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Verdict

November 15, 2013

Joanna L. Grossman

Hawaii Comes Full Circle on Same-Sex Marriage



Hawaii is where it all started: the modern battle over same-sex marriage, that is. The strong likelihood that Hawaii would legalize same-sex marriage in the early 1990s spurred a nationwide backlash that would stall, but ultimately not prevent, the legalization of same-sex marriage elsewhere. Way back when, Hawaii did not legalize same-sex marriage. But twenty years later, it has done so, with a bill signed into law by Governor Neil Abercrombie this week. The circle is now complete.

In this column, I'll describe Hawaii's role at the beginning of the modern same-sex marriage controversy, its dramatic impact on state and federal law regarding same-sex marriage, and the state's circular path to get back where it started.

The Ruling Heard 'Round the Country: *Baehr v. Lewin*

Although same-sex couples in several states sued in the 1970s to challenge the refusal of various county clerks to issue them marriage licenses, the modern same-sex marriage controversy dates in earnest only to the early 1990s. Those early lawsuits were met by courts that could hardly conceive what they were being asked to do—declare longstanding marriage laws unconstitutional because they excluded gays and lesbians—and showed no appetite for change. The push for marriage rights fizzled, and gay-rights activists shifted their focus to other endeavors, including more modest domestic -partnership ordinances adopted at the municipal level.

In the early 1990s, however, a new round of lawsuits were filed, raising statutory and constitutional challenges to marriage laws that, while largely silent on the gender of the parties, were tacitly understood to permit only heterosexual marriage. These lawsuits were filed strategically under state law alone, in order to avoid an appeal to the U.S. Supreme Court, which was expected to deny any federal constitutional right to same-sex marriage and to forestall further attempts to establish one.

One of these lawsuits was filed in Hawaii by several same-sex couples. The trial court in that case rebuffed their arguments for the same sorts of reasons that prior courts considering same-sex marriage had: Marriage is defined as being between one man and one woman; there is no fundamental right to a same-sex marriage; prohibiting same-sex marriage protects the institution of marriage; and a marriage between one man and one woman provides a better environment for having and raising children than a same-sex marriage would.

However, in 1993, the Hawaii Supreme Court unexpectedly reversed the trial court's decision, finding that prohibitions on same-sex marriage violated the Equal Rights Amendment of the Hawaii Constitution, which protects against discrimination on the basis of sex. In so doing, the Court accepted an argument that the plaintiffs had made only in a footnote in their brief. The plaintiffs argued that the ban on same-sex marriage was a form of sex discrimination (as opposed to sexual-orientation) discrimination. Because the law allowed a man, but not a woman, to marry a woman, it discriminated on the basis of gender. Under the Hawaii constitution, sex-based classifications receive strict scrutiny—meaning that Hawaii takes a more suspicious look at such classifications than would a court under the federal constitution. Thus, the case was remanded for a trial on whether the state could satisfy the very heavy burden of justifying the use of sex-based classifications in Hawaii's marriage law.

Although the Hawaii Supreme Court did not actually decide whether the prohibition on same-sex marriage was unconstitutional, its ruling in *Baehr* was a watershed moment in the mounting fight for same-sex marriage. Advocates saw it as symbolic of future successes, but it was also the catalyst for a conservative backlash of a type and strength previously unknown to family law.

Hawaii and the Federal Defense of Marriage Act: A Starring Role

As *Baehr* proceeded on remand, all eyes were on Hawaii. Attention was naturally drawn there, given the social importance of the same-sex marriage issue. But the intensity of the focus was fueled by the intervening debate about, and enactment of, DOMA in 1996. In the three-and-a-half years before the trial court in *Baehr* rendered its opinion on remand, fifteen states passed laws that would refuse recognition to valid same-sex marriages from other jurisdictions, and Congress passed the Defense of Marriage Act of 1996 ("DOMA"), Section Two of which purported to exempt states from having to give full faith and credit to same-sex marriages from other states, and Section Three of which defines marriage as between one man and one woman for purposes of federal law.

The animating force behind this first wave of federal and state anti-same-sex-marriage statutes was the belief that Hawaii was on the cusp of legalizing same-sex marriage—and, perhaps more importantly, the belief that this would mean same-sex marriage was effectively everywhere. Hawaii's impact on both federal, and eventually state law, was exacerbated by the mistaken perception that recognition of Hawaii same-sex marriages by other states would be both compelled and automatic. Adding fuel to the fire was the fact that both opponents and proponents assumed this to be true. For proponents of same-sex marriage, the claim represented both wishful thinking and a component of their strategy to gain marriage rights nationwide. For opponents of same-sex marriage generally, this assertion galvanized forces, imposed time pressure on states to protect themselves from an exported marriage policy, and provided powerful rhetoric to motivate quick legislative reactions.

Within the specific context of DOMA, the assertion gave opponents the ability to argue for passage of the law on grounds of federalism—to stop Hawaii's purported ability to export its national marriage policy to sister states over their ardent objections—rather than having to assume an express anti-gay-rights or even a pro-traditional-marriage platform. In the debate over DOMA, the full faith and credit claim provided the legal predicate necessary to justify Congressional intervention. Senator Trent Lott, for example, argued that if:

[S]uch a decision affected only Hawaii, *we could leave it to the residents of Hawaii to either live with the consequences or exercise their political rights to change things*. But a court decision would not be limited to just one State. It would raise threatening possibilities in other States because of [the Full Faith and Credit Clause.]”

Many others in Congress echoed Lott's fears about Hawaii's omnipotence. Representative McInnis warned that: “What this country does not want is for one State out of 50 States, that is, specifically the State of Hawaii, to be able to mandate its wishes upon every other State in the Union.” To “run the risk that a single judge in Hawaii may re-define the scope of . . . legislation throughout the other forty-nine states,” cautioned Hawaii State Legislator Terrence Tom would be “a dereliction of the responsibilities [Congress was] invested with by the voters.”

Those who opposed DOMA did not necessarily disagree with the characterization of the effect of full faith and credit on same-sex marriages. The late Representative Patsy Mink, for example, agreed “laws of one State must be given ‘full faith and credit’ by every other state,” but insisted that “Congress should not be enacting any bill to

declare otherwise.”

The legal predicate was only half the story. The factual predicate necessary to make the legal predicate relevant played an important role as well. Both proponents and opponents conjured visions of Boeing 767s shuttling gays and lesbians back and forth from the mainland to Hawaii to marry. One Republican captured the apparent concern:

“Quite simply, the legal ramifications of what the State court of Hawaii is about to do cannot be ignored. If the State court in Hawaii legalizes same-sex marriage, homosexual couples from other states around the country will fly to Hawaii and marry. These same couples will then go back to their respective States and argue that the full faith and credit clause of the U.S. Constitution requires their home State to recognize their union as a marriage.”

At the same time, same-sex marriage activists urged exactly this course of action. Oft-cited by members of Congress in the debate over DOMA was a memo authored by Evan Wolfson, director of the Marriage Project of the Lambda Legal Defense and Education Fund, which stated:

Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal nationwide recognition of their marriage unions.

It thus became a matter of desperation. To save the country from same-sex marriage, Congress thought, it had to act to make clear that gay Hawaiian marriages could be refused recognition on the mainland.

Why Hawaii Should Never Have Had This Impact

Throughout the debate over DOMA, one important point was missing: the Full Faith and Credit Clause has never been understood to require states to recognize one another’s marriages. The most exacting form of full faith and credit is reserved for court judgments. State laws, at best, receive a nod of deference. The law of interstate marriage recognition has developed solely on the principle of comity, or respect, for sister states. Comity dictates that states should recognize each other’s marriages, but there are plenty of situations in which particular states refused to recognize particular types of marriages. Thus, even if thousands of same-sex couples had headed for Hawaii to marry, states would not have been forced to give effect to them unless and until the Supreme Court required them to.

More importantly, Hawaii never did legalize same-sex marriage—at least not until this week, twenty years after the ruling of the state’s highest court in *Baehr*. On remand, the *Baehr* trial court did find that Hawaii’s justifications for prohibiting same-sex couples from marrying failed to satisfy the heavy burden required of laws that make use of sex classifications. However, before the appellate process could play out, the Hawaii constitution was amended to give the legislature the power to limit marriage to relationships between one man and one woman. Thereafter, the Hawaii Supreme Court held that this amendment rendered *Baehr*’s challenge to Hawaii’s marriage law moot. There was to be no same-sex marriage in Hawaii, at least not as a product of the ruling in *Baehr*.

Hawaii instead adopted a new status, called “reciprocal beneficiaries,” which enabled same-sex couples to register for limited mutual rights. Many years later, in 2011, Hawaii adopted a civil union law, which made a marriage-equivalent status available to same-sex couples without the name “marriage.” By this time, the civil union had become a popular compromise position in Democratic states that were not quite ready for same-sex marriage.

Hawaii’s Same-Sex Marriage Law

Senate Bill 1, the **Hawaii Marriage Equality Act of 2013**

(http://www.capitol.hawaii.gov/splsession2013b/SB1_HD1_.pdf), was signed into law on November 13, 2013. The preamble to the bill couches it in the Supreme Court’s ruling in *Windsor*, which invalidated the federal-law provision of DOMA and paved the way for equal treatment for federal-law purposes of heterosexual and homosexual marriages. Although Hawaii affords same-sex couples the civil union, which is an identical status at

the state-law level, the federal government does not treat them as marriages. The Hawaii legislature thus stated its intent to allow same-sex couples to take advantage of all the federal-law benefits of marriage by allowing them to marry rather than enter into civil unions. (Similar reasoning led to same-sex marriage by judicial ruling in New Jersey, as I explain [here](http://verdict.justia.com/2013/10/21/samesex-weddings-jersey-shore) (<http://verdict.justia.com/2013/10/21/samesex-weddings-jersey-shore>).) That objective is easily accomplished: As of December 2, 2013, same-sex couples will be allowed to marry, their marriages will be treated precisely as heterosexual marriages are, and all gender-specific statutory language relating to spouses is now to be read as gender-neutral.

Similar to the bills passed in many other states, the Hawaii law creates a “religious freedom” exemption, which clarifies that no clergy person shall be required to solemnize same-sex marriages if doing so violates their religious beliefs. (The religious exemption under New York’s same-sex marriage law is discussed [here](http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications) (<http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications>).) And religious organizations cannot be forced to provide “goods, services, or its facilities” in aid of a same-sex wedding if doing so violates the faith upon which the entity is based.

The bill also deals with the technical effects of adding marriage to the menu of formal recognition options. Reciprocal beneficiaries and civil union partners who are eligible to marry can do so. To the extent marriage brings additional rights or obligations, they only exist as of the date the marriage is solemnized.

Fast Forward Twenty Years: A Different World

The national landscape has changed dramatically since 1993. From a world in which there was almost no law of same-sex marriage came a world in which every state has an opinion. But those opinions, even within a single state, are in a state of constant flux. With bills signed in Illinois and Hawaii this month, there are now sixteen states that allow same-sex marriage (or will very shortly). The federal Defense of Marriage Act’s provision requiring refusal of recognition to same-sex marriages for all federal law purposes was invalidated by the Supreme Court in its 2013 decision in *United States v. Windsor*. (Section Two still stands, but, as explained above, has no purpose. The *Windsor* ruling and its aftermath are discussed [here](http://verdict.justia.com/2013/06/26/doma-is-dead) (<http://verdict.justia.com/2013/06/26/doma-is-dead>) and [here](http://localhost/grossman%2520brake%2520penn%2520state%2520scanhttp://verdict.justia.com:2013:09:03:falling-dominoes-same-sex-spouses-gain-more-recognition-rights%2520edit.doc) ([file://localhost/grossman%2520brake%2520penn%2520state%2520scanhttp://verdict.justia.com:2013:09:03:falling-dominoes-same-sex-spouses-gain-more-recognition-rights%2520edit.doc](http://localhost/grossman%2520brake%2520penn%2520state%2520scanhttp://verdict.justia.com:2013:09:03:falling-dominoes-same-sex-spouses-gain-more-recognition-rights%2520edit.doc))).

The battle for marriage equality is not over. Most of the remaining states have a statutory or constitutional ban on same-sex marriage. But well more than half the population lives in a state that allows same-sex marriage, and there is litigation in many non-same-sex-marriage states challenging the validity of their bans on the *recognition* of same-sex marriage after *Windsor*. The story will continue to unfold, but no state will play a role as big as Hawaii already has.

While those Boeing 767s may not be full, since same-sex couples have fifteen other states to choose from, surely some will choose beautiful Hawaii as the site of their destination wedding.



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