

Hawaii Justices Open Door to Legalizing Gay Marriages

■ **Law:** State high court calls ban unconstitutional and orders a trial. Ruling stirs debate across U.S.

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Picture this: Two lesbians fly to Hawaii and return to the mainland a week later, tanned—and wedded, official spouses under island law.

A Hawaii court case has pitched that scenario into the realm of possibility, opening the door for Hawaii to become the first state to legalize same-sex marriages.

The mere prospect of such a fundamental change in the concept of marriage is already sending tremors across the Pacific, spawning legislation and talk of constitutional amendments to block recognition of gay matrimony.

For if gay men and women gain the right to marry, they will not only attain access to a host of privileges—from tax deductions to inheritance rights—now beyond their reach, they will win a hugely symbolic stamp of mainstream legitimacy as well.

"What we're talking about to a large degree is Newt Gingrich's worst nightmare, recognition of the family as being love and not an Ozzie and Harriet definition of what it is," said Robert Bray of the National Gay and Lesbian Task Force.

Precisely for those reasons, Bray and other gay activists expect a tsunami-size reaction if Hawaii officially sanctions same-sex unions.

Ironically, all this is unfolding around an issue that has never been a top priority in the gay rights movement; nor for that matter, have activists even uniformly agreed that it is worth pursuing.

But whether the nation is ready or not for Bobs and Bills and Kathys and Sues to say "I do," the Hawaii Supreme Court is whistling the wedding tune.

The court, in a stunning 1993 decision, revived a lawsuit filed by a gay male couple and two lesbian couples who were denied marriage licenses. Ruling that the denial amounted to sex discrimination—explicitly forbidden in Hawaii's state Constitution—the justices ordered the case back to the lower courts for trial,

where "compelling state interests" will have to be proved to uphold the same-sex marriage ban.

Legal experts say that is one of the toughest legal standards, rarely met except in cases of national security or public safety. Whatever the trial outcome, the case is expected to return to the state Supreme Court for a final ruling within the next two years.

Citing the importance of procreation, the Hawaii Legislature weighed in last year with a law restricting marriage to a man and a woman, but that does not bind the court. The legislation also created a commission to determine if at least some marriage rights and benefits should be extended to gay couples.

University of Hawaii law professor Jon Van Dyke said the only thing likely to stop the Hawaii Supreme Court from ultimately legalizing same-sex marriages would be the enactment of a comprehensive statewide domestic partnership law according gays substantial benefits similar to those granted married couples.

Either way, "It will be revolutionary by mainland standards," observed Dan Foley, the couples' attorney.

And the mainland is watching. Sweethearts since their New Jersey high school days, Kevin Notre and Don Korotsky of West Hollywood have already informed their families that they will be hopping the plane to Hawaii if gay marriages become the law there.

"We've been together since 1978, and as friends and relatives have gotten married, we felt left out," Notre said. "They have a lot of benefits we don't and a lot of protections."

"The government says my love is valueless," he continued. "It's very frustrating. It doesn't exist [legally]. And we do exist."

While Notre and his partner are planning their island honeymoon, opponents of gay marriages are already at work.

A bill forbidding recognition of same-sex marriages was whisked through the Utah Legislature earlier this month. Alaska legislators have introduced a proposal limiting marriage to male-female couples.

In South Dakota, legislation banning gay marriages died in the Senate recently on a procedural vote after passing the House.

California has, since 1977, defined marriage as between a man and a woman.

Regardless of such legislative efforts, however, the pivotal battle will probably be a judicial one: The courts will be asked to decide whether other states are obliged to recognize Hawaii same-sex marriages under federal constitutional requirements that states observe one another's official acts.

Anticipating that court fight, the Rev. Louis Sheldon of the Anaheim-based Traditional Values Coalition said same-sex matrimony in Hawaii could prompt a drive to prevent its recognition by amending the U.S. Constitution. "We're looking at our legal options," said Sheldon, whose group is affiliated with 31,000 churches nationally. "This is a major issue with all our supporters."

Gay marriages, Sheldon said, are simply a political steppingstone for homosexuals. "What they really want is acceptance and that's something we can't give to them."

At the Washington-based Family Research Council, cultural studies director Robert Knight says that opening marriage to same-sex couples would strike at the heart of the institution.

"The very definition involves the union of two sexes. That's the whole point of marriage," said Knight, who is preparing an affidavit in the Hawaii case. "Equating a homosexual relationship with what Mom and Dad do devalues the whole concept of marriage."

However diminished by 50% di-

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orce rates and prenuptial agreements, marriage occupies a central place in the American psyche. Of all the items on the gay rights list, same-sex marriages thus promise to be among the prickliest.

"This just isn't going to help gays," Knight said. "The idea of Joe and Bill up there kissing at the altar just does something to most people. . . ."

Some opinion polls have shown a majority of the public supports giving gay partners some of the benefits associated with marriage, such as health insurance and social security. Legally sanctioned gay marriages, nevertheless, are strongly opposed.

"You're hitting a chord," said James Brundage, a University of Kansas legal historian and expert on the legal regulation of sexuality. "[People] think of marriage as something sacred, at least in some sense."

For all its emotional and religious meanings, marriage in this country is basically a civil institution of legal obligations, rights and privileges that protect and support the family.

In Hawaii, married couples enjoy about 60 rights and benefits. They range from the trivial, such as discounts on hunting licenses, to such crucial matters as child custody, survival benefits and the right to sue over the wrongful death of a spouse.

Domestic partnership programs have been adopted in more than 30 cities (including Los Angeles, Laguna Beach and West Hollywood)

and counties across the nation, as well as in the state of Vermont. But other than extending spousal insurance benefits to the partners of unmarried municipal—or in the case of Vermont, state—employees, such programs are largely symbolic in value.

Likewise, California legislation vetoed last year by Gov. Pete Wilson and reintroduced this session would allow unwed couples to register as domestic partners, but would have a very limited impact, affecting only such things as the assumption of conservatorships and hospital visitation.

"We use marriage as a gateway for so many benefits in our society that, by forbidding us the benefits that come with marriage, you are essentially discriminating economically against the whole community," said J Craig Fong, who until recently, headed the Los Angeles office of Lambda Legal Defense and Education Fund, a gay rights legal group that is helping Foley with the Hawaii case.

And, according to U.S. Supreme Court opinions, marriage is also a fundamental right.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," the court wrote in a landmark 1967 decision striking down state prohibitions on interracial marriage.

But with the exception of the Hawaii decision, lower courts have consistently dismissed legal challenges to same-sex wedding prohibitions, ruling that marriage is by definition and tradition a union between a man and a woman.

Citing the state Constitution's equal protection clause, the Hawaii Supreme Court found such reasoning "circular and unpersuasive."

As the courts have debated the matter, a different kind of discussion has taken place in the gay community.

Some lesbian feminists in particular have argued that gay men and women would be better off expanding the definition of family rather than embracing an institution that is, from their perspective, rooted in inequality.

"I would like us to move to an unhooking of a variety of benefits from the institution of marriage," said Nancy Polikoff, an American University law professor. "It's a flawed institution and there isn't any way that gay and lesbian couples can remedy that flaw."

Lorri L. Jean, executive director of the Los Angeles Gay and Lesbian Community Services Center, is in the same camp, but, she says, it's the minority view. "I think the vast majority of people in our community would love to be able to get married."

After all, Fong said: "Whether you are gay or straight . . . you grow up in America and are taught, from day one, that the ultimate thing is get a ring and get married."

By that measure, some maintain that gay marriages are actually a very conservative move, firmly planting homosexuals in traditional ground.

Over the long view of Western history, scholars say, government involvement in marriage is relatively recent, emerging with the rise of the modern state in the 1500s. Prior to that, marriages were either religious or simply private, domestic celebrations.

In a book published last year, the late Yale University historian John Boswell wrote that those religious ceremonies included blessings for same-sex couples in the early Catholic Church, a claim disputed by many church historians. USC anthropology professor Walter Williams also cites evidence of the historical acceptance of same-sex unions within Native American and non-Western cultures.

Existing in some form for thousands of years in every society, marriage "was fundamentally a way to protect property and children," said Andrew Cherlin, a public policy professor at Johns Hopkins University who has written extensively on marriage. "Marriage was a way that men . . . could ensure that no one else fathered children by their wives and it was the way men could control the labor of the children in the household."

The notion of marriage as a romantic partnership, sealed by love and companionship rather than economics, has taken hold only in the last century. At the same time, there has been a trend toward deregulation as laws dealing with adultery, interracial couples and contraception have fallen by the wayside in recent decades.

Viewed in that context, same-sex marriages are an extension of the evolving romantic ideal. "In a way, gay marriage is just taking up those themes that heterosexuals have been advancing about marriage for the last 50 years," Cherlin said.

Indeed, the idea of official same-sex unions has become ho-hum in Scandinavia. Since 1989, Denmark, Norway and Sweden have all enacted partnership laws allowing same-sex couples to formally register with the government and receive most of the legal benefits of marriage. The major exception bars them from adopting children.

Gay rights activists are anticipating a far different reaction in the United States, and some are worried that a favorable Hawaii decision may do their movement more harm than good.

"Now we're at a real tug of war stage" over gay rights, said Los Angeles attorney Thomas F. Coleman, a longtime advocate of domestic-partner rights. "This same-sex marriage thing is throwing gasoline into the fire and it's likely to explode."

Such qualms notwithstanding, gay groups are trying to ready themselves, hoping to avoid a repeat of the beating they took during fray over gays in the military.

"What concerns us now is what happens after we win," Fong said.

The central battle will concern whether other states must recognize Hawaii's same-sex marriages under the federal Constitution's full faith and credit clause, which requires states to honor one another's laws and official acts, including marriage.

The exception—if a state's acts violate important public policy of another—will surely be invoked by opponents, especially in states with anti-sodomy laws. The matter could ultimately wind up before the U.S. Supreme Court.

Foley, the attorney for the Hawaii gay couples, acknowledges that a victory for his clients will produce a backlash. "So excuse me," he said. "We shouldn't ask for rights because someone may not like it?"