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## Tulane Law Review:

# “The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act”

*Special Report to the Vermont Legislature*

Presented to the  
House Judiciary Committee  
January 27, 2000

Special Report No. V-5

## Tulane Law Review:

### “The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act”

The Hawaii Supreme Court was the first court in the nation to rule that a gender restriction in a marriage statute may be unconstitutional. It left open the question, however, as to whether the government could prove that compelling reasons existed to limit marriage to opposite-sex couples.

The threat of a judicial fiat legalizing same-sex marriage prompted the Hawaii Legislature to seriously consider other alternatives. Constitutional law Professor Jon Van Dyke advised legislators that nothing short of a comprehensive domestic partnership act would pass judicial scrutiny.

Known for his ongoing expertise in this field, Los Angeles attorney Thomas F. Coleman was invited by the Hawaii Commission on Sexual Orientation and the Law to discuss the domestic partnership option with commissioners in 1995. The following year, he was one of three witnesses invited by the Senate Judiciary Committee to make a presentation at an informational briefing for senators on the issue of domestic partnership.

Coleman spent several weeks in Hawaii during the 1996 legislative session. He met personally with almost all of the legislators or their staff members. He analyzed all proposed legislation introduced that year and testified at several committee hearings.

As a result of his experiences in Hawaii in 1995 and 1996, as well as his prior experience in October 1993 when he testified before a legislative committee about the option of domestic partnership, Coleman decided to write a law review article on this issue.

The article was published in “Law and Sexuality,” a periodical published and edited by the students of the Tulane University School of Law. Although it appeared in the official 1995 edition, that volume was not released until the summer of 1996. Because of this delay in publication, the process and results of the 1996 legislative session in Hawaii were able to be included in his article.

The article was not intended as a form of political advocacy. It did not argue that same-sex marriage should not be legalized in Hawaii or elsewhere. Rather, it was intended to explore issues which had been virtually ignored by legal treatises and legal scholars, most of whom were advocating either for or against gay marriage. The article focused on legal concepts such as “equity versus identity” and “all deliberate speed.” It also examined potential state interests which a court might find as compelling reasons to support the enactment of a comprehensive domestic partnership act.

The article, a copy of which is included in this booklet, also contains the framework for a comprehensive domestic partnership act, including potential legislative findings, as well as a copy of a model act which Coleman presented to the Hawaii Commission on Sexual Orientation and the Law.

# LAW & SEXUALITY

## A Review of Lesbian and Gay Legal Issues

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VOLUME 5

1995

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The Hawaii Legislature Has  
Compelling Reasons to Adopt  
a Comprehensive Domestic  
Partnership Act

Thomas F. Coleman

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Published and edited by the students of the Tulane University School of Law.

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# THE HAWAII LEGISLATURE HAS COMPELLING REASONS TO ADOPT A COMPREHENSIVE DOMESTIC PARTNERSHIP ACT\*

THOMAS F. COLEMAN†

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\* The first part of this Article was submitted to the Hawaii Commission on Sexual Orientation and the Law (hereinafter referred to as "Commission") in connection with testimony given by Thomas F. Coleman at the Commission's meeting in Honolulu on October 25, 1995. The Commission issued its report to the Hawaii Legislature on December 8, 1995. The report recommended that the Legislature either legalize same-sex marriage or enact a comprehensive Domestic Partnership Act.

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In May 1993, the Hawaii Supreme Court issued a landmark decision in *Baehr v. Lewin*.<sup>1</sup> In *Baehr*, the judicial branch of Hawaiian government challenged the executive and legislative branches to justify their current legal treatment of same-sex couples.<sup>2</sup> Invoking the equal protection clause of the Hawaii Constitution,<sup>3</sup> the court ordered the state to show cause why same-sex couples should not be allowed to marry under Hawaii law and thereby obtain the benefits and incur the obligations of state-sanctioned marriage.<sup>4</sup>

Under current law, there are scores of examples where gay and lesbian partners who have long-term committed relationships are denied legal rights associated with marriage. For example, a spouse can sue a drunk driver who wrongfully kills her mate. Same-sex partners cannot. An employee can put his or her spouse on a health plan at work. Same-sex couples have no right to such health benefits. Married couples can file a joint tax return if they find it financially beneficial to do so. Same-sex couples cannot. The rights and benefits available only to same-sex couples are many.

An opposite-sex couple who is married for just one day is entitled to dozens of special legal protections and benefits. Same-sex partners

1. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

2. *Id.* at 70.

3. "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. 1, § 5.

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

who have lived together in an intimate and interdependent relationship for twenty years are considered strangers in the eyes of the law. Rationalizing such disparate treatment is difficult, and the Baehr court insisted on a rational explanation.

In response to *Baehr*, the executive branch of the Hawaiian government, through the office of the Attorney General, has been preparing to defend the status quo in an upcoming trial that will commence in July 1996.<sup>5</sup> Still, despite constitutional guarantees of equal protection, Hawaiian same-sex couples are treated differently than heterosexual couples.<sup>6</sup> This inequitable treatment could mean that the Attorney General of Hawaii will be unsuccessful in defending the status quo in litigation unless the Legislature changes current law before the *Baehr* case returns to the Hawaii Supreme Court.<sup>7</sup>

Although the Legislature has criticized the decision of the Hawaii Supreme Court in *Baehr* and has steadfastly refused to legalize same-sex marriage through the legislative process, it has nonetheless expressed a willingness to reexamine the status quo with an eye toward possible legal reform.<sup>8</sup> The Legislature established a Commission on Sexual Orientation and the Law (hereinafter referred to as "Commission") and charged it with studying legal, economic, social, and policy issues that may be involved in such reform.<sup>9</sup> The Commission's mandate is to recommend an appropriate legislative response to the challenge presented by the court's decision in *Baehr*.<sup>10</sup> The Governor has publicly supported

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5. Originally set for September 1995, the trial date has been repeatedly delayed. Currently the hearing is set for July, 1996. Andrew Koppelman, *No Fantasy Island: Hawaii's Policy on Same-sex Marriage*, NEW REPUBLIC, Aug. 1995, at 22.

6. See discussion *infra* part I.

7. In the aftermath of *Baehr*, in June, 1994, Hawaii Governor John Waihee signed House Bill 2312 into law. The bill called for the establishment of a Commission on Sexual Orientation and the Law to conduct a study and present a report of its findings to the Legislature prior to the convening of the regular session of 1995. Scott K. Kozuma, *Baehr v. Lewin and Same-sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy*, 30 WILLAMETTE L. REV. 891, 903 n. 89 (1994); Cheryl Wetzstein, *Hawaii on Threshold to OK Gay Marriages*, WASHINGTON TIMES, Feb. 5, 1996, at A3.

8. See Kozuma, *supra* note 7.

9. *Id.*

10. *Id.*

domestic partnership legislation barring discriminatory treatment of same-sex couples without legalizing same-sex marriages.<sup>11</sup>

This Article explores reasons why the Legislature may prefer a comprehensive Domestic Partnership Act as an alternative to court-mandated legalization of same-sex marriage.<sup>12</sup> The factual information and legal precedents cited in this Article reflect realities that should be considered as the Commission on Sexual Orientation and the Law considers its recommendations to the Hawaii Legislature.<sup>13</sup> The purpose of this Article is neither to support nor to justify the status quo, but to report it accurately, grounding this Article's policy recommendations in historical precedents, evolving social attitudes, and current political realities.

Further, the information and arguments contained in this Article will fill an advocacy void that currently exists in the debate over same-sex marriage. The viewpoints from both ends of the political spectrum, from those advocating same-sex marriage to those advocating no change at all, have been well represented in the judicial and legislative processes to date. What has been missing from the debate is a voice from persons representing the middle, who respect diversity and seek end to unjust discrimination but who believe that legalizing same-sex marriage is not the appropriate approach.

The people in the middle, those with moderate political views on this subject, include gays and straights, men and women, Republicans, Democrats, and independents. Some simply prefer gradual social and legal change. Others, especially some in the gay and lesbian community, fear a political backlash if same-sex marriage is legalized at a time when

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11. Jeffrey J. Swart, *The Wedding Luau-Who Is Invited?: Hawaii, Same-sex Marriage and the Emerging Realities*, 43 EMORY L.J. 1577, 1610 (1994), citing Henry J. Reske, *Gay Marriage Ban Unconstitutional?*, A.B.A. J., July 1993, at 28.

12. Indeed, if lawmakers enact a statewide Domestic Partnership Act, the Hawaii Supreme Court will have the opportunity to evaluate the constitutionality of a statewide domestic partnership law. The Commission should recommend enacting such a law so that all policy choices are considered by both the Legislature and the Hawaii Supreme Court before *Baehr v. Lewin* is finally decided.

13. Some of the court decisions cited within this article are more than ten or twenty years old, and as a result the judges writing those opinions did not have the benefit of considering many of the social and legal changes that have occurred in American society in subsequent years. These decisions, however, have not been overturned and remain valid judicial precedents that may not be rejected without consideration.

two-thirds of the public opposes such a move.<sup>14</sup> In an attempt to find common ground among persons of good will from all political perspectives, this Article proposes the passage of a comprehensive Domestic Partnership Act as a political solution that may satisfy the equal protection requirements of the Hawaii Constitution.

I. THE LEGISLATURE HAS COMPELLING REASONS TO CHOOSE DOMESTIC PARTNERSHIP OVER SAME-SEX MARRIAGE

There are many reasons why the Hawaii Legislature may decide to pass a comprehensive Domestic Partnership Act rather than have the judiciary order the state to issue marriage licenses to same-sex couples. Even if each reason alone would not be sufficient to persuade the Hawaii Supreme Court to take less radical action, collectively these state interests may be compelling enough, first, to prompt the Legislature to pass such an act, and, second, to convince the court to accept domestic partnership as an adequate remedy to provide same-sex couples equal protection under Hawaii law.

A. *The Legislative Process Normally Involves Gradual Change Rather than Radical Reform*

Most legislators understand that life is not static. In order to be responsive to the needs of their constituents, legislators know that public policies, and the laws that reflect those policies, must adapt to keep pace with the changing conditions of society. The Hawaii Legislature has passed legal reform measures over the past two decades that reflect changing attitudes about homosexuality. It was one of the first state legislatures to decriminalize private homosexual acts between consenting adults.<sup>15</sup> Four years ago, legislators took another major step forward by prohibiting sexual orientation discrimination in employment, housing, and public accommodations.<sup>16</sup> Passage of a Domestic Partnership Act would be a logical next step as the process of law reform continues.

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14. See Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 n.10 (1995); Scott K. Kozuma, *Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy*, 30 WILLIAMETTE L. REV. 891, 905 n.98-99 (1994); William N. Eskridge, *A History of Same-Sex Marriage*, 79 W. VA. L. REV. 1419, 1502 (1993).

15. 1972 Haw. Sess. Laws ch. 9, § 1.

16. 1991 Haw. Sess. Laws ch. 2, § 1.



State legislators should be free to change laws gradually. When there is no denial of judicially defined fundamental rights, the federal Constitution gives much leeway to state legislatures as they respond to demands for reform. The United States Supreme Court has acknowledged this prerogative of the legislative branch to opt for gradual change rather than radical reform, stating: "[A] legislature need not 'strike at all evils at the same time,' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' . . . ."<sup>17</sup>

No fundamental right protected by federal Constitutional law is in question here. The Hawaii Supreme Court acknowledged in *Baehr* that same-sex marriage is not a fundamental right under the federal Constitution, stating that the nation's highest court "was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental."<sup>18</sup> Thus, the state Legislature may act deliberately and not hastily.

Further, the court declined to recognize a new fundamental right to same-sex marriage under the Hawaii Constitution, stating:

[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right of privacy or otherwise.<sup>19</sup>

The court emphasized that judges are not free to declare fundamental rights on the basis of their own "personal and private notions," but must look to the "traditions and collective conscience" of the people to determine whether a principle is so rooted there as to be ranked fundamental.<sup>20</sup> The court acknowledged that marriage has

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17. *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

18. *Baehr v. Lewin*, 852 P. 2d 44, 56 (Haw. 1993).

19. *Id.* at 57.

20. *Id.*

traditionally been limited to opposite-sex couples. However, it suggested that the state's equal protection clause would provide "a potential remedy" to same-sex couples.<sup>21</sup>

The decision in *Baehr* clearly underscored the government's need to respect societal traditions and the collective conscience of the people. However, it also highlighted the need to eliminate unjust discrimination. By passing a comprehensive domestic partnership act, the Legislature could balance these competing interests while continuing the process of incremental change. An Act conferring all the rights and obligations normally associated with marriage upon same-sex couples who obtained a Certificate of Domestic Partnership from the state would eliminate discrimination without offending societal traditions of heterosexual marriage. Indeed, such an Act would satisfy the demands of the equal protection clause of Hawaii's Constitution to the extent that it would give domestic partners all the rights and obligations that Hawaii law confers on married couples.

*B. The Public Overwhelmingly Opposes Same-Sex Marriage but Favors Domestic Partnership*

The Legislature is the political branch of government. As elected officials, legislators have a duty to represent their constituents. Public opinion therefore plays an important role in the legislative process. In the debate over whether to legalize same-sex marriage, public opinion on the subject of homosexuality must be taken seriously.

The plaintiffs in *Baehr* themselves injected the issue of homosexuality into the case by "[p]roclaiming their homosexuality and asserting a constitutional right to sexual orientation."<sup>22</sup> The Attorney General countered that the plaintiffs did not have a right "to enter into state-licensed homosexual marriages."<sup>23</sup> The trial court concluded that "homosexual marriage" is not a fundamental right.<sup>24</sup> Justice Burns, who

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21. *Id.*

22. *Baehr v. Lewin*, 852 P.2d at 52.

23. *Id.* at 51 ("The State's marriage laws contemplate marriage as a union between a man and a woman. . . because the only legalized right to marry is the right to enter a heterosexual marriage, [the] plaintiffs do not have a cognizable right. . .").

24. *Id.* at 56. The court rejected federal and state claims in turn. "The foregoing case law suggests that the federal construct of the fundamental right to marry-subsumed within the right to privacy implicitly protected by the United States Constitution-presently contemplates men and women." *Id.* The privacy right in the Hawaii Constitution is interpreted with guidance from the

wrote a concurring opinion in *Baehr*, felt that the outcome of the case hinged on the nature and origins of sexual orientation in general, and on the nature and origins of homosexuality in particular.<sup>25</sup>

A majority of Hawaii's Supreme Court justices, however, insulated themselves from dealing with the issue of homosexuality by declaring that the sole issue in the case was that of sex discrimination.<sup>26</sup> According to these justices, homosexuality had nothing to do with the issue of same-sex marriage.

In a sense, these justices exalted form over substance. They were correct that the case involved sex discrimination inasmuch as marriage has been limited to partners of opposite genders.<sup>27</sup> However, by unrealistically narrowing their judicial focus and ignoring human experience, the majority erroneously concluded that homosexuality was irrelevant to the issue of same-sex marriage.

The concept of "marriage" carries with it implications or assumptions of sexual intimacy between the marriage partners. It is axiomatic that the overwhelming majority of persons who marry are involved in a sexual relationship with each other. Although the status of marriage does not *require* sexual relations between spouses, people who marry normally contemplate sexual intimacy as part of the marriage relationship.

Laws are enacted in contemplation of probabilities, not theoretical possibilities. When the Legislature considers the issue of same-sex marriage, it is reasonable for the Legislature to assume that most same-sex couples who would marry, if marriage were available to them, would

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federal decisions in that area. *Id.* at 55 (*citing* *State v. Mueller*, 671 P. 2d 1351 (Haw. 1983)). The court refused to create a new fundamental right under the state constitutional right to privacy (HAW. CONST. art. 1, § 6.).

25. *Baehr*, 852 P.2d at 69 (Burns, J., concurring) ("In my view, the [Hawaii] constitution's reference to 'sex' includes all aspects of a person's 'sex' that are 'biologically fated.'"). Justice Burns contended that the question of whether people become homosexuals due to "nature or nurture" must be asked and answered before the court can determine whether to apply strict scrutiny or rational basis review. *Id.* at 70.

26. *See id.* at 58 n.17 (stating that "it is irrelevant, for purposes of the Constitutional analysis germane to this case, whether homosexuals constitute a 'suspect class,' because it is immaterial whether the plaintiffs, or any of them, are homosexuals."). The court, instead of focusing on an "immutable characteristics" analysis, cast the issue as the state's regulation of access to marriage on the basis of gender. *Id.* at 53 n.14.

27. *Baehr*, 852 P.2d at 60. The case included "on its face" and "as applied" challenges to the Hawaii marriage statute, HAW. REV. STAT. § 572-1 (1985).

be involved in a homosexual relationship. The Legislature may therefore appropriately consider public opinion concerning homosexuality as it grapples with the prospect of same-sex marriage.

The general public is overwhelmingly opposed to the legalization of same-sex marriage. National opinion polls consistently show general public opposition to same-sex marriage by a two to one margin.<sup>28</sup> Polling in Hawaii has shown similar attitudes about same-sex marriage, with seventy-one percent of respondents opposed, eighteen percent in favor, and nine percent unsure.<sup>29</sup> Assuming that "unsure" respondents split their votes evenly, seventy-five percent of the general adult population in Hawaii is opposed to same-sex marriage.<sup>30</sup>

Contrast the above figures with growing support for domestic partnership rights. In 1984, the city of Berkeley, California became the first employer in the nation to grant employee benefits, such as health and dental coverage, to the domestic partners of its employees.<sup>31</sup> Today, many public and private employers offer such benefits.

Public employers have offered domestic partners such benefits through the democratic process. City council members, as elected representatives of the people, have voted to support domestic partnership benefits.<sup>32</sup> In two instances where the issue was placed on the ballot, voters in San Francisco and Seattle supported the concept of domestic partnership.<sup>33</sup>

Actions of California legislators also provide some indication of public attitudes about domestic partnership versus same-sex marriage. In 1991, a bill was introduced in the California Legislature to legalize same-

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28. Polls conducted by *Time Magazine* showed sixty percent of adults opposed to same-sex marriage in 1992, sixty-five percent opposed in 1993, and sixty-four percent opposed in 1994. TIME/C.N.N./YANKELOVICH PARTNERS INC. (Roper Ctr. for Public Opinion 1995) (on file with LAW & SEXUALITY: REV. OF LESBIAN & GAY LEGAL ISSUES). The most recent national Gallup Poll shows that sixty-eight percent of the public opposes the legalization of same-sex marriage. David W. Moore, *Public Opposes Gay Marriages*, GALLUP NEWS SERVICE, April 4, 1996.

29. Greg Wiles, *Same-sex Marriages Opposed by 71% in Poll*, HONOLULU ADVERTISER, February 23, 1996, at A1.

30. If voters hold more conservative attitudes than the public at large, three out of every four voters might oppose same-sex marriage.

31. Steven Briggs, *Domestic Partners and Family Benefits: An Emerging Trend*, LAB. L. J. 749, 755 (1994).

32. For a comprehensive list, see Swart, *supra* note 11, at 1598 n.111.

33. Briggs, *supra* note 31, at 755.

sex marriage.<sup>34</sup> The bill died when it was unable to gain the support of even one member of the Democrat-controlled Assembly Judiciary Committee.<sup>35</sup>

In sharp contrast, both houses of the California Legislature passed AB 2810 in 1994.<sup>36</sup> The bill would have established a statewide domestic partnership registry, entitling domestic partners to various benefits. Although the bill was ultimately vetoed by the Governor,<sup>37</sup> its passage through the legislature demonstrates a growing public acceptance of domestic partnership rights, an acceptance that is growing despite continuing strong opposition to same-sex marriage.

Gains made by employees in the private sector also indicate growing public support for domestic partnership. Today, hundreds of private employers, and dozens of unions, provide domestic partner employment benefits such as sick leave, bereavement leave, medical and dental insurance, and even pension survivor benefits.<sup>38</sup>

The concept of same-sex domestic partnership rights seems to reconcile conflicting public attitudes about homosexuality. Although sixty-one percent of adults believe that "gay sex is always wrong,"<sup>39</sup> sixty-three percent oppose making consenting adult homosexual relations a crime.<sup>40</sup> Similarly, more than seventy percent oppose discrimination against gays in employment and housing, and a majority of adults would support a civil rights bill to prohibit such discrimination.<sup>41</sup>

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34. 1991 Cal. ALS 167. See Jerry Gillam, *Assembly Committee Endorses Early Presidential Primary Bill*, LOS ANGELES TIMES, May 3, 1991, at A30.

35. 1991 Cal. ALS 167.

36. 1994 Cal. ALS 2810.

37. *Assembly Committee Endorses Early Presidential Primary Bill*, LOS ANGELES TIMES, May 3, 1991, at A30.

38. Briggs, *supra* note 31, at 753-4.

39. The *Los Angeles Times* took a national poll of 1,515 adults in July 1994. See *Morals, Religion, and Politics* (table), LOS ANGELES TIMES, July 28, 1994, at A19.

40. EQUIFAX conducted this national survey of 2,254 adults in 1990. *2254 Nat'l Adults*, EQUIFAX (1990) (on file with LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES). A national survey done by the SAN FRANCISCO EXAMINER of 3,748 heterosexual adults in 1989 showed that even 63% of respondents who classified themselves as conservative felt that consenting adult homosexual relations in private should not be criminal. *3748 Heterosexuals, 400 Gay/Bisexuals*, TEICHNER & ASSOC., SAN FRANCISCO EXAMINER (1989) (on file with LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES).

41. A national Gallup Poll of 1,227 adults in 1989 showed that seventy-one percent supported equal job rights for gays. *Gallup Poll, 1989, Nat'l, 1227 Adults, # 355*, GALLUP ORGANIZATION (1989) (on file with LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES).

The public is sending a clear message to its elected representatives. The electorate opposes discrimination against gays and lesbians but does not want lawmakers to legalize same-sex marriage. With growing public support for the use of inclusive definitions of "family" and increasing comfort with the concept of domestic partnerships, passage of a comprehensive domestic partnership act is the appropriate political remedy for eliminating unjust discrimination against same-sex couples.

C. *Legalizing Gay Marriage in Hawaii Would Create Havoc in Intergovernmental Relations*

Although Hawaii consists of islands, its government is not isolated from the rest of the world. Hawaii has formal legal ties to the federal government and to each of the other forty-nine states. It also has legal and economic connections with many foreign nations. As Hawaii ponders how to respond to the constitutional challenge presented in *Baehr v. Lewin*, the legislature must consider the impact that legalizing same-sex marriage, or recognizing domestic partnerships, would have on intergovernmental relations.

Passage of a domestic partnership act could provide same-sex couples all of the rights and obligations that Hawaii legislators have the authority to confer within the territorial and legal jurisdiction of the state of Hawaii. Domestic partnership rights could be limited to *bone fide* residents of Hawaii, with a short waiting period before partners could register their relationships. Given such restrictions, a domestic partnership act would have few intergovernmental ramifications, since the benefits conferred would remain within the state.

Legalizing same-sex marriage in Hawaii, on the other hand, has intergovernmental implications that are staggering. Every state and every nation has marriage laws. Marriages in one jurisdiction are generally recognized as valid everywhere. However, since no state or nation currently recognizes same-sex marriages, and since opposition to such recognition seems universally strong, it is likely that governments outside of Hawaii would refuse to recognize same-sex marriages performed in Hawaii.<sup>42</sup>

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42. See Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-sex Marriages*, 47 STAN. L. REV. 499, 531 (1995). But see

Evan Wolfson, co-counsel for the plaintiffs in *Baehr v. Lewin*, has warned the gay community that if same-sex marriage is legalized, "there will be a tidal wave out of Hawaii that will reach every corner of the country."<sup>43</sup> A "Million Couple March on Hawaii" is not out of the question. Leaders in the gay and lesbian community predict that couples from each state in the nation will fly to Hawaii, get married, and return to their home states with marriage certificates in hand.<sup>44</sup> An ongoing confrontation with each state government and a myriad of federal agencies would then begin, with the state of Hawaii caught in the middle of these battles for years to come.

### 1. Confrontation with Congress

The legalization of same-sex marriage in Hawaii would automatically create a confrontation with Congress since the term "spouse" appears more than 1,400 times in federal statutes.<sup>45</sup> Although federal law usually has deferred to state law to determine whether a couple is married, precedent suggests that federal law will not recognize same-sex marriages as valid. In *Adams v. Howerton*,<sup>46</sup> a unanimous Ninth Circuit Court of Appeals stated: "The term 'marriage' ordinarily contemplates a relationship between a man and a woman . . . . The term 'spouse' commonly refers to one of the parties in a marital relationship so defined. Congress has not indicated an intent to enlarge the ordinary meaning of those words."<sup>47</sup> The court held that even if a gay couple secured a marriage certificate from a state government, federal law would not recognize the couple as "spouses" without explicit Congressional approval.<sup>48</sup>

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Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 426 (1995)(arguing that granting full faith and credit to marital decrees would fulfill both the language and the purposes behind the clause).

43. Evan Wolfson, *No Time for a Luau*, THE ADVOCATE, July 26, 1994, at 5.

44. Balian, *supra* note 42, at 400.

45. Per informal survey by author.

46. 673 F.2d 1036 (9th Cir. 1982).

47. *Id.* at 1040.

48. The Social Security Administration (S.S.A.) has also refused to recognize same-sex couples as "spouses" under federal law. In a letter from S.S.A. Deputy Press Officer Frank Battistelli to Keith Clark (a San Francisco writer) in 1989, Battistelli stated: "Section 1614(d) of the Social Security Act, in discussing determinations of whether two individuals are married for SSI purposes, refers to 'a man and a woman.' . . . In addition, section 416.1806 of the SSI regulations, in discussing marital relations, refers specifically to 'an individual and an unrelated member of the

It is unlikely that such approval would be forthcoming. Both houses of Congress are currently controlled by conservative legislators. Conservative representatives, whether Democrat or Republican, generally favor "traditional family values" and oppose "gay rights." While a recent national poll showed that sixty-one percent of all adults think "homosexual relations are always wrong," seventy percent of Republicans and seventy-five percent of all conservatives felt similarly.<sup>49</sup>

Hawaii administers federal laws and receives federal funds for such programs as public housing, public assistance, medicare, social security, and Federal Housing Authority loans. By legalizing same-sex marriage, Hawaii could face costly lawsuits and the possible loss of federal funds for a variety of programs when the federal government refuses to recognize that two men or two women are "spouses" under federal law.

## 2. Confrontations with Other States

No state in the nation recognizes marriages between two men or two women as legally valid. In fact, the trend during the past decade has been to replace gender-ambiguous marriage laws with statutes specifying that marriage is a relationship between a man and a woman.<sup>50</sup>

Litigation over the definition of marriage has always resulted in the same judicial conclusion: marriage contemplates a relationship between persons of the opposite sex.<sup>51</sup> Same-sex couples have filed

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opposite sex." Letter from Frank Battistelli, Deputy Press Officer, Social Security Administration, to Keith Clark (1989) (on file with author).

49. See *Morals, Religion, and Politics*, *supra* note 39, at A19.

50. See, e.g., CAL. FAM. CODE § 300 (West 1994); IND. CODE ANN. § 31-7-1-2 (West Supp. 1994); M. FAM. L. CODE ANN. § 2.201 (1984); OHIO REV. CODE ANN. § 3101.01 (1989), TEX. FAM. CODE ANN. § 1.01 (West 1993); UTAH CODE ANN. § 31-1-2 (1989); VA. CODE ANN. § 20-45.2 (Michie 1990).

51. See *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971) (holding that a marriage between two males was a nullity); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (ruling that a same-sex couple is incapable of entering into a marriage as that term is defined by state law); *M.T. v. J.T.*, 355 A.2d 204 (N. J. Super. Ct. App. Div. 1976) (concluding that a "lawful marriage requires performance of a ceremonial marriage of two persons of the opposite sex, a male and a female"); *Murphy v. State*, 653 S.W.2d 567 (Tex. Ct. App. 1983) (holding that under Texas law, "two males cannot obtain a marriage license or enter into common law marriage"); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that two persons of the same sex cannot contract a common law marriage); *Maryland Commission on Human Relations v. Greenbelt Homes Inc.*, 475 A.2d 1192 (Md. Ct. App. 1984) (explaining that the law did not confer any marital status on the



lawsuits claiming that they have a constitutional right to marry. Outside of Hawaii, these lawsuits have invariably been unsuccessful. In *Baker v. Nelson*,<sup>52</sup> the United States Supreme Court ruled that the federal Constitution does not require states to issue marriage licenses to same-sex couples.<sup>53</sup> More recently, the District of Columbia Court of Appeals ruled that same-sex marriage is not a fundamental right protected by the Due Process Clause of the federal Constitution in *Dean v. District of Columbia*.<sup>54</sup>

Other state courts have also denied constitutional challenges to marriage laws that recognize only opposite-sex relationships. A Washington state appellate court ruled that denying a marriage license to same-sex couples did not violate the equal protection clause of the state constitution.<sup>55</sup> Recently, an appeals court in New York ruled that the state's refusal to consider same-sex couples as "spouses" did not deny them equal protection under the law.<sup>56</sup>

a. Full Faith and Credit

With the Hawaii Supreme Court arguably contemplating the legalization of same-sex marriage, legislators in some states have introduced bills to reaffirm that same-sex marriages performed out of state will not be recognized in their home state.<sup>57</sup> Nonetheless, many gay

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relationships of homosexuals or lesbians); *Gajovski v. Gajovski*, 610 N.E.2d 431 (Ohio Ct. App. 1991)(holding that two women could not marry one another).

52. 409 U.S. 810 (1972).

53. The Minnesota Supreme Court ruled that the refusal of the state to issue a marriage license to a same-sex couple did not offend the First, Eighth, Ninth, or Fourteenth Amendments of the United States Constitution. *Baker v. Nelson*, 409 U.S. 810 (1972). The couple appealed to the United States Supreme Court. The nation's highest court dismissed the appeal "for want of a substantial federal question." *Id.* at 810. A vote to dismiss an appeal for want of a substantial federal question is a vote on the merits of the case, and such a decision by the Supreme Court is binding on all lower courts until such time as the Supreme Court informs them otherwise. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981).

54. 653 A.2d 307 (D.C. 1995).

55. *Singer v. Hara*, 552 P.2d 1187, 1191 (Wash. Ct. App. 1974).

56. *In re Cooper*, 592 N.Y.S.2d 797, 800 (1993).

57. David Sapsted, *U.S. Marches Down the Aisle to Same-sex Weddings States Fear that Honolulu Test Case Could open the Door for Homosexual Marriages*, DAILY TELEGRAPH, Mar. 29, 1996, at 23 (more than 20 states, suddenly confronting the prospect that by next year they may have to recognize such marriages, are attempting to rush through legislation designed to deny homosexuals the same status as heterosexual couples).

rights activists hope that the Full Faith and Credit Clause of the federal Constitution<sup>58</sup> will require each of the other states to legally recognize same-sex marriages performed in Hawaii. However, such a result is unlikely. As one law review article has summarized:

Because each state possesses a great interest in the marital relationships within its borders, each state has traditionally been sovereign to decide for itself who should be able to occupy these relationships. Therefore, a situation may arise where citizens from other states will flock to Hawaii to obtain same-sex marriages and then return to their domiciles. If all states are forced to recognize these marriages, Hawaii will effectively encroach upon the sovereignty of other states.<sup>59</sup>

One legal commentator has predicted that many states "will fight tooth and nail to preserve the status quo and to prevent same-sex couples from entering their territory."<sup>60</sup> Rather than compelling interstate recognition of marriage under the Full Faith and Credit Clause, the commentator forecasts that the United States Supreme Court "will most likely consign the question to the 'dismal swamp' of conflicts law" and as a result, "the battle for recognition of same-sex marriages will be fought state by state. . . ."<sup>61</sup>

Some precedents suggest that the Full Faith and Credit Clause will not prove to be the legal magic wand that many gay rights activists are hoping for. For example, in *Pacific Employers Ins. Co. v. Industrial Accident Commission of California*,<sup>62</sup> the United States Supreme Court stated that "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."<sup>63</sup> This is because there is a "public policy" exception to the Full Faith and Credit Clause.<sup>64</sup>

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58. U.S. CONST. art. IV, § 1.

59. Balian, *supra* note 42, at 400.

60. Keane, *supra* note 42, at 531.

61. *Id.*

62. 306 U.S. 493 (1939).

63. *Id.* at 504-5.

64. Because the presumption of validity of a marriage is extremely strong, *see, e.g., In re Estate of Murnion*, 686 P.2d 893, 897 (Mont. 1972), marriages of a sister state will be recognized

In *Nevada v. Hall*<sup>65</sup> the Supreme Court ruled that the Full Faith and Credit Clause did not require California to enforce a Nevada statute where doing so would "be obnoxious to its statutorily based policies."<sup>66</sup> The Court explained the public policy exception another way in *Carroll v. Lanza*:<sup>67</sup>

The Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting conflicting and opposed policy.<sup>68</sup>

Further, the Supreme Court has refused to force state governments across the nation to recognize the right of consenting adults of the same sex to have intimate relations in the privacy of their own homes. The Court upheld the authority of the states to impose criminal penalties on such conduct in *Bowers v. Hardwick*.<sup>69</sup> It seems unlikely that the Supreme Court would authorize the criminalization of homosexual conduct yet still require every state to recognize Hawaiian same-sex marriages as valid everywhere.

If Hawaii legalizes same-sex marriage, dozens, if not hundreds, of lawsuits filed throughout the nation will demand legal recognition of such unions. The end result will likely be a Supreme Court decision declaring that there is no federal right to such recognition, thus prompting a new round of lawsuits under state constitutional law. The state of Hawaii, however, will not merely sit on the sidelines watching this explosion of litigation. Hawaiian courts, and other agencies of Hawaiian government, will be drawn into legal battles involving individuals, corporations, and government agencies in other states.

#### b. Interstate Compacts

The state of Hawaii is a signatory to a variety of Multi-state or Interstate Compacts. Hawaii has signed the Multi-state Tax Compact,<sup>70</sup>

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unless doing so would violate a strong public policy. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2)(1971).

65. 440 U.S. 410 (1979).

66. *Id.* at 424.

67. 349 U.S. 408 (1955).

68. *Id.* at 412.

69. 487 U.S. 186 (1986).

70. HAW. REV. STAT. § 255-1 (1985).

the Adoption Assistance Compact,<sup>71</sup> the Interstate Compact on Placement of Children,<sup>72</sup> the Interstate Compact on Juveniles,<sup>73</sup> and the Western Interstate Corrections Compact.<sup>74</sup> These are binding and enforceable contracts. One party to such a contract may not unilaterally change its terms. Since "marriage" and "spouse" have always been considered to involve only opposite-sex relationships, what will happen if Hawaii changes the definition to include same-sex couples? Other signatory states will likely resist Hawaii's action. The potential magnitude and duration of ensuing legal battles could impose a heavy cost on Hawaiian taxpayers.

Imagine such litigation. Hawaiian prisoners who are temporarily housed in California may demand conjugal visits with a same-sex spouse under the Western Interstate Corrections Compact.<sup>75</sup> If California refuses, will the state of Hawaii sue California for breach of contract because a convicted murderer or arsonist is being denied equal rights as guaranteed by the interstate compact? Will Utah or Nevada agree to the placement of children in Hawaiian same-sex marriages on the same terms and conditions as opposite-sex marriages? If not, will they withdraw from the compact or sue Hawaii for breach of contract because Hawaii unilaterally changed a material term of the agreement?

Such legal battles can be avoided by passage of a comprehensive domestic partnership act. Domestic partners would receive the same rights and obligations of spouses under Hawaii law, but, absent a new interstate compact, states signing interstate compacts with Hawaii would not be forced to recognize such relationships as marriages. Hawaii would extend the equal protection guarantees in its state constitution to all of its residents without offending the sovereignty of other states.

c. Uniform Codes

Hawaii also has adopted more than a dozen uniform state laws, such as the Uniform Partnership Act,<sup>76</sup> the Uniform Commercial Code,<sup>77</sup>

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71. *Id.* at § 350C-4.

72. *Id.* at § 350E-1.

73. *Id.* at § 582-1.

74. *Id.* at § 355-1.

75. HAW. REV. STAT. § 355-1 (1985).

76. *Id.* at § 425-104.

77. *Id.* at § 490: 1-102.

the Uniform Transfers to Minors Act,<sup>78</sup> the Uniform Probate Code,<sup>79</sup> the Uniform Fraudulent Transfer Act,<sup>80</sup> and the Uniform Reciprocal Enforcement of Support Act.<sup>81</sup> The Hawaii Legislature has declared a strong public policy in favor of judicial interpretation of uniform codes consistent with other adopting states.<sup>82</sup> The Legislature has emphasized the importance of this public policy by including a specific mandate of uniform interpretation in many of the specific uniform codes.<sup>83</sup> The state's interest in adopting common definitions of basic terms such as "spouse" or "marriage" is undermined if Hawaii acts alone by legalizing same-sex marriage.

However, passage of a domestic partnership act could avoid this unfavorable consequence. The definition of "spouse" in the uniform codes would remain unchanged. A domestic partnership act would be contained in a separate omnibus statute that would create a new institution called "domestic partnership." This act, however, would clarify that, for purposes of all Hawaii laws, domestic partners would receive the same benefits and obligations as spouses. As a result, Hawaii could continue to be a cooperative participant in the uniform code system but offer equivalent benefits and obligations to same-sex spouses, albeit under different terminology.

### 3. International Relations

Same-sex *marriage* is not currently recognized by any nation. "Registered partnership" laws have been enacted in Sweden, Norway, and Denmark, but these nations have not opened up the institution of marriage to same-sex couples.<sup>84</sup> Indeed, the United States is not alone

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78. *Id.* at § 553-A-23.

79. *Id.* at § 560:1-102.

80. HAW. REV. STAT. § 651C-1.

81. *Id.* at § 576-23.

82. HAW. REV. STAT. § 1-24 instructs the Hawaiian judiciary that "All provisions of uniform acts adopted by the state shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them." *Id.* at § 1-24.

83. *See Id.* at §§ 425-104(4), 490:1-102(2)(c), 523A-40, 551D-6, 553A-23, 554B-20, 560:1-102(b)(5).

84. *Sweden Joins in Approving Partnership Law for Gay Couples*, LOS ANGELES TIMES, June 15, 1994, at E3. The domestic partnership laws in these three nations grants all the rights and obligations of marriage to registered same-sex couples, except for adoption of children, artificial insemination, in-vitro fertilization, and church weddings. In all three nations, one partner must be a

when it comes to political and legal protests against the exclusion of same-sex couples from legalized marriage.

In Canada, the Ontario Divisional Court recently ruled that denying marriage licenses to same-sex couples does not violate Canada's Charter of Rights and Freedoms.<sup>85</sup> In 1995, the Canadian Supreme Court ruled in a five to four decision that the Charter did not require the federal government to provide old-age pensions to same-sex couples.<sup>86</sup> On the political front, the Canadian House of Commons rejected a proposal to extend legal recognition to same-sex marriages. The vote was 124 to fifty-two, a seventy to thirty percent ratio that is strikingly similar to public opinion in the United States.<sup>87</sup>

Germany's high court upheld that nation's ban on same-sex marriage on October 13, 1993. While the justices acknowledged that gay couples need more legal rights, the court ruled that the ban was not unconstitutional.<sup>88</sup> In Israel, court decisions have brought only limited benefits to gay couples. On November 30, 1994, the Israel Supreme Court ruled that El Al airlines must extend the same benefits to partners of gay employees as it does to partners of heterosexuals.<sup>89</sup> However, earlier this year an Israeli judge ruled that the same-sex lover of an army colonel was not entitled to survivor benefits.<sup>90</sup>

Despite international reluctance to recognize same-sex marriage, Hungary may become the first nation to break ranks with the rest of the political world on the issue of same-sex marriage. On March 8, 1995, the Constitutional Court of Hungary issued a ruling involving same-sex marriages.<sup>91</sup> The court upheld the exclusion of same-sex couples from ceremonial marriages, noting that "[d]espite growing acceptance of

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citizen living in his or her home country. Denmark created "registered partnership" in 1989, Norway in 1993, and Sweden's law went into effect on January 1, 1995.

85. *Layland v. Ontario*, 104 D.L.R. 4th 214 (Ont. Div. 1993). The Charter of Rights and Freedoms is analogous to the United States Bill of Rights.

86. *Egan v. Canada*, 124 D.L.R. 4th 609 (Can. 1995).

87. *Same-Sex Couples in Canada Face Setback*, FRONTIERS, October 20, 1994, at 20; LESBIAN AND GAY LAW NOTES, 140 (1995).

88. Aras van Hertum, *Germany: Court Upholds Marriage Ban*, WASHINGTON BLADE, October 29, 1993.

89. *Israeli Court Rules in Gay Couple's Favor*, LOS ANGELES TIMES, December 1, 1994, at A10.

90. Jose Zuniga, *Israel: Court Says Colonel's Lover Not Due Benefits*, WASHINGTON BLADE, September 22, 1995, at 14.

91. *Hungary Legalizes Common-Law Gay Marriages*, FRONTIERS, April 7, 1995, at 28.

homosexuality [and] changes in the traditional definition of family, there is no reason to change the law on [civil] marriages."<sup>92</sup> Still, the court held that excluding same-sex couples from the benefits of common law marriage was unconstitutional. "It is arbitrary and contrary to human dignity... that the law [on common-law marriages] withholds recognition from couples living in economic and social union simply because they are of the same sex."<sup>93</sup> Thus, a couple who permanently live together and are in a sexual relationship are legally defined as being in a common law marriage in Hungary. And under Hungary's laws, common law marriages provide partners with the same privileges granted to couples who have civil ceremonies. The Hungarian Supreme Court ordered Parliament to make the changes necessary to implement common-law gay marriage by March 1, 1996.<sup>94</sup> Hungary may be the first nation to legalize same-sex marriage, albeit as a "separate but equal" institution to ceremonial marriage.

Holland is also considering the idea of legalizing same-sex marriage. The Minister of Justice and the Secretary of State for Internal Affairs submitted a plan to Parliament to change the marriage rules in that nation; and, out of 150 members of parliament, political activists estimate that ninety-four are in favor of legalizing same-sex marriage, forty-two are opposed, and the rest are unsure.<sup>95</sup> However, Dutch public opinion remains divided. Forty-four percent of the Dutch public favor opening the existing marriage laws to gays. Another thirty percent believe that a separate law should be enacted in favor of gay marriage, with restrictions on adoption, pensions, and inheritance. Only fifteen percent oppose any reform.<sup>96</sup> Because of these divisions in public opinion, Holland may join its Scandinavian neighbors in passing a "registered partnership" act instead of allowing same-sex marriage.

If Hawaii legalizes same-sex marriage, it will remove itself from the international consensus that marriage is an institution for opposite-sex couples. It would join the ranks of possibly only one other nation,

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92. *Hungary Legalizes Common-Law Gay Marriage*, INTERNATIONAL GAY AND LESBIAN ASSOCIATION BULLETIN (February, 1995).

93. Darice Clark, *Hungary: Constitutional Court Recognizes Gay Unions*, WASHINGTON BLADE, March 17, 1995, at 14.

94. *Id.*

95. Rex Wockner, *Netherlands to Legalize Gay Marriage*, FRONTIERS, July 14, 1995, at 24.

96. *Dutch Public Approves of Gay Marriage*, WASHINGTON BLADE, September 8, 1995, at 10.

Hungary, that has gone its own way on this issue. The ramifications of such a move by Hawaii, in terms of international relations for either Hawaii or the United States, are unknown.

*D. Domestic Partnership Would Distance the State from a Volatile Religious Dispute*

In the United States, the definition of marriage, the rights and responsibilities implicit in that relationship, and the protections and preferences afforded to marriage, are now governed by the secular law. However, the institution of marriage stems from deep Judeo-Christian religious origins in Anglo-American jurisprudence. As one court aptly explained:

The English civil law took its attitudes and basic principles from canon law, which in early times, was administered in the ecclesiastical courts. Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable and, by definition, impossible.<sup>97</sup>

Although times have changed, and many religious denominations are discussing more openly the issue of homosexual relationships, homosexual conduct still is considered a sin by nearly all major organized religions. Further, while many lay persons disagree with traditional Christian dogma blatantly opposing contraception or divorce, most agree with official church teaching on homosexuality. For example, in a national poll of nearly 1,000 Catholics in 1987, sixty-nine percent agreed that homosexual conduct was a sin.<sup>98</sup> In a national poll of 1,115 adults in

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97. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980). Contrary to the opinion of the court, one scholar has demonstrated through painstaking research that same-sex unions were not uncommon in pre-modern Europe, but with the passage of time, implicit religious acceptance of formalizing such relationships turned into active institutional opposition. See generally JOHN BOSWELL, *SAME SEX UNIONS IN PREMODERN EUROPE* (1994).

98. Russell Chandler, *Americans Like Pope But Challenge Doctrine*, LOS ANGELES TIMES, August 23, 1987, at 120.



1994, more than seventy-five percent of respondents who categorized themselves as white Protestant "Born-Agains" said that homosexual relations are always wrong, and eighty-seven percent of white Protestant fundamentalists felt the same.<sup>99</sup>

The Catholic Church is one of the largest denominations opposed to the legalization of same-sex marriage. Over the past decade, it has taken strong public positions on issues involving homosexuality. In 1986 the Vatican issued a letter, with the Pope's approval, instructing bishops to stamp out prohomosexual views and to oppose any attempt to condone homosexuality through legislation or other means.<sup>100</sup> In 1992, the Vatican issued another document contesting moves to give gays equal rights, particularly in the United States.<sup>101</sup> Pope John Paul made a public statement against the legalization of same-sex marriage.<sup>102</sup>

The Hawaii Commission on Sexual Orientation and the Law has itself heard testimony from religious leaders both opposing and supporting the legalization of same-sex marriage.<sup>103</sup> Some religious leaders have shown limited support for equal rights legislation, despite the fact that recent official church pronouncements leave them little room to maneuver. Bishop Louis E. Gelineau of the Roman Catholic Diocese of Providence explained his support for a new Rhode Island law prohibiting sexual orientation discrimination:

If proposed legislation attempts to condone or promote homosexual activity by equating morally all forms of sexual behavior, then it should be defeated. If it merely seeks to afford protection from unjust discrimination,

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99. *Morals, Religion, and Politics*, LOS ANGELES TIMES, July 28, 1994, at A19. In time, however, such strong opposition may fade. A Gallup Youth Survey of 500 youth conducted over a three year span from 1991 through 1994 showed that sixty-one percent of Catholic teens and fifty-five percent of Protestant youth supported gay rights. RELIGIOUS NEWS SERVICE, LOS ANGELES TIMES (on file with LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES).

100. Donna Schanche, *Vatican Warning Seen Against Liberal Views on Sexuality*, LOS ANGELES TIMES, October 31, 1986, at I10.

101. *Pope to Fight Resolution to Allow Gays to Marry*, LOS ANGELES TIMES, February 12, 1994, at B3.

102. *Id.*

103. Such division is not uncommon, even within the same denomination. For example, several years ago, the Episcopal Diocese of Newark, New Jersey, placed itself at odds with the majority of the nation's 3,000,000 Episcopalians when it adopted a resolution supporting the blessing of relationships of gay couples. In 1979, the church's General Convention had rejected a similar proposal by a vote of 100 to 23. *N.J. Episcopal Group Approves Unwed Couples, Gay Lifestyles*, LOS ANGELES TIMES, January 31, 1988, at I28.

which is not now afforded under our laws, then those laws should be changed.<sup>104</sup>

To the extent that the legalization of same-sex marriage would place homosexuality on the same moral par with heterosexuality, religious leaders of most major denominations would probably oppose such a change. However, the creation of a new civil institution, one without any historical association with religion, could distance the state from religious debate.

Marriage continues to be a hybrid church-state institution in the mind of the average person. The state authorizes ministers to perform marriages that are then recognized by civil law. But it is the church, not the state, that sets the rules as to who may perform such religious ceremonies within any given denomination. Changing the definition of marriage to include same-sex couples would give the *appearance* of the state attempting to interfere with internal religious matters. Just as a judge must not only be impartial but must give the appearance of impartiality, the state should not create the appearance of intruding into religious matters.

Passage of a comprehensive domestic partnership law, on the other hand, could achieve a beneficial result in terms of church-state relations. It would respect differing religious views on the subject of same-sex marriage, yet end unjust discrimination against same-sex couples under Hawaii's laws and in Hawaii's secular society. Indeed, under a domestic partnership act, Hawaii's same-sex couples would receive equal treatment with Hawaii's married heterosexual couples. The only legal difference between domestic partnership and a marriage would be the label, and allowing domestic partnerships would enable Hawaii's government officials to avoid the legal and political baggage that accompany labeling same-sex unions "marriages."

Passage of a domestic partnership act, rather than same-sex marriage, will not deprive Hawaii of a prominent leadership role in the international movement for equal rights. Hawaii would still be the first state in the nation to take such a positive step forward. Furthermore, a comprehensive domestic partnership law—with *equal* rights to marriage

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104. David W. Dunlap, *Rhode Island's Senate Sends Gay-Rights Bill to Governor*, NEW YORK TIMES, May 20, 1995, at A3.

under *state* law—would place Hawaii ahead of the Scandinavian nations that have been in the forefront of legal reform.

## II. EPILOGUE: EFFECTS OF A DOMESTIC PARTNERSHIP ACT ON LITIGATION

The Commission on Sexual Orientation and the Law issued its final report to the Legislature in December 1995. The report recommended that the Legislature adopt one of two approaches to end discrimination against same-sex couples. First, the Commission suggested that legalizing same-sex marriage was the right thing for the Legislature to do. Alternatively, the Commission urged that, if legislators could not pass a gay marriage law, they should enact a comprehensive domestic partnership act.<sup>105</sup>

### A. *The Proposed Domestic Partnership Act Can be Improved by Two Amendments*

The Commission's proposed draft of the Domestic Partnership Act could be strengthened by the Legislature in ways that would increase the prospect of surviving strict judicial scrutiny.<sup>106</sup>

#### 1. Rules of Construction

The act could contain a section titled "Rules of Construction." The Legislature could indicate that in adjudicating specific cases, courts may look to, but should not be bound by, marriage precedents. This would avoid problems arising from rigid adherence to marriage law that could lead to absurd or inequitable results. For example, failure to consummate a marriage was a ground for annulment at common law. The common law of England, as ascertained by English and American decisions, is the common law of Hawaii.<sup>107</sup> Under Hawaii law, a marriage may be annulled on a nonstatutory ground that was recognized

105. *Report of the Commission on Sexual Orientation and the Law [to the Hawaii Legislature]*, 139 (December 8, 1995) (on file with LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES).

106. *Id.* The draft of the domestic partnership act developed by the Commission and submitted to the Legislature (*see* Appendix A below) closely parallels a framework that had been submitted to the Commission by the author of this article. (*see* Appendix B below).

107. HAW. REV. STAT. § 1-1 (1985).

by courts of equity.<sup>108</sup> While courts have determined that the sexual act that consummates an opposite-sex marriage is the act of vaginal intercourse, what intimate act consummates a same-sex relationship? Rather than blindly applying existing marriage law, courts should be free to adopt new rules for annulment of a same-sex domestic partnership. Since domestic partnership is strictly a creature of statute, courts should construe the common law rules of annulment as inapplicable to domestic partnerships.

## 2. Interagency Task Force

The Legislature could also authorize the governor to convene an Interagency Task Force on Domestic Partnership Implementation. An agency composed of several major departments of the executive branch of government could monitor the implementation of the new act, meet twice a year to discuss any problems, and issue an annual report to the Legislature with recommendations for improvement. A sunset clause might disband the agency after several years.

The creation of such an agency would send a signal to the courts that the Legislature is serious about its intention to create a new civil institution that is parallel to marriage not only on its face but in its actual operation. It would demonstrate that the state is acting to achieve an equitable result "with all deliberate speed." It would also decrease the prospect of the courts retaining continuing jurisdiction in *Baehr v. Lewin* as a method of insuring ongoing equal protection of the law.

### B. *The Supreme Court May Dismiss Baehr v. Lewin as Being Moot*

In his testimony to the Commission, University of Hawaii constitutional law professor Jon Van Dyke suggested that the case of *Baehr v. Lewin* might be dismissed as moot if a comprehensive domestic partnership law were enacted.<sup>109</sup> The Attorney General agrees with this assessment.<sup>110</sup>

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108. *Ah Leong v. Ah Leong*, 29 Haw. 770 (1927), *rev'd on other grounds*, 27 F.2d 582 (9th Cir. 1928).

109. *Minutes of the Meeting Held Wednesday, October 25, 1995, Commission on Sexual Orientation and the Law*, LEGISLATIVE REFERENCE BUREAU, HONOLULU, HAWAII (on file with LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES) (summarizing the testimony of Professor Jon Van Dyke). According to Professor Van Dyke, passage of a comprehensive domestic partnership

The doctrines of mootness and standing are "founded in concern about the proper—a properly limited—role of the courts in a democratic society."<sup>111</sup> Strict adherence to these principles are required by the doctrine of separation of powers, which gives to the legislature the power to deal with general policies and to the courts the power to adjudicate specific controversies. Since the issue of marriage deals with generalities, implicating hundreds of statutes covering virtually all aspects of life, a court may well prefer to wait for a specific case in which a party claims that the domestic partnership law failed to afford the litigant a specific benefit that marriage confers.

By declaring the *Lewin* case as moot, if a comprehensive domestic partnership law is enacted, the court could properly decline to adjudicate equal protection claims in an abstract setting. These plaintiffs, or others, could file a new lawsuit if and when they are deprived of some specific and tangible benefit as a result of the domestic partnership law. If a domestic partnership act provided domestic partners the same benefits as marriage provides heterosexual couples, no such lawsuits should follow.

C. *Equal Protection Contemplates Equity, Not Identicality*

Passage of a comprehensive domestic partnership act could prompt the court to dismiss *Baehr v. Lewin* on the grounds that the Legislature has done all that it is required to do under the state constitution's equal protection clause.<sup>112</sup> If registered domestic partners receive all of the benefits and burdens conferred by marriage under state law, how is the state constitution violated? Hawaii's constitution does not require the state to pick fights with Congress or instigate litigation with other states. If same-sex marriage is legalized in Hawaii, such conflicts will follow.

However, creating a new civil institution, parallel to marriage for purposes of state law, should satisfy the guarantee of equal protection of

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act "[w]ould probably render the current litigation 'moot,' because the same-sex couples would no longer suffer any tangible 'injury' and hence would not have 'standing' to pursue the case."

110. See *Minutes of the Meeting Held Wednesday, October 11, 1995, Commission on Sexual Orientation and the Law*, LEGISLATIVE REFERENCE BUREAU, HONOLULU, HAWAII (on file with LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES) (summarizing the testimony of First Deputy Attorney General Steven Michaels).

111. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

112. HAW. CONST. art. I, § 5 (1978).

the laws. That guarantee insures equitable treatment, not identical treatment, of persons who are similarly situated. Indeed, the Hawaii Supreme Court must have intended a reasoned and not a "knee-jerk" approach to equal protection jurisprudence. A holding that gender discrimination is illegal *per se* would invalidate the practice of providing separate public rest rooms for men and women. It also would create more substantial problems. For example, requiring identical, rather than equitable, treatment as a condition of equal protection could prevent the government from spending more money on women's health than it does on men's health, even though women have more numerous and more expensive medical problems.<sup>113</sup> A principle of identity could also prevent the government from paying more money to women in pension survivor benefits than to men, even though women often live considerably longer.

Freedom from sex discrimination, as a component of equal protection, does not mandate equality in the abstract. It only requires that persons similarly situated be treated similarly. A comprehensive domestic partnership act would achieve such a result with respect to benefits and obligations conferred by marriage under *state law*.

*D. Principles of Equity Jurisprudence Require a Balancing of Interests*

The plaintiffs in *Baehr v. Lewin* have not sued the state for damages, nor have they sought mere declaratory relief. Rather, they seek to invoke the equitable powers of the court by asking for an injunction requiring the state to issue them a marriage license. It is the duty of a court of equity "to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief."<sup>114</sup> The consequences of requiring the state to issue marriage licenses to same-sex couples are unpredictable. Congress may use the federal purse strings to forbid the state to administer any federal funds in a way that benefits same-sex marriages. Hawaii may be drawn into interstate litigation with

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113. The "Report of the National Institutes of Health: Opportunities for Research on Women's Health" concluded that: (1) overall, women have worse health than men, (2) women will be the most susceptible to disease in the future, (3) certain health problems are more prevalent in women than in men, and (4) certain health problems are unique to women or affect women differently than they do men. *Report of the National Institutes of Health, Public Health Service, U.S. Dep't of Health and Human Services*, Pub. No. 92-3-157A, at 7 (1991).

114. *Eccles v. People's Bank*, 333 U.S. 426, 431 (1948).

other states that refuse to recognize same-sex marriages under various interstate compacts to which Hawaii is a signatory.

If the Legislature passes a domestic partnership act, the court may decide to balance these interests in favor of the state. The court could deny the plaintiffs' request for an injunction by balancing the needs of the plaintiffs, which arguably would be met by domestic partnerships, against the needs of the state, which include avoiding intergovernmental lawsuits.

*E. The Legislature Must Act with "All Deliberate Speed" Not with Haste*

Allowing for a gradual transition is not a denial of relief nor of the constitutional requirement of equal protection. For example, courts have allowed for transition periods in antitrust and nuisance cases.<sup>115</sup> The equitable power of a court to avoid the harsh effects of its decrees by allowing defendants a reasonable time in which to comply is another manifestation of broad judicial power to fashion remedies to meet the exigencies of unusual situations.<sup>116</sup>

The principle of "all deliberate speed" was used by the United States Supreme Court in *Brown v. Board of Education*,<sup>117</sup> when it ordered the transition from segregated to integrated public schools throughout the nation. As the court later explained, "it was consideration for the multifarious local difficulties and 'variety of obstacles' which might arise in this transition that led this Court eight years ago to frame its mandate in *Brown* in such language as 'good faith compliance at the earliest practicable date,' and 'all deliberate speed.'"<sup>118</sup>

The court in *Baehr v. Lewin* may ultimately conclude that equal protection has been violated because of the state's refusal to issue marriage licenses to same-sex couples. It may nonetheless rule that passage of a comprehensive domestic partnership act creates equality in result under state law. The passage of a domestic partnership act, with an interagency implementation task force, satisfies the state's duty to create equity for same-sex couples "with all deliberate speed." Just as the court

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115. See *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Georgia v. Tennessee Copper Co.*, 240 U.S. 650 (1916).

116. *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (D.C. Ohio 1949), modified 341 U.S. 593 (1951).

117. 349 U.S. 294 (1955).

118. *Goss v. Board of Education*, 373 U.S. 683, 689 (1963).

in *Brown* did not order compliance *forthwith*, the Hawaii Supreme Court may rule that the state constitution allows for a reasonable "transition period" and that a comprehensive domestic partnership act is part of that process. This transition period need not be excessive, but the court could allow the Domestic Partnership Act to operate for several years before deciding its validity.<sup>119</sup>

A principle similar to "all deliberate speed" was pivotal to the Canadian Supreme Court's decision in *Egan v. Canada*.<sup>120</sup> The Court reached two conclusions. First, the court held that equal protection clause of the Canadian Charter of Rights prohibited discrimination on the basis of sexual orientation. Second, in a five to four decision, the court concluded that the government's failure to provide same-sex couples with pension survivor benefits was not unconstitutional. Justice Sopinka provided the key vote to create a majority and wrote a concurring opinion. He concluded that:

[T]he government must be accorded some flexibility in extending social benefits and does not have to be proactive in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.<sup>121</sup>

Justice Sopinka referred to the legislation under scrutiny as "a substantial step in an incremental approach" to be more inclusive, and as a result, he was not prepared to rule that "the time has expired for the government to proceed to extend the benefits to same-sex couples."<sup>122</sup> He noted that the government was entitled to "assess the impact of extending the benefits contained in some 50 federal statutes"<sup>123</sup> and therefore left open the possibility that extended delays in providing equitable treatment might be ruled unconstitutional at a later date.

In *McKinney v. University of Guelph*,<sup>124</sup> Canadian Supreme Court Justice La Forest addressed the need for speedy remedial action another way, stating:

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119. More than a few years might be excessive. In *Green v. New Kent County School Bd.*, the court ruled that "'the time for mere "deliberate speed" has run out"' when the transition period involved 13 years of inaction. 391 U.S. 430, 438 (1968).

120. 124 D.L.R. 4th 609 (Can., May 25, 1995).

121. *Id.* at LEXIS \*38.

122. *Id.* at LEXIS \*41.

123. *Id.*

124. 76 D.L.R. 4th 545 (Can. 1990).



[I]t is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from a course of action, and to take account of the difficulties, whether social, economic, or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety.<sup>125</sup>

The Hawaii Legislature can be proud of the steps it has taken over the years to end unjust discrimination, including discrimination against same-sex couples. By passing a "consenting adults act" in 1972, it was one of the first legislatures in the nation to respect the privacy rights of unmarried couples. In 1988, it added "marital status" to the Human Rights Act, thus prohibiting discrimination against unmarried adults in housing and employment. In 1991, Hawaii became one of a handful of states to prohibit sexual orientation discrimination.<sup>126</sup>

In March of 1996, the state Senate in Hawaii passed a domestic partnership act.<sup>127</sup> As this Article goes to print, the domestic partnership bill is pending in the House of Representatives. Even if the bill does not pass both houses this year, there may still be time for the Legislature to pass a domestic partnership act during its 1997 session before *Baehr v. Lewin* is finally decided by the Hawaii Supreme Court.

The passage of a comprehensive domestic partnership act would be in keeping with legislative tradition of reasoned and deliberate expansion of Hawaii's civil rights protections. Just as the Hawaii Supreme Court should acknowledge the leadership shown by the Hawaii Legislature over the years, it should give state lawmakers operating room as they attempt to meet the constitutional challenge presented in *Baehr v. Lewin*.

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125. *Id.* at 317-318.

126. HAW. REV. STAT. § 378-2 (1994)(bars discrimination in employment, housing, public accommodations, and credit).

127. William Kresnak, *House: Same-sex Ban to Voters*, HONOLULU ADVERTISER, March 6, 1996, at A3.

**APPENDIX A\*****FRAMEWORK FOR A COMPREHENSIVE DOMESTIC PARTNERSHIP ACT****Section 1. Legislative findings and purpose**

This section should contain a statement of purpose and legislative findings showing that the Legislature: (1) is responding to the constitutional requirements set forth by the Supreme Court in *Baehr v. Lewin* (1993) 74 Haw. 645, 852 P.2d 44; (2) is attempting to eliminate disparate treatment of same-sex couples under current state laws; and (3) is recognizing and protecting various compelling state interests that, at this time, militate against the legalization of marriages between persons of the same sex. A proposed statement of legislative findings and purpose is attached.

**Section 2. Definitions**

This section should contain definitions for operative terms. For example: "director" would mean the director of health; "domestic partners" would mean two persons who register a declaration of domestic partnership with the director of health; and "declaration of domestic partnership" would mean a statement filed in a form provided by the director of health in which two persons declare their intent to enter into a domestic partnership.

**Section 3. Requisites of a domestic partnership**

This section should specify the requirements for a domestic partnership. By signing a declaration of domestic partnership, the domestic partners swear under penalty of perjury that they meet the following requirements:

- (1) Age. Each party to the domestic partnership is at least 18 years of age.

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\* This draft was prepared by Thomas F. Coleman, executive director of Spectrum Institute, at the request of Thomas P. Gill, Chairperson of the Commission on Sexual Orientation and the Law. The Commission was established by the Hawaii Legislature and has been studying ways to eradicate disparate treatment of same-sex couples. It will issue a report to the legislature in December 1995. For further information about this draft, contact Mr. Coleman at (213)258-8955.

- (2) Competency. Each party is competent to enter into a contract, and each has signed a declaration of domestic partnership as provided in section 4.
- (3) Rights and obligations. Each party agrees to assume the rights and obligations specified in section 5.
- (4) Marital status. Neither party is married to each other or to anyone else and neither party is a member of another domestic partnership.
- (5) Blood relationship. The parties are not related to each other in a way that would prevent them from being married to each other under chapter 572.

#### **Section 4. Formation of a domestic partnership**

This section should specify that a domestic partnership is established when each of the following requirements have been met:

- (1) A declaration of domestic partnership has been signed by two persons and both signatures have been notarized.
- (2) The declaration has been presented to the director for filing.
- (3) Both persons provide evidence to the director that they have met the same health requirements that are a prerequisite to the issuance of a marriage license.
- (4) The director files the declaration and issues a certificate of domestic partnership.

The section could also include a provision precluding the director from filing a declaration and issuing a certificate unless one of the parties declares that he or she has been a bona fide resident of Hawaii for a specified amount of time.

#### **Section 5. Rights and obligations**

This section should provide that, once the director has issued a certificate of domestic partnership, the parties shall have the same rights and obligations under Hawaii law that are conferred on spouses in a marriage relationship. It should also provide that domestic partners shall be included in any definition of "spouse," "family," "immediate family," "dependent" or "household" as those terms are used in statutory law,

decisional law, or administrative regulations of the State of Hawaii or any political subdivision thereof.

#### **Section 6. Dissolution of a domestic partnership**

This section should provide that a domestic partnership is dissolved in the same manner that has been provided for dissolution proceedings under chapter 572. Jurisdiction for domestic partnership dissolution proceedings should be conferred on the same court that has jurisdiction pursuant to chapter 572. This section should specify that the same procedural and substantive rights and obligations which apply to spouses involved in marriage dissolution proceedings shall apply to persons involved in domestic partnership dissolution proceedings. The appropriate judicial agency shall have the authority to promulgate forms for use in domestic partnership dissolution proceedings.

#### **Section 7. Nondiscrimination**

This section should add "domestic partnership status" to the state Human Rights Act. It should prohibit discrimination against domestic partners in employment, housing, and public accommodations. It should specify that unlawful discrimination occurs if a business that is subject to the act treats domestic partners differently than spouses, unless such disparate treatment is allowed by various exceptions contained in the Human Rights Act or is required by federal law.

#### **Section 8. Impairment of contracts**

This section should specify that contracts entered into prior to the effective date of this act shall not be impaired. It should provide that all contracts that are governed by Hawaii law that are entered into after the effective date of this act are subject to the provisions herein. It should also specify that any contract predating this act does not violate the nondiscrimination section of the act even though contract does not treat domestic partners the same as spouses. However, if a preexisting contract is modified or renewed after the effective date of this act, the contract is subject to this act, including the nondiscrimination section.

**Section 9. Preemption**

This section should specify that this statute supersedes any state law to the contrary. It should also declare that this statute preempts the authority of municipalities and other political subdivisions of the state from enacting any law, ordinance, rule, or regulation to the contrary.

**Section 10. Severability**

This section should declare that if any portion of this statute is declared invalid that such invalid section shall be severable from the remaining portions of the statute.

**PROPOSED FINDINGS AND STATEMENT OF PURPOSE****Section 1. Legislative findings and purpose**

(a) Title. This statute shall be known as the Domestic Partnership Act of 1996.

(b) Purpose. The purpose of this act is to respond to the constitutional concerns expressed by the Supreme Court in *Baehr v. Lewin* (1993) 74 Haw. 645, 852 P.2d 44, and at the same time to further several compelling state interests, including: fundamental concepts of fairness, equality, openness, and toleration; respect for the autonomy and privacy of individuals; recognition of history and tradition; respect for religious and ideological diversity; government neutrality in religious disputes; and to insure the uninterrupted conduct of public business.

(c) Findings. The legislature finds and declares that:

- (1) According to the Hawaii Supreme Court, opposite-sex couples have a fundamental right to marry under both the federal and state constitutions but same-sex couples do not possess such a fundamental right under either constitution. Nonetheless, the equal protection clause of the Hawaii Constitution may be violated if Hawaii laws confer on opposite-sex married couples various rights and obligations but denies those same rights and obligations to same-sex couples who are living together in long-term committed relationships.
- (2) Hawaii has a strong public policy to promote respect for human diversity. Such diversity is reflected in the composition of family structures, which include traditional nuclear families, married couples with and without children, dual-wage-earner families, single-parent families, stepfamilies, foster families, extended families, hanai relationships, guardianship families, and domestic partnership families.
- (3) The health and welfare of the state are best served by promoting stability in family relationships, regardless of their structural variations. Many domestic partnership relationships involve persons living together in long-term committed relationships. Basic fairness requires the state

- to treat domestic partners as members of each other's immediate family rather than as strangers to each other.
- (4) No state government has legalized marriages between persons of the same sex. The federal government does not recognize same-sex marriages. It is the consensus of nations that marriage is limited to opposite-sex couples. However, some nations and some state governments have recognized domestic partnerships and have conferred various rights and obligations on such relationships. Many municipalities and private-sector employers throughout the nation have also recognized domestic partnerships as legitimate family relationships that deserve to be treated with respect and fairness.
  - (5) Amending chapter 572 to provide for marriages between persons of the same sex would create unprecedented disruption in the public business of the state. This disruption would have been particularly severe in the field of intergovernmental relations, both state and federal. It would have created a substantial risk of confrontations with the federal Congress. It could have produced extended administrative and judicial disputes with other states through the full faith and credit clause of the federal constitution. It might have required a restructuring of Hawaii's obligations and responsibilities under various interstate compacts of which Hawaii is a signatory, and under numerous uniform state laws which Hawaii has adopted. It also would have created a significant possibility of foreign nations refusing to recognize marriages contracted in Hawaii.
  - (6) Because of the historical relationship between the institution of marriage and longstanding religious traditions, amending chapter 572 to allow for marriages between persons of the same sex could have conveyed the appearance of the state taking sides in a divisive religious dispute, thereby creating the appearance of crossing the federal constitutional boundary between church and state.
  - (7) For the foregoing reasons, the creation of an entirely new statute, coordinate with chapter 572 in terms of rights and

obligations under Hawaii law, but with entirely different nomenclature, is hereby enacted in order to satisfy the requirements of the Hawaii Constitution and to insure the uninterrupted conduct of public business.



**APPENDIX B  
A BILL FOR AN ACT RELATING TO DOMESTIC  
PARTNERSHIPS.**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF  
HAWAII:**

Section 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**CHAPTER  
DOMESTIC PARTNERSHIPS**

§ -1 Purpose. The purpose of this chapter is to create a way to recognize committed relationships of people and the right to identify the partners with whom they share their lives as members of each other's immediate family.

§ -2 Findings. Domestic partners live together in the context of a committed family relationship. However, they are often denied public and private-sector benefits, because they can not provide state certified proof of their relationship.

The State of Hawaii finds that domestic partners comprise a percentage of households within this jurisdiction that is not insignificant. Domestic partners are often subject to marital status discrimination in employment, housing, and public accommodations. The enactment of this registration section is a means of attempting to eliminate this discrimination.

§ -3 Definitions. For the purposes of this chapter:

"Basic living expenses" means basic food and shelter. It includes any other cost, such as medical care, if some or all of the cost is paid as a benefit to one or both partners because they have registered as domestic partners under this section.

"Declaration of domestic partnership" means a statement in a form issued by the director that declares the intent of two people to enter into a valid domestic partnership contract. By signing it, two people swear under penalty of perjury that they meet the requirements for a valid domestic partnership contract.

“Director” means the director of health.

“Domestic partners” means two adults who are parties to a valid domestic partnership contract and meet the requisites for a valid domestic partnership contract as defined in section -4.

“Joint responsibility” means that each partners agrees to provide for the other’s basic living expenses while the domestic partnership is in effect if the partner is unable to provide for himself or herself. It does not mean that the partners need contribute equally or jointly to basic living expenses. Anyone to whom these expenses are owed can enforce the responsibility established by this chapter.

“Live together” means that two people share the same place to live. It is not necessary that the legal right to possess the place be in both of their names. Two people may live together even if one or both have additional places to live. Domestic partners do not cease to live together if one leaves the shared place but intends to return.

§ -4 Requisites of a valid domestic partnership contract. In order to make a valid domestic partnership contract it shall be necessary that the parties shall:

- (1) Live together;
- (2) Consider themselves to be members of each other’s immediate family;
- (3) Agree to be jointly responsible for each other’s basic living expenses;
- (4) Neither be married nor a member of another domestic partnership;
- (5) Not be related by blood in a way that would prevent them from being married to each other under chapter 572;
- (6) Each be at least 18 years old;
- (7) Each shall be competent to enter into a contract; and
- (8) Each sign a declaration of domestic partnership as provided for in section -5.

§ -5 Establishing a domestic partnership. Two persons, who meet the criteria set out in § -4, may establish a domestic partnership by presenting a signed notarized declaration of domestic partnership to the director, who shall file it and give the partners a certificate of domestic

partnership showing that the declaration was filed in the names of the parties who shall be known as "domestic partners".

§ -6 Rights and obligations. Upon the issuance of a certificate of domestic partnership by the director, the parties named in the certificate shall have the same rights and obligations under the law that are conferred on spouses in a marriage relationship under chapter 572. A "domestic partner" shall be included in any definition or use of the terms "spouse", "family", "immediate family", or "dependent" as those terms are used throughout the law.

§ -7 Dissolution of domestic partnerships. The family court shall have jurisdiction over the dissolution of domestic partnerships. The dissolution of domestic partnerships shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage under chapter 572.

§ -8 Records and Fees. The director shall keep a record of all declarations. The director shall set the amount of the filing fee for declarations, but in no case shall the fee be higher than the fee for a marriage license. The fees charged shall cover the State's costs of administering this section.

§ -9 Preemption. This chapter shall supersede any state law, or political subdivision ordinance to the contrary.

§ -10 Private solemnization not required. Nothing in this chapter shall be construed to require any religious organization to solemnize a domestic partnership that does not recognize a domestic partner relationship within their ideology; provided that any rights and obligations of domestic partners are not obstructed or violated.

SECTION 2. Section 368-1, Hawaii Revised Statutes, is amended to read as follows:

"§ 368-1 Purpose and intent. The legislature finds and declares that the practice of discrimination because of the race, color, religion, age, sex, sexual orientation, marital status, *including domestic partnership*, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. It is the purpose of this chapter to provide a mechanism which provides for a uniform procedure for the enforcement of the State's discrimination laws. It is the legislature's intent to preserve all existing rights and remedies under such laws."

SECTION 3. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 5. This Act shall take effect upon its approval.

INTRODUCED BY: \_\_\_\_\_