

Document 168: Hawai'i Voters Reject Same-Sex Marriage (1998)

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Many conservatives were alarmed by the 1993 decision of the Hawai'i Supreme Court that said a state law which prohibited people from marrying another person of the same sex was a violation of the Hawai'i State Constitution's prohibition of discrimination on the basis of sex. This successful court suit, argued by civil rights attorney Daniel R. Foley, seemed to be the final word on the subject. However, in 1998 anti-gay activists moved to amend the state's Constitution, declaring that marriage is limited as a special right only between one man and one woman. On May 30, 2000, Daniel Foley gave an interview to Walter L. Williams about recent events in Hawai'i.

Please explain what has happened in the Hawai'i case since the pro-same-sex marriage Court decisions.

In 1994 the Hawai'i state legislature had passed a face-saving statute to limit marriage to a man and a woman. This statute would not have outweighed the Supreme Court decision in favor of same-sex marriage because it would still be seen as a violation of the equal protection clause of the state constitution. However, it did provide legislators with an excuse for irate voters that they had in fact voted to restrict marriage to heterosexuals, even though they knew the act would have no impact against a Supreme Court ruling to the contrary. It was just a cover.

Those who were most opposed to same-sex marriage felt that nothing could be certain to stop it except a constitutional amendment to the Hawai'i state constitution. In 1997 the Mormon, Catholic, and Evangelical Protestant churches, abandoning any pretense of separation of church and state, proposed legislation to amend the state

constitution to limit marriage solely to a man and a woman. We had been successful in opposing such a constitutional amendment up until that time, but they marshaled resources like never before. Due to their pressure, in 1997 the state legislature passed a proposed constitutional amendment that would give the legislature the power to limit marriage to opposite-sex couples. However, to balance this conservative limitation the legislature also passed a companion Reciprocal Beneficiary Act to extend the majority of rights and benefits of marriage to non-traditional couples. This Act gave benefits not just to same-sex couples, but also included other types of two people who could not marry. For example, a parent and a child over age eighteen could register under this Act, so that the child could remain on the parent's health insurance plan after reaching adulthood.

What are the tangible benefits provided by the Reciprocal Beneficiary Act?

Non-traditional couples at least can now receive many benefits that they had been denied before. For example, before this only man-woman married couples could acquire and register land tenancy in the entirety. The Reciprocal Beneficiary Act provides that same-sex couples who buy real estate together can own it as one, and do not have to pay taxes when one member of the couple dies. The surviving same-sex partner now gets the same tax break that a heterosexually-married spouse receives.

With the Reciprocal Beneficiary Act, one person in a couple cannot be sued for a debt made individually by their partner, just as a married couple have this benefit. For the first time non-traditional couples can have peace of mind in probate proceedings, where the surviving partner can inherit just as married people do. If one partner dies without a will, the other partner can inherit their property without another relative being able to challenge it in court. And the partner in a registered couple has hospital visitation rights, and can participate in decision-making if the other partner is medically incapacitated.

There are many legal benefits that are provided by marriage, and same-sex couples can now qualify for many of them. In this respect, the Act is an improvement. However, it is still not as good as marriage because there is no legal protection for couples once they go beyond Hawai'i state boundaries. Furthermore, beneficiary status is still second class citizenship for non-traditional couples, because there are other benefits of legal marriage that are not provided to same-sex couples.

There are two important categories of exceptions: first, in rights provided in family court cases (for example, child support and custody, alimony and divorce proceedings), and second, where state law interfaces with federal law (for example, in federal tax issues, social security, and immigration and naturalization). This federal exception was thought to be necessary because Congress had passed the Defense of Marriage Act in 1996, which stated that for federal purposes, marriage shall be defined only to be between a man and a woman. This reactionary Act had been pushed through Congress by conservatives who were appalled by what we were doing in Hawai'i.

It was a case of two steps forward, and one step back. Despite the disappointment about removing same-sex couples from being able to legally marry, it is still important to remember that this Reciprocal Beneficiary Act provided for the most sweeping rights package for non-traditional couples, including same-sex couples, in the history of the United States up to that time.

Tell us what happened in the vote to amend the state constitution.

Even though the legislature passed this package in 1997, the constitutional amendment to limit marriage to opposite-sex couples could not be voted upon until the next election in November 1998. I hoped that there was still a chance for us to get the state Supreme Court to rule in favor of same-sex marriage before that time....

To our great disappointment the Supreme Court delayed its ruling until after the results of the constitutional amendment vote would be known. The Supreme Court

justices had been subject to a lot of criticism over their original decision in favor of same-sex marriage, and basically they lacked the courage to follow through as they should have done. We did not anticipate this retreat by the Supreme Court, in which the justices lost their will.

How did this constitutional amendment manage to pass?

In 1998 the Utah-based Mormon Church stepped in to do everything they could to pass the constitutional amendment. The Mormons spent more money in the fight against same-sex marriage in Hawai'i than all the other churches combined. They did the same thing in fighting against recognition of same-sex marriage in California later. With all of the money at their disposal, they vastly outspent the pro-gay side in television and radio ads. They very effectively used scare tactics to convince many of the undecided voters that same-sex marriage would be a threat. For example, they claimed that legalization of same-sex marriages would lead to churches losing their right to perform any marriages if they refused to hold weddings for same-sex couples. The Hawai'i courts explicitly ruled that this would not happen, and that no clergyman is legally required to perform any wedding they do not want to. But the Mormons still made that claim, even though they knew it was not accurate. The religious coalition overwhelmed the pro-gay side, and voters approved the constitutional amendment in November 1998.

I remember that the pro-gay side did not push the basic issue of the rightness of same-sex marriage much in the campaign. Why not?

Some of the gay people in Hawai'i wanted to take on the issue of church interference in the political process, but polls indicated that if we did this we would lose the election. Polls of voters suggested that our side would be more likely to win by sticking to a message of "don't change the Hawai'i Constitution" and seeing the amendment as a threat to civil liberties in general. As a result, not much was said in the

campaign defending the right of people to marry someone of the same sex.

Unfortunately, despite this cautious approach the campaign was not effective in getting enough people to vote against the amendment.

Then maybe would it have been more effective to take a long-range view, and make the argument for equality anyway?

Looking at it from the short run, polls suggested this was the best strategy to try to win the election, and I don't want to criticize those brave activists who decided to follow this strategy. But now, having seen that the short-term strategy did not work, it is clear that we should have used the money raised to get out the basic message that gay and lesbian couples deserve equal rights to have legal marriage with the person they love, and that discrimination is wrong. This is the long-range strategy that, even if it might not have been immediately effective in the 1998 election, would have probably more effectively changed public opinion in the long run. It is the dilemma of short-term versus long-term thinking. But now that we learned this lesson the hard way in Hawai'i, activists in other states should learn from our mistake and look at such battles as merely one step in the long term effort to change public opinion. If we are going to have to spend all this money on television ads, we might as well use the money effectively to have the most long term impact.

How did the Hawai'i Supreme Court react to this vote?

After the constitutional amendment had been passed by the voters, the Supreme Court ruled that this vote enacted and legalized the 1994 statute passed by the legislature that limited marriage to opposite-sex couples. As a fall-back position we made a second argument that even if marriage is limited to a man and a woman, all the rights and benefits of marriage should still be extended to same-sex couples. On December 9, 1999 the Supreme Court dismissed our complaint without addressing this issue. I was very

disappointed, of course, but I am still not giving up. I am filing new court actions to get them to answer this question. The basis of my challenge is that the Supreme Court has never reversed its original 1993 conclusion in Baehr v. Lewin that not providing these benefits constitutes discrimination on the basis of sex. Therefore, even though we cannot call it marriage, same-sex couples deserve the same rights that opposite-sex couples get when they legally marry.

What do you think is going to happen in Hawai'i in the future?

As a compromise, we think that within the next year or so Hawai'i will pass legislation that will essentially be similar to the civil union legislation passed in 2000 by the Vermont state legislature. That legislation gives all the same rights to same-sex couples that married heterosexual couples now have, even though it is not called marriage. There is a chance, depending on the outcome of the 2000 elections, that the United States government will create a federal civil union category. Democratic nominee Al Gore has already come out in support of such a category, but Republican nominee George W. Bush opposes it. So we will have to see what happens. But the point is that none of this would be happening now if we had not pushed the issue in Hawai'i in the early 1990s.

The success of civil unions in Vermont is a direct result of what we did, and the Vermont Supreme Court cited the Hawai'i Supreme Court decision in their own 1999 ruling supporting the equal rights of same-sex couples. The Vermont Supreme Court recommended their state legislature to use the 1995 report of the Hawai'i Commission on Sexual Orientation and the Law as a model for Vermont. Now, in turn, what has happened in Vermont—as well as in several other nations around the world—is having an impact in Hawai'i. When we consider that same-sex marriage was never even considered until Denmark moved toward legal recognition in 1989, this is a very quick

international movement. The synergy of what happens in one part of the world has an impact in another area.

What our Hawai'i court case did was to make the issue of equal rights for same-sex couples respectable in American politics. It moved along the effort to enact domestic partnerships, or what are now being called civil unions, as a compromise. For example, when it looked like Hawaii might enact fullfledged marriage for same-sex couples, conservative columnist William Safire wrote a column in the New York Times supporting domestic partnerships as a moderate solution. That would never have happened if we did not push for total equality in marriage. Many voters in Hawai'i who opposed granting marriage to lesbian and gay couples in 1998 have now come to accept that justice requires giving equal rights to everyone in some form.

What are public opinion polls in Hawai'i showing about changes in attitude toward same-sex marriage?

Polls have been pretty consistent from 1991 to 1998, that Hawai'i voters remained about two to one against legalizing same-sex marriage. But that does not mean those figures would remain the same if the Supreme Court had ruled firmly in favor of same-sex marriage at the beginning. To compare it to the question of interracial marriage, a Gallup Poll in 1968, a year after the United States Supreme Court ruled firmly in favor of a black-white couple in Loving v. Virginia, showed seventy percent of Americans opposed interracial marriage. But because the Court ruled firmly, and state miscegenation laws were declared unconstitutional, gradually the issue of interracial marriage became a non-issue. After interracial marriage was legalized, people saw that the sky did not fall. They saw that much of what conservative reactionaries said about the destruction of civilization did not turn out to be true. People gradually got used to the idea that someone should have the right to marry another person of a different race if they wanted. This idea has now been incorporated into the list of rights that any American can

expect to have in our legacy of freedom. Interracial marriage is now a non-issue in American politics, even though it was a major controversy only a few decades ago.

It is the experience of interracial marriage being part of the way things are, that convinced most people that it is OK. There is a synergy between legal decisions and public opinion that follows this experience. That is how social change occurs, and I predict that a similar pattern will occur with gay and lesbian equality. One day people will look back on the controversy of same-sex marriage, and wonder what all the fuss was about.

Therefore, even though the term “marriage” still remains a sticking point for many people, the new idea of civil unions is becoming more acceptable. This is a transition stage, because it still is not totally equal. It is separate and unequal, just like decisions trying to provide for some rights of black people in the segregated South before the United States Supreme Court ruled firmly in 1956 that separate is inherently unequal. That time will come in the area of gay and lesbian rights. We did not get equality in Hawai’i as quickly as I thought it would happen, but we will get there. What we are going through now is a major step in the larger effort for equality.

Source: Unpublished interview of Daniel R. Foley by Walter L. Williams, Honolulu, May 30, 2000.

Bibliography: See also Daniel Woog, Friends and Family: The True Stories of Gay America’s Straight Allies. Los Angeles: Alyson, 1999.