Baehr v. Lewin and the Long Road to Marriage Equality

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In 1993, the Hawai'i Supreme Court held in *Baehr v. Lewin* that excluding same-sex couples from marriage was presumptively invalid under the Hawai'i Constitution because it discriminated on the basis of sex.[1] Consequently, the exclusion could only be upheld if the State could demonstrate that it "further[ed] compelling state interests and [was] narrowly drawn to avoid unnecessary abridgments of constitutional rights."[2] This decision marked the first victory in the marriage equality movement in America.

Part I provides a rich description of the *Baehr v. Lewin* litigation, the decisions of the Hawai'i courts, and subsequent political developments in Hawai'i. Part II briefly describes national and international developments in relation to marriage equality since 1993. *Baehr* and its progeny have generated an important debate in legal and social science literature about whether "early" civil rights victories are incremental steps forward or precipitate a damaging backlash. Part III summarizes this debate. In Part IV, we seek to add something new to both the backlash debate and the conflict over same-sex marriage. We argue that, on balance, *Baehr* was an important step forward for lesbian, gay, bisexual, and transgender (LGBT) rights and gender equality. By asking the State to explain why same-sex couples could not be married, the Hawai'i Supreme Court opened a dialogue that continues to this day.

I. THE BATTLE OVER SAME-SEX MARRIAGE IN HAWAI'I

A. The Baehr v. Lewin *Litigation*

In 1990, in Hawai'i, as in all other states, same-sex couples were denied access to marriage. Unlike a handful of other jurisdictions, Hawai'i did not recognize domestic partnerships. Bill Woods, an organizer with the Gay

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[1] 74 Haw. 530, 597, 852 P.2d 44, 74 (1993).

[2] *Id.* at 582, 852 P.2d at 68.

Community Center in Honolulu, sought to challenge the exclusion of same-sex couples from marriage and found three couples who wanted to marry.[3]

The possibility of same-sex marriage seemed audacious and improbable in 1990. First, many gay people were deeply closeted. Most Americans reported that they did not personally know a homosexual person and condemned sex between gay couples, whatever the circumstances, while less than a third of Americans thought that heterosexual sex between unmarried people was always wrong.[4] Employers, including public employers, openly discriminated against gay persons.[5] There were almost no openly gay people on television, in Congress, or on the bench. Many gay people kept their identities and core loving relations secret from friends, family, and colleagues.[6] In Hawai'i, Professor Mari Matsuda of the University of Hawai'i William S. Richardson School of Law observed that the process of coming out of the closet is particularly intricate where extended families or 'ohana are complex and important.[7]

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[3] CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 151-57 (2010) (providing a rich version of the story of *Baehr v. Lewin*); *see also* David Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 281, 290-95 (John D'Emilio ed., 2000); WILLIAM ESKRIDGE, THE CASE FOR SAME SEX MARRIAGE 1-5 (1996).

[4] Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 235 n.34 (1988) (citing *Ferment in the Bedroom*, NEWSWEEK, Aug. 8, 1983, at 38, 38) [hereinafter Law, *Homosexuality*]. In 1983, only about one-fourth of adults surveyed in the United States reported having friends or acquaintances who were homosexual. Gregory M. Herek, *Beyond Homophobia: A Social Psychological Perspective on Attitudes Towards Lesbians and Gay Men*, *in* BASHERS, BAITERS AND BIGOTS: HOMOPHOBIA IN MODERN SOCIETY 1, 8 (J. De Cecco ed., 1984). In 1974, the most recent year for which quantitative, comparative data was available, seventy percent of Americans believed that sexual relations between members of the same sex were always wrong, even when the two people loved one another. Kenneth L. Nyberg & John P. Alston, *Analysis of Public Attitudes Toward Homosexual Behavior*, 2 J. HOMOSEXUALITY 99, 106 (1976). By contrast, less than one-third of Americans disapproved of sexual relations between unmarried adult men and women who loved each other. *Id.*

[5] *See, e.g.*, Singer v. U.S. Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976) (stating that public announcement of homosexual activities justifies the government's denial of employment), *vacated*, 429 U.S. 1033 (1977); Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986) (determining that there was no denial of due process in firing of gay CIA employee); Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (finding no civil rights violation when Georgia Attorney General Mike Bowers fired Robin Shahar, a female attorney in his office, when she publically announced a celebration of her commitment to another woman).

[6] *See generally* STEVEN SEIDMAN, BEYOND THE CLOSET: THE TRANSFORMATION OF GAY AND LESBIAN LIFE (2002).

[7] Mari Matsuda, *Love, Change*, 17 YALE J. L. & FEMINISM 185, 189-90 (2005).

Second, earlier challenges to the exclusion of same-sex couples from marriage in other states had been not only uniformly unsuccessful,[8] but were treated with dismissive contempt. In 1986, the Supreme Court held in *Bowers v. Hardwick* that, as applied to homosexual people, federal constitutional norms of privacy and liberty did not bar the state from imposing criminal punishment on adult consensual sexual conduct in the home.[9] *Bowers* was not overruled until 2003.[10]

Third, the national leadership of the LGBT legal community had made a nearly unanimous judgment that it was premature to pursue constitutional litigation challenging state laws that denied same-sex couples access to marriage.[11] In 1989, Tom Stoddard, then-executive director of Lambda Legal, and legal director Paula Ettelbrick debated whether the gay community should make marriage equality a priority issue.[12] Stoddard offered practical and moral arguments in support of an aggressive effort to promote marriage equality.[13] Ettelbrick responded by noting the patriarchal nature of marriage and the dangers of looking to the state to legitimate intimate relations.[14]

Apart from disagreement over whether marriage equality should be a priority, most national gay rights litigators believed that marriage equality was an unrealistic short-term goal, either in courts or in legislatures, and that it was more strategically sensible to seek recognition for same-sex couples in concrete, limited contexts.[15]

1. Plaintiffs and their counsel

On December 17, 1990, three same-sex couples sought marriage licenses from the Hawai'i Department of Health.[16] While they waited for the

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[8] *See generally* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. 1974); Jones v. Callahan, 501 S.W.2d 588 (Ky. App. 1973); Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); DeSanto v. Barnsley, 476 A.2d 952 (Pa. Super. 1984).

[9] 478 U.S. 186, 196 (1986).

[10] Lawrence v. Texas, 539 U.S. 558 (2003).

[11] Chambers, *supra* note 3, at 289-90; BALL, *supra* note 3, at 164-65.

[12] Chambers, *supra* note 3, at 289.

[13] Tom Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* SEXUALITY, GENDER, AND THE LAW 1099, 1099-1101 (William N. Eskridge, Jr. & Nan D. Hunter eds., 2d ed. 2004).

[14] Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, *in* SEXUALITY, GENDER, AND THE LAW, *supra* note 13, at 1098, 1098-99.

[15] BALL, *supra* note 3, at 164. This consensus included Nan Hunter and Matthew Coles of the American Civil Liberties Union (ACLU) and Lambda Legal, despite philosophical support from Stoddard and other leading LGBT lawyers, meeting at the Gay Rights Litigators' Roundtable. *Id.* Evan Wolfson, then a lawyer at Lambda Legal and now the founder and executive director of Freedom to Marry, dissented from this consensus. *Id.* at 157-60.

[16] BALL, *supra* note 3, at 156.

Department to decide whether to issue the licenses, Woods and the couples sought a lawyer to represent them, first approaching the local chapter of the American Civil Liberties Union (ACLU).[17] Carl Varady, ACLU of Hawai'i's Legal Director, following standard ACLU practice, referred the request to the litigation committee, and asked the national legal department for advice and assurance of help.[18] Bill Rubinstein and Nan Hunter of the national office informed Varady that the LGBT community was divided on the wisdom of challenging the denial of marriage equality and asked him to canvass the local LGBT community to learn its views.[19] Varady spoke informally with some thirty LGBT activists and civil libertarians and found that a slight majority favored a lawsuit challenging the denial of same-sex marriage.[20] Ultimately, the local and national ACLU participated in the case as amicus curiae and filed briefs in the trial court and the Hawai'i Supreme Court, emphasizing equal protection arguments.[21] Lambda Legal declined to represent the couples, despite the best efforts of Evan Wolfson, then a young staff attorney, to persuade it to do so.[22]

When the ACLU and Lambda Legal failed to accept the case, Woods and the couples sought help from Dan Foley, who was a leading Honolulu civil rights attorney in private practice.[23] After graduating from the University of San Francisco Law School in 1974, Foley served as counsel to various governmental bodies in Micronesia—then under U.S. control—in their quest for self-rule.[24] He developed a love for Pacific life and culture and settled in Hawai'i, serving as legal director of the Hawai'i ACLU from 1984 to 1987.[25] At the Hawai'i ACLU, he won a class action requiring the State to reform its prisons[26] and successfully represented many other civil liberties plaintiffs.[27] In

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[17] *Id.* at 165.

[18] E-mail from Carl Varady, Legal Dir., ACLU of Haw., to Sylvia A. Law (Jan. 15, 2011, 13:59:27 HST) (on file with authors).

[19] *Id.*

[20] *Id.*; *see also* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1638 (1997).

[21] E-mail from Carl Varady to Sylvia A. Law, *supra* note 18.

[22] BALL, *supra* note 3, at 165. Lambda ultimately filed an amicus brief when the case reached the Hawai'i Supreme Court and joined as co-counsel on the remand to the trial court. *See infra* Parts I.A.3, I.B.

[23] BALL, *supra* note 3, at 161.

[24] *Id.* at 160-61.

[25] *Id.* at 161.

[26] Spear v. Waihee, Civ. No. 84-1104 (D. Haw. 1984).

[27] *See* Daniel R. Foley Curriculum Vitae (on file with authors). Cases include advocating for children of undocumented aliens' right to general assistance, the Miss Gay Molokai Pageant's First Amendment rights, and native Hawaiian land and religious rights; bringing a whistle-blower case against the Office of the Sheriff, a First Amendment challenge to a government-sponsored cross, and privacy challenges to governmental drug testing programs;

1987, Foley left the Hawai'i ACLU for private general public interest practice.[28]

Foley agreed to represent the three couples. He believed they had plausible legal claims under the Hawai'i Constitution, even though he informed the couples that, realistically, their suit had little chance of success.[29] He knew that no other attorney was likely to take the case and believed that the couples were entitled to their day in court.[30] Foley is not gay and had not previously been a gay rights activist. He was, however, destined to spend the next decade as an advocate for marriage equality.[31]

2. *The initial* Baehr v. Lewin *litigation*

In May 1991, after the Department of Health denied their requests, the couples filed suit, presenting two straightforward claims under the Hawai'i Constitution. First, they argued that denying same-sex couples access to marriage licenses violated the plaintiffs' right to privacy as guaranteed by article I, section 6 of the Hawai'i Constitution.[32] Unlike the U.S. Constitution, Hawai'i's constitution explicitly recognizes a right of privacy. It provides that "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."[33] The plaintiffs argued that the concept of privacy requires that the State respect the interests of all individuals to have intimate, committed relations with people of their choice.[34]

Second, the plaintiffs argued that the State denied them the equal protection of the law as protected by the Hawai'i Constitution.[35] Foley emphasized that the State's justifications for treating gay and straight couples differently did not

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placing an anti-nuclear referendum and access to the Libertarian Party on the ballot; and overturning a state law that placed limits on handicapped in housing. *Id.*

[28] *Id.*

[29] BALL, *supra* note 3, at 166.

[30] *Id.*

[31] Since 2000, Foley has served as an Associate Judge on the Hawai'i Intermediate Court of Appeals. Crystal Kua, *Foley Confirmed Despite Opposition*, HONOLULU STAR-BULLETIN, Aug. 4, 2000, *available at* http://archives.starbulletin.com/2000/08/04/news/story6.html. Foley's nomination to the bench was opposed by the Alliance for Traditional Marriage and Values, headed by Mike Gabbard. *Id.*

[32] HAW. CONST. art. I, § 6.

[33] *Id.*

[34] Baehr v. Lewin, 74 Haw. 530, 539, 852 P.2d 44, 50 (1993); BALL, *supra* note 3, at 169.

[35] HAW. CONST. art. I, § 5 ("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.").

withstand scrutiny.[36] The State asserted that marriage was about procreation, but eight years earlier, the Hawai'i Legislature eliminated the requirement that marriage applicants demonstrate that they were capable of reproduction.[37] The State asserted that denying same-sex marriage was necessary to protect children and promote heterosexual parenting, but this assertion was found to be meritless when the case eventually went to trial.[38]

The claims were heard by Circuit Court Judge Robert G. Klein.[39] On October 1, 1991, the circuit court granted the defendant's motion for judgment on the pleadings.[40] The order contained a variety of findings of fact. As the Hawai'i Supreme Court subsequently noted:

> [T]he circuit court "found" that: (1) HRS § 572-1 "does not infringe upon a person's individuality or lifestyle decisions, *and none of the plaintiffs has provided testimony to the contrary*"; (2) HRS § 572-1 "does not . . . restrict [or] burden . . . the exercise of the right to engage in a homosexual lifestyle"; (3) Hawaii has exhibited a "history of tolerance for all peoples and their cultures"; (4) "*the plaintiffs have failed to show* that they have been ostracized or oppressed in Hawaii and have opted instead to rely on a general statement of historic problems encountered by homosexuals which may not be relevant to Hawaii"; (5) "homosexuals in Hawaii have not been relegated to a position of political powerlessness." . . . *[T]here is no evidence* that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii"; . . . (8) HRS § 572-1 "is obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation.[41]

In one sense, the circuit court's decision was a gift to the plaintiffs. In an effort to explain his reasons, Judge Klein offered contestable factual assertions that made judgment on the pleadings inappropriate and invited reversal.

The plaintiffs were also blessed by serendipitous changes in the Hawai'i Supreme Court's membership. Between the case filing in May 1991 and the Hawai'i Supreme Court's opinion in May 1993, "there was a marked

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[36] BALL, *supra* note 3, at 170.

[37] *See Baehr*, 74 Haw. at 539, 852 P.2d at 49.

[38] *See infra* text accompanying notes 89-94.

[39] Judge Klein, who is native Hawaiian, earned his law degree from the University of Oregon in 1972 and served as a law clerk to Hawai'i Supreme Court Chief Justice William S. Richardson. He was a Hawai'i state trial judge for fourteen years and a justice on the Hawai'i Supreme Court from 1992 to 2000. McCorriston Miller Mukai MacKinnon LLP, Attorney Biography for Robert G. Klein (Nov. 11, 2011), http://www.m4law.com/Attorneys/Robert-G-Klein.shtml. When *Baehr* reached the Hawai'i Supreme Court, he recused himself. Nancy Klingeman & Kenneth May, *For Better or for Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same-Sex Marriage in Hawaii*, 16 U. HAW. L. REV. 447, 491 n.160 (1994).

[40] *Baehr*, 74 Haw. at 543-44, 852 P.2d at 52.

[41] *Id.* at 547-48, 852 P.2d at 53-55 (emphases in original).

generational shift in the court's composition."[42] Governor John Waihe'e appointed Steven H. Levinson to the Hawai'i Supreme Court in 1992, and Ronald T.Y. Moon was elevated to Chief Justice in 1993.[43]

When Levinson was appointed, he "described himself as a child of the 1960s with a tendency to 'reach out and grab issues, rather than duck them.'"[44] Levinson was born in 1946 and moved to Hawai'i in 1971 after graduating from University of Michigan School of Law.[45] He served as a law clerk for his uncle, Hawai'i Supreme Court Associate Justice Bernard Levinson, and then spent seventeen years in private practice.[46] Governor John Waihe'e appointed Levinson in 1989 to the Hawai'i State Judiciary as a circuit court judge, where he served for three years before being elevated to the Hawai'i Supreme Court.[47]

Chief Justice Ronald T.Y. Moon was born in Hawai'i in 1940.[48] His grandparents were among the first Korean immigrants to Hawai'i.[49] He received his J.D. from University of Iowa College of Law before returning to Honolulu to clerk for United States District Court Judge Martin Pence.[50] After clerking, Moon served as a Honolulu deputy prosecutor until 1968, when he entered private practice.[51] In 1982, Governor George Ariyoshi appointed Moon to the Hawai'i State Judiciary as a circuit court judge.[52] Governor John Waihe'e elevated Moon to Associate Justice of the Hawai'i Supreme Court in 1990, where he served until he was elevated once again to Chief Justice.[53]

3. Baehr v. Lewin*: The Hawai'i Supreme Court decision*

On May 5, 1993, the Hawai'i Supreme Court issued its decision holding that excluding same-sex couples from marriage was presumptively invalid under the Hawai'i Constitution because it discriminated on the basis of sex. The law could only be upheld if the State demonstrated that it "further[ed] compelling state interests and [was] narrowly drawn to avoid unnecessary abridgments of

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[42] BALL, *supra* note 3, at 169.

[43] Lynda Arakawa, *Top Jurists Represent Diverse Backgrounds*, HONOLULU ADVERTISER, Nov. 23, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Nov/23/ln/ln09a.html.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

constitutional rights."[54] Associate Justice Steven H. Levinson wrote a plurality opinion for himself and Acting Chief Justice Ronald T.Y. Moon. Intermediate Court of Appeals Chief Judge James Burns, sitting by designation, concurred; Intermediate Court of Appeals Judge Walter Heen, also sitting by designation, dissented.[55] This was the first time that any court, let alone the highest court of a state, held that a state must justify its reasons for denying marriage to same-sex couples. It was a watershed case.

As a preliminary matter, Justice Levinson framed the issue as one of same-sex marriage rather than homosexual marriage. "'Homosexual' and 'same-sex' marriages are not synonymous."[56] Homosexual and heterosexual describe sexual attractions or behaviors. "Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."[57] This framing is accurate. Marriage licensing authorities do not ask applicants about sexual attraction or behavior, and state laws do not require or authorize them to do so. This framing led the plurality to see the claim as one of discrimination on the basis of gender, rather than discrimination against homosexual people.[58]

Justice Levinson rejected the plaintiffs' main argument that denying same-sex couples the right to marry violated the Hawai'i Constitution's explicit protection of the right to privacy.[59] Although the Hawai'i Supreme Court had adopted an expansive interpretation of the privacy guarantee of the 1978 Hawai'i Constitution only five years earlier in *State v. Kam*,[60] Justice Levinson narrowly framed the question in *Baehr* as whether to recognize a new fundamental right to same-sex marriage.[61]

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[54] Baehr v. Lewin, 74 Haw. 530, 583, 852 P.2d 44, 68 (1993).

[55] *Id.* at 584, 852 P.2d at 68 (Burns, J., concurring); *id.* at 587, 852 P.2d at 70 (Heen, J., dissenting).

[56] *Id.* at 543 n.11, 852 P.2d at 51 n.11 (plurality opinion).

[57] *Id.*

[58] *Id.* at 564, 852 P.2d at 60.

[59] *Id.* at 550-57, 852 P.2d at 55-57.

[60] 69 Haw. 483, 748 P.2d 372 (1988). Kam, a clerk at the Lido Bookstore in Honolulu, was convicted of selling a pornographic magazine to an undercover police officer. *Id.* at 486, 748 P.2d at 374. In *United States v. 12 200-FT Reels of Super 8mm Film*, the U.S. Supreme Court held that while the Federal Constitution protects individuals' constitutional right to possess and view obscene material in the privacy of their homes, "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." 413 U.S. 123, 128 (1973). But in *Kam*, the Hawai'i Supreme Court held that banning commercial distribution violated the state constitution, explaining, "It is obvious that an adult person cannot read or view pornographic material in the privacy of his or her own home if the government prosecutes the sellers of pornography . . . and consequently bans any commercial distribution." *Kam*, 69 Haw. at 495, 748 P.2d at 379. Dan Foley represented the defendant in *Kam*.

[61] *Baehr*, 74 Haw. at 555, 852 P.2d at 57.

The *Baehr* court refused to affirm that same-sex couples could be denied the right to marry without violating those "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."[62]

Justice Levinson's equal protection analysis began with the observation that marriage is a state-controlled legal status that gives rise to many rights and benefits.[63] Additionally, the equal protection clause of the Hawai'i Constitution is "more elaborate" than its federal counterpart.[64] The clause specifically prohibits discrimination on the basis of sex.[65] The Hawai'i marriage statute, by its plain language, "restricts the marital relation to a male and a female."[66] Once Justice Levinson defined the dispute as one of gender discrimination, the resolution was relatively easy. The Hawai'i Constitution creates a strong presumption against the validity of laws that discriminate on the basis of sex. Relying upon the court's 1978 decision in *Holdman v. Olim*,[67] the plurality reasoned:

> First, we clearly and unequivocally established, for purposes of equal protection analysis under the Hawaii Constitution, that sex-based classifications are subject, as a *per se* matter, to some form of "heightened" scrutiny . . . . Second, we assumed, *arguendo*, that such sex-based classifications were subject to "strict scrutiny." Third, we reaffirmed the longstanding principle that this court is free to accord greater protections to Hawaii's citizens . . . than are recognized under the United States Constitution.[68]

Accordingly, the *Baehr* plurality held that the marriage statute created a sex-based classification and was "presumed to be unconstitutional" unless the defendant could show "that (a) the statute's sex-based classification is justified

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[62] *Id.* at 556-57, 852 P.2d at 57. Justice Levinson later wrote an extensive dissenting opinion affirming a broad reading of the Hawai'i Constitution's privacy clause in a case challenging the constitutionality of Hawai'i's ban on the possession of marijuana. *See* State v. Mallan, 86 Haw. 440, 454-509, 950 P.2d 178, 192-247 (1998) (Levinson, J., dissenting). Justice Levinson distinguished *Baehr* from *Mallan*. *Id.* at 466, 950 P.2d at 204.

[63] *Baehr*, 74 Haw. at 558-59, 852 P.2d at 58. Hawai'i has not recognized common law marriages since the 1920s. *Id.*

[64] *Id.* at 562, 852 P.2d at 60.

[65] "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.

[66] *Baehr*, 74 Haw. at 563, 852 P.2d at 60.

[67] 59 Haw. 346, 581 P.2d 1164 (1978).

[68] *Baehr*, 74 Haw. at 576-77, 852 P.2d at 65-66. Despite the demanding dicta, the *Holdman* court rejected the claim of a woman prison visitor who was refused entry because she was not wearing a brassiere. *Holdman*, 59 Haw. at 347, 581 P.2d at 1165-66. The court held that the policy did not constitute a sex-based classification, and, if it did, "the compelling state interest test would be satisfied in this case if it were to be held applicable." *Id.* at 352, 581 P.2d at 1168.

by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."[69]

The State argued that "the fact that homosexual . . . partners cannot form a state-licensed marriage [was] not the product of impermissible discrimination implicating equal protection considerations, but rather a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire[d]."[70] In other words, marriage is, by definition, a relationship between a man and a woman. But when the marriage statute is seen as discriminating on the basis of gender, rather than sexual orientation, the argument becomes "circular and unpersuasive."[71] In addition, when prohibiting same-sex marriage is seen as a form of discrimination on the basis of sex, the analogy to *Loving v. Virginia*[72] is powerful. In *Loving*, the U.S. Supreme Court held that Virginia's law limiting marriage to people of the same race violated the Equal Protection Clause of the Fourteenth Amendment.[73] In *Baehr*, the State defended its denial of marriage to same-sex couples, saying that the bar was equally applicable to men and women.[74] Similarly, in *Loving*, Virginia contended that "because its miscegenation statutes punish[ed] equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, d[id] not constitute an invidious discrimination based upon race."[75] The U.S. Supreme Court rejected that logic and held:

> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races . . . . At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny" . . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.[76]

The gender discrimination theory adopted by the *Baehr* court was not the central focus of the plaintiffs' constitutional challenge.[77] Professor Carlos Ball reported that at oral argument, "one of the judges asked Assistant General Faust

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[69] *Baehr*, 74 Haw. at 580, 852 P.2d at 67.

[70] *Id.* at 564-65, 852 P.2d at 61 (internal quotation marks omitted).

[71] *Id.* at 565, 852 P.2d at 61.

[72] 388 U.S. 1 (1967).

[73] *Id.* at 12.

[74] *Baehr*, 74 Haw. at 580-82, 852 P.2d at 67-68.

[75] *Loving*, 388 U.S. at 8.

[76] *Id.* at 11-12.

[77] The plaintiffs' key arguments were that denying same-sex couples access to marriage denied them a fundamental liberty protected by the strong privacy protection of the Hawai'i Constitution and violated equal protection by creating an irrational classification between heterosexual and homosexual couples. *See supra* text accompanying notes 32-35.

whether it did not in fact constitute discrimination to deny "a male and a male" a marriage license when it is provided to a "male and a female?"[78] Retired Justice Levinson reported that Judge Burns asked this question.[79] The notion that denying same-sex couples access to marriage unconstitutionally discriminates on the basis of sex had been explored in law review literature prior to 1992,[80] but the *Baehr* court did not rely upon or refer to these articles.

Somewhat ironically, Judge Burns did not sign on to the sex discrimination argument, but concurred with a caveat. He asked: "As used in the Hawaii Constitution, to what does the word 'sex' refer? In my view, the Hawaii Constitution's reference to 'sex' includes all aspects of each person's 'sex' that are 'biologically fated.'"[81] Judge Burns was correct that one factor that traditionally makes race a paradigmatic suspect classification is that it is biologically determined, or "immutable."[82] Further, the question of whether sexual orientation is biologically determined or chosen has long been controversial in the LGBT community.[83] Justice Levinson, for the plurality, found that the question of whether sexual orientation is chosen or fated was irrelevant to the fact that the marriage law discriminates on the basis of sex.[84]

Intermediate Court of Appeals Judge Walter Heen, sitting by designation, dissented, relying on the reasoning of other state courts that marriage, by definition, is a relationship between a man and a woman.[85] Judge Heen reasoned that the Hawai'i marriage law "treat[ed] everyone alike and applies equally to both sexes."[86] The "legislative purpose of fostering and protecting

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[78] BALL, *supra* note 3, at 170. The Attorney General responded that the distinction was "permissible discrimination." *Id.*

[79] Interview with Steven Levinson, Assoc. Justice (ret.), Haw. Sup. Ct., in Honolulu, Haw. (Jan. 28, 2011).

[80] Law, *Homosexuality*, *supra* note 4; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

[81] Baehr v. Lewin, 74 Haw. 530, 585, 852 P.2d. 44, 69 (1993) (Burns, J., concurring).

[82] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 360-61 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (noting the relevance of immutability to suspect classifications); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (concluding that sex-based classifications are suspect based in part on the immutability of sex). *But see* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (explaining that the mentally retarded are "different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one") (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1990)).

[83] WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 501-652 (2003).

[84] *Baehr*, 74 Haw. at 547 n.14, 852 P.2d at 53 n.14.

[85] *Id.* at 590, 852 P.2d at 71 (Heen, J., dissenting).

[86] *Id.*

the propagation of the human race through heterosexual marriages" justified denying plaintiffs a license to marry.[87]

By relying on equal protection, rather than the due process clause (a fundamental rights analysis), the Hawai'i Supreme Court followed a long judicial and scholarly tradition. A fundamental right, or privacy, approach identifies particular individual interests (in this case, marriage), as especially important and demands that the State provide strong reasons to justify the denial of the fundamental right. An equal protection holding demands that the State explain the reasons for treating allegedly similar couples differently. "[T]he Due Process Clause has often been interpreted so as to protect traditionally recognized rights . . . [while] [t]he Equal Protection Clause is emphatically not an effort to protect traditionally held values. . . . The function of the Equal Protection Clause is to protect disadvantaged groups."[88]

B. Baehr v. Lewin*: The aftermath in Hawai'i*

In May 1993, the Hawai'i Supreme Court remanded *Baehr v. Lewin* to the trial court to give the State the opportunity to demonstrate its reasons for denying marriage licenses to same-sex couples.[89] The State delayed the trial until the fall of 1996.[90] It sought to demonstrate that same-sex couples were inferior parents, while the plaintiffs presented experts who testified as to the growing evidence that virtually no differences existed in development, self-esteem, and gender role behavior between the children of LGBT parents and those of heterosexual parents.[91] On cross-examination, the State's experts conceded that gay parents performed in a fully satisfactory manner.[92] At trial on December 3, 1996, Judge Kevin Chang found that same-sex couples are just as qualified to be parents as heterosexual couples and that, far from harming children, recognizing same-sex marriage would help children of LGBT couples by offering them the legal benefits of two parents who are married to each

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[87] *Id.* at 596-97, 852 P.2d at 74.

[88] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1169-74 (1988).

[89] *Baehr*, 74 Haw. at 582, 852 P.2d at 68.

[90] Chambers, *supra* note 3, at 292. Three clergy members of the Church of Jesus Christ of Latter-Day Saints and the church itself sought to intervene, arguing that if same-sex marriage were legal, they, as people authorized to solemnize marriages under Hawai'i law, would be required to do so in violation of their religious beliefs. *Id.* The trial court denied the motion to intervene and the Hawai'i Supreme Court affirmed. *Id.* Both courts allowed the trial to be delayed while the proposed intervenors appealed. *Id.*; Baehr v. Miike, 80 Haw. 341, 910 P.2d 112 (1996).

[91] Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *5 (Haw. 1st Cir. Dec. 3, 1996); BALL, *supra* note 3, at 175-78; Chambers, *supra* note 3, at 292-93.

[92] Chambers, *supra* note 3, at 292; BALL, *supra* note 3, at 175-78.

other.[93] Judge Chang found that "children of gay and lesbian parents and same-sex couples tend to adjust and develop in a normal fashion" and that "in Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving, and committed relationships."[94] Opponents of same-sex marriage criticized the State for focusing on child rearing, urging the State to defend its marriage statute by demonstrating that same-sex marriage destabilized traditional heterosexual marriage.[95] On appeal from the trial court's decision, the State hired a private, conservative lawyer who made those arguments.[96]

During the years between the Hawai'i Supreme Court's decision in 1993 and the trial court's finding in 1996 that no rational, much less compelling, reason supported excluding same-sex couples from marriage, the issue of same-sex marriage was debated politically in Hawai'i. Reacting quickly to the Supreme Court's 1993 decision, the Legislature established a Commission on Sexual Orientation and the Law to make recommendations regarding the rights and benefits of same-sex couples.[97] The Legislature required that the commission include members representing the Mormon and Roman Catholic Churches.[98] When the Hawai'i state courts invalidated the provision regarding church representatives as unconstitutional, the Legislature created a smaller commission with the same mission.[99] In December 1995, the commission recommended that the Legislature legalize same-sex marriage or, in the alternative, adopt a domestic partnership law according same-sex couples the same rights as married couples.[100] Opponents of same-sex marriage grew in political strength, particularly through an organization called Hawai'i's Future Today, which had the backing of the Catholic and Mormon churches, as well as support from conservative groups from the Mainland.[101]

In 1997, the Legislature adopted a Reciprocal Beneficiaries Law, the first in the nation, which permitted any two individuals who could not otherwise marry to receive some of the rights and benefits that accompany marriage, such as hospital visitation rights, inheritance rights, joint ownership of property, and the opportunity to sue for wrongful death.[102] At the same time, the Legislature approved a constitutional amendment that, if accepted by voters in November 1998, would give the Legislature the authority to limit marriage to one man and

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[93] BALL, *supra* note 3, at 181.
[94] Chambers, *supra* note 3, at 292-93.
[95] *Id.* at 293.
[96] BALL, *supra* note 3, at 182.
[97] Chambers, *supra* note 3, at 292.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] BALL, *supra* note 3, at 180.
[102] HAW. REV. STAT. §§ 572C-1 to -7 (1997).

one woman.[103] On November 3, 1998, Hawai'i voters adopted the marriage amendment by a margin of sixty-nine percent to twenty-nine percent.[104] Dan Foley, the *Baehr* plaintiffs' attorney, sought to persuade the Hawai'i Supreme Court to read the constitutional amendment to require formal legislative action before the constitutional holding requiring marriage equality was reversed.[105] The Hawai'i Supreme Court, in an unsigned opinion, rejected Foley's argument.[106]

C. The Prospects for Same-Sex Marriage and Civil Unions in Hawai'i Today

Marriage equality was not seriously debated in Hawai'i from 1998 until 2009. Although the 1998 constitutional amendment seemed to allow the Legislature to authorize same-sex marriage, marriage equality advocates did not press for that. In 2002, Hawai'i, a traditionally Democratic state, elected Republican Linda Lingle as Governor, and she served until December 2010.[107] The conservative coalition that mobilized to oppose same-sex marriage was an important part of Lingle's political base.

There was no robust organized effort to press for greater recognition of same-sex relationships until 2007, when Equality Hawai'i began to build a broad-based coalition in support of civil unions.[108]

In 2010, the Hawai'i Legislature voted for civil unions—18-7 in the Senate and 31-20 in the House.[109] On July 6, 2010, Governor Lingle vetoed the bill.[110] Lingle said:

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[103] Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *5 (Dec. 9, 1999) (citing 1997 Haw. Sess. L. H.B. 117 § 2, at 1247.) The bill proposed adding the following language to article I of the Hawai'i Constitution: "Section 23. The legislature shall have the power to reserve marriage to opposite-sex couples." *Id.*

[104] BALL, *supra* note 3, at 184.

[105] *Id.*

[106] *Baehr*, 1999 Haw. LEXIS 391, at *5.

[107] Derrick DePledge, *The Lingle Years*, HONOLULU STAR-ADVERTISER, Dec. 5, 2010, *available at* http://www.staradvertiser.com/news/20101205_The_Lingle_Years.html.

[108] *See* Equality Hawai'i, http://www.equalityhawaii.org (last visited Mar. 20, 2011); Hawai'i Family Portraits, Husbands Without Borders, http://www.hawaiifamilyportraits.org/alan.html (last visited Mar. 20, 2011).

[109] *Lingle Vetoes Civil Unions Bill*, HONOLULU STAR-ADVERTISER, July 6, 2010, *available at* http://www.staradvertiser.com/news/Lingle_vetoes_civil_unions_bill.html.

[110] Posting of Jonathan Capehart to PostPartisan, Washington Post Blog, *Override Hawaii Gov. Lingle's Veto of Civil Unions*, http://voices.washingtonpost.com/postpartisan/2010/07/override_hawaii_gov_lingles_ve.html (July 8, 2010, 15:52 EST).

> It would be a mistake to allow a decision of this magnitude to be made by one individual or a small group of elected officials. And while ours is a system of representative government it also is one that recognizes that, from time to time, there are issues that require the reflection, collective wisdom and consent of the people and reserves to them the right to directly decide those matters. This is one such issue.[111]

Lingle's veto message is difficult to defend. It was not "one individual or a small group of elected officials"[112] who decided to authorize civil unions, but a large majority of the democratically elected Legislature. The Hawai'i Constitution, which presumably reflects the "collective wisdom and consent of the people,"[113] gave the Legislature the power to decide whether to allow same-sex marriage.[114] In response to Lingle's veto, Lambda Legal and the ACLU filed suit in state court seeking equal rights for same-sex couples, without claiming a right to marry.[115]

In the 2010 Democratic primary election for Governor to replace Linda Lingle, Neil Abercrombie, long-time Hawai'i Congressperson, defeated Honolulu Mayor Mufi Hannemann by a surprising landslide margin of twenty-two points.[116] The *Honolulu Star-Advertiser* noted that "their most substantive difference was over civil unions."[117] Abercrombie went on to defeat Republican Lieutenant Governor James "Duke" Aiona by a landslide margin of seventeen points.[118] Again, one of the major issues dividing the candidates was same-sex unions.[119]

In 2011, the Hawai'i Legislature acted quickly to authorize civil unions, and Governor Abercrombie signed it into law on February 23, effective on January 1, 2012.[120] The Act provides that partners to a civil union "shall have all the

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *See supra* notes 103-04 and accompanying text.

[115] *Gay Couples Sue Hawaii*, ADVOCATE.COM, July 29, 2010, http://www.advocate.com/printArticle.aspx?id=131299.

[116] Derrick DePledge, *Blowout: Abercrombie to Face Aiona After Trouncing Hannemann*, HONOLULU STAR-ADVERTISER, Sept. 18, 2010, *available at* http://www.staradvertiser.com/news/20100918_Abercombie_takes_early_lead_in_governors_race.html; Eugene Tanner, *Abercrombie Wins Dem. Primary for Governor in Hawaii*, USA TODAY, Sept. 20, 2010, *available at* http://www.usatoday.com/news/politics/2010-09-18-hawaii-election_N.htm.

[117] DePledge, *supra* note 116.

[118] Herbert A. Sample, *Aiona's Margin of Defeat Surprises*, HONOLULU STAR-ADVERTISER, Nov. 8, 2010, *available at* http://www.staradvertiser.com/news/hawaiinews/20101108_Aionas_margin_of_defeat_surprises.html.

[119] Tanner, *supra* note 116.

[120] Act of Feb. 23, 2011, No. 1, 2011 Haw. Sess. Laws 1; B.J. Reyes, *"Today is an Amazing Day": Civil Union Supporters Rejoice, Opponents Lament the New Law*, HONOLULU STAR-

same rights, benefits, protections, and responsibilities under law" as are granted to married couples.[121] "The family court of each circuit shall have jurisdiction over all proceedings relating to the annulment, divorce, and separation of civil unions entered into in this State in the same manner as marriages."[122] The requirements for eligibility to enter into a civil union are the same as the requirements for marriage, except that the Act provides that a civil union partner may not be "a partner in another civil union, a spouse in a marriage, or a party to a reciprocal beneficiary relationship."[123] The Act provides that "[a]ll unions entered into in other jurisdictions between two individuals not recognized under section 572-3 [the marriage statute] shall be recognized as civil unions."[124]

II. THE NATIONAL SAME-SEX MARRIAGE MOVEMENT AFTER *BAEHR V. LEWIN*

In 1993, few people could imagine same-sex marriage. In 2012, same-sex marriage is a vibrant, concrete reality. In the United States, same-sex couples currently can marry in six states—Connecticut,[125] Iowa,[126] Massachusetts,[127] New Hampshire,[128] New York,[129] and Vermont[130]— and the District of Columbia.[131] Moreover, as this article went to print, Maryland and Washington passed laws that will bring the total number of jurisdictions allowing same-sex marriage to at least nine by 2013, unless the laws are first repealed by referendum.[132] In addition, the attorneys general of Maryland[133] and Rhode

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ADVERTISER, Feb. 24, 2011, *available at* http://www.staradvertiser.com/news/20110224_Today_is_an_amazing_day.html; Vicki Viotti, *Civil Unions: The Road Ahead*, HONOLULU STAR-ADVERTISER, Mar. 6, 2011, *available at* http://www.staradvertiser.com/editorials/20110306_Civil_unions_The_road_ahead.html.

[121] Act of Feb. 23, 2011, No. 1, 2011 Haw. Sess. Laws 1.

[122] *Id.*

[123] *Id.* Thus it seems that a Hawai'i couple who had entered into a reciprocal beneficiary relationship would need to terminate that relation prior to entering into a civil union. *Id.*

[124] *Id.* This issue has been controversial in other states. *See infra* text accompanying note 135.

[125] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[126] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[127] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[128] N.H. REV. STAT. ANN. § 457:1-a (2010).

[129] In June 2011, New York became the third and largest state to enact marriage equality legislatively. Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

[130] VT. STAT. ANN. tit.15, § 8 (2009).

[131] D.C. CODE § 46-406 (2010).

[132] Same-sex couples will be able to marry in Maryland beginning January 1, 2013 unless the issue is placed on the November 2012 ballot by referendum and the law is rejected by the

Island[134] have issued advisory opinions that the state may recognize same-sex marriages performed in other jurisdictions, although the Rhode Island Supreme Court has cast some doubt on whether the courts will follow the attorney general's opinion in that state.[135] Furthermore, seven states—California, Hawai'i, Illinois, Nevada, New Jersey, Oregon, and Washington—offer civil unions or domestic partnerships granting all of the state-level rights and responsibilities of marriage.[136] Finally, an additional three states—Colorado, Maine, and Wisconsin—offer civil unions or domestic partnerships granting some of the state-level rights and responsibilities of marriage.[137]

Despite these successes, the campaign for marriage equality has also suffered serious setbacks. Opponents of same-sex marriage have been remarkably successful at enacting legislation and amending state constitutions to preserve marriage as a heterosexual institution and preclude recognition of same-sex relationships. Two waves of such laws swept the nation over the past eighteen years, clustered around the presidential elections of 1996 and 2004. This Part reviews the successes and setbacks of the national same-sex marriage movement since *Baehr v. Lewin*.

A. DOMA and Mini-DOMAs

The judicial victories in Hawai'i were followed by a wave of legislative setbacks for same-sex marriage. The most significant was the Defense of

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voters. Annie Linskey, *O'Malley to Sign Same-Sex Marriage Bill Today*, THE BALTIMORE SUN, Mar. 1, 2012, *available at* http://www.baltimoresun.com/news/maryland/politics/blog/bal-omalley-to-sign-samesex-marriage-bill-today-20120229,0,1317765.story. The Washington law takes effect on June 7, 2012 unless opponents gather enough signatures to submit the law to the voters by referendum in the November 2012 elections, in which case the law will be put on hold until the voters approve or reject it. Lornet Turnbull, *Gregoire Signs Gay Marriage Into Law*, THE SEATTLE TIMES, Feb. 13, 2012, *available at* http://seattletimes.nwsource.com/html/localnews/2017497028_gaymarriage14m.html.

[133] 95 Md. Op. Att'y Gen. 3 (Feb. 23, 2010).

[134] Letter from Patrick C. Lynch, R.I. Att'y Gen., to Jack R. Warner, R.I. Comm'r of Higher Educ. (Feb. 20, 2007) (on file with authors).

[135] In *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007), the Rhode Island Supreme Court held that the state family court could not entertain a petition for divorce from a same-sex couple married in Massachusetts.

[136] *See* Human Rights Campaign, Marriage Equality & Other Relationship Recognition Laws (Map), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last visited July 18, 2011) [hereinafter Human Rights Campaign]; *see also, e.g.*, CAL. FAM. CODE § 297-297.5 (1999); ME. P.L. 2003, c. 672 (2004); NEV. REV. STAT. § 122A.200 (2009); Monica Davey, *Illinois Governor Signs Civil Union Law*, N.Y. TIMES, Jan. 31, 2011, *available at* http://thecaucus.blogs.nytimes.com/2011/01/31/illinois-governor-signs-civil-union-law/.

[137] *See* Human Rights Campaign, *supra* note 136.

Marriage Act (DOMA), which the United States Congress passed in 1996.[138] The federal legislation (1) declared that no state is required to recognize any public acts concerning same-sex marriages recognized by another state; and (2) defined "marriage" for purposes of federal law as "a legal union between one man and one woman as husband and wife."[139]

Although the House report on DOMA recites that it was adopted in response to the decision in *Baehr*,[140] closer examination of the legislative and political history suggests that DOMA was promoted as a wedge issue in anticipation of the 1996 presidential election. Anti-gay rights activists asserted that the U.S. Constitution would obligate other states to recognize marriages performed in Hawai'i.[141] Professor Jane Schacter observed:

> Same-sex marriage has proven to be something of a perfect storm for the Religious Right. The controversy combines in a single issue several of that movement's foundational commitments—commitments to normative heterosexuality, to traditional gender roles, to combating perceived judicial activism on cultural issues, and to the idea that marriage is an institution under widespread social siege and in need of defense.[142]

Same-sex marriage became a major issue in the 1996 campaign, when eight conservative religious groups organized a rally three days before the Iowa caucuses and asked candidates to sign a pledge, the Marriage Protection Resolution, opposing same-sex marriage.[143] Then-President William Clinton's effort to end the ban on gay people in the military had backfired. The "don't ask, don't tell compromise" pleased no one and caused him political damage.[144] DOMA was introduced in May and was passed with both Republican and Democratic support in September 1996.[145] President Clinton quickly, and without protest, signed the act into law.[146]

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

[139] *Id.*

[140] H.R. Rep. No. 104-664, at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07.

[141] Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1203 (2009).

[142] *Id.* at 1214.

[143] Craig A. Rimmerman, *The Presidency, Congress, and Same-Sex Marriage*, *in* THE POLITICS OF SAME-SEX MARRIAGE 273, 276 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

[144] See Schacter, *supra* note 141, at 1218-19.

[145] The House approved the bill 342 to 67; the Senate 85 to 14. DOMA watch, Federal Defense of Marriage Act (DOMA), http://www.domawatch.org/about/federaldoma.html (last visited Mar. 20, 2011).

[146] This was before the trial court in *Baehr* ruled that the State had failed to demonstrate any rational basis for the ban on same-sex marriage. Baehr v. Miike, No. 91-1394, 1996 WL694235, at *5 (Haw. 1st Cir. Dec. 3, 1996).

Section two of DOMA provides that no state shall be required to recognize same-sex marriages entered into in other states.[147] Because states have traditionally had the authority to determine which out-of-state marriages they recognize,[148] most scholars see the provision as a symbolic statement of federal opposition to same-sex marriage that does not materially change the legal landscape.[149] Section three of DOMA provides that marriage is "a legal union between one man and one woman" for the purposes of federal law.[150] As a practical matter, this means that same-sex couples do not qualify for federal benefits available to heterosexual married couples, including tax and Social Security benefits.

Legal and political support for DOMA has eroded in recent years. In 2010, the Massachusetts U.S. District Court held in *Gill v. Office of Personnel Management* that denying federal benefits based on marriage to same-sex couples legally married in Massachusetts violated the federal guarantee of equal protection because there was no rational justification for the distinction.[151] In a companion case, the same court held that DOMA violated the Tenth Amendment by intruding on areas of exclusive state authority by forcing the Commonwealth to engage in invidious discrimination against its own citizens

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[147] 28 U.S.C. § 1738C (2006).

[148] The general rule, embodied in section 283 of the Second Restatement of Conflicts of Law, provides that 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." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2) (1971). Some states affirm the value of recognizing marriages that were valid where performed and are reluctant to find public policy reasons to deny the validity of marriages. For example, in *In re Estate of May*, the New York Court of Appeals recognized a Rhode Island marriage between an uncle and a niece that would have been void if performed in New York. *In re* Estate of May, 114 N.E.2d 4, 5-7 (N.Y. 1953). Other states more willingly insist that marriage partners comply with state rules. For example, in *Catalano v. Catalano*, the Connecticut Supreme Court refused to recognize a marriage between an uncle and a niece, even though their marriage was legal in Italy, where they had married, and they had lived together as man and wife for many years. 170 A.2d 726 (Conn. 1961).

[149] Most scholars support the Restatement regime under which states decide which marriage rules violate "the strong public policy of the state." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2) (1971). This approach respects federalism and the fact that different states have different values. *See, e.g.*, Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005) [hereinafter Koppelman, *Interstate Recognition*]; Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2208-13 (2005). *But see* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that the Full Faith and Credit clause of the U.S. Constitution requires that states respect marriages recognized in other states).

[150] 1 U.S.C. § 7 (2006).

[151] 699 F. Supp. 2d 374, 397 (D. Mass. 2010).

in order to receive and retain federal funds.[152] Two similar challenges to DOMA were filed in the U.S. District Courts of Connecticut and the Southern District of New York on November 9, 2010.[153]

Upon taking office, President Obama found himself caught between his constituents' opposition to DOMA and a sense of obligation to defend a validly enacted law of Congress.[154] After initially defending DOMA in the courts, on February 23, 2011, the Obama Administration reversed course. Attorney General Eric H. Holder, Jr. informed Congress that the Department of Justice (DOJ) had determined that section three of DOMA was unconstitutional and, therefore, the DOJ would no longer defend the law.[155] Attorney General Holder explained that the new lawsuits filed in Connecticut and New York required the DOJ to reconsider whether gays and lesbians constitute a suspect class under the Equal Protection Clause, triggering the application of heightened scrutiny to DOMA's sexual orientation-based classifications.[156] The Attorney General concluded that other courts are likely to hold that gays and lesbians do constitute a suspect class because of, among other factors, the history of discrimination against gays and lesbians.[157]

Consequently, the DOJ could no longer defend DOMA using hypothetical rationales, but had to defend Congress' actual motivations for the law as "substantially related to an important government objective."[158] This, Attorney General Holder concluded, the DOJ could not do. He cited the numerous expressions of moral disapproval of gays and lesbians and their intimate relationships in the congressional record and explained that this was "precisely

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[152] Massachusetts v. Sebelius, 698 F. Supp. 2d 234, 253 (D. Mass. 2010). As this article went to print, the First Circuit affirmed the judgment of the district court in both cases. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012).

[153] *See* Pedersen v. OPM, No. 310 CV 1750 (VLB) (D. Conn. Nov. 9, 2010) (same-sex couples from Connecticut, Vermont, and New Hampshire filed suit in federal court in Connecticut challenging the denial of federal benefits based on marriage); Windsor v. United States, No. 10 CV 8435 (direct) (S.D.N.Y. Nov. 9, 2010). Edith Windsor married Thea Spyer in Canada in 2007 and lived in New York, where their marriage was not recognized. *Id.* When Spyer died in 2009, Windsor had to pay $350,000 in federal estate taxes, which she would not have had to pay if the federal government recognized their marriage. *Id.*

[154] *Editorial: A Bad Call on Gay Rights*, N.Y. TIMES, June 15, 2009, *available at* http://www.nytimes.com/2009/06/16/opinion/16tue1.html; *see also* Charlie Savage, *Suits on Same-Sex Marriage May Force Administration to Take a Stand*, N.Y. TIMES, Jan. 28, 2011, *available at* http://www.nytimes.com/2011/01/29/us/politics/29marriage.html. The Department of Justice generally, but not always, defends the validly enacted laws of Congress. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001).

[155] Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to John A. Boehner, U.S. Rep. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[156] *Id.* at 1-2.

[157] *Id.* at 2-4.

[158] *Id.* at 4 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

the kind of stereotype-based thinking and animus that the Equal Protection Clause was designed to guard against."[159] The Attorney General's change of policy, and particularly his endorsement of strict scrutiny for distinctions based on sexual orientation, is a significant victory in the campaign for marriage equality. Still, the House of Representatives quickly stepped in to defend DOMA,[160] and the Obama Administration will continue to enforce the law until it is repealed or enjoined by a court of law.[161]

In addition to the federal DOMA, the 1990s witnessed the construction of a second line of statutory defense against same-sex marriage at the state level. Beginning with Hawai'i in 1994,[162] thirty-eight states passed so-called "mini-DOMAs," defining marriage as heterosexual and, in most but not all cases, also precluding the recognition of same-sex marriages performed in other states.[163]

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[159] *Id.* at 5 (citation omitted).

[160] Jennifer Steinhauer, *House Republicans Move to Uphold Marriage Act*, N.Y. TIMES, Mar. 5, 2011, at A16.

[161] Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to John A. Boehner, U.S. Rep., *supra* note 155, at 5.

[162] Act of June 22, 1994, No. 217, 1994 Haw. Sess. Laws 526 (codified as HAW. REV. STAT. § 572-1 (2006)). The Hawai'i law was purely symbolic given that the Hawai'i Supreme Court in *Baehr* had held that the State must show a compelling reason to limit marriage to between a man and a woman and the voters of Hawai'i had not yet amended the state constitution to authorize the Legislature to define marriage notwithstanding the constitution's equal protection clause. *See supra* notes 101-06 and accompanying text.

[163] 1998 Ala. Acts 500 (codified as ALA. CODE § 30-1-19 (2010)); 1996 Alaska Sess. Laws 21 (codified as ALASKA STAT. § 25.05.011 (2010)); 1996 Ariz. Sess. Laws 348 (codified as ARIZ. REV. STAT. ANN. § 25-101 (2011)); 1997 Ark. Acts 146 (codified as ARK. CODE ANN. § 9-11-208 (2010)); Prop. 22, § 2, approved March 7, 2000 (codified as CAL. FAM. CODE § 308.5 (West 2010)), *invalidated by In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); 2000 Colo. Sess. Laws ch. 233, § 1 (codified as COLO. REV. STAT. § 14-2-104(1)(b) (2010)); 2005 Conn. Pub. Act. 10 (codified as CONN. GEN. STAT. ANN. § 46b-38nn), repealed by 2009 Conn. Pub. Act. 13; 1996 Del. Laws 375 (codified as DEL. CODE ANN. tit. 13, § 101 (2011)); 1997 Fla. Laws 268 (codified as FLA. STAT. ANN. § 741.212 (West 2010)); 1996 Ga. Laws 1025 (codified as GA. CODE ANN. § 19-3-3.1 (2011)); 1996 Idaho Sess. Laws 331 (codified as IDAHO CODE ANN. § 32-209 (2011)); 1996 Ill. Laws 89-459 (codified as 750 ILL. COMP. STAT. §§ 5/212, 213.1 (2011)); 1997 Ind. Acts 1 (codified as IND. CODE ANN. § 31-11-1-1 (West 2010)); 1998 Iowa Acts 1099 (codified as IOWA CODE ANN. § 595.2(1) (West 2009)), *invalidated by* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); 1996 Kan. Sess. Laws 142 (codified as KAN. STAT. ANN. § 23-101 (2011)); KY. REV. STAT. ANN. § 402.005 (LexisNexis 2010); 1999 La. Acts 890 (codified as LA. CIV. CODE ANN. art. 3520 (2010)); 1997 Me. Laws 65 (codified as ME. REV. STAT. ANN. tit. 19-A, § 701 (2010)); 1996 Mich. Pub. Acts 324 (codified as MICH. COMP. LAWS ANN. § 551.1 (West 2011)); 1997 Minn. Laws 203, art. 10 (codified as MINN. STAT. ANN. § 517.03 (West 2010)); 1997 Miss. Laws 301 (codified as MISS. CODE ANN. § 93-1-1(2) (2010)); 1996 Mo. Legis. Serv. S.B. 768 (codified as MO. ANN. STAT. § 451.022 (West 2010)); 1997 Mont. Laws 424 (codified as MONT. CODE ANN. § 40-1-401(1)(d) (2009)); 2004 N.H. Laws 100:1 (codified as N.H. REV. STAT. ANN. § 457:3 (2004)), amended by 2009 N.H. Laws 59:1; 1996 N.C. Sess. Laws 588 (codified as N.C. GEN. STAT. ANN. § 51-1.2 (West 2010)); 1997 N.D. Laws 145

Twenty-five mini-DOMAs were passed in 1996 and 1997 alone.[164] By the time the *Baehr v. Lewin* litigation came to an end in 1998, thirty-one states had enacted laws to prevent the recognition of same-sex marriages.[165]

After 1998, seven more states added such laws, but their rate of enactment fell off precipitously, with the last mini-DOMA enacted in 2005.[166] Moreover, the California,[167] Connecticut,[168] and Iowa[169] state supreme courts struck down their state's heterosexual marriage laws in 2008 and 2009, New Hampshire reversed its policy to allow same-sex marriage in 2009,[170] and New York became the third and largest state to pass marriage equality legislatively in 2011.[171] Nevertheless, a total of thirty-four states currently have statutes on the books proscribing same-sex marriage.

B. The Best of Times: Baker, Lawrence, Goodridge, *and the Mayors*

The wave of bans on same-sex marriage laws that swept much of the nation in the 1990s was followed by two important judicial victories for marriage equality in New England. In July 1997, before the *Baehr* litigation concluded, three same-sex couples in Vermont, represented by Gay & Lesbian Advocates & Defenders (GLAD), filed a lawsuit challenging the State's refusal to issue them marriage licenses.[172] In December 1999, the Vermont Supreme Court

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(codified as N.D. CENT. CODE § 14-03-01 (2009)); 2004 Ohio Laws 61 (codified as OHIO REV. CODE ANN. § 3101.01(c)(1) (West 2011)); 1996 Okla. Sess. Laws 131 (codified as OKLA. STAT. ANN. tit. 43, § 3.1 (West 2010)); 1996 Pa. Laws 124 (codified as 23 PA. STAT. ANN. § 1704 (West 2010)); 1996 S.C. Acts 327 (codified as S.C. CODE ANN. § 20-1-15 (2010)); 1996 S.D. Laws 161 (codified as S.D. CODIFIED LAWS § 25-1-1 (2010)); 1996 Tenn. Pub. Acts 1031 (codified as TENN. CODE ANN. § 36-3-113 (2010)); 1997 Tex. Sess. Law Serv. 7 (West) (codified as TEX. FAM. CODE ANN. § 2.001(b) (West 2009)); 1999 Utah Laws 15 (codified as UTAH CODE ANN. §§ 30-1-2, -1-4 (2010)); 1997 Va. Acts 354, 365 (codified as VA. CODE ANN. § 20-45.2 (2010)); 1998 Wash. Sess. Laws 1 (codified as WASH. REV. CODE ANN. §§ 26.04.010, 26.04.020 (West 2010)); 2001 W. Va. Acts 91 (codified as W. VA. CODE ANN. § 48-2-603 (West 2010)).

[164] *See supra* note 163.

[165] *See supra* note 163.

[166] *See supra* note 163.

[167] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). The California Supreme Court was itself subsequently overruled by two ballot initiatives. *See* Strauss v. Horton, 207 P.3d 48, 68 (Cal. 2009).

[168] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[169] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[170] 2009 N.H. Laws 59:1 (codified as N.H. REV. STAT. ANN. § 457:1-a (2010)); *see also* Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 3, 2009, at A19, *available at* http://www.nytimes.com/2009/06/04/us/04marriage.html.

[171] *See* Confessore and Barbaro, *supra* note 129.

[172] Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 23 (2005).

held in *Baker v. State* that under the common benefits clause of the Vermont Constitution, "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[173] The court left it to the State Legislature to decide whether this would take the form of "marriage" or an equivalent domestic partnership or civil unions system.[174] The Legislature ultimately chose to institute civil unions, enacting them into law in 2000.[175]

The next year, GLAD filed a marriage equality lawsuit in Massachusetts.[176] In November 2003, the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* held that the State did not have a rational basis to deny same-sex couples marriage; therefore, refusing to issue same-sex couples marriage licenses violated both the due process and the equal protection clauses of the Massachusetts Constitution.[177] The court gave the Legislature 180 days to remedy the constitutional violation.[178]

Baehr v. Lewin had a direct influence on the Vermont and Massachusetts supreme courts that recognized same-sex unions. In *Baker v. State*, Associate Justice Denise R. Johnson rested her concurring opinion on the sex discrimination analysis first articulated in *Baehr*.[179] Justice Johnson would have gone further than the majority and enjoined "the State from denying marriage licenses to plaintiffs based on sex or sexual orientation."[180] Similarly, in *Goodridge v. Department of Public Health*, Associate Justice John M. Greaney, who provided the critical fourth vote necessary to allow same-sex couples to marry, adopted the Hawai'i Supreme Court's sex discrimination analysis in his concurring opinion:[181]

> That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. . . . Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he

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[173] 744 A.2d 864, 867 (Vt. 1999).

[174] *Id.* at 886.

[175] *See* 2000 Vt. Adv. Legis. Serv. 91 (LexisNexis); VT. STAT. ANN. tit. 15, § 1204 (2010).

[176] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

[177] *Id.* at 961.

[178] *Id.* at 970.

[179] 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part) (citing Baehr v. Lewin, 74 Haw. 530, 572, 852 P.2d 44, 64 (1993)).

[180] *Id.* at 898.

[181] 798 N.E.2d at 970-71 (Greene, J., concurring) (citing sex-based discrimination analysis in *Baehr*, 74 Haw. at 564, 852 P.2d at 60, and *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part)).

(Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law.[182]

It was the best of times for LGBT rights advocates. In June 2003, the U.S. Supreme Court in *Lawrence v. Texas*[183] struck down a Texas law criminalizing consensual same-sex sodomy and overruled *Bowers v. Hardwick*,[184] a seventeen-year-old opinion in which the Court had upheld Georgia's sodomy law. The majority opinion in *Lawrence*, written by Justice Kennedy, held that the criminalization of intimate, adult consensual conduct violated the substantive component of the Fourteenth Amendment's Due Process Clause.[185] The Court explained that the State cannot demean the existence of homosexuals or control their destiny by making their private sexual conduct a crime: "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[186] Accordingly, the Court declared: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[187]

Justice O'Connor concurred in the judgment, but would have struck down the law under the Equal Protection Clause of the Fourteenth Amendment, rather than the Due Process Clause, for singling out homosexual sodomy.[188] She explained that "[w]hen a law exhibits such a desire to harm a politically unpopular group," the Court applies a "more searching form of rational basis review" under the Equal Protection Clause.[189] The Texas law could not survive heightened rational basis review because mere moral disapproval does not constitute a legitimate government interest.[190]

Both Justice Kennedy and Justice O'Connor expressly limited the sweep of their opinions, disavowing their application to same-sex marriage. The majority explained that " [t]he present case does not involve . . . whether the

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[182] *Id.* at 971.

[183] 539 U.S. 558 (2003).

[184] 478 U.S. 186 (1986).

[185] 539 U.S. at 578.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 579 (O'Connor, J., concurring in the judgment). Justice O'Connor joined the majority in *Bowers*, 478 U.S. 186, and declined to join the majority in overruling it. *Lawrence*, 539 U.S. at 582. She construed the question in *Bowers* as "whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy." *Id.* (citing *Bowers*, 478 U.S. at 188 n.2). But in *Lawrence* the question was whether "moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy." *Id.*

[189] *Lawrence*, 539 U.S. at 580.

[190] *Id.* at 582 (citing Romer v. Evans, 517 U.S. 620, 633 (1996)).

government must give formal recognition to any relationship that homosexual persons seek to enter."[191] Justice O'Connor went further:

> Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.[192]

The Court's decision in *Lawrence* provoked a fiery dissent from Justice Scalia, who recognized its implications for same-sex marriage:[193]

> Justice O'Connor seeks to preserve [state laws limiting marriage to opposite-sex couples] by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest . . . . But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples . . . . In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).[194]

For Justice Scalia, moral disapproval of homosexuality constituted a perfectly legitimate government interest.[195]

Although Justice Scalia's opinion is deeply disturbing to those committed to LGBT equality, he is certainly right that the equal protection principles articulated by Justice O'Connor are equally applicable to laws banning same-sex marriage. Indeed, they are the same equal protection principles applied by the Hawai'i courts in *Baehr v. Lewin*, albeit to sex rather than sexual orientation.

In the wake of *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, the same-sex marriage movement moved out of the courts and into several LGBT-friendly city halls. In 2004, Mayor Gavin Newsom of San Francisco declared California's marriage law unconstitutional and ordered his City Clerk to begin issuing same-sex marriage licenses.[196] The City Clerk issued roughly 4000 marriage licenses to same-sex couples before a state court stopped the process and, ultimately, invalidated the marriages.[197] During March 2004, local officials also issued marriage licenses to same-sex couples in Multnomah County, Oregon, Asbury Park, New Jersey, Sandoval County, New

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[191] *Id.* at 578.

[192] *Id.* at 585.

[193] *Id.* at 602 (Scalia, J., dissenting).

[194] *Id.* at 601-02 (emphasis in original) (citation omitted).

[195] *Id.* at 602.

[196] *See* Lockyer v. City & Cnty. of San Francisco, 95 P.3d 459, 464-65 (Cal. 2004).

[197] *Id.* at 465-66.

Mexico, and New Paltz, New York before being similarly enjoined by court orders.[198]

Finally, on May 17, 2004, same-sex marriages began in Massachusetts—the first same-sex marriages in the United States that were not invalidated by a court order.[199]

C. The Worst of Times: Constitutional Amendments and the 2004 Election

Beginning in 1998, a third and more serious line of defense was erected against the recognition of same-sex marriages across the nation: twenty-nine states amended their state constitutions to prohibit the recognition of same-sex marriages.[200] First, voters in Alaska amended their state constitution to recognize only marriages between "one man and one woman" after a state trial court held that the denial of marriage to same-sex couples was subject to strict scrutiny under the Alaska Constitution.[201] Next, in 2000, Nebraska and Nevada followed suit.[202] These states represented the first "pre-emptive" marriage amendments; at that time, there was no same-sex marriage litigation in those states. They were also the first to expressly proscribe any recognition of same-sex marriages from other states, which became a common feature of these amendments.[203]

Then, following the advent of same-sex marriage in Massachusetts, and on the eve of the 2004 election, Republicans in Congress proposed a Federal Marriage Amendment (FMA), mandating a federal definition of marriage as

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[198] *See* Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 3-27 (2007) [hereinafter Law, *Who Gets to Interpret the Constitution?*].

[199] Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES, June 15, 2007, *available at* http://www.nytimes.com/2007/06/15/us/15gay.html.

[200] ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. 30, § 1; ARK. CONST. of 1868, amend. 83; CAL. CONST. art. 1, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. 1, § 27; GA. CONST. art. I, § IV; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OKLA. CONST. art. II, § 35; OHIO CONST. art. XV, § 11; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. 11, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. 1, § 15-A; WIS. CONST. art. 13, § 13.

[201] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI., 1998 WL 88743, at *6 (Alaska Super. Feb. 27, 1998). In Hawai'i, by contrast, the voters merely gave the legislature the power to limit marriage to heterosexual couples. BALL, *supra* note 3, at 184.

[202] In Nevada, voters had to approve the amendment again in the next general election. *See* NEV. CONST. art. 19, § 2(4).

[203] William C. Duncan, *Revisiting State Marriage Recognition Provisions*, 38 CREIGHTON L. REV. 233, 261-62 (2005).

limited to a man and a woman.[204] In July 2004, a 48-50 procedural vote thwarted Republican hopes to bring the proposed amendment before the Senate.[205] The House waited until September 30 to bring the amendment to the floor; it attained a 227-186 majority, but fell short of the constitutionally required two-thirds vote.[206]

Failure to adopt a marriage amendment at the federal level helped to inspire action in several states.[207] In 2004, thirteen states amended their constitutions to recognize only heterosexual marriages.[208] Some claimed that the measures "acted like magnets for thousands of socially conservative voters in rural and suburban communities who might not otherwise have voted."[209] All of the initiatives passed by wide margins. In only two states—Michigan and Oregon—the amendments were passed with less than sixty percent of the vote.[210] In 2005 and 2006, another ten states amended their constitutions to proscribe same-sex marriage,[211] bringing the total to twenty-six.

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[204] Proposing an amendment to the Constitution of the United States relating to marriage, H.R.J. Res. 106, 108th Cong. (2004), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108hjres106ih/pdf/BILLS-108hjres106ih.pdf. A slightly different version of the FMA was first introduced in Congress in 2002, but never made it out of committee. Proposing an amendment to the Constitution of the United States relating to marriage, H.R.J. Res. 93, 107th Cong. (2002), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-107hjres93ih/pdf/BILLS-107hjres93ih.pdf.

[205] Laurie Kellman, *Gay Marriage Ban Falls Short of Majority*, WASH. POST, June 7, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700929.html; Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, *available at* http://www.nytimes.com/2004/07/15/us/senators-block-initiative-to-ban-same-sex-unions.html.

[206] Final Vote Results for Roll Call 484, U.S. House of Representatives Office of the Clerk (Sept. 30, 2004), http://clerk.house.gov/evs/2004/roll484.xml.

[207] JAMES W. CEASER & ANDREW E. BUSCH, RED OVER BLUE: THE 2004 ELECTIONS AND AMERICAN POLITICS 149-50 (2005).

[208] *Id. at* 161-62. The thirteen states were Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah. In all but Louisiana and Missouri, which voted on the measures in September and August, respectively, the amendment was put to the voters on the Presidential Election Day in November. Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643, 659 & nn.112-18 (2009) [hereinafter Rosenberg, *Saul Alinsky*].

[209] James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at A4.

[210] CEASER & BUSCH, *supra* note 207, at 161-62; Rosenberg, *Saul Alinsky*, *supra* note 208, at 659 & n.118.

[211] The ten states were Kansas and Texas in 2005, and Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin in 2006. *See* Rosenberg, *Saul Alinsky*, *supra* note 208, at 660 & nn.122-24.

The spate of constitutional amendments declined dramatically after 2006, but did not completely abate. In 2008, three more states, including California, amended their constitutions, and in 2012 North Carolina did as well.[212] Still, as the wave of marriage amendments subsided after 2006, the pace of marriage equality victories picked up. Between 2008 and 2012, the Connecticut Supreme Court, the Iowa Supreme Court, the state legislatures of Vermont, New Hampshire, New York, Washington, and Maryland, and the Council of the District of Columbia acted to require the recognition of same-sex marriages in their jurisdictions.[213]

D. California

In California, the struggle over same-sex marriage has been complex and controversial. In 2011, many of the issues presented by the debate over same-sex marriage, and the "backlash" debate (discussed below in Part III), are in a lively state of play. In 2000, California voters approved Proposition 22, a legislative act proposed by citizen initiative, making clear that marriage is limited to a man and a woman.[214] Even though the California Constitution provides strong protection for liberty and equality,[215] LGBT litigators decided not to litigate same-sex marriage there because it is notoriously easy to amend the California Constitution through citizen initiatives.[216]

In September 2005, the California Legislature became the first in the nation to pass equal marriage rights legislation for same-sex couples.[217] However, Governor Schwarzenegger vetoed the bill because it conflicted with Proposition 22 and California law does not allow the legislature to overrule statutes passed

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[212] Rosenberg, *Saul Alinsky*, *supra* note 208, at 6 & n.118. The other two states were Arizona and Florida. *Id.*; *see also* Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

[213] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); VT. STAT. ANN. tit.15, § 8 (2009); N.H. REV. STAT. ANN. § 457:1-a (2010); 2011 N.Y. Sess. Laws Ch. 95 (A8354) (McKinney); 2012 Wash. Legis. Serv. Ch. 3 (S.S.B. 6239) (West); Linskey, *supra* note 132; D.C. CODE § 46-406 (2010).

[214] Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1260-61 (2010).

[215] California was the first state to hold that the state law banning inter-racial marriage violated the California Constitution's equal protection clause, nineteen years before the U.S. Supreme Court reached that conclusion in *Loving v. Virginia*, 388 U.S. 1 (1967). Perez v. Sharp, 198 P.2d 17 (Cal. 1948). California held that gender classifications are constitutionally suspect in 1971 before the U.S. Supreme Court subjected them to heightened scrutiny. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971).

[216] Cummings & NeJaime, *supra* note 214, at 1255.

[217] Dean E. Murphy, *Same Sex Marriage Wins Vote in California*, N.Y. TIMES, Sept. 7, 2005, *available at* http://www.nytimes.com/2005/09/07/national/07california.html.

through citizen initiatives.[218] On May 15, 2008, the California Supreme Court held that limiting marriage to a man and a woman violated state due process and equal protection guarantees because the right to marry is fundamental, sexual orientation constitutes a suspect classification, and no compelling state interest supports the restriction.[219] But on November 4, 2008, California voters passed Proposition 8 by a fifty-two to forty-eight margin,[220] amending the California Constitution to provide that "only marriage between a man and a woman is valid or recognized in California."[221] Eighteen thousand same-sex couples got married in California between May 15 and November 4, 2008.[222] On May 26, 2009, the California Supreme Court rejected arguments that Proposition 8 was an improper attempt to revise, rather than amend, the California Constitution and upheld the referenda.[223] The court also, however, held that the marriages already entered into were valid.[224]

On May 22, 2009, a few days before the decision upholding Proposition 8, Ted Olson and David Boies filed suit in federal court on behalf of same-sex couples, challenging Proposition 8 under the U.S. Constitution.[225] Olson represented George W. Bush in the 2000 election recount and then served as his solicitor general.[226] David Boies is a prominent trial lawyer who represented Al Gore in the recount.[227] For the most part, both California and national LGBT legal leadership were acutely aware of the rightward drift of the federal courts and were not eager to press a glitzy federal claim challenging Proposition 8.[228] But, like when the *Baehr v. Lewin* plaintiffs filed suit in Hawai'i in 1991, or when Gavin Newsom began marrying same-sex couples in 2004, civil rights litigators who thought the initiative unwise were pressed to join a struggle that they did not choose.

Perry v. Schwarzenegger was assigned to Judge Vaughn R. Walker of the Northern District of California.[229] The plaintiffs were two same-sex couples.[230] Dozens of LGBT organizations, churches, civil rights organizations, bar associations, law professors, and others participated as amici in support of the

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[218] Law, *Who Gets to Interpret the Constitution?*, *supra* note 198, at 13.

[219] *In re* Marriage Cases, 183 P.3d 384, 400-04 (Cal. 2008).

[220] *See* Strauss v. Horton, 207 P.3d 48, 68 (Cal. 2009).

[221] *See id.* at 65 (quoting CAL. CONST. art. I, § 7.5). In other words, Proposition 8 did by constitutional amendment essentially what Proposition 22 had attempted to do by legislative act.

[222] *Id.* at 59.

[223] *Id.* at 122.

[224] *Id.*

[225] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

[226] Cummings & NeJaime, *supra* note 214, at 1299.

[227] *Id.*

[228] *See id.* at 1299-1300.

[229] *Perry*, 704 F. Supp. 2d 921.

[230] *Id.* at 927.

plaintiffs.[231] The defendants were California's Governor, Attorney General, several public health officials, and County Clerk-Recorders.[232] All of the governmental defendants refused to defend Proposition 8, with the exception of the Attorney General, who conceded that it was unconstitutional.[233] Judge Walker allowed the official proponents of Proposition 8 to intervene and defend the initiative.[234]

From January 11, 2010 to January 27, 2010, Judge Walker conducted a trial, inviting the parties to present and cross-examine both lay and expert witnesses to explore whether any evidence supported California's refusal to recognize marriage between two people because of their sex.[235] The plaintiffs presented eight lay witnesses, including the four plaintiffs, who offered moving testimony on the reasons marriage was important to them.[236] In addition, nine highly-qualified experts[237] on the history of marriage, the sociology and psychology of various forms of child rearing, and the economic effects of same-sex marriage testified as to the benefits of same-sex marriage and the lack of justification for excluding same-sex couples from marriage.[238]

The proponents of Proposition 8 "vigorously defended the constitutionality of Proposition 8" but "eschew[ed] all but a rather limited factual presentation."[239] The proponents presented only one witness, David Blankenhorn, to address the government's interest in denying marriage to same-sex couples.[240] Blankenhorn, founder and president of the Institute for American Values, was presented as an expert on marriage, fatherhood and family structure.[241] Blankenhorn did not have a doctorate, and while he had published, he had never published in a peer-reviewed journal.[242] Eventually, Judge Walker rejected Blankenhorn's testimony, not simply because he lacked

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[231] *See, e.g.*, Brief for American Civil Liberties Union, Lambda Legal Defense and Education Fund., Inc., and National Center for Lesbian Rights as Amici Curiae Supporting Plaintiffs, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292), 2010 WL 391010.

[232] *Perry*, 704 F. Supp. 2d 921.

[233] *Id.* at 928.

[234] *Id.*

[235] *Id.* at 929.

[236] *Id.* at 932.

[237] *Id.* at 938-45 (describing the plaintiffs' expert witnesses' credentials).

[238] *Id.* at 933-38. The court made extensive findings as to the credibility and competence of the plaintiffs' experts. *Id.*

[239] *Id.* at 931.

[240] *Id.* at 932.

[241] *Id.* at 945.

[242] *Id.* at 945-46. Prior to becoming an expert on marriage, fatherhood and family structure, Blankenhorn had been a community organizer. *Id.* While President Obama has made it respectable to have been a community organizer, it probably does not bear on whether he is an expert.

personal expert qualification, but rather because "Blankenhorn's opinions [were] not supported by reliable evidence or methodology and Blankenhorn failed to consider evidence contrary to his view in presenting his testimony. The court therefore [found] the opinions of Blankenhorn to be unreliable and entitled to essentially no weight."[243]

The trial was the most extensive ever conducted on the question of whether there is any rational reason for the state to deny same-sex couples the right to marry.[244] Judge Walker, having conducted a serious factual trial, cast most of his conclusions as findings of fact. Because they are findings of fact rather than conclusions of law, appellate courts have limited authority to reverse Judge Walker's decision.[245]

On the basis of the testimony presented to him, Judge Walker found that "[m]arriage in the United States has always been a civil matter."[246] Indeed, Judge Walker's opinion included a lengthy discussion of the history of the institution of marriage, including its traditional organization "based on presumptions of a division of labor along gender lines."[247] It noted that "[m]en were seen as suited for certain types of work and women for others. Women were suited to raise children and men were seen as suited to provide for the family."[248] Judge Walker found, however, that "California has eliminated

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[243] *Id.* at 950. Blankenhorn's general theory is that "there are three universal rules that govern marriage: (1) the rule of opposites (the 'man/woman' rule); (2) the rule of two; and (3) the rule of sex." *Id.* at 946. On cross-examination, he conceded that the rule of two is often violated in the case of both serial monogamy and polygamy, and that the rule of sex is violated when one spouse is in a prison, without a system of conjugal visits. *Id.* at 948. In addition to this general theory, he asserted that "children raised by married, biological parents do better on average than children raised in other environments." *Id.* The court found that the evidence presented by Blankenhorn and the plaintiffs' experts "may well [have] support[ed] a conclusion that parents' marital status may affect child outcomes"; the studies did "not, however, support a conclusion that the biological connection between a parent and his or her child is a significant variable for child outcomes." *Id.*

[244] The trial process and factual findings of *Baehr* in 1996, Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. 1st Cir. Dec. 3, 1996), and the court in *Perry* are stunningly similar. In *Baehr*, on remand the state trial court found, after a full hearing in which each side presented expert testimony subject to cross examination, that the government had wholly failed to establish that same-sex couples were less competent to raise children than heterosexual couples. BALL, *supra* note 3, at 175-78, 181. It remains to be seen whether the same-sex marriage dispute will be resolved on the basis of facts.

[245] FED. R. CIV. P. 52(a)(6); *see also* Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

[246] *Perry*, 704 F. Supp. 2d at 946. Judge Walker also made the factual finding that "a person may not marry unless he or she has the legal capacity to consent to marriage," and that neither California nor any other state "has ever required that individuals entering a marriage be willing or able to procreate." *Id.*

[247] *Id.* at 958.

[248] *Id.*

marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their dependants."[249] Furthermore, he made extensive factual findings about contemporary understandings of the benefits of marriage—familial, emotional, psychological, and material—which are no longer gendered.[250]

Turning to the question of sexual orientation, informed by expert opinion, Judge Walker found that sexual orientation "is fundamental to a person's identity"[251] and that "California has no interest in asking gays and lesbians to change their sexual orientation . . . . Same-sex couples are *identical* to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions."[252] In addition, rejecting Proposition 8 proponents' claims that allowing same-sex marriage would undermine heterosexual marriage, Judge Walker found: "Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry. . . ."[253]

In a key factual finding, Judge Walker also found that "[t]he children of same-sex couples benefit when their parents can marry."[254] He made extensive findings that whether a child is well-adjusted does not depend on the gender or sexual orientation of the parents.[255]

Still sticking to the facts as shown by the expert evidence, Judge Walker found that Proposition 8 reminds LGBT couples in "committed long-term relationships that their relationships are not as highly valued as opposite-sex relationships."[256] Judge Walker found that "[d]omestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States."[257] Furthermore, Judge Walker found that "[p]ublic and private discrimination against gays and lesbians occurs in California and in the United States."[258] Addressing the Proposition 8 campaign, Judge Walker found, as a matter of fact, that the "campaign relied on [negative] stereotypes to show that same-sex relationships are inferior to opposite-sex relationships."[259]

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[249] *Id.* at 960.

[250] *Id.* at 960-64.

[251] *Id.* at 964, 966.

[252] *Id.* at 967 (emphasis added).

[253] *Id.* at 972.

[254] *Id.* at 973.

[255] *Id.* at 981-82.

[256] *Id.* at 979.

[257] *Id.* at 970. Judge Walker relied on the fact that the proponents of Proposition 8 conceded that marriage is uniquely valuable and that domestic partnership, civil unions or other protections for families are culturally inferior. *Id.*

[258] *Id.* at 981.

[259] *Id.* at 990.

Turning from facts to law, Judge Walker noted that "[t]he parties [did] not dispute that the right to marry is fundamental."[260] The question presented was "whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right."[261] Judge Walker held that "[p]laintiffs do not seek recognition of a new right . . . . Rather, plaintiffs ask California to recognize their relationships for what they are: marriages."[262] Therefore, Judge Walker held that Proposition 8 is subject to strict scrutiny under the plaintiffs' due process claim.[263] "Under strict scrutiny, the state bears the burden of producing evidence to show that Proposition 8 is narrowly tailored to a compelling government interest . . . . Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny[.]"[264]

Turning to the plaintiffs' equal protection claims, Judge Walker found that "Proposition 8 discriminates both on the basis of sex and on the basis of sexual orientation."[265] Although the court did not cite *Baehr v. Lewin*, Judge Walker agreed with the sex discrimination analysis articulated by the Hawai'i Supreme Court. He reasoned: "Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."[266] But Judge Walker concluded that the law also discriminated on the basis of sexual orientation: "sex and sexual orientation are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation. . . . Sexual orientation discrimination is thus a phenomenon distinct from, but related to, sex discrimination."[267]

This was an important move. Reviewing the marriage law under the heightened scrutiny applicable to sex discrimination would have made Judge Walker's decision more vulnerable on appeal because it is far from clear whether the Ninth Circuit or the Supreme Court would agree that the law should be subject to heightened scrutiny. But all laws must at a minimum satisfy rational basis review.[268]

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[260] *Id.* at 992.
[261] *Id.*
[262] *Id.* at 993.
[263] *Id.* at 994.
[264] *Id.* at 995.
[265] *Id.* at 996.
[266] *Id.*
[267] *Id.*
[268] Romer v. Evans, 517 U.S. 620, 632 (1996); Heller v. Doe, 509 U.S. 312, 320-21 (1993).

After scrutinizing the justifications offered for Proposition 8, the court held that it failed to satisfy even rational basis review:[269]

> Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus toward gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate. . . . 'The Constitution cannot control private biases, but neither can it tolerate them' . . . . California's obligation is to treat its citizens equally, not to 'mandate [its] own moral code.' '[M]oral disapproval, without any other asserted state interest,' has never been a rational basis for legislation.[270]

On August 4, 2010, based on the foregoing findings of fact and conclusions of law, the district court held that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[271] Accordingly, Judge Walker enjoined the application and enforcement of Proposition 8.[272] The same day, the proponents of the initiative filed a notice of appeal, and the Ninth Circuit subsequently stayed the district court's order pending appeal.[273]

On February 7, 2012, a three-judge panel of the Ninth Circuit affirmed the district court's judgment in a 2-1 decision authored by Judge Stephen Reinhardt.[274] Judge Reinhardt's opinion held Proposition 8 unconstitutional on narrower grounds than Judge Walker's. The court declined to decide "[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry[.]"[275] Rather, relying heavily on the Supreme Court's opinion in *Romer v. Evans*, the court held that "[b]y using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection

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[269] *Perry*, 704 F. Supp. 2d at 997. Although he held that Proposition 8 failed to satisfy even rational basis review, Judge Walker concluded that laws targeting gays and lesbians should be subject to strict scrutiny because the group has "experienced a 'history of purposeful unequal treatment' [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)).

[270] *Id.* at 1002 (citing *Romer*, 517 U.S. at 633; Moreno v. Dep't of Agric., 413 U.S. 528, 534 (1973); Palmore v. Sidoti, 466 U.S. 429, 433 (1984); Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in the judgment)).

[271] *Id.* at 1003-04. Judge Walker held that the equal protection claim was "based on sexual orientation, but this claim [was] equivalent to a claim of discrimination based on sex." *Id.* at 996.

[272] *Id.* at 1003-04.

[273] Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010).

[274] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[275] *Id.* at 1064 (emphasis in original).

Clause."[276] Because California is the only state where the right to same-sex marriage was repealed by referendum after such marriages had already legally taken place, the opinion does not mandate same-sex marriage beyond California.

On June 5, 2012, as this article went to print, the Ninth Circuit denied Proposition 8 supporters' petition for en banc review by eleven of the Ninth Circuit's judges.[277] The narrow holding of Judge Reinhardt's opinion, specific to the unique history of same-sex marriage in California, provides the Supreme Court with a ready-made rationale to deny cert if the Court is reluctant to settle the question of marriage equality.[278]

Like the Hawai'i Supreme Court in *Baehr*, the court in *Perry* gave the defendants an opportunity to present justifications for the alleged discrimination or deprivation of liberty. The Hawai'i Supreme Court did this by remanding the case to the trial court, while Judge Walker insisted on a trial on the merits, even though neither the plaintiffs nor the defendants wanted a trial.[279] Insisting on a factual trial is not only fair to the State, but it is very useful politically. Part of the power of both *Baehr* and *Perry* is that the defendants, given the opportunity to show a basis for denying same-sex couples the right to marry, came up so short.

E. Beyond U.S. Politics and Law

The movement toward recognizing same-sex marriage has also made dramatic gains outside the United States, particularly in Europe, but in Latin America and South Africa as well. In 1989, Denmark became the first country to grant legal status to same-sex unions.[280] Since 2001, ten additional nations have made marriage available to same-sex couples.[281] Additionally, nineteen nations have authorized civil unions for same-sex couples.[282]

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[276] *Id.* at 1096.

[277] Perry v. Brown, 681 F.3d 1065 (9th Cir. 2012).

[278] For an excellent commentary on same-sex marriage, see Georgetown University School of Law Professor Nan Hunter's blog, Hunter of Justice: A Blog About Sexuality, Gender, Law and Culture, http://hunterforjustice.typepad.com/ (last visited Mar. 25, 2011).

[279] *See* Cummings & NeJaime, *supra* note 214, at 1300-01.

[280] The Danish Registered Partnership Act, No. 372, June 1, 1989, *available at* http://www.ilga-europe.org/content/download/10993/65145/file/Denmark%20registered%20partnership%20(english).pdf.

[281] *See* Marriage Law Foundation, INTERNATIONAL SURVEY OF LEGAL RECOGNITION OF SAME-SEX COUPLES (2011), http://marriagelawfoundation.org/publications/International.pdf. The following are listed in the order they were adopted: Netherlands, 2001; Belgium, 2003; Canada, 2005; Spain, 2005; South Africa, 2006, Norway, 2008; Sweden, 2009; Argentina, 2010; Iceland, 2010; Portugal, 2010. *Id.*

[282] Scott T. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications*

F. Public Attitudes to Same-Sex Marriage

Public attitudes toward LGBT people and same-sex marriage have changed significantly since *Baehr v. Lewin* in 1993. According to a Gallup poll, between 1996—when DOMA was passed—and 2010, the proportion of Americans who supported same-sex marriage increased from twenty-seven percent to forty-four percent.[283] The Pew Research Center reported that in 2010, for the first time in polling history, fewer than half of those polled opposed same-sex marriage (forty-eight percent opposed and forty-two percent supported).[284] People born after 1980 favor allowing gays and lesbians to marry legally by a fifty-three percent to thirty-nine percent margin, while those born before 1945 continue to oppose same-sex marriage, fifty-nine percent to twenty-nine percent.[285]

An analysis of a 2010 CNN poll found that a narrow majority of Americans support same-sex marriage; this is the first poll to find majority support.[286] According to research by political science professors Andrew Gelman, Jeffrey Lax, and Justin Phillips of the Columbia University Department of Political Science, same-sex marriage did not have majority support in any state as recently as 2004.[287] By 2008, the majority in three states supported marriage equality, and by 2011, seventeen states had crossed the fifty percent line.[288]

The results of the two ballot measures in California defining marriage as heterosexual are instructive. In 2000, California voters approved Proposition 22, which statutorily defined marriage as between a man and a woman, by a sixty-one percent to thirty-nine percent margin.[289] In 2008, California voters approved Proposition 8, the constitutional ban on same-sex marriage, by only a fifty-two percent to forty-eight percent margin.[290] When Proposition 8 was

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for Same-Sex Spouses in a World Without DOMA, 16 WM. & MARY J. WOMEN'S L. 536, 607 n.329 (2010).

[283] Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP, May 24, 2010, http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx.

[284] *Support for Same-Sex Marriage Edges Upward*, THE PEW RESEARCH CENTER FOR PEOPLE & THE PRESS, Oct. 6, 2010, http://people-press.org/report/662/same-sex-marriage.

[285] *Id.*

[286] *Americans Split Evenly on Gay Marriage*, politicalticker (CNN) (Aug. 11, 2010, 00:34 EST), http://politicalticker.blogs.cnn.com/2010/08/11/americans-split-evenly-on-gay-marriage/.

[287] *Id.*

[288] *Id.* (discussing CNN, OPINION RESEARCH POLL (2010), http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a1a.pdf).

[289] DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF ELECTION RESULTS (2010), *available at* http://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf.

[290] Local Ballot Measures (CNN) (Jan. 12, 2009, 00:00 EST), http://www.cnn.com/ELECTION/2008/results/ballot.measures/.

approved, a majority of people opposed same-sex marriage, while in 2011 a majority supported it.[291] A similar shift occurred in Maine, where same-sex marriage legislation was repealed by referenda in 2009.[292]

Of course, public opinion does not necessarily translate into a change in public policy. If a minority feels strongly and is willing to vote on a single issue basis, it is able to exercise political power disproportionate to its popular support. These issues are explored further in Part IV.

III. THE BACKLASH DEBATE

The successes and setbacks of the marriage equality movement since *Baehr v. Lewin* have provoked debate among lawyers, activists, and scholars about whether litigation has been an effective tool for achieving the movement's goals while the majority of the public does not support same-sex marriage. On one side are those we call the "Backlash Theorists," who reject the capacity of the courts to effect social change and are skeptical of the possibility of achieving marriage equality through litigation. They contend that the handful of judicial victories have produced a backlash with far greater costs than can be justified by their benefits. On the other side are those we call the "Backlash Skeptics." While acknowledging that the marriage equality movement has suffered serious setbacks at the ballot box, these scholars and activists argue that the benefits of litigation have, on balance, outweighed its costs.

We will explore the arguments made by each side in this backlash debate in greater detail before turning to our own assessment of the achievements of the marriage-equality litigation and the part that can be reasonably attributed to *Baehr*.

A. The Backlash Theorists

The Backlash Theorists generally support marriage equality; they simply take issue with how the movement has pursued that goal. John D'Emilio, an eminent historian of sexuality, gender, and social movements, has called the marriage campaign nothing less than a "disaster".[293] "Despite all the cheering for the gains we have made, the attempt to achieve marriage through the courts

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[291] Andrew Gelman, Jeffrey Lax & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 21, 2010, at WK3, *available at* http://www.nytimes.com/2010/08/22/weekinreview/22gay.html.

[292] *Id.*

[293] John D'Emilio, *Will the Courts Set us Free? Reflections on the Campaign for Same Sex Marriage*, *in* THE POLITICS OF SAME-SEX MARRIAGE 39, 45 (Craig A. Rimmerman & Clyde Wilcox eds., 2007). D'Emilio first presented his views at a lecture in February 2004, before the 2004 Presidential election. *Id.* at 61.

has provoked a series of defeats that constitute *the greatest calamity in the history of the gay and lesbian movement in the United States*."[294] Gerald N. Rosenberg, a professor of political science and lecturer in law at the University of Chicago, contends that "[t]he battle for same-sex marriage would have been better served if [LGBT activists] had never brought litigation, or had lost their cases."[295] In his opinion, the same-sex marriage litigation has "set back [the] goal of marriage equality for at least a generation."[296] Michael J. Klarman, a professor of constitutional law and history at Harvard Law School, contends that, "[b]y outpacing public opinion on issues of social reform,"[297] judicial rulings such as *Baehr* "mobilize opponents, undercut moderates, and retard the cause they purport to advance."[298]

Rosenberg and Klarman are best known for challenging liberal assumptions about the impact of the U.S. Supreme Court's historic opinion in *Brown v. Board of Education*.[299] They argue that the opinion provoked massive resistance to desegregation by Southern Whites, reversed gains in the struggle for racial equality that had been made since World War II, and unleashed a wave of violence against African Americans.[300] Notwithstanding the Court's order in *Brown*, Rosenberg and Klarman contend that desegregation did not make any significant progress, other than in the border states, until the 1960s, when Congress and the President committed themselves to ending Jim Crow.[301]

Rosenberg argues that courts are poor catalysts of social change due to a variety of institutional constraints. First, the limited nature of constitutional rights forces advocates to argue for the extension or recognition of new rights, which courts are reluctant to do given the importance of precedent to judicial decision-making.[302] Second, the Supreme Court cannot risk getting too far ahead of the political branches given the judiciary's dependence on and

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[294] *Id.* at 45 (emphasis added).

[295] Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813 (2006).

[296] Rosenberg, *Saul Alinsky*, *supra* note 208, at 656.

[297] Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 482 (2005) [hereinafter Klarman, *Brown and Lawrence*].

[298] *Id. But see* Michael J. Klarman, *Marriage Equality: Are Lawsuits the Best Way?*, HARV. L. BULL., Summer 2009, at 7, 9, *available at* http://www.law.harvard.edu/news/bulletin/2009/summer/ask.php (qualifying the backlash claim concerning *Goodridge*).

[299] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Benjamin I. Page ed., 2d ed. 2008) [hereinafter ROSENBERG, THE HOLLOW HOPE]; Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) [hereinafter Klarman, *How Brown Changed Race Relations*]; Klarman, *Brown and Lawrence*, *supra* note 297.

[300] Klarman, *Brown and Lawrence*, *supra* note 297, at 453-58.

[301] *Id.*

[302] ROSENBERG, THE HOLLOW HOPE, *supra* note 299, at 10-13.

vulnerability to Congress and the President.[303] Third, even if these institutional constraints can be overcome, the judiciary is decentralized and lacks the resources and expertise to implement comprehensive social reforms.[304] Put differently, courts ultimately depend on other institutional actors to carry out their orders.

Accordingly, Rosenberg argues that courts can produce social change only when these constraints are overcome through: (1) sufficient legal precedent for change; (2) sufficient support in Congress and the executive branch for change; *and* (3) either sufficient support or low levels of opposition among the citizenry.[305] In addition, there must be: (a) positive or negative inducements for compliance with the court's order; (b) the ability for the court's order to be implemented through the market; *or* (c) some other incentive to comply for those responsible for implementation.[306]

Rosenberg first published his ideas in *The Hollow Hope* in 1991.[307] But he began work on a second edition of the book in response to the *Baehr* litigation.[308] By 2008, when the second edition of *The Hollow Hope* was finally published, Rosenberg was confident that the marriage equality movement was the most recent progressive movement to fall prey to the lure of litigation and provoke a political backlash that undermined its goals.[309]

Like Rosenberg, Klarman also comes to same-sex marriage by way of *Brown v. Board of Education*. He first published his backlash thesis concerning *Brown* in 1994,[310] but after *Goodridge v. Department of Public Health* he believed that he had found another example to support his thesis. He argues that court rulings such as *Brown* and *Goodridge* produce a political backlash because they (1) raise the salience of the social issue and force people to take sides; (2) incite anger over "outside interference" or "judicial activism"; and (3) alter the order in which social change would otherwise occur by skipping incremental steps with greater public support (e.g., desegregation of transportation rather than education in the case of *Brown*, and civil unions rather than marriage in the case of *Goodridge*).[311] Moreover, Klarman argues that the Supreme Court is rarely willing to lead public opinion.[312]

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[303] *Id.* at 13-15.

[304] *Id.* at 15-21.

[305] *Id.* at 32-36.

[306] *Id.*

[307] ROSENBERG, THE HOLLOW HOPE, *supra* note 299.

[308] *Id.* at 35-36.

[309] *Id.* at 419.

[310] Klarman, *How Brown Changed Race Relations*, *supra* note 299.

[311] Klarman, *Brown and Lawrence*, *supra* note 297, at 473-82. Klarman believes that *Brown* indirectly led to the success of the civil rights movement in the 1960s because the wave of violence that swept the South in its wake ultimately contributed to Northern whites' demands for political intervention by Congress and the President. Klarman, *How Brown Changed Race*

John D'Emilio agrees with Klarman's general assessment of the Supreme Court's political inclinations.[313] Neither *Brown* nor *Roe v. Wade*[314] placed the Supreme Court in the "vanguard of social change."[315] Instead, he suggests, "both decisions built on strong foundations in American society, culture, and law. They attempted to place a constitutional imprimatur on trends already well under way."[316] In addition, citing Gayle S. Rubin, D'Emilio contends that "[s]ex laws are notoriously easy to pass[,]" but "[o]nce they are on the books, they are extremely difficult to dislodge."[317] In other words, without relief from the United States Supreme Court, the marriage equality movement will have to contend with the hard slog of repealing scores of heterosexual marriage laws and constitutional provisions put in place since *Baehr*.

In sum, the Backlash Theorists argue that the marriage equality movement has been "one step forward, two steps backwards."[318] Nowhere has full marriage equality been achieved.[319] While same-sex marriage is available in a handful of states and the District of Columbia, none of these marriages are recognized at the federal level, or in the vast majority of other states. The judicial victories have motivated opponents more than supporters, and the movement has provoked a backlash erecting multiple barriers to further progress in the rest of the country and at the federal level. Moreover, the Backlash Theorists suggest that same-sex marriage litigation has diverted valuable resources from other more effective strategies and causes.[320] More could have been achieved if LGBT advocates had focused on non-litigation strategies and less politically contentious issues, such as civil unions and employment discrimination.

B. The Backlash Skeptics

A group of activists and academics have challenged the Backlash Theorists' description of the marriage-equality movement as well as their conclusions about its success. Rather than seeing one step forward and two steps backward,

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Relations, *supra* note 299, at 111-16. But because the anti-LGBT backlash has not included similarly organized violence, he does not see the same indirect benefits for marriage equality. Klarman, *Brown and Lawrence*, *supra* note 297, at 482.

312 Klarman, *Brown and Lawrence*, *supra* note 297, at 482.

313 D'Emilio, *supra* note 293, at 44-45.

314 403 U.S. 113 (1973).

315 D'Emilio, *supra* note 293, at 56-57.

316 *Id.*

317 *Id.* at 60.

318 ROSENBERG, THE HOLLOW HOPE, *supra* note 299, at 368.

319 *Id.* at 352.

320 *Id.* at 423.

these Backlash Skeptics look at the past nineteen years and see two steps forward and one step backward.

The Backlash Skeptics reject three major descriptive premises of the Backlash Theorists: (1) that the marriage equality movement has wholly, or even primarily, chosen litigation as a means to achieve their goals; (2) that LGBT legislative victories are immune to political backlash; and (3) that movement lawyers have controlled the agenda.

Laura Beth Nielsen argues that the marriage equality movement has combined impact litigation with a host of other non-litigation strategies including direct action, community organizing, political strategies, education, and public demonstrations.[321] Moreover, the Backlash Skeptics do not believe a campaign focused purely on legislation would have fared any better: LGBT legislative victories have also been overturned by citizen lawmaking mechanisms.[322]

National movement attorneys have picked their battles carefully and litigated only where they have public support, in states such as Vermont and Massachusetts.[323] But the movement advocates do not control the world. Same-sex couples might find a lawyer to represent them and a court to listen to their claims, as in Hawai'i.[324] Mayors might decide that their oath to support the constitution prohibits them from denying marriage licenses to same-sex couples, as in San Francisco and New Paltz.[325] Flashy, competent, well-funded lawyers might decide to launch a federal constitutional claim.[326]

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[321] Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 671, 673 (2009).

[322] *See, e.g.*, Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 179-81 (2009); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 878-81 (2006); Bonauto, *supra* note 172, at 64. In 1977, after the Dade County Metropolitan Commission in Florida enacted an antidiscrimination ordinance, a campaign led by Anita Bryant successfully placed a referendum on Dade County's ballot repealing the ordinance. CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 127-28 (Shane Phelan ed., 2002); Keck, *Beyond Backlash*, *supra*, at 179. The voters approved the referendum by a margin of more than two to one. RIMMERMAN, *supra*, at 127-28. Similarly, a series of LGBT-friendly local ordinances enacted in Colorado in the 1980s and 1990s prompted a 1992 citizen's initiative that amended the Colorado Constitution to ban any laws offering legal protections on the basis of sexual orientation. Keck, *supra*, at 179-80. Until the U.S. Supreme Court struck down the Colorado amendment in *Romer v. Evans*, laws precluding LGBT protections were placed on state-wide ballots in Idaho, Maine, and Oregon, and local jurisdiction ballots in Florida, Ohio, and Oregon. *Id.* at 180.

[323] *See* Baker v. State, 744 A.2d 864, 867 (Vt. 1999); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

[324] *See supra* notes 17-31 and accompanying text.

[325] *See supra* notes 196-98 and accompanying text.

[326] *See supra* notes 225-29 and accompanying text (discussing the plaintiffs' lawyers in

More fundamentally, the Backlash Skeptics challenge the Backlash Theorists' appraisal of the net effect of the marriage equality movement since *Baehr*.[327] For the Backlash Skeptics such as Thomas M. Keck and Carlos A. Ball, the availability of same-sex marriage in six states[328] and the District of Columbia, and the recognition of such marriages in at least one other state,[329] is no small achievement, notwithstanding their lack of federal recognition.[330]

In addition, the Backlash Skeptics contend that the real world impact of the backlash has not been as significant as it seems at first blush. Keck points out that no state recognized same-sex marriage before *Baehr* and that therefore the statutory bans, while psychologically demoralizing, have not effected a change in policy.[331] Moreover, while the state constitutional bans are worse because they preclude the legislature and the courts as future agents of change, Keck argues that in the vast majority of these states, neither the courts nor the legislature are likely to change marriage policy anytime soon.[332] Change will come in most of these places only, if at all, through federal court intervention.[333]

The Backlash Skeptics also contend that the marriage equality movement has had collateral benefits ignored by the Backlash Theorists. The focus on marriage, and the resistance to marriage, has increased public support for civil unions, which have emerged as a compromise position.[334] In the 2004 presidential race, both George W. Bush and John Kerry supported civil unions for same-sex couples.[335] In the 2008 presidential race, all the major Democratic

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Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)).

[327] Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1494 (2006) [hereinafter Ball, *The Backlash Thesis*].

[328] Connecticut (2008), District of Columbia (2010), Iowa (2009), Massachusetts (2004), New Hampshire (2010), New York (2011), and Vermont (2009). Human Rights Campaign, *supra* note 136. As noted above, *see supra* note 132 and accompanying text, Washington and Maryland may soon be added to this list.

[329] Maryland recognizes same-sex marriages where contracted. 95 Md. Op. Att'y Gen. 3 (Feb. 23, 2010); *see supra* text accompanying note 132.

[330] Ball, *The Backlash Thesis*, *supra* note 327, at 1525; Keck, *supra* note 322, at 164, 168-69. Indeed, the Backlash Skeptics' view of the importance of these achievements seems to prove their related point that the successes of litigation inspired supporters as well as opponents, contrary to Rosenberg and Klarman's view of judicial decisions in advance of public opinion. *Id.*

[331] Keck, *supra* note 322, at 158, 168.

[332] *Id.* at 168.

[333] *Id.*

[334] Ball, *The Backlash Thesis*, *supra* note 327, at 1530.

[335] Sheryl Gay Stolberg, *Democratic Candidates Are Split on the Issue of Gay Marriages*, N.Y. TIMES, July 16, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F05EFDB153CF935A25754C0A9659C8B63

candidates supported civil unions.[336] Today, in 2011, sixty-six percent of Americans support same-sex marriage or civil unions.[337] Thus, the debate has shifted from whether to recognize same-sex relationships to how to recognize them, which represents a significant step forward.[338]

Indeed, in addition to the states recognizing same-sex marriages, seven states provide all of the state-level spousal benefits to same-sex couples in domestic partnerships or civil unions,[339] and three states provide some state-level spousal benefits.[340] In many cases, these expansions of partnership rights took place against the background of same-sex marriage litigation. "Beginning with Hawai'i, every state in which a court has ruled in favor of expanded partnership rights for same-sex couples [has] indeed subsequently seen an expansion of such rights."[341] In California, Connecticut, New Jersey, and New York, lawmakers expanded the rights granted same-sex couples while litigation was pending; in Oregon, Washington, and again in New York, legislators acted after litigation *failed* to achieve same-sex marriage.[342]

Moreover, the Backlash Skeptics argue that it is reasonable to attribute other LGBT successes, such as the repeal of sodomy laws, the enactment of laws prohibiting discrimination and penalizing hate crimes based on sexual orientation, and greater acceptance of adoptions by LGBT couples, to the marriage equality campaign.[343] By increasing LGBT visibility and humanizing same-sex relationships, the marriage equality movement has forced politicians

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(despite the title of the article, it reports that Kerry, Howard Dean, Joseph Leiberman and Richard Gephardt all opposed same-sex marriage, but supported civil unions); Elisabeth Bumiller, *Bush Says His Party is Wrong to Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 24, 2004, *available at* http://www.nytimes.com/2004/10/26/politics/campaign/26gay.html.

[336] Andrew Jacobs, *For Gay Democrats, a Primary Where Rights Are Not an Issue, This Time*, N.Y. TIMES, Jan. 28, 2008, *available at* http://www.nytimes.com/2008/01/28/us/politics/28gay.html; Katharine Q. Seelye et al., *On the Issues: Social Issues*, N.Y. TIMES, 2008, http://elections.nytimes.com/2008/president/issues/abortion.html.

[337] Posting of Joel Connelly to Seattle PI, *Poll: Big Majority for Same-Sex Marriage/Civil Unions*, SEATTLE PI (Feb. 8, 2011, 13:00 PST), http://blog.seattlepi.com/seattlepolitics/2011/02/08/poll-big-majority-for-same-sex-marriage-civil-unions/.

[338] Ball, *The Backlash Thesis*, *supra* note 327, at 1532.

[339] Human Rights Campaign, *supra* note 136. The states are California (domestic partnerships in 1999 and expanded rights in 2005), Hawai'i (civil unions in 2011), Illinois (2010), Nevada (domestic partnerships in 2009), New Jersey (civil unions in 2007), Oregon (domestic partnerships in 2008) and Washington (domestic partnerships in 2007 and 2009). *Id.*

[340] *Id.* The states are Colorado (designated beneficiaries, 2009), Maine (2004), and Wisconsin (domestic partnerships, 2009). *Id.*

[341] Keck, *supra* note 322, at 169.

[342] *Id.* at 170.

[343] Ball, *The Backlash Thesis*, *supra* note 327, at 1533-34; Keck, *supra* note 322, at 171-75 & tbls.5, 6.

and voters to think about their LGBT neighbors and how far they are willing to extend the promise of equality. Since *Baehr v. Lewin*, we have witnessed the end of the criminalization of consensual sodomy, twenty-one states have passed laws targeting hate crimes based on sexual orientation, twelve states have passed laws prohibiting employment discrimination on the basis of sexual orientation, and eleven states have passed laws prohibiting employment discrimination on the basis of gender identity.[344]

IV. AN EVALUATION OF *BAEHR V. LEWIN* AND THE BACKLASH DEBATE

D'Emilio, Rosenberg, and Klarman argue that the movement for LGBT liberty, equality, and respect would be better if Dan Foley had never agreed to represent the plaintiffs in *Baehr v. Lewin*, or if Justices Moon and Levinson had ruled against marriage equality. We disagree, largely for the reasons articulated by the Backlash Skeptics. In this part we offer additional thoughts about this debate.

In the late 1980s, there were several components to the same-sex marriage debate in the LGBT community.[345] Is the fight for same-sex marriage a desirable goal? Is it a strategically wise priority for the LGBT movement? Is litigation the best way to pursue the goal? The Backlash Theorists focus primarily on the wisdom of constitutional litigation.

Powerful reasons supported the LGBT movement's determination in the 1980s that it was unwise to seek same-sex marriage through litigation. Courts had summarily dismissed all of the claims brought up to that point.[346] Society and the courts have always had more difficulty eradicating historic prejudice in the home than in the public sphere. For example, both the NAACP and the ACLU opposed constitutional challenges to anti-miscegenation laws long after the U.S. Supreme Court decided *Brown v. Board of Education* in 1954.[347] The Court did not decide *Loving v. Virginia*[348] until 1967, thirteen years after *Brown v. Board of Education* and nineteen years after the California Supreme Court struck down the anti-miscegenation law in *Perez v. Sharp*.[349] But while it makes sense for civil rights leadership to seek to set an agenda, both the Backlash Theorists and the LGBT leadership overestimate the ability of the organized movement to control the world.[350] The LGBT leadership had little choice but to join the marriage equality litigation once it began.

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[344] Keck, *supra* note 322, at 175 tbl.6.

[345] *See supra* text accompanying notes 8-15.

[346] *See supra* note 8.

[347] Schacter, *supra* note 141, at 1161-62.

[348] 388 U.S. 1 (1967).

[349] 198 P.2d 17 (Cal. 1948).

[350] *See supra* notes 324-326 and accompanying text.

The same-sex marriage litigation of the past twenty years has produced three important benefits. First, judicial decisions like *Baehr*—from *Perry v. Schwarzenegger*[351] to *Gill v. Office of Personnel Management*[352]—reveal that when asked to present reasons for denying same-sex couples access to marriage, those who oppose same-sex marriage are unable to articulate and defend reasons other than tradition, a particular version of morality, and irrational prejudice. Even when the constitutional claims have been rejected by the courts, as in New York,[353] powerful dissents demonstrate the irrationality of the discrimination that can hinder political change.[354] Irrational prejudice is good enough in the context of legislation or popular politics, but not in a judicial context that asks for a rational relationship between ends and means, backed by evidence subject to cross-examination. This is an important advantage of litigation over legal reform via the legislature or ballot initiatives. The same-sex marriage debate is a powerful argument for the rule of law.

Second, sometimes, as in Massachusetts, Vermont, California, Connecticut, and Iowa,[355] the litigation is successful and same-sex couples get married. While the Backlash Theorists are right that the U.S. Supreme Court is generally loathe to advance far ahead of the national mood, it is a big country, and same-sex marriage litigation has found a receptive audience in several state supreme courts. And it is fair to assume that these judicial decisions support legislative action in other states. The availability of same-sex marriage in six states and the District of Columbia and the recognition of such marriages by at least two other states is a significant achievement. These marriages afford same-sex couples with all of the benefits conferred by the state on opposite-sex couples, including inheritance rights, hospital visitation rights, emergency medical decision-making powers, access to health and pension benefits, reciprocal support obligations, and division of marital property.[356]

Apart from the material benefits to families headed by same-sex couples, the implementation of same-sex marriage in several states demonstrates that the sky will not fall and provides examples that LGBT activists can point to as they attempt to expand the number of states that recognize these unions. The best way to influence public opinion on gay marriage is to implement it.[357] In

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[351] 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[352] 699 F. Supp. 2d 374 (D. Mass. 2010).

[353] Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006).

[354] *See, e.g., id.* at 22 (Kaye, C.J., dissenting). *See also* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (suggesting ways in which litigation losses can benefit movements for social change).

[355] *See supra* Part II.B.

[356] NAT'L CONFERENCE OF STATE LEGISLATURES, CIVIL UNIONS & DOMESTIC PARTNERSHIP STATUTES (2010), http://www.ncsl.org/Default.aspx?TabId=16444.

[357] Barney Frank, U.S. Rep., Keynote Address at the Charles R. Williams Project on Sexual Orientation on the Law and Public Policy at UCLA, 4th Annual Update on Sexual Orientation

Vermont, initial reaction to the Vermont Supreme Court's decision that civil unions were constitutionally required was extremely hostile.[358] The same occurred in Massachusetts.[359] As Congressman Barney Frank noted, if the Massachusetts Constitution could have been amended the day after *Goodridge v. Department of Public Health*, it would have been.[360] But, as time has passed and same-sex couples have gotten married, it has, in Frank's words, "become boring" and thereby acceptable with the new question being: "What do you get your lesbian neighbors from Crate and Barrel?"

Third, same-sex marriage litigation has had spillover effects. First and foremost, the struggle for marriage equality has made civil unions a compromise position supported by the majority of Americans and now available in some form in ten states.[361] Moreover, it is reasonable to attribute other LGBT successes—the repeal of sodomy laws, the enactment of laws prohibiting discrimination and penalizing hate crimes based on sexual orientation, and greater acceptance of adoptions by LGBT couples—to the marriage equality campaign, which has increased LGBT visibility and humanized LGBT relationships.[362] The years since *Baehr* have seen major changes in the law to protect LGBT people from discrimination.[363] "Some of the biggest successes [in] the gay rights movement came in the 1990s through changes in corporate policies that covered thousands of employees."[364] It is, of course, impossible to rigorously demonstrate a cause and effect relationship between same-sex marriage and these spillover effects. But it is clear that state supreme court decisions like *Baehr v. Lewin*—including *Baker v. State*,[365] *Goodridge v. Department of Public Health*,[366] and *In re Marriage Cases*[367]—provoked a public debate about the value of same-sex relationships that has forced politicians and voters to think about how far they are willing to extend the promise of equality.

The Backlash Theorists vastly overstate the difficulty in implementing same-sex marriage. Constitutional challenges to policies denying marriage licenses to same-sex couples are fundamentally different than challenges to segregated

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Law and Public Policy (Feb. 25, 2005).

[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] *See* Human Rights Campaign, *supra* note 136.

[362] Ball, *The Backlash Thesis*, *supra* note 327, at 1533-34; Keck, *supra* note 322, at 171-75 & tbls.5, 6.

[363] *See supra* Parts I-II.

[364] URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 10 (1996).

[365] 744 A.2d 864, 867 (Vt. 1999).

[366] 798 N.E.2d 941, 949 (Mass. 2003).

[367] 183 P.3d 384 (Cal. 2008).

schools, oppressive prisons, or a vast range of public policies that discriminate, in effect, on the basis of race, class, gender, or disability. These classic civil rights claims demand huge resources to gather and present facts to demonstrate discrimination and to prove lack of justification. Implementing a court order to end segregation, or de facto discrimination in schools or the workplace, or to reform prisons or mental institutions is a complex process that typically demands decades of judicial oversight, special masters, and fact-finding.[368] By contrast, an order striking down an official state policy that denies marriage licenses to otherwise qualified couples simply because they are of the same sex is simple to implement. The court must merely tell the county clerk to start issuing licenses. Thus, the challenges identified by Rosenberg in implementing court-ordered social reform[369] do not seem to exist in the case of same-sex marriage, which has been implemented successfully wherever it has been ordered.

The Backlash Theorists are certainly correct that the federal and state DOMAs make it more difficult to achieve marriage equality; however, the cause and effect relation between the same-sex marriage litigation and these laws is less than clear. As noted earlier, the possibility of same-sex marriages presents a perfect political storm for the religious right.[370] Moreover, we largely agree with Keck that the two waves of state anti-same-sex marriage statutes and constitutional amendments have, for the most part, not changed policy.[371] Although in Hawai'i and Alaska, ballot initiatives preempted the implementation of a policy change by the courts, and more recently a ballot initiative in Maine preempted a same-sex marriage statute, only in California did a ballot initiative actually reverse an implemented same-sex marriage policy.[372] In the rest of the states with constitutional amendments it will be more difficult to gain marriage equality, but we agree with the Backlash Skeptics that it is unlikely that courts or legislatures in many of these states will be receptive to marriage equality arguments in the near future. Thus, these states will require very hard political work in any event, whether working through the state legislatures or voter initiatives, in the absence of federal court intervention.

Will it be, as D'Emilio suggests,[373] harder to remove these laws than it was to put them on the books in the first place? In the thirty states with

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[368] *See* JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY (1981).

[369] ROSENBERG, THE HOLLOW HOPE, *supra* note 299, at 15-21.

[370] *See supra* text accompanying note 142.

[371] Keck, *supra* note 322, at 158, 168.

[372] *See supra* text accompanying notes 201 (Alaska), 219-23 (California), 103-06 (Hawai'i).

[373] D'Emilio, *supra* note 293, at 60.

constitutional amendments, it will certainly require changing the views of the voters in the absence of federal court intervention along the lines of *Perry v. Schwarzenegger*.[374] How difficult this will be and how long it will take depend on the state. The odds of California reversing its course in the next couple of years are good; the odds of Utah reversing its course are not.

The more concerning setbacks are the nineteen constitutional amendments that could be interpreted to preclude civil unions and other types of legal recognition of same-sex relationships. A majority of Americans now support some type of legal recognition of same-sex relationships,[375] and while civil unions may not enjoy majority support in each of these individual states, there is certainly greater support for civil unions than for same-sex marriage. Civil unions can provide many of the same tangible benefits offered by states. This is a very real cost of the backlash and the movement should focus on trying to salvage what it can from these amendments.

Finally, the most important setback in the marriage equality movement has been DOMA, and more specifically its withholding of federal recognition of same-sex marriages. The fact that these marriages are not recognized by the federal government is of enormous practical consequence and likely discourages same-sex couples from marriage in states where it is allowed. To be sure, it is not the federal recognition of same-sex marriage as much as the idea of same-sex marriage itself that rankles social conservatives and many voters who have not thought much about the issue.[376] Whether rational or not, both sides in this debate attach great importance merely to the word "marriage."[377] But without DOMA, the same-sex marriages recognized at the

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[374] 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[375] The Pew Forum on Religion & Public Life, MAJORITY CONTINUES TO SUPPORT CIVIL UNIONS (2009), http://pewforum.org/Gay-Marriage-and-Homosexuality/Majority-Continues-To-Support-Civil-Unions.aspx.

[376] *See, e.g.*, Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 387 (1999) ("The fight is mostly about a word, not an act. Couples are not arrested for participating in a ceremony of same-sex union."); 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, 450 (1996) ("Whatever the context of the debate, most speakers are transfixed by the symbolism of legal recognition.").

[377] In *Perry v. Schwarzenegger*, Judge Walker found that "marriage" has a unique symbolic meaning in our culture and that even the proponents of Proposition 8 "admit that there is a significant symbolic disparity between domestic partnership and marriage." 704 F. Supp. 2d at 970. *Compare* Human Rights Campaign Marriage & Relationship Recognition, http://www.hrc.org/issues/marriage/marriage_introduction.asp (last visited Mar. 21, 2011) ("Only marriage can provide families with true equality."), *with* Family Research Council, Human Sexuality: Homosexuality, http://www.frc.org/human-sexuality#homosexuality (last visited Mar. 23, 2011) ("Attempts to join two men or two women in 'marriage' constitute a radical redefinition and falsification of the institution.").

state level would have all the same rights and benefits as any other marriages at the state level, although they might not be recognized by other states. The end of DOMA, either by repeal or court injunction, would go a long way toward achieving same-sex marriage in America.

Nevertheless, comparing 1993, when *Baehr v. Lewin* was decided, and the present, it is hard to understand how anyone could believe that LGBT relationships do not enjoy greater social respect and state recognition, or that we are not closer than ever before to same-sex marriage becoming a norm. The fact that the same-sex marriage movement has encountered stiff political resistance does not change the fact that it has made significant headway in many places. Indeed, on May 9, 2012, President Obama became the first U.S. president to declare that same-sex marriage should be legal,[378] something that would have been unimaginable in 1993.

In sum, the United States has experienced a polarization of policy on same-sex marriage, even as it continues to rapidly change. A handful of more liberal states and the District of Columbia have implemented same-sex marriage policies, a much larger number of more conservative states have set up legal barriers to any change in policy, and a third group of states are still very much in flux in their recognition of same-sex relationships but have improved dramatically. This third group includes California, Illinois, and New Jersey—some of the most populous, diverse, and economically significant states in the union. The entire West Coast, Hawai'i, Illinois, and New Jersey now recognize same-sex marriage in all but name. Meanwhile, throughout the nation, public attitudes towards same-sex relationships and same-sex marriage are improving. This is what progress looks like, even if there is still a long road ahead before we achieve full marriage equality.

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[378] Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand On Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.