

## SEVEN

### The Case of Same-Sex Marriage

Same-sex couples masquerading as opposite-sex couples have successfully obtained marriage licenses and married each other throughout American history.<sup>1</sup> In the 1970s, however, lesbians and gay men finally began to argue that they had the *right* to marry their same-sex partners. The first recorded legal challenge occurred in 1970, when Jack Baker and Mike McConnell sued a Minnesota county clerk who had refused to grant them a marriage license. The two men argued, among other things, that the state's refusal to allow them to marry each other violated their rights to due process and equal protection. In 1971, the Minnesota Supreme Court became the first appellate court in the nation to consider the subject of same-sex marriage. It ruled against Baker and McConnell, holding that the fundamental right to marry did not apply to same-sex unions, because, by definition, marriage could only occur between one man and one woman.

*Baker v. Nelson* was the first in a twenty-three-year-long series of rulings across the nation upholding the right of states to prohibit same-sex marriage.<sup>2</sup> In the 1990s, however, gay rights activists finally succeeded in fracturing this judicial consensus. Courts in three different states—Hawaii, Alaska, and Vermont—ruled that same-sex couples had a constitutional interest in being able to marry.

In no instance did same-sex marriage advocates ultimately get what they were litigating for: marriage licenses. But the translation of these decisions into public policy took markedly divergent paths. The Alaskan plaintiffs in *Brause and Dugan v. Bureau of Vital Statistics* (1998) not only failed to receive marriage licenses, they precipitated the development and passage of a state constitutional amendment restricting marriage to opposite-sex couples. The Hawaiian plaintiffs in *Baehr v. Lewin* (1993) saw the institution of a similar constitutional amendment in reaction to their litigation, but they also witnessed the passage of a law (the Reciprocal Beneficiaries Act) designed to grant unmarried couples many of the state-level rights and benefits traditionally accorded to married couples. Moreover, the *Baehr* plaintiffs also saw their litigation spark a

nationwide debate over same-sex marriage, with consequences for the public policies of the federal government and most states. The Vermont plaintiffs in *Baker v. State of Vermont* (1999) had yet another experience. On July 1, 2000, in response to their litigation, they saw Vermont become the only state in the United States to accord same-sex couples the rights and privileges traditionally associated with heterosexual marriage, albeit under the name “civil unions” rather than marriage.

In this chapter, I use the lens of legal opportunity structure to examine the dominoes set into motion by these three court decisions. An LOS perspective lends itself to three propositions. The first is that legal decisions such as *Baehr*, *Brause*, and *Baker* rarely produce clear wins or losses for advocates of sociopolitical reform. Instead they produce opportunities for action on the part of both reformers and their opponents, opportunities that may or may not be exploited successfully. The second is that the value of any particular opportunity is not just a function of an actor’s abilities but is also dependent on the other institutional and sociolegal factors that combine to create the structure of legal opportunities. In other words, similar legal decisions occurring in different states may create dissimilar opportunities for action because of differences in each state’s LOS. The third proposition is that changes in the structure of legal opportunities may reverberate in the structure of political opportunities as well. As I showed in chapter 6, LOS and POS are not interchangeable. But neither are they completely independent from one another. Changes in one simultaneously affect and are constrained by the contours of the other.

In the following pages, I lay out the origins, progress, and outcomes of *Baehr*, *Brause*, and *Baker*. I then argue that the reason why Hawaii, Alaska, and Vermont reacted so differently to the decisions in these cases was largely a function of differences in the LOS and POS in the three states rather than of differences in the strategies of pro- and anti-same-sex marriage activists. I begin by providing some background into why gay rights activists have pursued the right to marry.

## Why Marriage?

Legally recognized marriages bring with them a plethora of state- and federal-level rights and responsibilities. In 1997, the Government Accounting Office (GAO) released a report detailing 1,049 separate governmental benefits associated with civil marriage. The lion’s share of rights and responsibilities associated with marriage falls under two cate-

gories: financial and familial. Even a partial listing of financial benefits is eye-opening. Married couples may file tax returns jointly, inherit from each other automatically in the absence of a will, share income from governmental programs such as Social Security and Medicare, obtain wrongful death benefits for a surviving partner, obtain joint insurance policies, and partake in employer-provided benefits such as access to health insurance and pension protections. The familial benefits are even more significant. A small sampling includes the following: Married couples are treated as each other's automatic next of kin for purposes of medical decision making, hospital visitation, and burial arrangements. They are assumed to have joint rights and responsibilities in parenting, including custody and visitation in the event of divorce. And they may take bereavement or sick leave to care for each other or for their children. It is important to note that couples can obtain relatively few of these benefits for each other in any way *other* than marriage. In short, the institution of marriage is a powerful mechanism for promoting familial and economic stability.

That gay rights litigators would pursue same-sex marriage seems obvious now. But there has been severe intracommunity tension over the value of pursuing marriage as a movement goal. As one Lambda litigator recalled in an interview with me, "There were some issues over which we all fought quite bitterly [in the late 1980s and early 1990s], and there were strong disagreements, marriage being chief among them."

This tension has largely, but not invariably, played out along gender lines, with lesbian activists more critical than their gay male counterparts of marriage as an institution.<sup>3</sup> Lambda was not immune from this tension. In fact, a debate between two of its lawyers helped to ignite it, in what Bill Rubenstein (1997, 1635) called a "marriage announcement of sorts." In 1989, *Out/Look*, a now defunct lesbian and gay journal, published two articles side by side. The first article, written by then-Lambda executive director Tom Stoddard, was entitled "Why Gay People Should Seek the Right to Marry" and set out practical and philosophical reasons why same-sex marriage rights should become a priority for the gay rights movement. The second article, written by then-Lambda legal director Paula Ettelbrick, was called "Since When Is Marriage a Path to Liberation?" and set forth reasons why same-sex marriage should *not* be a priority for the movement.<sup>4</sup>

The practical upshot of this intracommunity fissure was that, until 1993, none of the major gay legal groups treated same-sex marriage as an immediate priority. That all changed when the Hawaii Supreme Court

handed down its groundbreaking decision in *Baehr v. Lewin*. We turn to it now.

### ***Baehr v. Lewin* and Its Impact**

In 1991, three same-sex couples in Hawaii filed suit after being denied marriage licenses, arguing that they had a fundamental right to marry each other under Hawaii's constitution. Their lawyer was Dan Foley, an attorney who had done work for the ACLU in the past but was acting independently with respect to *Baehr*. Foley approached both Lambda and the ACLU for assistance in the case, but they both declined the invitation to become cocounsel. Lambda did decide, however, to submit an amicus curiae brief supporting same-sex marriage.

Like many of the marriage challenges preceding it, *Baehr* was dismissed by the trial court, which ruled that Hawaii's marriage statute did not contemplate marriages between members of the same sex. On appeal, however, the Hawaii Supreme Court made history by becoming the first court in the nation to treat seriously the claim that same-sex couples had a constitutional interest in marrying each other. It is interesting that it rejected the plaintiffs' right-to-marry argument and based its ruling on a claim the plaintiffs had not raised: that the state's ban on same-sex marriage constituted sex discrimination and thus was subject to strict scrutiny under Hawaii's constitution.<sup>5</sup> It reinstated the case and remanded it for a trial to determine whether the state's rationale for banning same-sex marriage was important enough to constitute a compelling governmental interest.

The Hawaii Supreme Court's ruling set many wheels into motion. At the most basic level, it instituted a legal frame that would make it exceptionally difficult for Hawaii to defend its ban on same-sex marriage, just as the Colorado Supreme Court's early ruling in *Evans v. Romer* made it exceptionally difficult for Colorado to defend the constitutionality of Amendment 2.

The 1993 decision also prompted action by the Hawaii legislature. It quickly amended the state's marriage statute to clarify that marriage required a man and a woman.<sup>6</sup> It also created the Commission on Sexual Orientation and the Law to study the legal inequities faced by same-sex couples. Late in 1995 the commission issued its report, recommending that the legislature legalize same-sex marriage or, at the very least, establish domestic partnerships. Legislative responses to this proposal spanned

the gamut. Bills were introduced variously to legalize same-sex marriage, to establish domestic partnerships, and to amend Hawaii's constitution to prohibit same-sex marriage. While a domestic partnership bill passed in the senate in 1996, it failed to pass in the house, and the issue of same-sex marriage receded from the legislature's agenda until the trial court handed down its decision in *Baehr* late in 1996 (about which more subsequently).

The 1993 decision in *Baehr* reverberated far beyond Hawaii's shores. It served as the impetus for widespread gay rights mobilization around same-sex marriage rights. Preeminent among the newly mobilized in this area was Lambda. After the decision came down, Lambda reversed its earlier stance of nonaction with respect to same-sex marriage. Part of the reason for this reversal may have been staff turnover. Both Tom Stoddard and Paula Ettelbrick had departed Lambda by the time *Baehr* came down. And Evan Wolfson, one of the remaining Lambda litigators, was a vocal proponent of same-sex marriage. Interviews with present and former staff members, though, indicate that the legal opening provided by *Baehr* was the primary stimulus for Lambda's change of heart.

The organization now took up Dan Foley's invitation to act as cocounsel in the case. Evan Wolfson was tapped to become Lambda's litigator. In addition, Lambda established the Marriage Project in late 1994, also headed up by Wolfson. The Marriage Project's goal was to coordinate and facilitate state-by-state political organizing and public education around the issue of same-sex marriage. Its emphasis on political mobilization reflected Lambda's recognition that the *Baehr* decision was both promising and dangerous for gay rights advocates. The Full Faith and Credit Clause of the U.S. Constitution generally requires that states recognize official acts and proceedings of other states.<sup>7</sup> Should Hawaii sanction same-sex marriages, other states might well be forced to recognize those marriages. However, exceptions to the requirements of the Full Faith and Credit Clause have been granted when recognizing that a marriage violates the "strong public policy" of the state.<sup>8</sup> Lambda recognized that *Baehr* might provoke a backlash and that opponents of same-sex marriages would probably attempt to carve "strong public policy" objections into law across the nation. If they succeeded, lgb people might well find their marriages recognized in some states but not in others. The Marriage Project was designed to forestall this scenario by providing an umbrella organization within which gay rights activists could work to raise public awareness of the discrimination faced by same-sex couples, to file court cases as appropriate, and to lobby public officials. It garnered

support and involvement from a wide array of gay rights organizations and non-gay allies, as well as a number of religious groups.<sup>9</sup>

Lambda was right. Concern about the possibility that other states might have to recognize same-sex marriages performed in Hawaii prompted widespread opposition. Conservative groups such as the Family Research Council, Focus on the Family, and the Christian Coalition and religious organizations such as the Mormon, Catholic, and many evangelical churches vigorously lobbied federal and state legislators to pass laws designed to counter *Baehr* (Dunlap 1996; Nagourney 1996).

By and large, opponents of same-sex marriage had more success on the political front than did supporters. Although supporters were able to deflect bills in several states, by the time the trial court issued its decision in *Baehr* late in 1996, sixteen states had passed bills doing one or more of the following: explicitly defining marriage as a union between one man and one woman, prohibiting marriage between members of the same sex, and prohibiting recognition of same-sex marriages performed in other jurisdictions.<sup>10</sup> Most striking is the fact that shortly before the trial on *Baehr* was to begin Congress passed—and President Clinton signed—DOMA, which (a) exempted states from the requirements of the Full Faith and Credit Clause insofar as it pertained to recognizing same-sex marriages performed in other states and (b) defined the words *marriage* and *spouse* to encompass only heterosexual couplings for all federal purposes.<sup>11</sup> *Baehr*'s impact even extended to the 1996 presidential race. On the eve of the Iowa caucuses, a “marriage protection” rally was endorsed by all but one of the five Republican presidential candidates.<sup>12</sup>

When, on December 3, 1996, the trial court assigned to hear *Baehr* ruled that Hawaii had shown *no* rational reason—much less a compelling one—for preventing same-sex couples from marrying, additional reactions were sparked.<sup>13</sup> The state immediately requested and received a stay of the lower court's ruling pending an appeal to the Hawaii Supreme Court. The Hawaii legislature, in turn, revisited the subject of same-sex marriage. It passed two bills in 1997. The first, called the Reciprocal Beneficiaries Act, gave a laundry list of legal and economic protections to couples, both homosexual and heterosexual, who were ineligible to marry.<sup>14</sup> It became effective in the summer of 1997.

At the time, the Reciprocal Beneficiaries law offered the broadest set of protections to same-sex couples anywhere in the nation. Specifically, the law offered about 60 state-level benefits to registered beneficiaries, including hospital visitation, family leave, health coverage, and inheritance. It fell far short, however, of the 160 or so state-level benefits

offered by legal marriage in Hawaii. (Moreover, some of the benefits promised by the bill were subsequently chipped away. Within a few months of the law's enactment, Hawaii's attorney general issued an opinion letter stating that private employers were not required to provide health insurance to the reciprocal beneficiaries of their employees.<sup>15</sup> And the provision that reciprocal beneficiaries of state employees be eligible to receive health benefits expired in 1999, when the legislature did not reauthorize it.)

The second bill passed by the legislature in response to the 1996 *Baehr* trial court ruling authorized the people of Hawaii to vote on a constitutional amendment that would grant the legislature the power to restrict marriage to opposite-sex couples.<sup>16</sup> The proposed amendment was placed on the 1998 ballot. Proponents and opponents of same-sex marriage engaged in massive campaigns to sway the vote on the upcoming ballot measure.<sup>17</sup> As in Colorado during the Amendment 2 campaign, opponents of same-sex marriage were more successful in framing their argument in the court of public opinion. Voters in Hawaii ultimately approved the measure by a margin of more than 2-1. The Hawaii Supreme Court subsequently dismissed *Baehr*, ruling that the amendment had taken the marriage statute "out of the ambit of the equal protection clause of the Hawaii Constitution" and that the case was therefore moot.<sup>18</sup>

While the 1996 trial and subsequent ruling in *Baehr* clearly affected the POS and LOS vis-à-vis same-sex marriage in Hawaii, it also affected the POS and LOS on the mainland. As the trial drew closer and the decision came down, legislatures and governors across the nation became more concerned about the Full Faith and Credit implications of legalizing same-sex marriage in Hawaii. The number of states implementing "mini-DOMAs" accelerated sharply (see fig. 7), even though supporters of gay rights managed to deflect several measures. As noted previously, sixteen states had passed such laws by the time the trial court decision in *Baehr* came down; fourteen of those sixteen occurred in 1996. In 1997, nine more states passed mini-DOMAs.<sup>19</sup> By the close of 1998, when Hawaii voters passed their constitutional amendment, the number of states with mini-DOMAs had risen to thirty.<sup>20</sup> The passage of anti-same-sex marriage bills subsequently tapered off after Hawaii's constitution was amended. Only one state, Louisiana, passed such a measure in 1999. In 2000, however, four more states passed mini-DOMAs,<sup>21</sup> largely, I argue subsequently, in reaction to the Vermont high court's decision in *Baker v. State* and the subsequent creation of civil unions.

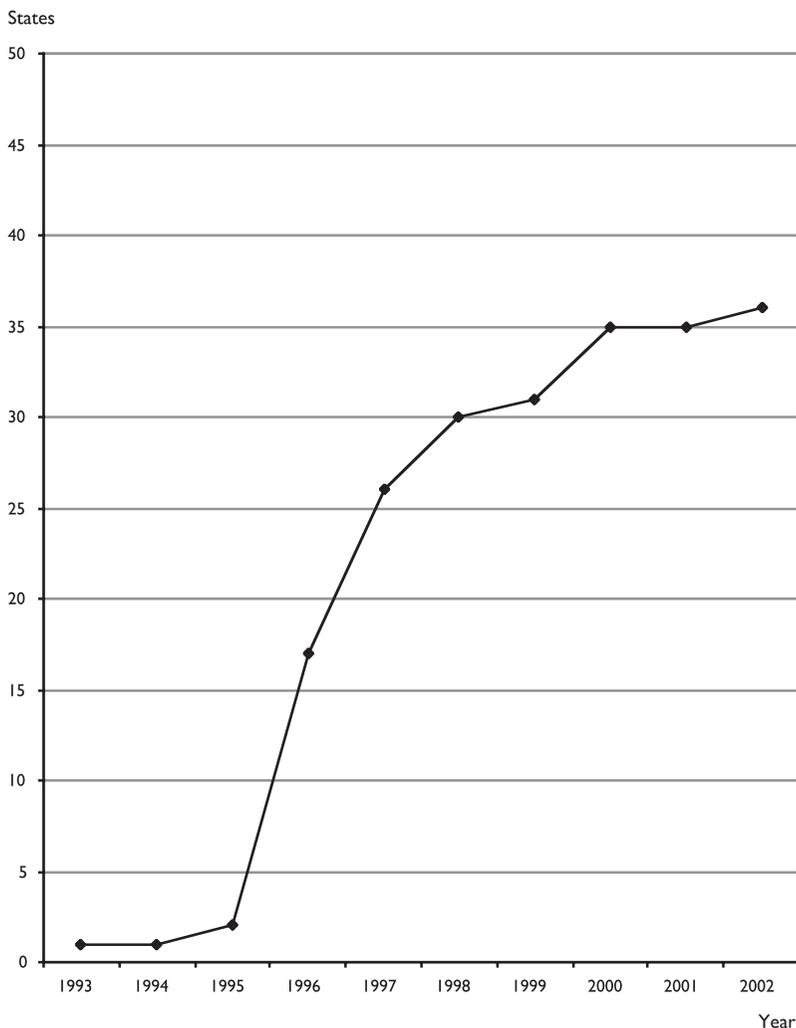


Fig. 7. Number of states with laws specifically limiting marriage to opposite-sex couples

In sum, *Baehr* was neither a clear win nor a clear loss for gay rights advocates. Instead, the change it made in the structure of legal opportunities created space for action by multiple actors in multiple domains. Allies and opponents of same-sex marriage in Hawaii and on the mainland used *Baehr* as a focal point for mobilization. Legislators in Hawaii responded to *Baehr's* progress by simultaneously enacting a broad Reci-

procal Beneficiaries law and seeking to amend the state's constitution to give itself the sole power to define the parameters of marriage. Hawaiian voters in turn amended their constitution. Legislators in Congress and in thirty-four states across the nation passed laws designed to limit same-sex marriage while legislators in many other states considered, but did not enact, similar laws.

In addition to these events, *Baehr* also inspired a handful of same-sex couples across the nation to contemplate legal challenges to their states' marriage laws. We turn to one such legal challenge now.

### *Brause and Dugan v. Bureau of Vital Statistics and Its Impact*

In 1995 two men, Jay Brause and Gene Dugan, sought a marriage license from the Alaska Bureau of Vital Statistics. It was denied, and together with their private counsel they sued, seeking to force the state to allow them to marry each other. They raised three claims: that the gender-neutral language of Alaska's marriage law permitted same-sex marriage and that refusing to allow them to marry violated their fundamental rights to privacy and equal protection under Alaska's constitution.

They were inspired by two recent legal decisions. The first was the 1993 ruling in *Baehr v. Lewin*. The second was a 1995 decision by a trial court in Fairbanks, Alaska. The case, *Tumeo v. University of Alaska*, involved a challenge to the University of Alaska-Fairbanks's policy of limiting spousal benefits to the "husbands" and "wives" of its married employees. The judge in the case (Meg Greene) ruled that, under Alaska's constitution, the university could not treat same-sex couples in committed relationships differently from heterosexually married couples. In the course of issuing her decision, she also suggested that Alaskan law might require marriage to be extended to same-sex couples (*Tumeo*, slip op. 7, n. 8).

Brause and Dugan were not the only ones inspired by *Tumeo*. In response to the decision, the Alaska legislature enacted a mini-DOMA, revising its marriage statute to explicitly exclude same-sex marriages and to refuse recognition to same-sex marriages performed in other jurisdictions.<sup>22</sup> Brause and Dugan subsequently amended their suit, asking the court to find that the revised statute was unconstitutional as well.

The trial court issued its ruling early in 1998. As did the Hawaii Supreme Court before it, the Alaska court found the ban on same-sex marriage to constitute sex discrimination. In addition, it held that the

fundamental right of marriage extended to same-sex couples and that Alaska could not infringe upon that right absent a compelling governmental purpose. The court ordered a trial to determine whether the state could demonstrate such a purpose. The state petitioned the Alaska Supreme Court for review of the decision, but the high court declined to intervene.

The trial never had the chance to occur. Within three months of the decision, the Alaska legislature approved a proposed constitutional amendment that said in relevant part, “To be valid or recognized in this State, a marriage may exist only between one man and one woman.”<sup>23</sup> As had occurred in Hawaii, the proposed constitutional amendment was placed on the 1998 ballot for ratification by the citizenry. As had occurred in Hawaii, the amendment passed by a margin of more than 2–1.<sup>24</sup> In light of the newly amended constitution, *Brause* was dismissed.

At the close of 1998, advocates of same-sex marriage seemed outgunned and outmaneuvered. Seemingly favorable changes in the structure of legal opportunities in Hawaii and Alaska created space for activism in both legal and political terrains, but their adversaries were generally able to utilize that space more effectively than they were. Constitutional amendments wiped out judicial gains in both states. Congress passed the DOMA. Another thirty states (not including Hawaii and Alaska) passed mini-DOMAs. But within a year, the landscape would change dramatically.

### *Baker v. State of Vermont* and Its Impact

In 1997, three same-sex couples sued Vermont for denying them marriage licenses. *Baker v. State* differed from its predecessors, *Baehr* and *Brause*, in that organized litigators were involved in the case from the outset. The three couples were represented by Susan Murray and Beth Robinson, two private lawyers with long-standing interest and involvement in gay rights concerns. They were also represented by Mary Bonauto of the Boston-based gay rights law firm GLAD. *Baker* was a product of extended discussions among the legal staffs of all the major gay rights litigation organizations. The Marriage Project and the Litigators’ Roundtable, both hosted by Lambda, provided a forum for these discussions.

Much had changed in the six years since *Baehr* was initiated. The dissonance about the merits of pursuing same-sex marriage had all but dis-

appeared. The major groups all agreed that the time was right to push the legal envelope still further by bringing a same-sex marriage suit in a state with a relatively friendly attitude toward gay rights.<sup>25</sup> When Robinson and Murray presented them with the opportunity to bring a suit in Vermont, organized gay rights litigators were happy to get on board.<sup>26</sup> Vermont seemed a fine choice. Its courts had a track record of openness to gay rights claims. By way of illustration, its supreme court was the first in the nation to approve a second-parent adoption by a same-sex couple.<sup>27</sup> The court also had a track record of reading Vermont's equal protection clause more expansively than the federal equal protection clause. In addition, the Vermont Constitution contained an unusual provision called the Common Benefits Clause, which the courts had construed to mean that benefits provided by the state had to be made available to all citizens.<sup>28</sup> Organized gay rights litigators hoped that the combination of these three factors would produce a decision upholding the right of same-sex couples to marry.

*Baker's* initial foray into the courts was unsuccessful. The trial court dismissed the case late in 1997, finding that the state's interest in promoting "the link between procreation and child rearing" constituted a sufficient reason for banning same-sex marriage.<sup>29</sup> On appeal, however, the Vermont Supreme Court disagreed with the lower court's ruling. In its December 20, 1999, decision, the court unanimously ruled that Vermont's differential treatment of same-sex and opposite-sex couples violated the Common Benefits Clause of the state's constitution.

Unlike the Hawaii Supreme Court in *Baehr*, the *Baker* court did not remand the case for a trial to determine whether the state had adequate justification for discriminating against same-sex couples.<sup>30</sup> Instead it drew on oral arguments and the evidence contained in the numerous briefs submitted both by the parties and by a slew of amici curiae<sup>31</sup> to determine that the ban on same-sex marriage was irrational. Said the court, "The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nothing less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity" (*Baker*, 889).

Notwithstanding its finding that Vermont's refusal to allow same-sex marriages was unconstitutional, the supreme court did not order the state to start issuing marriage licenses immediately. Instead it ordered the legislature to come up with a way—whether through the extension of marriage

or the creation of a different institution—to give same-sex couples all the benefits and protections that Vermont provided to married couples.<sup>32</sup>

The legislature's reaction was swift. The same day the decision came down, the speaker of the Vermont House of Representatives, Michael Obuchowski, polled his colleagues about their reaction to the ruling. Given three real options—extending marriage, creating a new “marriage-like” status, or attempting to circumvent the high court's ruling—the representatives polled that day largely felt that instituting some sort of domestic partnership was the most likely alternative (Lisberg and Remsen 1999). And although legislative proposals ultimately ran the gamut from legalizing same-sex marriage to adding a mini-DOMA provision to the constitution to impeaching the Vermont Supreme Court, initial predictions turned out to be correct. Four months after *Baker* was handed down, the legislature passed the Civil Unions Act<sup>33</sup> and Governor Howard Dean signed it into law. It became effective on July 1, 2000.

The creation of civil unions was in many ways a major victory for gay rights. Under the act, same-sex partners entering into civil union are treated as the functional equivalent of heterosexual spouses insofar as Vermont law is concerned. Nonetheless, civil unions still fall far short of marriage. The Civil Unions Act itself distinguishes civil unions from marriage, which it defines as “the legally recognized union of one man and one woman.” More important is the fact that the establishment of a civil union does not entitle a couple to any of the rights and benefits that result from marriage under *federal* law. This has led to some bizarre results. For example, the members of a couple in a civil union are “married” for the purposes of filing state income tax forms in Vermont but are single for the purposes of filing federal income tax forms. Civil unions also fall short of marriage in that they are not transportable from state to state.<sup>34</sup> This too leads to bizarre results, not the least of which is that a couple joined in civil union are each other's legal next of kin in Vermont but are legal strangers in other states.<sup>35</sup>

Like *Baehr*, *Baker*'s impact also extended beyond its state's borders. Supporters of same-sex marriage seized on *Baker* and the civil union law it prompted as mobilizing agents. Every major gay rights organization issued press releases lauding both events. Recognizing that lgb couples might react to Vermont's law by filing same-sex marriage suits in their own states, Lambda, GLAD, the ACLU, and the NCLR also took the unusual action of jointly issuing a pamphlet that explained the requirements, benefits, and limitations of civil unions and attempted to channel the activism of lgb people.

This is a thrilling victory—and undoubtedly the beginning of a new era, but there's a need for patience, planning and strategic thinking in the work ahead for all of us. We are in a long term civil rights struggle. There is no quick fix for the discrimination we will encounter. The struggle to gain acceptance and to dismantle the legal regime erected against our families will take time.

Legal advocates do not recommend that lawsuits be filed in most instances of discrimination. We must proceed collectively and carefully, moving forward the best cases in the best places at the best times. The organizations listed below, in partnership with local lawyers, are happy to talk about the kinds of problems you are facing so that we can position ourselves with those few cases which will best move us forward toward full citizenship and equality.

There are valuable roles to play apart from litigation. The discrimination you face can be turned into a valuable educational tool when you share that experience with your community and with policy makers. We all need to talk with our elected leaders as well as our neighbors to persuade them that recognizing the “common humanity” of gay people (as the Vermont Supreme Court put it) and same-sex families is fair, necessary for strong families, valuable for communities and solid public policy. Join us in our collective work to win the Freedom to Marry, recognition and protection of all families, and full equality under law.<sup>36</sup>

Opponents of same-sex marriage also seized on *Baker* and civil unions as mobilizing agents. As with *Baehr*, opponents were somewhat more successful on the political front than were supporters of same-sex marriage. Four additional states passed mini-DOMAs in 2000; references to *Baker* and/or civil unions were commonly part of legislative debates on the issue. That Vermont played an important role in the passage of these laws is particularly obvious in Nebraska's case. On November 3, 2000, voters in that state amended their constitution to reserve marriage to opposite-sex couples and to prohibit the state from recognizing marriages, civil unions, domestic partnerships, or “other same-sex relationships” contracted in another state.<sup>37</sup>

In sum, *Baker* was similar to *Baehr* in that it was neither a clear win nor a clear loss for gay rights advocates. Consistent with the expectations of an LOS perspective, favorable legal decisions in both states produced opportunities for sociolegal change rather than sociolegal change itself.

Where *Baker* differed from *Baehr*—and from *Brause*—of course, is in

the real-world outcome it inspired. Although all three cases produced rulings that favored the expansion of marriage to include same-sex couples, Vermont, Hawaii, and Alaska forged very different public policies in response to those rulings. A separate-but-equal system was put into place in Vermont. A limited set of benefits was extended to same-sex couples in Hawaii, but the power to define marriage was also removed from the state's judiciary and vested in its legislature. A constitutional amendment banning same-sex marriages was implemented in Alaska.

In the following pages I consider the question of why Vermont reacted more favorably than Hawaii or Alaska to the prospect of treating same-sex relationships as equal to opposite-sex ones. My core contention is that, although the decisions in the three states were reasonably similar, they created dissimilar opportunities for action because of differences in each state's LOS and POS.

### Differences in the LOS and POS in Hawaii, Alaska, and Vermont

In his seminal article on the radiating impact of courts, Marc Galanter (1983, 136) argued that “the messages disseminated by courts do not carry endowments or produce effects excepts as they are received, interpreted, and used by (potential) actors. Therefore, the meaning of judicial signals is dependent on the information, experience, skill, and resources that disputants bring to them.” LOS theory would suggest, however, that the value of any particular opportunity is more than just a function of the actors' information and ability. It is also dependent on other institutional and sociolegal factors, such as access to the formal institutional structure of the law, existing legal and cultural frames, and the configuration of elite alignments. Similar judicial signals, in other words, may create dissimilar opportunities for a particular set of disputants because of systematic differences in the political and legal opportunity structures in which those signals reverberate. As I will show, the signals sent by *Baehr*, *Brause*, and *Baker* played out in very different contexts.

### *Configuration of Judicial Elites and Legal Framing of Same-Sex Marriage*

I have referred to the decisions in *Baehr*, *Brause*, and *Baker* as being reasonably similar in that the courts in all three cases ruled that same-sex

couples had a constitutional interest in being able to marry one another. It is important to recognize, however, that the three cases were at different stages of completion when the legislatures stepped in.

The Alaska case was at the earliest stage of litigation when it was preempted by the legislature. A lower court judge had denied a motion to dismiss the case, ruling that the litigants had raised a valid legal question and that the state would be required to demonstrate a compelling purpose for its prohibition of same-sex marriage at trial. Because no final decision had been handed down, the Alaska legislature could act without directly challenging the court. Its action was preventative rather than curative. The Hawaii legislature was likewise able to act before a final decision about the constitutionality of prohibiting same-sex marriage was handed down, and so its actions were also preventative rather than curative.

The Vermont legislature, in contrast, was faced with a *fait accompli*. The Vermont Supreme Court ordered it to develop a mechanism whereby same-sex couples would receive all the state-level benefits and protections already provided to married couples. The court also informed the legislature that it would retain jurisdiction in the case. If the legislature did not enact implementing legislation within “a reasonable period of time,” it said, the court might reopen the case, this time mandating the institution of same-sex marriage. By its actions, the Vermont Supreme Court put the legislature in the position of either supporting same-sex partnerships (of some sort) or precipitating a constitutional crisis. In effect, the stakes were much higher for the Vermont legislature than they were for its counterparts in Hawaii and Alaska.

That the cases were at different stages of completion was at least partly a function of the judges deciding them. The Alaska case was just in its initial stages, of course, but the Hawaii and Vermont suits had reached their state courts of last resort. The pace of response to these two suits differed markedly. The Hawaii Supreme Court, for reasons as yet unknown, sat on the case for nearly three years. It received the case early in 1997 and, based on its prior history of handing down decisions, was widely expected to issue a ruling within twelve to eighteen months. Yet the *Baehr* court did not issue its final ruling—vacating the lower court decision in light of the 1998 constitutional amendment—until December 1999. One likely explanation for the high court’s actions is that it deliberately chose to await the outcome of the ballot measure before issuing its ruling, perhaps to guard its legitimacy.

In contrast to the slow and measured pace of the Hawaii Supreme

Court—deciding initially that a compelling state purpose was necessary to sustain the ban on same-sex marriage, remanding the case for a trial on the merits, and then holding on to the case for years—the Vermont Supreme Court acted in a relatively quick and decisive manner. Although it deliberated the case for some eighteen months, the ruling it ultimately issued was final. While the Hawaii Supreme Court’s actions may have been strategic, the Vermont Supreme Court’s actions certainly were. The majority opinion by Chief Justice Amestoy makes the strategic element of the *Baker* ruling clear. In response to Justice Johnson’s dissenting opinion, which argued that the Vermont high court should mandate same-sex marriage, Amestoy wrote the following.

Our colleague greatly underestimates what we decide today and *greatly overestimates the simplicity and effectiveness* of her proposed mandate. First, our opinion provides greater recognition of—and protection for—same sex relationships than has been recognized by any court of final jurisdiction in this country with the instructive exception of the Hawaii Supreme Court in *Baehr*. Second, the dissent’s suggestion that her mandate would avoid the “political caldron” of public debate is—even allowing for the welcome lack of political sophistication of the judiciary—*significantly insulated from reality*. (*Baker*, 888, citations omitted; emphasis added)

As evidence for his assertion, Amestoy cited the constitutional amendments in Hawaii and Alaska that overturned court decisions favoring same-sex marriage. Clearly, Amestoy was cognizant of the political backlash that the Vermont decision might provoke and was attempting to defuse it by requiring the extension of marriage rights rather than marriage itself to same-sex couples.

In sum, the decisions in *Baehr*, *Brause*, and *Baker*, while all recognizing the constitutional interest of same-sex couples in marrying, presented different signals to their respective legislatures. The stakes were higher for the Vermont legislature than for the Hawaii and Alaska legislatures because of the finality of the decision and because of the legal frame established by it. Yet this difference in signaling is insufficient, standing alone, to account for the very different ways in which the three cases were translated into public policy. The Vermont legislature could have started the process of constitutional amendment notwithstanding *Baker*. Indeed, attempts were made. And the legislatures in Hawaii and Alaska

were certainly not required to put proposed constitutional amendments on the ballot in their states. Something more was going on. We turn next to an examination of the amendment process.

### *Access to the Formal Institutional Structure of the Law*

Polls conducted in Vermont, Hawaii, and Alaska shortly after the decisions in *Baker*, *Baehr*, and *Brause* came down indicated a deep split in public opinion about the propriety of same-sex marriage. For example, a poll conducted by the *Rutland Herald*, *Times Argus*, and WCAX-TV in January 2000 found that only 38 percent of respondents agreed with the decision in *Baker* and that less than 15 percent thought that marriage should be extended to same-sex couples (Graff 2000). A similar poll conducted by the *Honolulu Star-Bulletin* in January 1994 found that nearly three out of five Hawaiians opposed same-sex marriage (Essoyan 1994). A pair of public opinion surveys conducted in Alaska in the immediate aftermath of *Brause* presented somewhat divergent findings: one poll found that about two-thirds of the Alaskans surveyed favored an amendment banning same-sex marriage, while the other found that only about one-half of the surveyed group favored such an amendment (Rinehart 1998).

While the majority of people in all three states apparently favored a continued ban on same-sex marriage, the ability of antigay activists to tap into the process of citizen lawmaking varied across state lines. In both Hawaii and Alaska, opponents of same-sex marriage had relatively easy access to an important institutional mechanism for lawmaking, namely, constitutional amendment. In Vermont, however, access was much more difficult. A comparison of amendment procedures illustrates the differences among the three states.

The amendment process in Alaska and Hawaii is quite similar. In both states, a two-thirds majority vote in both legislative houses authorizes placement of a constitutional amendment on the ballot.<sup>38</sup> In Alaska, the vote occurs at the next regularly scheduled general election.<sup>39</sup> In Hawaii, the vote takes place at the next congressional election (every even year).<sup>40</sup> The procedure for amending Vermont's constitution is more cumbersome. The amendment must first pass the senate with a two-thirds vote. It must then pass the house by a simple majority. At that point, the houses must recommend the constitutional amendment for action by the *next* session of the legislature. Then both houses must approve the amendment again, this time by a simple majority vote. The

amendment is then placed on the ballot for ratification by the people. It becomes law if it garners a simple majority of the popular vote.<sup>41</sup>

The relative ease of amending the constitution allowed opponents in Alaska to capitalize on people's initial discomfort with the superior court's ruling in *Brause* to counteract it. The court issued its ruling late in February 1998. Within three months, the legislature had okayed a proposed anti-same-sex marriage amendment, allowing it to be put before voters that same year. Similar action by the Hawaii legislature in 1997 put a proposed amendment on the 1998 ballot (the next congressional election year).

The constitutional amendment strategy was less feasible for same-sex marriage opponents in Vermont because of the length of time and number of hurdles required to change the constitution. An amendment initially proposed by the legislature in 2000 could not make it onto the ballot until 2003 at the earliest, assuming that four different legislative bodies approved it (two votes in the house and two in the senate). This is not to say that opponents could not have chosen to pursue an amendment strategy. Indeed, attempts were made. But in Vermont the onerous amendment procedures, together with factors such as the configuration of political and judicial elites and existing sociolegal frames, made preempting the court's ruling through citizen lawmaking much more difficult than in either Hawaii or Alaska.

This was not accidental. According to my interviews with members of Lambda's staff and other key players in the fight for same-sex marriage, a major reason Vermont was considered a good location in which to file a same-sex marriage suit was the relative difficulty of amending its constitution. Gay rights advocates were cognizant that, just as with antigay initiatives, courts of public opinion were likely to be less favorable to their goals than were courts of law. In the aftermath of the federal DOMA and its state-level counterparts, organized same-sex marriage activists were eager to avoid ballot-box battles on the subject of marriage if they could. The formal institutional structure of Vermont law, they reasoned, would mitigate the chance that favorable courtroom decisions would be erased through constitutional amendment.

Of course, legislators intent on subverting *Baker's* intent could have started the amendment ball rolling despite the procedural hurdles, just as legislators intent on honoring *Baehr* or *Brause* could have refused to initiate the amendment process. The difference in the ultimate impact of the three court decisions was obviously dependent on the actions of law-

makers as well as the structure of the lawmaking process. We turn to the set of elite political alignments in Alaska, Hawaii, and Vermont next.

### *Configuration of Political Elites and Cultural Framing of Gay Rights*

Differences in the opportunities provided by *Baehr*, *Brause*, and *Baker* extended to the attitudes of state legislators and governors as well as the process of constitutional amendment. Quite obviously, lawmakers in Vermont were more open to the notion of granting equal marriage rights to same-sex couples than were lawmakers in Hawaii. Hawaiian lawmakers were in turn more open to gay rights claims than were their Alaskan counterparts.

Part of the reason for this difference was the partisan composition of the legislatures in the three states (the governors of all three states were Democrats). Historically, Democrats have been more favorable to gay rights claims than have Republicans (see Button, Rienzo, and Wald 1997; Hertzog 1996; Riggle and Tadlock 1999). Both houses of the relatively hostile Alaska legislature were controlled by Republicans, and the Republicans were much more likely than their Democratic counterparts to support the creation of a constitutional amendment banning same-sex marriage. (In fact, the vote in the senate broke down along strict party lines: the fourteen Republicans voted to authorize the amendment while the six Democrats voted against it.) The relatively more tolerant legislatures of Hawaii and Vermont, in contrast, were controlled by Democrats. Republicans in these states were also more likely than Democrats to oppose extending the rights associated with marriage to same-sex couples, although the relationship between partisan affiliation and support for same-sex marriage was far from perfect.

Moving beyond partisanship per se, the attitudes of the political elites in the legislatures and executive branches of the three states were particularly important in structuring the contours of the opportunities presented by *Brause*, *Baehr*, and *Baker*. Legislatures are complex, hierarchical structures. Each house is presided over by the leader of whichever party has the most seats. This elite actor, variously referred to as the majority leader or the speaker, has significant agenda-setting capacities, usually including the determination of whether and when a particular bill will be discussed and voted upon. Committee chairs are also elite political actors, albeit with a smaller portfolio. As a rule, bills introduced into

a legislature are referred to one or more appropriate committees, which are composed of a subset of the members of the entire body. Bills must make it through committee before they can be voted on by the body of the legislature as a whole (called voting “on the floor”). Like majority leaders, committee chairs have significant agenda-setting functions, which often include the scheduling of committee bills for consideration.

The house and senate majority leaders in Alaska were singularly opposed to the superior court’s ruling in *Brause*, as were the relevant committee chairs in both bodies and the governor. By way of illustration, on the first business day after *Brause* was handed down, the senate majority leader, Robin Taylor, announced the introduction of a bill authorizing a constitutional amendment to ban same-sex marriage and issued the following statement.

[I]t is apparent that our Judiciary needs further clarification on fundamental values. Marriage has been the foundation of civilization for thousands of years and in cultures around the world. Marriage is the most important social institution in our society. The state has a . . . principal interest in preserving and protecting the special status of marriage, regardless of religious beliefs. (Quoted in Clarkson, Coolidge, and Duncan 1999, 227)

Political elites in Hawaii, however, were more mixed in their reactions to the court rulings in *Baehr*. Democratic governor Ben Cayetano announced his opposition to the notion of same-sex marriage early on. Democratic speaker of the house Joe Souki announced that in reaction to the December 1996 trial court ruling in *Baehr* he would push for two measures: a constitutional amendment to circumvent the court’s decision and a domestic partnership bill giving same-sex couples some of the rights and responsibilities traditionally associated with marriage (see Eskridge 2002, 23). The judiciary committee and the rank-and-file members of the house acquiesced to both requests. Within a few weeks the house passed one bill authorizing a constitutional amendment to ban same-sex marriage and another bill providing a limited set of benefits to “reciprocal beneficiaries,” which the house defined as including couples who were excluded by law from marriage, whether because they were of the same sex or because, like a mother and son, they were too closely related to each other.

The senate, which had passed a reasonably comprehensive domestic partnership bill the year before only to see it fail to progress in the house,

balked at the house's language. As Art Leonard (1997) reported in *Lesbian/Gay Law Notes*, several senators in key committee positions were adamantly opposed to a constitutional amendment banning same-sex marriage and were supportive of a broad array of domestic partnership benefits for same-sex couples. They refused to allow consideration of any proposals to ban same-sex marriage outright. This effectively killed the house's legislation.

The senate then passed a very different pair of bills. One was a "life partnership" bill similar in scope to Vermont's civil union law. The other was a proposed constitutional amendment that allowed the state to reserve marriage to opposite-sex couples, so long as "the application of this reservation does not deprive any person of civil rights on the basis of sex." This measure was clearly symbolic rather than court evading, given that the *Baehr* court had already ruled that banning same-sex marriage constituted sex discrimination under Hawaii's constitution.

In any event, the split in elite alignments between the house and the senate forced the creation of a conference committee to attempt to reconcile the two bills. Lambda and other advocates of same-sex marriage hoped that the divide between the chambers was too great to allow an acceptable compromise to be reached. They were sorely disappointed when, after two months of negotiations, a consensus emerged. First, the committee suggested placing a constitutional measure on the 1998 ballot "to clarify that the legislature has the power to reserve marriage to opposite sex couples." This language was clearly intended to circumvent *Baehr* in a way that the senate's original was not, but it was less harsh than the house's version in that it allowed—but did not require—the prohibition of same-sex marriages. Second, the conference committee suggested the enactment of a "reciprocal beneficiaries" measure, defining it as the house did but expanding the number of benefits its conferred. As noted previously, the final measure accorded reciprocal beneficiaries about 60 of the more than 160 state-level benefits accorded to married couples. These benefits included medical decision-making and inheritance rights as well as access to employee health benefits (although that provision lapsed in 1999) but excluded any benefits related to taxation as well as adoption and custody rights.

As noted in the March 1997 edition of *Lesbian/Gay Law Notes*, the scheduling of the votes on the two measures suggested that senate leaders were holding the proposed constitutional amendment "hostage" to the successful legislative passage of and gubernatorial acquiescence to the reciprocal beneficiaries measure. (This tactic led to some unusual lobby-

ing efforts: some of the most vocal opponents of same-sex marriage found themselves lobbying for passage of the reciprocal beneficiaries measure in order to get the proposed constitutional amendment on the ballot!) In the end, both measures were passed.

The reactions of political elites in Vermont differed in some key respects from the reactions of political elites in Hawaii and Alaska. Most notably, they were more deferential to the judiciary's judgment. All of the major institutional players—the governor, the majority leaders in the house and senate, and the chairs of the house and senate judiciary committees—accepted the *Baker* ruling as a mandate to rectify the unequal treatment of opposite- and same-sex couples. Governor Howard Dean, for example, praised the supreme court for its flexibility in allowing the legislature to craft a solution to the unequal treatment of same-sex couples even though he also stated his opposition to same-sex marriage. He announced that he would favor the establishment of a parallel institution in accord with the supreme court's requirements.<sup>42</sup> Other political elites were even more supportive of the Vermont Supreme Court's decision. Speaker of the House Michael Obuchowski, for instance, argued that the most appropriate response to the logic of *Baker* was to open marriage to same-sex couples. Lieutenant Governor Doug Racine echoed Obuchowski's sentiment.

The attitudes of key legislative actors structured much of the legislative debate over the *Baker* ruling. Most obviously, the chairs of both the house and senate judiciary committees refused to schedule hearings or votes on several bills designed to circumvent the supreme court's decision, including proposals to impeach the members of the high court and proposals to amend the state's constitution to prohibit same-sex marriages. More subtly, the attitudes of legislative leaders influenced the context in which *Baker*'s directive was evaluated. The hearings chaired by Thomas Little, the Republican chair of the house judiciary committee, are illustrative.

In an interview with William Eskridge (2002, 58), Little explained that his preferences about the appropriate legislative reaction to *Baker* were not fully formed when the judiciary committee received the issue to study but that he felt it was important to build consensus and avoid divisiveness on the issue of same-sex marriage. To that end, he scheduled twenty-nine days of hearings on the subject, soliciting a wide range of legal, academic, social, and religious viewpoints. The committee—which was composed of five Republicans, five Democrats, and one Progressive—ultimately decided that the Vermont General Assembly should respond

to *Baker's* mandate by creating a separate-but-equal institution to be known as civil unions. The most striking feature of the 8–3 vote was that not a single member wanted to circumvent the high court's decision. The three dissenters, in fact, felt that the committee had not gone far enough and that it should have pushed for same-sex marriage.<sup>43</sup>

This is not to say that the Vermont legislature was unanimous in its deference to the supreme court's ruling in *Baker*. A number of legislators were staunchly opposed to giving same-sex relationships the imprimatur of official sanction. And ultimately, the house vote was close: the Civil Unions Act was passed by a margin of 76–69.<sup>44</sup> It seems reasonable, though, to suggest that the attitudes and tactics of political elites in Vermont played a significant role in shaping the political system's response to a change in the structure of legal opportunities.

Certainly Beth Robinson and Susan Murray, the Vermont lawyers who initiated *Baker v. State* in conjunction with GLAD, thought so. They spent a full two years lobbying key legislators and engaging in other forms of political activism around same-sex marriage prior to filing a lawsuit. In fact, they turned down the opportunity to bring suit in 1995, believing that the political climate was not yet conducive to extending marriage rights to lesbian and gay couples.<sup>45</sup> Their primary vehicle for activism was the Vermont Freedom to Marry Task Force, which they helped form in 1995. The task force developed in reaction to the 1993 decision in *Baehr* and the early legislative backlash it provoked and explicitly drew on the rubric set forth by Lambda when it established the Marriage Project.

In this respect, the tactics of gay rights activists differed markedly in Vermont, Hawaii, and Alaska. Hawaii's *Baehr* was brought prior to any local political organizing around same-sex marriage. Such organizing only began after the 1993 decision, when the Hawaii legislature moved to amend the marriage statute to explicitly require opposite-sex couples. Recall as well that none of the national legal and political gay rights groups began mobilizing behind same-sex marriage until after the 1993 decision. And although Lambda recognized that *Baehr* was likely to stimulate a political backlash, most pro-same-sex marriage activism in Hawaii and around the nation was defensive in posture, as lgb activists tried to stymie attempts to enact mini-DOMAs.

Political activism in Alaska on behalf of same-sex marriage was likewise defensive. *Brause* was not litigated as part of a holistic effort to effect sociolegal change in Alaska. It was brought by a single gay male couple and a private lawyer. Gay rights activists in Alaska largely became

aware of the litigation only after the trial court had issued its decision and they had to scramble to try to deflect a political backlash.

While it seems reasonable to assume that the energy expended by gay rights activists in Vermont to lay the political groundwork for same-sex marriage paid dividends, it is important to recognize that the political terrain was somewhat more fertile in Vermont than in Hawaii or Alaska. Prior to 1998, all three states were considered to have relatively tolerant attitudes toward lgb people. Their legislatures were among the earliest to decriminalize sodomy, Hawaii's in 1972, Vermont's in 1977, and Alaska's in 1978. And none of them had what Bill Eskridge (1999) refers to as "no promo homo" laws, that is, laws designed to ensure that sex and AIDS education did not treat homosexual behavior as acceptable.

On the track of political acceptance of gay rights claims, however, Vermont and Hawaii outpaced Alaska. Alaska had not enacted a statewide gay rights law prior to the filing of a same-sex marriage lawsuit. Vermont and Hawaii had. In fact, they were among the earliest states to do so. Vermont's law was enacted in 1991 and was comprehensive in scope, protecting lesbians and gay men from discrimination in public and private employment, public accommodations, education, housing, credit, and union practices. Hawaii's law, passed in 1991, was more limited than Vermont's, prohibiting antigay discrimination only in public and private employment. These laws reflected different political cultures; they also reflected the varying electoral influence of lgb people. Lgb people have typically played a much smaller role in Alaskan elections than they have in elections in Hawaii and Vermont, where they constitute a not insignificant constituency for Democrats and, in the case of Vermont, Progressives.

In sum, the attitudes of political elites about same-sex marriage and the history of political acceptance of gay rights claims differed quite a bit in Alaska, Hawaii, and Vermont. The Alaska legislature was controlled by Republicans who were staunchly opposed to granting marriage, or any of its attendant rights, to same-sex couples. Even less controversial rights, such as the right to be free from sexual orientation discrimination in employment or public housing, had not yet been enacted in Alaska. Gay rights activists had done no political groundwork to soften up the legislature or the public with respect to same-sex marriage, and the lgb community played only a small role in electoral politics.

The political situation in Hawaii was somewhat more amenable to the notion of treating same-sex relationships as the legal equivalent of opposite-sex ones. The legislature was controlled by Democrats, but there was

a fissure between the house and senate leadership concerning the desirability of same-sex marriage and/or domestic partnerships. The house was much more hostile than the senate to extending marriage-like rights to same-sex couples, and this split forced a compromise. Although political groundwork concerning same-sex marriage had not been done prior to *Baehr*, the Hawaii legislature had passed a limited statewide gay rights law already, and the lgb community played a significant role in the Democratic electoral coalition.

The political situation in Vermont was more favorable still to the interests of those seeking to equalize the legal footing of same-sex and opposite-sex relationships. The legislature was, like Hawaii's, controlled by Democrats, but the leadership was much more consistently favorable to the prospect of extending marriage rights to same-sex couples. Activists had been working on this issue for years, building support both at the grassroots level and in the general assembly. And finally, Vermont was among the most progressive states in terms of its gay rights legislation, and the lgb community was actively involved in electoral politics.

## Conclusion

This chapter has used the issue of same-sex marriage to explore the effects of legal decisions on the real lives of lgb people.<sup>46</sup> As it has shown, "wins" in court do not translate simplistically into preferred public policy outcomes. In the case of Alaska, victory in the courtroom arguably damaged the sociolegal position of lgb people in the state; a prohibition on same-sex marriages is now enshrined into the state's constitution. Nothing short of a new constitutional amendment or a determination that Alaska's constitution violates the U.S. Constitution will remove it. This is a much higher hurdle to jump than the one same-sex couples faced prior to the litigation of *Brause*. In the case of Vermont, victory in the courtroom appears to have advanced the sociolegal status of lgb people in the state, albeit not as much as gay rights advocates had hoped. While same-sex couples cannot marry, they can enter into a civil union, which gives them all the state-level rights and responsibilities accorded to married couples.

In the case of Hawaii, victory in the courtroom in 1993 and in 1996 seems to have precipitated numerous shifts in public policy, several favorable to the interests of same-sex couples and several unfavorable to those interests. Same-sex Hawaiian couples may now become reciprocal

beneficiaries, as may opposite-sex pairs who are not legally permitted to marry. This accords them some important state-level benefits that they did not have prior to *Baehr*, although far fewer than those accorded to married couples. Hawaii's constitution now also contains an amendment allowing the legislature to reserve marriage to opposite-sex couples. Beyond Hawaii, *Baehr* inspired the passage of the federal DOMA and thirty-five state mini-DOMAs, which have placed significant new hurdles in the path of same-sex couples seeking to marry.

The notion that courtroom “wins” do not translate simplistically into favorable public policy is a vein that has been mined by other scholars (see especially McCann 1994; Rosenberg 1991). What I offer in this chapter is a way to conceptualize the relationship between legal decisions and public policy. Specifically, I argue that it is useful to think of legal decisions as creating moments of opportunity for a wide range of legal and political actors operating within specific legal and political contexts. Viewing legal decisions in this way offers a number of benefits. First, it highlights the fact that the process of legal reform is not autonomous but rather contingent on the interaction of a variety of institutional, cultural, and strategic factors. Thus similar legal decisions can be translated into very different public policies because of differences in the strategic choices made by various actors and/or differences in the specific legal and political contexts in which those decisions are interpreted. In the context of same-sex marriage, these differences included the available legal and cultural frames, the configuration of political and legal elites, and access to the formal institutional structure of the law.

Second, viewing legal decisions this way privileges neither structural nor behavioral analyses of legal reform. Instead it encourages us to examine the relationship between actors and the sociopolitical and legal institutions within which they operate. Third, it emphasizes the interdependence of law and politics. Legal decisions, after all, are commonly interpreted and implemented by political actors. This interdependence means that the opportunity created by shifts in the structure of legal opportunities is often mediated by the prevailing structure of political opportunities and vice versa.

Finally, viewing legal decisions as creating moments of opportunity bounded by the specific legal and political contexts in which they occur allows us to comprehend both the promise and the limitations of legal mobilization. The story of same-sex marriage litigation can be told in two different ways. From one perspective, seven people in Hawaii (the six plaintiffs and Dan Foley, their lawyer) started a revolution. By bring-

ing a suit whose legal merits were convincing to the majority of the Hawaii Supreme Court, these seven individuals rocketed same-sex marriage to the center of the movement for gay rights. They fomented widespread change in the legal framing of same-sex marriage and inspired same-sex couples in other states, most notably Vermont, to stand up and assert their “right” to marry each other. They likewise fomented widespread change in the cultural framing of marriage by forcing the issue of same-sex marriage into mainstream consciousness. Prior to *Baehr*, the issue of same-sex marriage remained confined to the gay and lesbian press. Since 1993, however, the subject has been covered by every major U.S. newspaper and newsmagazine, particularly within the past few years. In addition, a number of highly rated television shows have dealt with the topic in recent years.<sup>47</sup> Moreover, these depictions have generally been sympathetic.

That cultural frames have begun to shift is also suggested by public opinion data. Well over half of the American population continues to oppose same-sex marriage, but the numbers are beginning to fall. Polling by Princeton Survey Research Associates, for example, shows about a five-point increase in the percentage of Americans favoring legally sanctioned same-sex marriages in the years between 1994 and 1998. Polling by Yankelovich Partners reveals a six-point increase in the years between 1989 and 1998. Polling by Gallup between 1996 and 2000 shows a seven-point increase. These numbers are not substantial, but they do suggest that attitudes about same-sex marriage are beginning to soften.

Litigation and its aftermath also seem to have provoked religious groups around the nation to seriously consider the subject of same-sex marriage. Although many denominations have issued statements opposing the right of same-sex couples to marry, others have proclaimed their support.<sup>48</sup> Many churches and synagogues across the nation now perform religious ceremonies for same-sex couples, often referred to as holy unions. It is important to note that this movement in religious attitudes toward same-sex marriage followed rather than preceded *Baehr*. It is at least plausible to suggest that these changes are a by-product of same-sex marriage litigation and the public conversation it engendered.

The story of same-sex marriage litigation can also be viewed in a dimmer light. From this perspective, winning legal concessions in a politically hostile environment may be less than useless; it may be actively harmful to a social movement’s sociolegal goals. As many scholars have noted, there is often a substantial gap between the promises of legal reform and its actual impact (see especially Canon and Johnson 1999; Horowitz 1977;

Rosenberg 1991). The most common reasons cited for this gap are the lack of enforcement power of the courts and its lack of independence from the other branches. This was certainly the case in Alaska, Hawaii, and Vermont. In all three states, the legislatures were able to take legal decisions and refashion them to their liking. Scholars have also noted the not insubstantial costs of litigating and have suggested that litigation competes with, and diverts resources from, other potentially more useful forms of activism (see McCann 1986; Rosenberg 1991; Scheingold 1974). This has certainly been the case with litigation over same-sex marriage. Gay rights activists across the nation were forced to devote their energies and resources to the struggle for same-sex marriage in the aftermath of *Baehr*, if only to attempt to deflect political backlash. *Baehr*, in effect, forced the larger movement for gay rights to fight a battle it had not chosen and exacted a great political cost: the passage of marriage defense acts in Congress and thirty-five states.

My point here is not to draw conclusions about the wisdom of pursuing same-sex marriage through the courts. It is simply to claim that viewing legal decisions as creating moments of opportunity bounded by the specific legal and political contexts in which they occur allows us to examine both the promise and the limitations of mobilizing the law on behalf of sociolegal goals. In the concluding chapter, I examine this subject further.