Inclusive Opinion, Committee on Legal Opinions in Real Estate Transactions, Section of Real Property, Probate, and Trust Law, American Bar Association; and the American College of Real Estate Lawyers Attorneys' Opinions Committee., *Inclusive Real Estate Secured Transaction Opinion Report* (1999) [hereinafter "*Inclusive Opinion Report*"], *available at* http://www.acrel.org/public/whatsnew.pdf. (with notes); http://www.abanet.org/rppt/inclusive-art.pdf. (without notes); and http://cctr.umkc.edu/dept/dirt/files/incl_rep.pdf. (without notes).

V. GENERIC QUALIFICATION AND ASSURANCE

Like the *Report*, the Committee believes it is appropriate and consistent with Hawai'i practice to incorporate into Opinion Letters in Mortgage Loan Transactions a Generic Qualification with Assurance stating generally that certain provisions in the loan documents may not be enforceable but providing assurance regarding the enforceability of key provisions in the loan documents.[17] This limits the broad assurance regarding enforceability which is otherwise given in an *Accord/Report* Opinion.[18] The *Report*, while endorsing a Generic Qualification with Assurance, takes no position regarding the preferred language of such term.[19] The Committee endorses the following language for a Generic Qualification and Assurance:

> *In addition to the General Qualifications [an Accord-defined term], the Opinion set forth in [the] paragraph [stating that the Loan Documents are enforceable] is subject to the further qualification that certain provisions of the Loan Documents may not be enforceable; nevertheless, such unenforceability will not render the Loan Documents invalid as a whole or preclude:*
>
> *(i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty)[20] as provided in the Note,*
>
> *(ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest or upon a material default in any other material provision of the Loan Documents, and*
>
> *(iii) the foreclosure in accordance with applicable law of the lien on and security interest in the Collateral created by the security documents upon maturity or upon the acceleration pursuant to (ii) above.*

This language is adopted from language proposed by the American College of Real Estate Lawyers and modifications proposed by the *Report*.[21] It is appropriate in the Committee's view because: (i) loan documents often contain provisions of questionable enforceability under Hawai'i law; (ii) these provisions are not otherwise identified as unenforceable in either the *Accord*

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[17] *See Report, supra* note 11, at ¶11.

[18] *See id.*

[19] *See id.* at ¶11A (discussing language alternatives).

[20] Opinion Recipients may wish to have this parenthetical limited to increases in the interest rate triggered by certain events, e.g., default. This avoids any implication that the Opinion Giver thinks that the base interest rate is itself a penalty. The Committee considers this request reasonable. If there is concern that the base interest rate is a penalty, that concern can be addressed and, if necessary, an express qualification can be made in the Opinion Letter.

[21] *See Report, supra* note 11, at ¶11A.

or the *Report*; (iii) Opinion Recipients are often aware that certain provisions in their loan documents are of doubtful enforceability, but nonetheless want to take advantage of any benefit such provisions will provide; and (iv) it is often not cost effective to provide a detailed list of such items. Generally, what is important to the Opinion Recipient is assurance that the key provisions of the Loan Documents are enforceable, and that assurance is provided. However, where the Opinion Recipient is not represented by local counsel, the Opinion Recipient may have questions about the enforceability of certain provisions which are important to the transaction at issue, but which are not addressed if the Generic Qualification with Assurance is used. It may be appropriate for the Opinion Recipient to ask for opinions or assurances regarding specific provisions, but the additional cost of such opinions should be first expressly addressed among the Opinion Recipient, the Opinion Giver, and the Client. The Committee hopes that the information contained in Appendix 2 will facilitate this process.

To clarify the meaning of the Generic Qualification with Assurance, the Committee provides the following examples of matters included and not included within the Assurance. These examples are for illustration purposes only, and are not intended to be an exclusive list. Inclusion within the Assurance does not affect the limitations imposed in the *Accord* by the following *Accord*-defined items: the Bankruptcy and Insolvency Exception; the Equitable Principles Limitation, the Other Common Qualifications; and other express *Accord* exclusions.

A. Assurances Included In the Assurance.

The Generic Qualification with Assurance *does include assurances that provisions in loan documents containing the following are enforceable:*

(a) The right to accelerate regardless of a state reinstatement law.[22]

(b) The right to receive contingent interest, participation interest, rate adjustments, negative amortization, and compounded interest to the extent provided in the [t]ransaction [d]ocuments.[23]

(c) The ability to seek full recovery for any deficiency after foreclosure or to sue on the debt without having foreclosed.[24]

(d) The ability to enforce a right in rents to the extent such enforcement would be considered a foreclosure or to the extent that acceleration and foreclosure

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[22] *Id.* at 597.

[23] *Id.*

[24] *Id.*

would be available if a borrower interfered with a lender's exercise of rights under an assignment of rents.[25]

(e) The right to accelerate for a violation of a provision that restricts sale, financing, leasing, or ownership interests (the 'due-on' provisions), [but] it provides no assurance that a clause prohibiting the creation of a junior lien can be specifically enforced to avoid the lien.[26]

B. Assurances Not Included in the Assurance.

1. Excluded Assurances Identified in the Report.

The Generic Qualification with Assurance *does not include assurances that provisions in loan documents containing the following are enforceable:*

(a) [The right] to appointment of a receiver or the right to collect assigned leases or rents.[27]

(b) Nonforeclosure remedies or procedures, such as those pertaining to an assignment of rents, except to the extent enforcement of a right in rents would be considered a foreclosure or to the extent that acceleration and foreclosure would be available if a borrower interfered with a lender's exercise of rights under an assignment of rents.[28]

(c) Specific enforcement of a prohibition against creating a junior lien to avoid the lien.[29]

(d) Prepayment fees.[30]

(e) A collateral or absolute assignment of rents (except as included within the concept of foreclosure of rents as Collateral).[31]

(f) A determination of the rights or protections of a mortgagee in possession.[32]

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[25] *Id.*; *cf. infra* Appendix 2, Item 3.

[26] *Report, supra* note 11, at 599. This *Hawai'i 2000 Report* focuses on commercial mortgage loans. However, where the Collateral is residential real property containing less than five dwelling units, Opinion Givers are cautioned to review the Garn Act, 42 U.S.C. § 1701j-3 (2000), which provides that due-on-sale clauses are not enforceable under certain circumstances. 42 U.S.C. § 1701j-3(d) (2000).

[27] *Id.* at 596. *See also infra* Appendix 2, Items 3 and 8.

[28] *See also infra* Appendix 2, Item 3.

[29] *Report, supra* note 11 at 599.

[30] *Id.*

[31] *Id. See also infra* Appendix 2, Item 3.

[32] *Report, supra* note 11 at 596.

(g) The ability to add the cost of cure of a debtor's default to the secured indebtedness.[33]

2. Excluded Assurances Identified in this Hawai'i 2000 Report.

In addition to those matters identified in the *Report*, the Committee concludes that the Generic Qualification with Assurance *does not include assurances that provisions in loan documents containing the following are enforceable*:

(a) A waiver of jury trial.[34]

(b) A prohibition against oral modification or waivers.[35]

(c) Dragnet or anaconda clauses which purport to make the Collateral security for future or past advances from the lender to the debtor, unless the Mortgage specifically refers to particular advances, or unless such advances relate to the same transaction or series of transactions as the principle debt for which the Mortgage is given.[36]

VI. POTENTIAL ADDITIONAL QUALIFICATIONS

The Committee's review of Hawai'i law in Appendix 2 has identified one additional qualification that should be included where residential real property is the Collateral. As explained in Appendix 2, Item 9, it is appropriate to include the following additional qualification language in a Hawai'i Opinion Letter:

> The list of Other Common Qualifications identified in the *Accord* and the *Report* is supplemented by the addition of the following: 'where the Collateral is residential real property, limit or affect the enforceability of provisions that provide for the application of insurance proceeds to reduce indebtedness, or that provide for an increased rate of interest on the occurrence of a casualty affecting the Collateral.'

VII. ADDITIONAL OPINIONS

The *Accord*, the *Report*, and this *Hawai'i 2000 Report* all contemplate that in certain situations it will be appropriate for an Opinion Recipient to request

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[33] *Id.*; *cf. infra* Appendix 2, Item 1.

[34] *See infra* Appendix 2, Item 2.

[35] *See infra* Appendix 2, Item 4.

[36] *See infra* Appendix 2, Item 1.

opinions beyond those provided in the sample Opinion Letter and for an Opinion Giver to provide such opinions. Likewise, there may be transactions where it is not appropriate to provide all the opinions in the sample Opinion Letter. The Committee believes that application of the "Golden Rule" and a careful balancing of the costs and benefits of additional opinions provides guidance regarding when opinions should be given.

The Golden Rule (adapted to the present situation) provides:

> It is inappropriate to request an opinion that the Opinion Recipient's counsel, possessing the requisite expertise (and therefore competence respecting the legal issue), would not render if it were the Opinion Giver.[37]

The cost of additional opinions should be balanced against the benefits of these opinions and such matters should be openly addressed among the Client, the Opinion Giver and the Opinion Recipient. Unlike some states, Hawai'i often does not have statutes or clear case law which address certain issues on which Opinion Recipients may request opinions. Thus, opinions which might be readily given in other states may be quite costly in Hawai'i. For example, opinions regarding enforcement of choice of law provisions in loan documents (except to the extent they are covered by the mandatory choice of law provisions of the Hawai'i Uniform Commercial Code) are based on a few Hawai'i decisions and on analysis of other authority.[38] Similarly, opinions regarding security interests in property that is not covered by the Hawai'i Uniform Commercial Code and which is not real property are based on scant and ancient law. Such opinions are difficult to give and very costly.

The Committee makes the following recommendations:

Opinion	*Recommendation/Rationale*
Title to Personal Property	Should not be given. Primarily a factual matter.
Title to Real Property	Should not be given. By custom this is addressed through a title insurance policy, and attorneys in Hawai'i do not search title.
Priority of Security Interest in Real Property	Should not be given. By custom this is addressed through a title insurance policy, and attorneys in Hawai'i do not search title.

[37] *See* Committee on Legal Opinions, *supra* note 4, at 226, 1.B.(1).

[38] *See infra* Appendix 2, Item 5.

Compliance of a property with zoning, environmental laws, shoreline management laws, and building codes	Should not be given. Involves factual issues not within the expertise of attorneys and is more properly given by architects, engineers and other professionals. Often involves costly due diligence. An attorney may opine, if requested, on the legal meaning of certain statutes or ordinances.
All required licenses and approvals necessary to the operation of the property have been obtained	Should not be given. This opinion involves numerous factual issues which the Opinion Giver typically has no way of investigating.
Transfer is not a fraudulent conveyance	Rarely, if ever, appropriate to give. Requires a fact-based evaluation of client solvency. The preferred approach is for the Opinion Recipient to obtain the facts directly from the Client together with any necessary legal advice from its own counsel.[39]
Bankruptcy of parent or subsidiary will not result in a consolidation of parent and subsidiary	Rarely, if ever, appropriate to give. Requires a fact-based evaluation of the adequacy of capitalization. The preferred approach is for the Opinion Recipient to obtain the facts directly from the Client together with any necessary legal advice from its own counsel.[40]

[39] *But see* TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions* (hereinafter "*Opinions in the Bankruptcy Context*"), 46 BUS. LAW. 717, 727-29 (1991) (discussing when fraudulent transfer opinion may be appropriate).

[40] *But see id.* at 725-27 (discussing when a no substantive consolidation opinion may be appropriate).

Creation and Priority of Security Interest in Collateral which is not real property and which is not covered by the UCC	Generally not given. Often very costly. Should be given only in unusual circumstances.
Creation, Attachment and Perfection of Security Interests in UCC Personal Property	Generally not given. May be very costly depending on the type of collateral, since such opinions are not part of the regular practice of most Hawai'i practitioners. Should be given only when cost is justified.[41] No opinion regarding title is expressed in such opinions. Hawai'i opinions are often limited to collateral in which a security interest is perfected by filing.
Priority of Security Interest in UCC Personal Property	Generally not given. May be costly depending on the type of collateral, since such opinions are not part of the regular practice of most Hawai'i practitioners. Should be given only when cost is justified. No opinion regarding title is expressed in such opinions. Hawai'i opinions are often limited to collateral in which a security interest is perfected by filing. The Opinion Giver should be permitted to rely on chattel lien reports prepared by others.[42]

[41] For an excellent discussion of such opinions, *see* TriBar Opinion Committee, *UCC Security Interest Opinions*, 49 BUS. LAW. 362 (1993), *supplemented by* TriBar Opinion Committee, *An Addendum for Protected Purchasers-U.C.C. Security Interest Opinions*, 54 BUS. LAW. 1261 (1999).

[42] For an excellent discussion of such opinions see *id.*

Law chosen in document (other than Hawai'i law) will be followed by Hawai'i courts.	Rarely given and extremely costly. Should be given only when the cost of the opinion is justified. When given, it is a reasoned opinion, citing relevant authority and relying on specific assumptions.[43]
No Litigation Confirmation	Rarely given. Generally, this is a factual matter which can be addressed by a Client representation in the loan documents.[44]

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[43] See *infra* Appendix 3, Item 1, for a form of opinion.

A reasoned (or "explained") opinion is typically rendered when, in the view of the opinion giver, the opinion's conclusions should not be stated apart from its underlying reasoning (for example, when the opinion giver reaches a conclusion despite the existence of possibly contradictory authority). By setting forth the reasoning behind the opinion, the opinion giver spells out, for evaluation by the opinion recipient and its counsel, such matters as a lack of judicial authority, the presence of divided authority or contrary but outdated authority. The conclusions expressed in a 'reasoned' opinion are sometimes limited by the phrase 'while the matter is not free from doubt' or some similar phrase. However, at other times the opinion, although containing reasoning, will not be limited in this way because the opinion giver has concluded that the opinion as 'reasoned' needs no further characterization.

Closing Opinions, supra note 15, at 607. Reasoned opinions typically conclude with a statement "[b]ased on the foregoing, it is our opinion that a Hawai'i court would [or should] conclude. . . ."

In Hawai'i, the Committee believes the use of the word "would" has indicated a higher degree of certainty than use of the word "should." Some credit rating agencies, such as Standard & Poor's, have also taken this view. *Opinions in the Bankruptcy Context, supra* note 39, at 733. However, practitioners in other geographic areas do not view "would" and "should" as conveying a different degree of certainty. *Closing Opinions, supra* note 15, at n.37. On a forward-going basis, so that there is no misunderstanding with out-of-state counsel, the Committee recommends that Hawai'i Opinion Givers expressly qualify both a "would" or "should" opinion, where the Opinion Giver thinks that some explanation beyond the reasoning set out is needed. The use of a reasoned opinion implicitly communicates uncertainties and limitations to a recipient. This can also be done with a "clean" opinion that is expressly qualified, e.g., by using the phrase "while the matter is not free from doubt." *Opinions in the Bankruptcy Context, supra* note 39, at 734-36. A "clean" opinion states a conclusion without reference to the legal authority on which it is based. Committee on Legal Opinions, *supra* note 4, at 229, II.C. Even an unqualified clean opinion is not a guarantee that a court will reach a particular result, but a statement of the Opinion Giver's professional judgment. *Opinions in the Bankruptcy Context, supra* note 37, at 734-36; *Principles, supra* note 10, at 832, II.D.

[44] See *infra* Appendix 3, Item 2, for a form of confirmation.

VIII. CONCLUSION

The Committee hopes that this *Hawai'i 2000 Report* streamlines the Opinion negotiating process, clarifies Hawai'i Opinion Letter practice, and makes the process of giving opinions more accessible to Hawai'i practitioners.

APPENDIX 1

HAWAI'I OPINION LETTER WITH COMMENTARY*

[Date]

[Name and Address]

Ladies and Gentlemen:

We have acted as counsel to _____ ("the Client") in connection with the execution by the Client of the Loan Agreement ("the Loan Agreement") with you. We have also reviewed the following documents (together with the Loan Agreement, the "Loan Documents").

1. [List documents either in the text of the letter or in an appendix.]

Hawai'i Comment 1: The scope of inquiry is not limited to these documents, unless an express limitation is stated. Such an express limitation may be appropriate when the Opinion Giver has not been involved in the Transaction, and is contacted solely for the purpose of providing an opinion on state law issues. Absent express limitation, under the *Accord* the opinion recipient may assume that the Opinion Giver has reviewed such documents and given consideration to such matters of law and fact (in accordance with *Accord* principles) as the Opinion Giver deems appropriate, in the Opinion Giver's professional judgment. *Accord* § 2.

Hawai'i Comment 2: With respect to facts (as contrasted to legal conclusions at issue), the *Accord* permits the Opinion Giver, without investigation to rely on Public Authority Documents, such as good standing certificates, tax clearance certificates, etc., and on statements and certificates by the Client, officials and others so long as these are believed to be appropriate sources for the information (unless the Opinion Giver is aware of facts that would make the reliance unreasonable). In addition to relying on facts in Public Authority Documents, the Opinion Giver is entitled to rely on legal conclusions contained in Public Authority Documents. See Hawai'i Comment 10 regarding legal conclusions at issue. There is generally no need to state the reliance in the Opinion or to analyze underlying data. *Accord* § 3. However, the Opinion must expressly state if the Opinion Giver relies on factual representations of the Opinion Recipient or on factual representations of the Client in the Loan Documents. *Id.;* See Hawai'i

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* Capitalized terms in this sample Opinion Letter are defined in the *Accord* and the *Report*.

Comment 8 regarding reliance on factual representations of the Client in the Loan Documents.

This Opinion Letter is provided to you at the request of the Client pursuant to Section _____ of the Loan Agreement. Except as otherwise indicated herein, capitalized terms used in this Opinion Letter are defined as set forth in the Loan Agreement or the Accord, as modified by the Report (see below).

Hawai'i Comment 3: Under the Hawai'i Rules of Professional Conduct, a third-party opinion may only be rendered if the Client consents after consultation. H.R.P.C. 2.3. A reference to the Loan Agreement section that requires the Opinion Letter is helpful but the Opinion Giver should provide the client with a copy of the proposed opinion so that the client can consult with the Opinion Giver regarding the Opinion. *Guidelines* II.F.

This Opinion Letter is governed by, and shall be interpreted in accordance with, the Legal Opinion Accord of the ABA Section of Business Law (1991) ("Accord") as modified by the Report on Adaptation of the Legal Opinion Accord of the ABA Section of Real Property, Probate and Trust Law and the American College of Real Estate Lawyers (1993) ("Report") as to opinions pertaining to Real Estate Secured Transactions or to security interests in Real Property. As a consequence, it is subject to a number of qualifications, exceptions, definitions, limitations on coverage and other limitations, all as more particularly described in the Accord and the Report, and this Opinion Letter should be read in conjunction therewith.

Hawai'i Comment 4: Both Client's and Lender's counsel must be familiar with the qualifications, limitations, exceptions, definitions and assumptions that are stated in the *Accord* and its commentaries, and the *Report*. For example, under the *Accord*–consistent with Hawai'i practice–it is proper for an Opinion Giver to assume: genuineness of signatures; legal capacity of natural persons; issuance of permits relevant to consummation of the Transaction; requisite title to property; lack of mutual mistake, fraud or duress; and compliance with requirements of good faith and fair dealing. *Accord* §4; *Report* ¶ 4. These assumptions need not be expressly stated. Other assumptions should be expressly stated. *Accord* § 4. It is never permissible, however, for an Opinion Giver to make an assumption if the Opinion Giver has Actual Knowledge (an *Accord*-defined term) of facts that under the circumstances would make the reliance unreasonable. *Accord* § 5.

The law covered by the opinions expressed herein is limited to [the Federal Law of the United States and] the Law of the State of Hawai'i.

Hawai'i Comment 5: The *Accord* contemplates–and it is customary–that the Opinion Giver will limit the Opinion to the law of a specified jurisdiction.

Accord § 1. For an explanation of the *Accord*'s treatment of chosen law and arbitration provisions in documents, *See* Hawai'i Comments 15 and 16.

The Client is formed in a jurisdiction other than the State of Hawai'i and accordingly we have assumed, with your permission, that the Client is validly existing and in good standing in such jurisdiction and is duly authorized to execute the Loan Documents, pursuant to the laws of the jurisdiction in which it is formed.

Hawai'i Comment 6: If this assumption is made, an Opinion Recipient will likely require a separate opinion supporting the assumption from an attorney in the jurisdiction of incorporation or formation. However, it is important to expressly state this assumption. Otherwise, under the *Accord*, the Opinion Giver is understood to have given the above Opinion as an implied part of a Remedies Opinion (*see* Hawai'i Comment 13), even though such Opinion is an Opinion which is necessarily made under the law of another jurisdiction. *Accord* § 10(c). An alternative would be to rely on Other Counsel licensed to practice in the jurisdiction of the Client's formation with respect to the Client's organizational status, good standing and authorization of the Transaction Documents. *Id.* However, if such reliance on Other Counsel is expressed, the Opinion Giver is deemed to have concluded that Other Counsel is competent, on the basis of professional reputation, to render the opinion on which reliance is placed. *Accord* § 8(d).

Hawai'i Comment 7: If the Client is a Hawai'i entity, the Remedies Opinion subsumes the conclusion that the Client validly exists in good standing in its jurisdiction of organization and that the necessary authorizations (e.g. shareholder, board of directors resolutions) to make the Loan Documents binding on the Client have occurred. *Accord* § 10(c). Thus, a separate statement of these two commonly given Hawai'i opinions is not required.

We have relied upon factual representations made by the Client in _____ *of the Loan Agreement.*

Hawai'i Comment 8: It is prudent for the Opinion Giver to obtain from the Client a certificate setting forth certain basic factual matters on which the Opinion Giver will rely. For example, such certifications often provide that organizational documents have not been amended or canceled, that business operations as described in the documents have not been changed, that required approvals and authorizations have been obtained, that the Client is not aware of restrictions to execution and performance of the transaction documents, and that the person signing is an officer. As noted above in Hawai'i Comment 2, reliance on such information need not be expressly stated. Reliance on factual information in certificates, without investigation, is generally appropriate because attorneys have no special expertise in factual investigation and the cost of investigation is often not justified by the transaction. If, however, the Opinion Giver is relying on representations in the Loan Documents, an express statement

of reliance must be made. *Accord* § 3(b)(ii). This is because representations and warranties in a Loan Documents are sometimes used as a risk allocation device. *Commentary* ¶ 3.2.

Hawai'i Comment 9: It is sometimes difficult to determine whether a matter is factual or requires a legal conclusion. Under the *Accord*, an Opinion Giver may not rely on information which constitutes a statement, directly or in practical effect, of any legal conclusion at issue (unless it is contained in a Public Authority document, or contained in a legal opinion of Other Counsel on which the Opinion Letter expressly relies). *Accord* § 3(b)(i). The Opinion Giver, if asked, should be willing to allow the Opinion Recipient to review and approve any certificate upon which the Opinion Giver is relying (to minimize confusion between facts and legal conclusions). Further, the Opinion Giver should not seek to rely on representations in the Loan Documents to the extent such representations constitute legal conclusions on which an opinion is sought.

Hawai'i Comment 10: By way of example, the Committee concludes that certifications that organizational documents have not been amended or canceled, and business operations as described in the documents have not been changed, are essentially statements of fact. If an authorization or approval from a party outside the Client must be obtained (*e.g.* a consent from another lender), a certification of an official of the Client that a particular authorization or approval was obtained is a statement of fact. However, a conclusion about which authorizations or approvals need to be obtained is a conclusion of law based on facts. If the No Breach or Default Opinion set out in paragraph 2 below of this sample Opinion Letter is given and an authorization or approval is required under the identified agreements to prevent a breach or default, the conclusion about which authorizations or approvals need to be obtained is a legal conclusion at issue. Reliance on a broadly phrased certificate that all required authorizations and approvals have been obtained would not be appropriate. Rather, the Opinion Giver should first review the specified agreements to determine what authorizations or approvals are required, but then could rely on a certification of an officer that specific authorizations or approvals were obtained. *See Commentary* ¶ 15.4. Likewise, a statement that the Client and its owners have authorized and approved the agreement which is the subject of the Opinion would be a legal conclusion at issue on which it would be improper for an Opinion Giver providing a Remedies Opinion (paragraph 1 below of this sample Opinion Letter) to rely. One of the primary duties of the Opinion Giver is to review the formation documents of the Client and the corporate and shareholder resolutions to determine whether they are adequate. It would, however, be appropriate to rely on a certification that the meeting at which the resolutions were adopted was duly called and held, since although this is a subsidiary legal conclusion based on facts, it is not a legal conclusion at issue. Similarly, while it would be appropriate to rely on a certification that an individual is an officer, an Opinion Giver should review the constituent documents and/or corporate or shareholder

resolutions to confirm that the officer has the legal authority to sign the agreement at issue.

We note that various issues concerning _____ are addressed in the opinion of [Other Counsel], separately provided to you and we express no opinion with respect to those matters.

Hawai'i Comment 11: If the Opinion Giver makes this statement and identifies the legal issues, under the *Accord*, the Opinion Giver is relieved of responsibility for a reasonable investigation of the Other Counsel's reputation and assumes no responsibility for either the competence of Other Counsel or the form, scope or substance of Other Counsel's legal opinion. The same result is reached if the Opinion is merely silent on and does not mention Other Counsel. *Accord* § 8. However, if the Opinion Giver expressly relies on the opinion of Other Counsel, the Opinion Giver is deemed to have concluded that Other Counsel is competent, on the basis of professional reputation, to render the opinion on which reliance is placed. *Accord* § 8(d). A disclaimer regarding the professional reputation of Other Counsel may be appropriate when the Opinion Giver is not familiar with Other Counsel's reputation.

Based upon and subject to the foregoing, we are of the opinion that:

1. The Loan Documents are enforceable against the Client.

Hawai'i Comment 12: Under the *Accord*, this opinion means: (i) a contract has been formed, (ii) a remedy will be available with respect to each agreement of the Client in the contract or such agreement will otherwise be given effect, and (iii) any remedy expressly provided for in the contract will be given effect as stated. *Accord* § 10(a).

Hawai'i Comment 13: The Remedies Opinion subsumes the commonly given Hawai'i opinions that (i) the Client validly exists in good standing in its jurisdiction of organization, and (ii) all actions or approvals by the Client (*e.g.*, by its board of directors) and its owners (*e.g.*, shareholders, partners, or members) necessary (without resort to principles of estoppel, apparent authority, waiver or the like) to bind the Client under the contract have been taken or obtained and the contract has been duly executed pursuant thereto. *Commentary* ¶ 10.4(ii). This Remedies Opinion under the *Accord* is automatically subject to General Qualifications which include the Bankruptcy and Insolvency Exception, the Equitable Principles Limitations and the Other Common Qualifications. *Accord* § 10. If, however, the Opinion Giver wishes to qualify opinions other than the Remedies Opinion with the General Qualifications, a statement to that effect must be made. *Accord* § 11.

Hawai'i Comment 14: The *Report* endorses further limitation of the Remedies Opinion with a generic qualification coupled with some form of assurance. *Report* ¶ 11. *See Hawai'i 2000 Report § V.*

Hawai'i Comment 15: Under the *Accord* and the *Report*, the Remedies Opinion includes an Opinion that, if the Loan Documents indicate a choice of Hawai'i law, this choice will be given effect, so long as Hawai'i law is not contrary to a fundamental policy of an Other Jurisdiction. *Commentary* ¶ 10.5; *Report* ¶ 9. In many transactions, this "implied" choice-of-law opinion is entirely appropriate. However, in some transactions the Opinion Giver will need carefully to evaluate Hawai'i choice-of-law rules, and perhaps give a reasoned opinion on this issue. (For a discussion of Hawai'i choice-of-law rules, and a form of reasoned opinion, see Appendix 2, Item 5 and Appendix 3, Item 1.) If another state's law is chosen, or none is chosen, then the Remedies Opinion is silent as to which law will apply, but the Opinion is given as if the local law of the Opining Jurisdiction–without reference to conflict-of-laws rules–applies (although this may be contrary to the express terms of the documents). *Accord* §10(d); *Commentary* ¶10.5.

Hawai'i Comment 16: If a document contains an arbitration clause, a Remedies Opinion means that the arbitration provision will be enforced by a court, but does not indicate how the arbitration will deal with the agreement. *Accord* § 10.

2. Execution and delivery by the Client of, and performance of its agreements in, the Loan Documents do not (i) violate the Constituent Documents, (ii) breach or result in a default under any existing obligation of the Client under the "Other Agreements" disclosed in the Loan Agreement [or otherwise specifically identified], or (iii) breach or otherwise violate any existing obligation of the Client under any Court Order disclosed in the Loan Agreement [or otherwise specifically identified].

Hawai'i Comment 17: The *Accord* contemplates that the Opinion Giver will opine on Other Agreements and Court Orders only if they are in some way specifically identified. *Accord* § 15. The Opinion is given with respect to "breaches" or "defaults" of the specified documents, a more precise approach than stating that there is no "conflict with" specified documents. *Commentary* ¶ 15.2. Further, the Opinion is limited under the *Accord* to breaches, defaults, or violations caused by the existence of and the performance by the Client of acts required to be performed by the Loan Documents or other identified agreements. *Commentary* ¶ 15.5.

3. Execution and delivery by the Client of the Loan Documents, and performance by the Client of its repayment agreements in the Loan Documents, do not violate applicable provisions of statutory law or regulation.

Hawai'i Comment 18: Consistent with the *Accord* and the *Report*, and Hawai'i practice, this Opinion does not address whether the Client is generally in compliance with all laws, but whether the transaction at issue will violate applicable statutory law or regulations. A transaction violates a statute if it is

prohibited by the statute or will subject the Client to a fine, penalty or other sanction. *Accord* § 16. The Opinion with respect to the Client's performance is limited to the aspect most important to the Lender, repayment of the sum borrowed. *Report* ¶¶ 14, 15. Further, certain specific legal issues are expressly excluded from coverage, *e.g.*, title to property (for real property this is ordinarily handled by title insurance), securities laws, tax laws, antitrust laws, and Local Law (including county and city ordinances). *Accord* § 19; *Report* ¶ 17.

Hawai'i Comment 19: Generally, it is appropriate to exclude Local Law as the *Accord* and *Report* do. In Hawai'i, Local Law governs the transferability of liquor licenses and inventory, building permits, and Special Management Area Use permits. Under certain circumstances, it may be appropriate for Opinion Recipients to ask for opinions on selected Local Law issues. The cost of such opinions should be evaluated at the outset of the transaction.

The General Qualifications (the Bankruptcy and Insolvency Exception, the Equitable Principles Limitation and the Other Common Qualifications) apply to the Opinion(s) set forth in paragraph(s) 2 and 3 above as well as to the Opinion set forth in paragraph 1 above.

Hawai'i Comment 20: This statement is required in order to apply the General Qualifications to any Opinion in addition to the Remedies Opinion. *Accord* § 11. It is generally accepted practice in Hawai'i to extend the General Qualifications to opinions other than the Remedies Opinion. *Cf. Closing Opinions* at 598 (in addition to applying to the Remedies Opinion, the Bankruptcy Exception and the Equitable Principles Limitation apply to all opinions that raise concerns to which they are addressed).

Hawai'i Comment 21: The exceptions, limitations, and qualifications contained within the General Qualifications deserve careful review by both Opinion Recipients and Opinion Givers.

The list of Other Common Qualifications identified in the Accord and the Report is supplemented by the addition of the following: "where the Collateral is residential real property, limit or affect the enforceability of provisions that provide for the application of insurance proceeds to reduce indebtedness, or that provide for an increased rate of interest on the occurrence of a casualty affecting the Collateral."

Hawai'i Comment 22: This additional qualification is added to address H.R.S. § 506-7. *See* Appendix 2, Item 9.

In addition to the General Qualifications, the Opinion set forth in paragraph 1 is subject to the further qualification that certain provisions of the Loan Documents may not be enforceable; nevertheless, such unenforceability will not render the Loan Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Client to repay

the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest or upon a material default in any other material provision of the Loan Documents, and (iii) the foreclosure in accordance with applicable law of the lien on and security interest in the Collateral created by the security documents upon maturity or upon the acceleration pursuant to (ii) above.

Hawai'i Comment 23: As more fully described in the *Report*, reliance on only the Bankruptcy and Insolvency Exception, the Equitable Principles Limitation and the Other Common Qualifications presents difficulties in a secured real property transaction. *Report* ¶ 11. Therefore the *Report* recommends addition of a generic qualification coupled with an assurance. *Id.* See Section V of the *Hawai'i 2000 Report* for a discussion of this form of generic qualification with assurance.

A copy of this Opinion Letter may be delivered by you to _____ _____ in connection with _____, and such _____ may rely on this Opinion Letter as if it were addressed and had been delivered to _____ on the date hereof. Subject to the foregoing, this Opinion Letter may be relied upon by you only in connection with the Transaction and may not be used or relied upon by you or any other person for any purpose whatsoever, except to the extent authorized in the Accord, and without in each instance our prior written consent.

Hawai'i Comment 24: An Opinion Letter speaks only as of its date and the Opinion Giver has no obligation to update the Opinion Recipient regarding changes in the Law. *Accord* § 9. However, to the extent that legislation has been enacted but is not effective on the Opinion Letter's date, and such legislation would alter an Opinion expressed in the Opinion Letter if the Opinion Letter were dated after the effective date of the legislation, the Opinion Giver should call the matter to the Opinion Recipient's attention in the Opinion Letter. *Commentary* ¶ 9.3.

Hawai'i Comment 25: An Opinion Letter deals only with the specific legal issues it expressly addresses. An express opinion includes an implied opinion only if it is both essential to the legal conclusions reached by the express opinion and, based upon prevailing norms and expectations among experienced lawyers in Hawai'i, reasonable in the circumstances. *Accord* §18.

Very truly yours,

NAME OF LAW FIRM

APPENDIX 2

SELECTED HAWAI'I LEGAL ISSUES[1]

1. Hawai'i Law Relating to Dragnet Provisions

A typical dragnet or "anaconda" provision in a mortgage provides that the mortgage instrument secures all amounts owed by the mortgagor to the mortgagee, including past or future advances.

H.R.S. section 506-1(b) expressly allows a mortgage to secure "a past debt . . . or a debt incurred for advances which may be made by the mortgagee subsequent to the execution of the mortgage even though the mortgagee is under no contractual duty to make such advances."

The Hawai'i Supreme Court, however, has limited the scope of mortgage provisions which purport to secure any and all future or past debts owed by the mortgagor to the mortgagee in holding that a dragnet or anaconda clause in a mortgage is enforceable only if the mortgage or a subsequent agreement specifically refers to the advance to be secured, or if the prior or subsequent advance for which security is claimed relates to the same transaction or series of transactions as the principle debt for which the mortgage is given. *Akamine & Sons, Ltd. v. American Sec. Bank*, 50 Haw. 304, 312, 440 P.2d 262, 268 (1968); *Kamaole Resort Twenty-One v. Ficke Hawaiian Inv., Inc.*, 60 Haw. 413, 426, 591 P.2d 104, 117 (1979). Accordingly, while no Hawai'i case has specifically addressed the issue of advances made by the lender for the protection of its security, it is customary lending practice in Hawai'i to include an express provision within a mortgage instrument that future advances made by the lender to protect its security are secured by the mortgage. This avoids any question regarding whether such advances relate to the lender's principal debt for which the mortgage was given.

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[1] The *Hawai'i 2000 Report* and this Appendix concentrate on commercial Mortgage Loan Transactions. Issues related to residential and consumer loans are not addressed. *See, e.g.*, H.R.S. Chapter 487A (requiring "plain language" in agreements involving less than $25,000 for personal, family or household purposes, or leases for residential purposes); H.R.S. Chapter 478 (setting out usury laws applicable to certain non-commercial transactions); the federal Truth-in-Lending Act (15 U.S.C. §§ 1601 *et seq.*) and Regulation Z (12 C.F.R. §§ 226.1 *et seq.*) (transactions for personal, family or household purposes). Similarly, issues unique to secured transactions not involving real property are not addressed; *see e.g.*, H.R.S. §§ 490:1-102, 9-311 and 9-501; nor are issues related to life insurance and disability insurance issued in connection with a loan or credit transaction; H.R.S. Chapter 431:10B.

Comment: The Committee believes that the enforcement of a "dragnet" or "anaconda" provision is included in the Generic Qualification and that such provision is not saved by the Assurance. See Hawai'i 2000 Report § V.B.2.(c). As a matter of professional courtesy, Hawai'i Opinion Givers should mention Hawai'i rules regarding these provisions to lawyers for out-of-state Opinion Recipients.

H.R.S. section 506-1(b) also limits the priority of future advances under a mortgage in relation to a subsequently recorded mortgage, lien or other encumbrance–recorded prior to the date such advances are made–to the maximum amount of future advances stated in the mortgage. Accordingly, it is prudent lending practice for the mortgage instrument to state a specific maximum amount of future advances which the lender can make to protect its interest in the property in addition to the maximum principal amount. In the absence of a specific dollar amount for future advances, it is not clear whether a court, strictly construing Hawai'i's future advances statute, will give payments (even those for the benefit of the property) the same priority as the principal and interest of the mortgaged amount.

Comment: H.R.S. section 506-1(b) addresses the priority of a mortgagee's future advances vis-a-vis other lien holders. It does not address the enforceability of the mortgage between the client and the lender. No opinion regarding priority is expressed in an Accord/Report opinion, Report ¶¶17 & 18; therefore, no qualification needs to be taken regarding this issue.

2. Hawai'i Law Relating to Waiver of Jury

The right to a jury trial in civil cases is a fundamental right in American law. U.S. Constitution Amendment VII; Hawai'i Constitution Article I, § 13. A number of courts have considered the enforceability of a waiver of the right to a trial by jury by a party when such waiver was made long before any particular disputed issue actually arises, such as when parties enter into a financial arrangement or other contractual agreement. The vast majority of courts have held, at least in the abstract, that if the parties entered into a contract containing a jury trial waiver clause, such clause will be enforced to the extent the circumstances under which the waiver was given were not unreasonable. Moreover, some courts have observed that these jury trial waivers are appropriate since in many commercial transactions, advance assurance that any dispute would be subject to expeditious resolution in a court trial would best serve the needs of the contracting parties and those of the overburdened judicial system. However, this view is qualified in many cases that note that the right to a jury trial is highly favored, and so contractual

waivers of jury trials, entered into independent of specific litigation, will be strictly construed and will not be lightly inferred or extended. On the other hand, a few courts have ruled that jury trial waiver clauses are or may be invalid in general, often reasoning that these waivers, unlike waivers agreed upon by the parties after the institution of a particular proceeding and just for the duration of said proceeding, were not authorized by various state constitutional or statutory jury waiver provisions. For a general compilation of cases addressing the effectiveness of a waiver of jury trial, the Committee refers to Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R. 5th 53 (1996).

The only Hawai'i case addressing contractual jury trial waivers is *Territory of Hawai'i ex. rel. Use of Garden Island Motors, Ltd. v. Metropolitan Casualty Ins. Co. of New York*, 32 Haw. 109 (1931) in which the court held that since language in the contract waiving a trial by jury at issue was permissive rather than obligatory ("suit . . . may be brought before a court . . . without a jury"), the party's right to demand a trial by jury was not waived. The court expressly noted "[i]f it had been stated in the stipulation that a trial by jury was waived other questions would be presented" and so did not reach the validity of the waiver itself. H.R.S. section 667-1 provides that there is no right to a jury trial in a foreclosure action with respect to the amount due under the mortgage. However, there may be other disputes between the borrower and lender which could be the subject of a jury trial.

Comment: The Committee believes that the enforceability of a provision waiving a jury trial is included in the Generic Qualification and that such provision is not saved by the Assurance. See Hawaii 2000 Report § V.B.2.(a).

3. Hawai'i Law Relating to Assignment of Rents

H.R.S. section 506-1(a) provides that, "[e]very transfer of an interest in real property or fixtures made as security for the performance of another act or subject to defeasance upon the payment of an obligation, whether the transfer is made in trust or otherwise, is to be deemed to be a mortgage and shall create a lien only as security for the obligation and shall not be deemed to pass title."

Although no Hawai'i state court has directly addressed the issue of whether an assignment of leases constitutes a mortgage or an outright conveyance, the United States Bankruptcy Court, whose holdings are persuasive (as opposed to binding) in the state courts of Hawai'i, has held that H.R.S. section 506-1(a) applies to an assignment of rents made as security for payment of a debt. *In re Zales*, 77 B.R. 257, 258 (1987). Under this analysis, since the assignment is only a lien, the mortgagee is not entitled to collect and receive the rents

until the mortgagee, either directly or through a court appointed receiver takes possession of the property.

The most recent case on assignment of rents is *Hawai'i National Bank v. Cook*, No. 22225 (Haw. App. May 16, 2000), *available at* http:/www.Hawai'i.gov/jud/ica22225.htm, *cert. granted* (Haw. June 21, 2000), *available at* http:/www.Hawai'i.gov/jud/22225certg.html. In this case, the Hawai'i Intermediate Court of Appeals ("ICA") was faced with a dispute over disposal of sublease rents collected by a commissioner appointed in the foreclosure of a leasehold interest. The lessee's (sublessor's) lender, Hawai'i National Bank, claimed the sublease rents under an assignment of rents, while the ground (master) lessor, Bishop Estate, claimed that the ground lease rental delinquency must be paid before any sublease rents were paid to the Bank. The lower court held in favor of the ground lessor, and the Bank appealed.

The ICA began its analysis by observing that "Hawai'i mortgage law is based on the lien theory of mortgages," citing *FHLMC v. Transamerica Ins. Co.*, 89 Haw. 157, 164, 969 P.2d 1275, 1282 (1998).[2] Under the "lien" theory, title to the mortgaged real estate remains with the mortgagor until the mortgage is satisfied or foreclosed. *Id.* With this background, the ICA then discussed the difference between "absolute assignments" and "security interest assignments." The former "gives the mortgagee immediate title to the rents but postpones the mortgagee's right to collect final income until the happening of a specific condition, usually the mortgagor's default." *Hawai'i Nat'l Bank.* A "security interest assignment" does not pass title to the rents but merely creates a lien on the rents as additional security for the debt. This type of assignment is not self-executing and the mortgagee must take further action in order to have the right to the rents. A mortgagee with a security interest assignment, the ICA concludes, "must exert some form of possessory right upon the property in order to be entitled to the rental income," although the ICA observed that "a handful of jurisdictions do not predicate the right to rents on possession." Whether or not a given jurisdiction construes an assignment as being "absolute" or a "security interest" may be dependent on whether that jurisdiction is a "title" or a "lien" state. *Id.* In lien theory states, the ICA observed, courts are less inclined to interpret an assignment of rents as absolute and more inclined to refuse to recognize an absolute assignment of rents. *Id.*

The ICA, however, did not address whether the assignment of rents before it was–under Hawai'i law–an absolute assignment or a security interest

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[2] Hawai'i differs from Pennsylvania, which follows the "title" theory, which was the basis for the decision in *In re Jason Realty, L.P.*, 59 F.3d 423 (3rd Cir. 1995) that an assignment of rents is self-executing and, upon the mortgagor/debtor's default, the mortgagee is entitled to rents and the debtor's estate has no interest therein.

assignment. Nor did the court address what steps, other than appointment of a receiver, would be sufficient under a security interest assignment to establish the Bank's rights to collect the sublease income. Since the Bank had begun a foreclosure action and had a receiver appointed, the Bank had the right to collect the sublease rents, whatever the rule. But, the Bank's rights were not absolute. The Bank, the ICA reasoned, had at best constructive possession of the property, while the receiver had actual possession of the property and so superior rights in the sublease rents. *Hawai'i Nat'l Bank.* The receiver, as an officer of the court, held such monies, not just for the Bank as the beneficiary of the assignment of sublease rents, but to maintain the mortgaged property. Such maintenance duties included the obligation to pay the ground lease rent. Thus, the ICA held, the full amount of the ground lease rent should be paid to the ground lessor from the sublease rents (collected by the receiver) with the balance of the sublease rents paid to the Bank who was the assignee under the assignment of sublease rents. *Id.*

Under *Zales* and *Hawai'i National Bank*, an assignment of rents as security, even if worded as an absolute assignment, may be construed to create an assignment for security purposes only. If so, until the lender takes additional action to obtain possession, the lender likely has no right to receive rents under said leases. (Note that an assignment of rights other than rents as security is likely governed by the Hawai'i Uniform Commercial Code ("Hawai'i UCC") and collection of payments due pursuant to such assignment is permissible without taking possession of anything. *See* H.R.S. §§ 490:9-104, and 9-502.)

Comment: Under the Generic Qualification and Assurance, assurance is not given regarding the enforceability of the right to collect lease rents (other than through the foreclosure process) which may be the subject of a separate "absolute assignment of rents." unless there is a specific assurance addressing this particular remedy. See Hawaii 2000 Report §§ V.A.(d), V.B.1.(a) & V.B.1.(b). No additional qualification is necessary. Given the current state of Hawai'i law, no additional assurance should be given on the enforceability of the lender's right to collect lease rents.

4. Hawai'i Law Relating to Oral Modifications

Transaction documents typically have a provision which restrict further modification of the document to written instruments, thereby excluding oral agreements unless reduced to a written form.

In *Certified Corp. v. Hawai'i Teamsters and Allied Works, Local 996*, 597 F. 2d 1269 (9th Cir. 1979), the court held that oral agreements are sufficient to modify a written collective bargaining agreement despite language in the

agreement expressly requiring that any modification be in writing. *See id.* at 1271. While this case dealt with a collective bargaining agreement, the rule of law it lays down is stated generally. *Certified Corp.* was cited with approval by a Washington court to give effect to oral agreements to extend and modify a five-year, commercial real property lease. *Pacific Northwest Group A v. Pizza Blends, Inc.*, 951 P.2d 826, 828-29 (Wash. App. 1998).

Other Hawai'i case law that has reviewed oral modifications of a written contract, in the absence of a provision requiring alterations of the contract to be in writing, has focused on (1) the ambiguity of the contract leaving room for subsequent clarification (*see Chang v. Ueoka*, 39 Haw. 341 (1952)), (2) the mutual agreement of the parties to the original contract (*see Hawaiian Dredging Co., Ltd. v. Holloway*, 16 Haw. 638 (1905)), (3) the definitiveness of the oral modifications sufficient to make it a valid agreement (*see Lo v. First Trust Co. of Hilo, Ltd.*, 25 Haw. 185 (1919)), and (4) compliance with the Statute of Frauds (*see Dimond v. MacFarlane*, 11 Haw. 181 (1897). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 149 (1981).

To the extent that the proposed oral modification relates to a mortgage instrument, it would appear that the Statute of Frauds would prohibit the enforcement thereof thus giving effect to the requirement of a written modification absent circumstances (*i.e.*, partial performance, detrimental reliance, etc.) which would satisfy the requirements of the Statute of Frauds. However, if the oral modification related to a promissory note in deferring interest for six (6) months (thus avoiding the one (1) year requirement in the Statute of Frauds), then in the face of *Certified Corp.* it is unclear whether the prohibition against oral modifications would be enforced.

Comment: The Committee believes that enforcement of a provision requiring written modifications to documents is included in the Generic Qualification and that such provision is not saved by the Assurance. See Hawaii 2000 Report § V.B.2.(b).

5. Hawai'i Law Relating to Choice-of-Law Provisions

The Hawai'i Supreme Court has held–with respect to contracts generally–that when the "parties choose the law of a particular state to govern their contractual relationship and the chosen law *has some nexus with the parties or the contract*, that law will generally be applied so as to protect the justified expectations of the parties." *See Airgo, Inc. v. Horizon Cargo Transport, Inc.*, 66 Haw. 590, 595, 670 P.2d 1277, 1281 (1983) citing Restatement (Second) Conflict of Laws (the "Restatement") §187 (1) (1971) (emphasis added); *Hawaiian Telephone Co. v. Microform Data Systems, Inc.*, 829 F.2d 919, 922 (9th Cir. 1987); *Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 921 P.2d

146, 153 (1996). Similarly, the Hawai'i UCC provides generally that the parties to a transaction can agree that the law of a particular state shall govern their rights and duties where the *transaction bears a reasonable relationship to that state.* H.R.S. § 490:1-105 (emphasis added).

The Committee is aware of no case where the differences between the wording of the Hawai'i common law standard and the Hawai'i UCC standard have made a difference in the outcome of a case. However, practitioners should be aware of these differences in analyzing particular fact situations and should be careful to determine which standard applies to particular documents. For example, a promissory note that is a negotiable instrument would be covered by the Hawai'i UCC (*see* H.R.S. §§ 490:3-102 and :3-104) while a non-negotiable promissory note would be subject to the Hawai'i common law standard.

In determining whether the appropriate relationship or nexus is present, a number of factors should be considered, such as the following: the place of organization, the place of domicile and the location of various offices of the parties to the contract, the place of negotiation of the contract, the place of execution of the contract, the location of the subject matter of the contract, and the place of performance of the contract. *See* H.R.S. § 490:1-105, Official Comment 1; Restatement § 188. *See also Airgo, Hawaiian Telephone* and *Brown, supra.*

There are, however, several exceptions to the general rule regarding the enforceability of a choice of law provision. First, real property is exclusively subject to the law of the state within which it is situated, and, therefore, "all matters concerning taxation of such realty, title, alienation, and the transfer of such realty and the validity, effect, and construction which is to be accorded agreements intending to convey or otherwise deal with such realty are determined by the doctrine of *lex loci rei sitae*, that is, the law of the place where the land is located." *Grayco Land Escrow, Ltd.*, 57 Haw 436, 450; 559 P.2d 264 (1977), citing Restatement §222. *Cf.* Restatement §§ 190-191, 228.

Thus, matters such as the method of perfection/recordation of a security interest, the effects of the failure to perfect or record, foreclosure and collateral protection provisions, will be governed by the law of the situs of the property. *See* Restatement §229.

Second, the Hawai'i UCC, H.R.S. sections 490:1-105 and :9-103, mandates the application of the law of a certain state to determine perfection, the effect of perfection or nonperfection, and the priority of a security interest in certain collateral.[3]

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[3] Effective as of July 1, 2001, when the new UCC Article 9 goes into effect, the Article 9 choice of law provisions will be located at H.R.S. sections in 490:9-301 to 9-307.

Third, the Restatement provides that an otherwise effective choice-of-law provision in a contract will not be given effect if the "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of Section 188 [(relating to most significant contacts)], would be the state of applicable law in the absence of an effective choice of law by the parties." Restatement § 187 (2)(b). *See also* Restatement § 203, comments e and f (applying this rule in modified form to usury laws).

Hawai'i courts "look to the Restatement for guidance regarding conflict of laws." *UARCO Inc. v. Lam*, 18 F. Supp.2d 1116, 1123 (D.Haw. 1998); *California Federal Svgs & Loan v. Bell*, 6 Haw. App. 597, 735 P.2d 499 (1987).

There are no reported Hawai'i cases addressing what constitutes a fundamental policy of this state in the context of a loan in which the parties had a choice-of-law provision. However, in addressing the permissibility of a deficiency judgment in the context of a foreclosure of an agreement of sale which apparently had no choice-of-law provision and which the Court acknowledged had a significant relationship to California, the Hawai'i Supreme Court held that Hawai'i law would apply because, while "California's interest in protecting its citizens against deficiency judgments . . . is of extreme importance to it . . . [o]f equal, if not greater, importance. . . are considerations regarding predictability of results in disputes over transactions involving land in this jurisdiction, maintenance of interstate order, and this state's governmental interest in upholding its law relating to real estate transactions." *California*, 6 Haw. App. at 606, 735 P.2d at 505-06. Given this ruling, it would not be surprising if the Hawai'i Supreme Court found the "fundamental policy" exception applied to matters relating to foreclosure or the enforcement of security documents even though those matters do not affect an interest in the land.

It is not practical for a Hawai'i practitioner to identify, at the time the opinion is given, potential fundamental policy conflicts between the law of the chosen state and Hawai'i law. Such identification would require the Hawai'i lawyer to know and be able to compare both the law of Hawai'i *and* the law of the chosen state. Most Hawai'i practitioners will not be familiar with the law of the chosen state. *See Commentary* ¶ 10.5 (noting that a reasoned chosen law opinion will often be subject to a fundamental policy exception); *Report* ¶ 9 (qualifying the implied chosen law opinion of the *Accord*, relating to enforcement of a provision choosing the Law of the Opining Jurisdiction, to exclude an implied opinion that the Law of the Opining Jurisdiction is not contrary to a fundamental policy of the Law of an Other Jurisdiction).

Comment: See Appendix 1, Hawai'i Comment 15, for a discussion of the Accord treatment of choice-of-law provisions. An opinion on the enforceability of a choice-of-law provision in a transaction which involves more than one jurisdiction often involves a significant amount of time, effort and cost. The Opinion Giver and the Opinion Recipient should discuss the need for such an opinion at the commencement of the opinion process. The Committee has included a sample of a reasoned opinion in Appendix 3.

6. Hawai'i Law Relating to Attorney's Fees

Typically, contracts contain provisions in which attorney's fees may be awarded to the prevailing party. Loan documents also contain a similar provision although usually cast in favor of the lender only. H.R.S. section 607-14 limits the attorney's fees that may be awarded in a judicial enforcement action by providing, where a promissory note or other contract in writing provides for attorney's fees, that the court may allow a fee of not greater than the lesser of (i) twenty-five percent (25%) of the judgment, or (ii) the amount specified therein.

Comment: The Report ¶12 supplements the Other Common Qualifications of Accord §14 by subjecting the Remedies Opinion to the effect of generally applicable rules of law that "impose limitations on attorneys' or trustees' fees." Report ¶12 (l). No further qualification is necessary.

7. Hawai'i Law Relating to Non-judicial Foreclosures

In most Hawai'i commercial real estate loan transactions, the mortgage instrument gives the lender the right to sell the mortgaged real property by way of a non-judicial foreclosure. Two separate processes for a non-judicial foreclosure under "power of sale" are codified in H.R.S. sections 667-5 and -10 (applicable to all mortgage and loan documents), and part II of Chapter 667 adopted in 1999 (applicable only to mortgages and other loan documents executed after July 1, 1999; H.R.S. § 667-42).

Non-judicial foreclosures in Hawai'i were infrequently used for many years primarily because title insurance companies were wary of insuring title when a mortgagee obtained title to mortgaged property without having the title transfer confirmed by a court. The power of sale provisions in H.R.S. sections 667-5 *et seq.* require only publication notice of the foreclosure sale, and, in contrast to other states, do not preclude mortgagees in Hawai'i foreclosing by way of power of sale from obtaining a deficiency judgment against the borrower. As a result, title companies often declined to issue title insurance

following a non-judicial foreclosure because of concern about title being challenged by a mortgagor facing a large deficiency judgment.

In an effort to provide a streamlined non-judicial foreclosure procedure, in 1999 Hawai'i enacted H.R.S. sections 667-21 *et seq.* as an "alternative power of sale process to the foreclosure by power of sale under [section 667-5]". The new statute sets forth a detailed description of the documents, information and materials that are statutorily required to proceed. Notice of default must be served on the borrower the same way a summons is served and no deficiency is allowed. The major stumbling block, however, to an effective use of these statutory provisions is H.R.S. section 667-31(a) which requires that the "mortgagor or borrower shall sign the conveyance document on his or her own behalf." Absent some ability to force the mortgagor to execute a document, it is highly unlikely that a mortgagor being foreclosed upon would cooperate to transfer its interest in the mortgaged property to the lender.

In the last few years, some of the major title companies in Hawai'i have established internal guidelines on the steps they require in order for them to issue a policy of title insurance following a non-judicial foreclosure. The statutory authority for these foreclosures remains H.R.S. sections 667-5 *et seq.* The guidelines generally follow the procedures set forth in H.R.S. sections 667-21 *et seq.*, excluding a sign off by the mortgagor or borrower but *including* the mortgagee's waiver of any deficiency against the borrower. Most title companies also consider the type of mortgaged property (i.e. residential or commercial) and the size of mortgaged debt and value of the mortgaged property before issuing title insurance in connection with non-judicial foreclosures.

In *Matsushige v. U.S. Bancorp Mortgage*, Civil No. 00-1-2396-08 (Circuit Court of the First Circuit, State of Hawai'i filed August 4, 2000) the complaint challenges the constitutionality of H.R.S. section 667-5 alleging that it fails to impose upon lenders either sufficient requirements to ensure, or any obligation to secure, the highest possible market price in a public auction sale, thus depriving borrowers of their respective federal and state procedural due process rights. As of the date of this publication, the class action lawsuit has not yet been decided.

Comment: The reference to "foreclosure" in clause (iii) of the Assurance does not guaranty any specific foreclosure remedy available under state law and does not therefore restore the meaning of Accord § 10(a)(iii). Report, ¶11A. The Committee is aware of no significant commercial transaction in Hawai'i where the mortgagor has acquired title through a non-judicial power of sale process. It is not generally appropriate for Hawai'i Opinion Givers to include an assurance that a non-judicial power of sale provision in a mortgage is enforceable.

8. Hawai'i Law Relating to Ex Parte Appointment of Receivers

In most Hawai'i real estate loan transactions, the commercial mortgage provides the lender with the right to the appointment of a receiver of the mortgaged property who is to collect the rents, revenues and income deriving therefrom, on an *ex parte* basis with the mortgagor / borrower specifically consenting to the same without necessity of the lender posting any bond or other security.

Hawai'i law permits but does mandate the appointment of receivers in foreclosure proceedings prior to entry of a final judgment. *See Employee's Ret. Sys. v. Aina Alii, Inc.*, 64 Haw. 457, 643 P.2d 65 (1982); *Miller v. Leadership Hous. Sys., Inc.*, 57 Haw. 321, 555 P.2d 864 (1976). The standards for the appointment of a receiver are set forth in several pre-statehood cases: (1) the party seeking a receiver has an interest in the property at issue; and (2) the property is in danger of loss from neglect, waste, misconduct or insolvency of the defendant. *See e.g., Oyama v. Stuart*, 22 Haw. 693 (1915) (partnership assets); *McChesney v. Kona Sugar Co.*, 15 Haw. 710 (1904) (sugar plantation); *Lee Chu v. Noar*, 14 Haw. 648 (1903) (real property); *California Feed Co., v. Club Stables Co.*, 10 Haw. 209 (1896) (corporate assets). However, those cases either did not deal with a specific provision in the security instrument that authorized the appointment of a receiver, or in the case where a provision did appear, the parties had stipulated to the appointment of a receiver.

Where a provision in the mortgage specifically authorizes the appointment of a receiver, some courts in other jurisdictions permit such appointment, without a showing of neglect or waste, on the basis of a default under the mortgage document. *See e.g. Bank of Am. Nat'l Trust and Sav. Ass'n v. Denver Hotel Ass'n Ltd. P'ship*, 830 P.2d 1138 (Colo. 1992). It is not clear whether Hawai'i courts would also require a showing of waste or neglect where there is an express provision in the mortgage allowing appointment of a receiver.

There are no Hawai'i appellate decisions which would permit the lender to appoint a receiver on an *ex parte* basis. As a matter of current practice, Hawai'i courts require that notice be given to the mortgagor of the lender's motion for appointment of a receiver. The mortgagor will then have the opportunity to contest the appointment at a court hearing on the lender's motion, although the motion is often heard on an expedited basis.

Comment: The Committee believes that enforcement of a provision authorizing the appointment of a receiver on an ex parte basis (with no requirement that waste or neglect be shown) is included in the Generic

Qualification and that such provision is not saved by the Assurance. See Hawaii 2000 Report § V.B.1.(a).

9. Hawai'i Law Relating to Damage to Residential Real Property

In most Hawai'i real estate loan transactions, the commercial mortgage gives the lender the right to apply all casualty insurance proceeds against the outstanding balance of the loan.

Under H.R.S. section 506-7, the mortgagor of residential real property securing a loan has the option to use the casualty insurance proceeds to "reduce the indebtedness due under the loan, or to repair, restore or rebuild the residential real property." Moreover, the rate of interest on the loan may not be increased by reason of the damage or destruction of such property. The Committee notes that the term "residential real property" is not defined in chapter 506.[4] This term may include fee simple or leasehold real property on which is situate dwelling units, or a residential condominium or cooperative apartment, the primary use of which is occupancy as a residence. *See, e.g.*, H.R.S. §§ 206G-2, 412:10-100, and 508D-1. Since mortgaged properties in a commercial context may include such properties as apartment buildings or mixed use buildings, the Opinion Giver should be mindful of the provisions of H.R.S. section 506-7.

Comment: The Committee believes that enforcement of a provision authorizing the lender to apply casualty insurance proceeds to reduce the debt owed is included in the Generic Qualification and that the Assurance could fairly be read as not saving such provision. On a going forward basis, the Committee recommends that Opinion Givers include an express qualification addressing this statute when the mortgaged property includes "residential real property." A form of such qualification is provided in Hawaii 2000 Report section VI.

10. Hawai'i Law Relating to Insurance Requirements

A lender may not condition a loan on a borrower agreeing to use a particular insurance agent or company. Similarly, where insurance is required by a loan, a lender can not unreasonably reject a contract of insurance furnished by a borrower. H.R.S. § 431:13-104(a).

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[4] H.R.S. section 506-7 was enacted in 1980 as part of an Act relating to interest and usury overriding the provisions of the Federal Depository Institutions Regulations and Monetary Control Act of 1980 and providing for local control over such issues. H.R. 4986; H.B. 1782-80.

Comment: The Committee believes that enforcement of a provision prohibited by H.R.S. section 431:13-104 is included in the Generic Qualification and that such provision is not saved by the Assurance. As a matter of professional courtesy, Hawai'i Opinion Givers should mention Hawai'i rules regarding these provisions to lawyers for out-of-state Opinion Recipients.

APPENDIX 3

SAMPLE LANGUAGE FOR ADDITIONAL OPINIONS

1. Reasoned Choice of Law Sample Opinion (For use when the Loan Documents choose the Law of an Other Jurisdiction).

The Hawai'i Supreme Court has held–with respect to contracts generally–that when the parties choose the law of a particular state to govern their contractual relationship and the chosen law has some nexus with the parties or the contract, that law will generally be applied.[5] *Similarly, the Hawai'i Uniform Commercial Code ("Hawai'i UCC") provides generally that the parties to a transaction can agree that the law of a particular state shall govern their rights and duties where the transaction bears a reasonable relationship to that state.*[6] *There are, however, several exceptions to these general rules.*

First, real property is exclusively subject to the law of the state within which it is situated, and, therefore, "all matters concerning taxation of such realty, title, alienation, and the transfer of such realty and the validity, effect, and construction which is to be accorded agreements intending to convey or otherwise deal with such realty are determined by the doctrine of lex loci rei sitae, that is, the law of the place where the land is located."[7]

Second, the Hawai'i UCC mandates the application of the law of a certain state to determine perfection, the effect of perfection or nonperfection, and the priority of a security interest in certain collateral covered by the Loan Documents.[8]

Third, the Restatement (Second) Conflict of Laws (the "Restatement") provides that an otherwise effective choice of law provision in a contract will not be given effect if the "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and

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[5] *See* Airgo, Inc. v. Horizon Cargo Transp., Inc., 66 Haw. 590, 595, 670 P.2d 1277, 1281 (1983) (citing RESTATEMENT (SECOND), CONFLICT OF LAWS § 187(1) (1971)); Hawaiian Tel. Co. v. Microform Data Sys., Inc., 829 F.2d 919, 922 (9th Cir. 1987); Brown v. KFC Nat'l Mgmt., Co., 82 Haw. 226, 233, 921 P.2d 146, 153 (1996).

[6] HAW. REV. STAT. §§ 490:1-105.

[7] Grayco Land Escrow, Ltd., 57 Haw. 436, 450, 559 P.2d 264 (1977) (citations omitted) (no chosen law provision at issue).

[8] HAW. REV. STAT. §§ 490:1-105 and 9-103.

which, under the rule of Section 188 [relating to most significant contacts], would be the state of applicable law in the absence of an effective choice of law by the parties."[9] *Hawai'i courts look to the Restatement for guidance regarding conflict of laws.*[10]

Based on the foregoing, the assumptions concerning the negotiation and performance of the Loan Documents as set forth below, and the terms of the Loan Documents, we are of the opinion that a Hawai'i court would give effect to the provisions in each Loan Document choosing the law of the State of _____, except to the extent that such choice of law pertains to matters of the type described in the above-noted exceptions. As used in this paragraph, "would" means that it is our reasoned opinion that a certain result will be obtained, but, because the Law does not directly address the Opinion given, our Opinion is qualified and explained.

In rendering this Opinion, we have relied, without investigation, upon the assumptions set forth below:

> [Relate applicable facts regarding the relationship of the parties and the transaction to the State whose law has been designated in the chosen law provisions.]

Comment: See Appendix 2, Item 5, for a discussion of the applicable Hawai'i law.

2. No Litigation Confirmation

We hereby confirm to you, pursuant to the request set forth in Section ___ of the Loan Agreement, that there are no actions or proceedings against the Client, pending or overtly threatened in writing, before any court, governmental agency or arbitrator which (i) seek to affect the enforceability of the Loan Agreement, or (ii) except as disclosed in _____, come within the objective standard established in the Agreement for disclosure of such matters.

Comment: This is essentially a factual confirmation and is phrased as such, not as a legal opinion. However, when the Opinion Giver regularly represents the Client, the Opinion Giver is a likely source of information regarding this issue. *Commentary* ¶17.1. The confirmation is based solely on a factual certificate from the appropriate Client representative and a review of the

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[9] RESTATEMENT (SECOND) CONFLICT OF LAWS, § 187(2)(b) (1999). *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS, § 203 (1971), cmts. e and f (applying this rule in modified form to usury laws).

[10] *See* UARCO, Inc. v. Lam, 18 F.Supp.2d 1116, 1123 (D. Haw. 1998); (citing California Fed. Sav. & Loan Ass'n v. Bell, 6 Haw. App. 597, 604-05, 735 P.2d 499, 504-05 (1987).

Opinion Giver's litigation docket (a listing of legal proceedings being given substantive attention by the Opinion Giver). The Opinion Giver need not conduct any broader review of its files or of public records. *Commentary* ¶ 17.2.

Some Opinion Givers feel that it is inappropriate to provide a confirmation based on anything more than a review of the Opinion Giver's litigation docket, since that is the only (arguably) unique knowledge the Opinion Giver has. However, some Opinion Recipients think that the broader certification provided here is appropriate because it will likely result in the Opinion Giver focusing the Client on certain pertinent matters which might otherwise be inadvertently overlooked. The costs and benefits of this confirmation should be weighed in individual transactions. Although this form of confirmation is included here, the Committee concludes that this confirmation is rarely appropriate. A direct representation (perhaps in the Loan Documents) from the Client to the Opinion Recipient is usually the better course. *Cf. Closing Opinions* at 665 (in most cases the "no litigation confirmation" can be eliminated and the Opinion Recipient can rely on representations from the Client).