

# **DEMOCRATS FOR DOMESTIC PARTNERSHIP**

## ***The Current Push for Gay Marriage Will Hurt Democratic Congressional Candidates***

Congressional candidates may be forced to take a position on the volatile issue of gay marriage during the 1996 election campaigns. When this issue hits the political radar screen, it will create a campaign nightmare for most democratic candidates that will make the gays-in-the-military fiasco look like a picnic.

If candidates are forced to take a public stand on gay marriage, democratic politicians will get hurt the most. If they support gay marriage, they may alienate many moderate and conservative democrats, not to mention would-be Republican switchovers. Opposing it may cause them to lose votes, money, and volunteers from liberals and gay rights activists.

Making gay marriage a national issue is a lose-lose situation for Democratic candidates. Republican contenders, on the other hand, will mostly remain unharmed as they "just say no" to same-sex marriage.

Whether congressional candidates will be put on the gay-marriage hotseat lies in the hands of the 68 Democrats who overwhelmingly control the Hawaii Legislature. What they do in their local debate on this issue will have national political ramifications for many years.

### ***The Hawaii Court Case***

In 1993, the Hawaii Supreme Court issued its landmark decision in *Baehr v. Lewin*, 852 P.2d 44. Invoking the equal protection clause of the state constitution, the court ordered the state to begin issuing marriage licenses to same-sex couples, or show compelling reasons why same-sex marriage should not be legalized. The case was sent back to the Circuit Court for a trial.

The legislature's immediate response to the decision in *Baehr* was to pass a statute, by a margin of nearly two-to-one, criticizing the court and reaffirming that marriage is limited to opposite-sex couples. However, the new statute will not effect the litigation. The Supreme Court's decision was based on the state constitution, which

overrides any conflicting statute. Furthermore, the state constitution may not be amended by initiative, and lawmakers apparently lack sufficient votes to put the issue on the ballot as a referendum measure.

Legal scholars, such as University of Hawaii constitutional law professor Jon Van Dyke, say the state can not justify the present treatment of same-sex couples. Under current law, two partners who have lived together as a family unit for 20 years or more are basically considered strangers by the law.

The trial of the case is set to begin on August 1, 1996. According to professor Van Dyke, the state is sure to lose the case unless the legislature acts quickly to pass a constitutionally acceptable alternative to same-sex marriage.

The political solution is a comprehensive domestic partnership act, such as Senate Bill 3113 (S.D.1). Such an act would confer all of the benefits and obligations of marriage under Hawaii law, as part of a new civil institution that

would be parallel to, but distinct from, marriage.

Domestic partnership has its advantages. It respects history and tradition which limits marriage to opposite-sex couples, but takes a major step forward to end unjust discrimination against unmarried couples who live together in long-term committed relationships. It also attempts to avoid trampling on the religious sensibilities of most major denominations that see the legalization of same-sex marriage as an abomination.

The Senate is expected to pass S.B. 3113 by March 7, 1996. If the House approves S.B. 3113 before the legislative session ends in May 1996, and if the trial court accepts it as a constitutional alternative to gay marriage, then congressional candidates can breathe a sigh of relief. But if the House fails to take action, and the trial court rules in favor of same-sex marriage, watch out! The national media is already reserving seats for the trial and will no doubt fan the political flames if the judge gives the nod to gay marriage just weeks before the November elections.

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## **Hundreds of Federal Statutes**

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A recent federal court decision highlights the problem that will face virtually every agency of the federal government if Hawaii legalizes same-sex marriage. In *Bone v. Allen* (1995) 186 B.R. 769, Bankruptcy Court Judge David Kahn ruled that Congress did not intend to establish a federal definition of marriage. That is because laws on marriage have traditionally been left to the states to control.

Judge Kahn concluded that if a state were to legalize marriage between same-sex couples, then such couples would be considered spouses under federal statutes. According to Judge Kahn, if Congress does not like this result, it has the option of creating a new standard that would limit the definition of marriage, for purposes of federal law, to opposite-sex couples who are legally married under state law.

Given this federal connection to marriage, if the trial judge in Hawaii rules in favor of gay marriage when the trial ends in August, and when the media frenzy then begins, Republican party political strategists will have a field day during the remainder of the election season as they clobber liberal Democrats with the issue.

### **Public Opinion**

National surveys by reputable pollsters show that the public opposes the legalization of same-sex marriage by a two-to-one margin. The average of six polls conducted by Time, Newsweek, and the National Opinion Research Center between 1989 and 1994, shows that 66% of adults oppose legalizing gay marriage.

The average of three other national polls done of *registered voters* by U.S. News, EPIC/MRA, and Barna Research Group between 1993 and 1995, resulted in virtually identical figures: 66% against gay marriage.

The opposition to same-sex marriage seems to stem from religious and personal moral values. In a national poll conducted by the Los

Angeles Times in October 1995, almost three-fourths of respondents said they considered homosexual relations wrong. In a similar poll done by the National Opinion Research Center in 1990, 73% of respondents agreed with the statement "gay sex is always wrong." With public opinion about homosexuality so negative, it is little wonder that a large majority is against legalizing gay marriage.

There are sharp contrasts between republicans, democrats, and independents on this issue. In one poll, 85% of Republicans opposed gay marriage, 57% of Democrats disapproved, but only 50% of independents objected. While these figures may cause democratic candidates anxiety as they formulate a campaign position on this issue, the safest political response will be clear to most Republican politicians.

### **Most Risk to Democrats**

Democratic congressional candidates will be the most vulnerable when the gay marriage issue hits the political radar screen. Unless they have a district dominated by liberal voters, democratic incumbents or contenders face serious risks if they

support the legalization of same-sex marriage.

For those in districts with large numbers of moderate and conservative voters of either party, a general election could be lost if the gay marriage issue is not handled properly. They don't want to turn off middle-of-the-road straight voters, but they don't want to alienate gay and lesbian voters either.

The answer lies in a middle-of-the-road approach to legalizing same-sex relationships -- local option on passage of domestic partnership legislation. Supporting federalism and states' rights is the "in thing" these days and is not likely to get any democratic politician in serious trouble with moderate voters, especially if there are no federal or multi-state ramifications.

Allowing Hawaii to go its own way on domestic partnership, as long as no federal funds are involved, and as long as other states are not forced to take the same action, may be the best political solution that moderate democratic candidates could offer. Support for domestic partnership is also consistent with Democratic party

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politics over the past few years.

### **Democrats Favor Domestic Partnership**

The issue of local option on domestic partnership rights is not new to congressional democrats. It has arisen each year since 1992 when the District of Columbia both established a domestic partnership registry for local residents and decided to offer health benefits to district employees who had domestic partners.

During each of the last few years, Congress has put restrictions in the district's annual budget bill that prevented any funds from being used to implement the domestic partnership measures. Most democrats, however, supported local option on domestic partnership.

One of the recent skirmishes occurred in October 1995, when the House of Representatives voted to repeal the district's domestic partnership laws outright, rather than continuing to block funding for the measures each and every year. Republicans overwhelmingly supported repeal (200 to 30), while most Democrats favored local option (141 to 49).

Democratic support for domestic partnership has not been limited to Congress.

For example, two years ago the California Legislature passed a bill creating a statewide domestic partnership registry that also granted some legal protection to opposite-sex and same-sex couples who registered. The bill passed each house by razor-thin margins, with most Democrats in favor and virtually all Republicans opposed.

Democrats felt safe because the bill was backed by many seniors groups, including the influential AARP. The bill was drafted with seniors in mind, since many elderly men and women live together out of wedlock, for personal, family, or financial reasons. California Governor Pete Wilson, a republican, vetoed the bill when it hit his desk.

The backing of Democrats for domestic partnership rights has growing public support. For example, when the issue was put on the ballot in Seattle and San Francisco a few years ago, voters gave their approval. Both measures offered benefits to opposite-sex and same-sex couples who were not married but who lived together as a

family unit.

An increasing number of public and private employers also extend benefits to domestic partners. In 1984, the city of Berkeley was the only employer in the nation to do so. Today, more than 50 municipalities across the nation, and hundreds of private employers, now offer such benefits to their employees. Most of the employees who have signed up for such benefits are those living in opposite-sex relationships.

Public opinion polls also show increasing approval for recognizing domestic partners as a "family," with modest support for some benefits. For example, in a national poll done by Massachusetts Mutual Life Insurance Company in 1989, 74% of adults defined "family" as "a group of people who love and care for each other," while only 22% used a rigid definition of "a group of people related by blood, marriage, or adoption." That same year, when Time magazine surveyed the public, 54% agreed that gays should be able to get medical and insurance benefits from their partner's policies.

In sharp contrast to domestic partnership which is based on an inclusive definition of "family," bills to legalize same-sex marriage have gone nowhere. For example, when such a

bill was introduced a few years ago in the California Legislature, the author could not gain even one favorable vote in the democratic-controlled Assembly Judiciary Committee.

### **Coherent Explanation Needed**

In answer to a pre-election survey from the Human Rights Campaign Fund, President Clinton was asked if he would support same-sex marriages. He simply answered "no" without further comment.

When the question came up again at a national gathering of gay and lesbian journalists, White House adviser, George Stephanopoulos, responded: "[T]he president has had a position on gay and lesbian marriage for quite a long time, and he doesn't support extending a federal guarantee or federal protection." When asked to elaborate, Stephanopoulos stressed that Clinton "thinks the proper role for the federal government is to work in the fight against discrimination in the

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workplace, but he does not believe that we should endorse or sanction marriages."

While the bottom-line answer is clear, the president's reasoning is deficient. Why does he not support gay marriage? Protection from job discrimination does not address the issue of discrimination against same-sex couples.

A forthright answer that does not attempt to duck the issue would go along way. Politicians who decide to say "no" to gay marriage might explain that their constituents overwhelmingly oppose gay marriage, if that is the case. However, politicians could show some appearance of leadership by supporting a state's right to enact a domestic partnership law, especially if federal funds are not involved and if other states are not forced to accept domestic partnership if they oppose it.

### ***Immediate Action Required***

The issue of gay marriage may remain a hot issue in Hawaii, but not be dragged into the national political debate, if moderate Democrats around the nation share their views with the Democrats who control the Hawaii House of Representatives. The time for such communication is now.

The Hawaii Senate is expected to pass a comprehensive domestic partnership bill (S.B. 3113) by March 7, 1996. If the House approves the bill by mid-April, the bill could be considered by the trial court as an alternative to marriage.

However, if Democrats in the Hawaii House of Representatives do nothing, legal scholars predict that the trial court will order the state to begin issuing marriage licenses to same-sex couples. Such a ruling would be likely to issue in late August or early September 1996.

In contrast, if lawmakers pass a comprehensive domestic partnership act which grants the same rights as marriage under *state* law, this would avoid any involvement with federal law or any conflict with other states. According to the Attorney General of Hawaii, and according to constitutional law professor Jon Van Dyke, passage of such a law could result in the court dismissing the marriage case as moot, inasmuch as the plaintiffs would have no tangible injury under state law. The state constitution does not contemplate the

necessity of state lawmakers picking a fight with Congress or attempting to regulate the internal family law of other states.

Hawaii Governor Ben Cayetano has indicated that he would sign a domestic partnership bill if legislators pass one. Senate leaders would send him such a bill (S.B. 3113) if House Speaker Joe Souki and House Judiciary Committee chair Terrance Tom would only cooperate.

Passage of a comprehensive domestic partnership law in Hawaii could keep the issue of gay marriage out of congressional races throughout the nation, and out of the presidential race as well. If this seems desirable to Democratic party strategists and politicians, then now is the time to communicate with the Democratic leaders in the Hawaii House of Representatives.

What would be the message to Hawaii House democrats? Passage of a comprehensive domestic partnership act will not only help to end unjust discrimination in Hawaii, it will help Democratic party candidates nationwide.

-- Thomas F. Coleman

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**If keeping the gay marriage issue out of congressional races throughout the nation seems desirable to Democratic party strategists, then now is the time to communicate with Democratic leaders in the Hawaii House.**

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Thomas F. Coleman is an attorney in Los Angeles. For the past 23 years, his law practice has concentrated on defending the right of privacy and fighting marital

status and sexual orientation discrimination. Mr. Coleman has participated in such cases before the United States Supreme Court, and in appellate courts in Alaska, California, Illinois, Michigan, New York, and Georgia.

Mr. Coleman was invited to testify as an expert witness before the Hawaii Commission on Sexual Orientation and the Law. His testimony is cited throughout the Commission's report to the Legislature.

He was one of three witnesses invited to testify before the Judiciary Committee of the Hawaii Senate for an informational briefing on the legal and economic implications associated with passage of a domestic partnership bill.

For several years, Mr. Coleman taught a class on "Rights of Domestic Partners" at the University of Southern California Law Center. He has served as an appointed member of various governmental study commissions in California, including the Governor's Commission on Personal Privacy (1980-1982), the Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence (1984-1990), the California Legislature's Joint Select Task Force on the Changing Family (1987-1990), and the Insurance Commissioner's Anti-Discrimination Task Force (1993-1994).

# **DOMESTIC PARTNERSHIP vs. GAY MARRIAGE**

## **Key Points for Congressional Democrats to Consider**

- Congressional incumbents and contenders may be forced to take a position on the volatile issue of gay marriage during the 1996 election campaigns.
- National surveys show that the public opposes the legalization of same-sex marriage by a two-to-one margin. In contrast, polls show increasing approval for recognizing domestic partners as a "family," with modest support for some benefits.
- If candidates are forced to take a public stand on gay marriage, democratic politicians will get hurt the most. If they support gay marriage, they may alienate many moderate and conservative Democrats and would-be republican switchovers. Opposing it may cause them to lose votes, money, and volunteers from liberals and gay political groups.
- Whether congressional candidates will be put on the gay-marriage hotseat lies in the hands of the 68 Democrats who control the Hawaii Legislature.
- The political solution is passage of a comprehensive domestic partnership act by Hawaii legislators. It would confer the benefits and obligations of marriage under Hawaii law, as part of a new civil institution that would be parallel, but distinct from marriage.
- If the Hawaii legislature passes such as law before its session ends in May 1996, and if the court there accepts it as a constitutional alternative to gay marriage when the trial ends in August, then congressional candidates can breathe a sigh of relief. But if the legislature fails to take action, and the trial court rules in favor of same-sex marriage, watch out!
- Congressional candidates will not be able to duck the gay marriage issue by claiming it is not of federal concern. The terms "spouse" and "marriage" are used nearly 1,500 times in federal statutes.
- The answer lies in a middle-of-the-road approach to legalizing same-sex relationships -- local option on domestic partnership legislation. Supporting federalism and states' rights is the "in thing" these days and is not likely to get any democratic politician in serious trouble with moderate voters, especially if there are no federal funds involved or any contentious multi-state ramifications.
- The issue of local option on domestic partnership rights is not new to congressional democrats. Each year since 1992, Congress has put restrictions in the District of Columbia's annual budget bill, preventing any funds from being used to implement the domestic partnership measures. Most democrats, however, supported local option on domestic partnership.
- The backing of Democrats for domestic partnership rights has growing public support. For example, when the issue was put on the ballot in Seattle and San Francisco a few years ago, voters gave their approval. Both measures offered benefits to opposite-sex as well as same-sex couples who were not married but who lived together as a family unit.
- An increasing number of public and private employers now extend benefits to domestic partners. In 1984, the city of Berkeley was the only employer in the nation to do so. Today, more than 50 municipalities across the nation, and hundreds of private employers, offer such benefits to employees.
- A forthright answer that does not attempt to duck the issue would go a long way. Politicians who decide to say "no" to gay marriage might explain that their constituents overwhelmingly oppose gay marriage, if that is the case. However, politicians could show some appearance of leadership. They could support a state's right to enact a domestic partnership law, especially if federal funds are not involved and if other states are not forced to accept domestic partnership within their boundaries if those states oppose it.
- Passage of a comprehensive domestic partnership law in Hawaii could keep the issue of gay marriage out of congressional races. If this result seems desirable to democratic party strategists and politicians, then now is the time to communicate with the democratic party leadership in Hawaii.
- A handful of Hawaii Democrats can keep the issue local, or unleash a gay-marriage tidal wave toward the mainland. National democratic party leaders may want to communicate with Senate Judiciary chair Rey Graulty, House Speaker Joe Souki, Senate President Norman Mizuguchi, and House Judiciary chair Terrance Tom. If a domestic partnership bill hits his desk, Governor Ben Cayetano has said he will sign it.