I. INTRODUCTION

When the Hawaii Supreme Court tentatively ruled that the state's bar against same-sex marriage was a denial of equal protection under the Hawaii Constitution it shook many politicians and religious leaders to their cores.[1] They, as well as the public in general, were just coming to accept open gay men and lesbians, their activism for pro-

1. On May 5, 1993, the Hawaii Supreme Court ruled that the Hawaii marriage statute's prohibition of same-sex marriage discriminated on the basis of sex, and therefore, presumptively violated equal protection principles under Hawaii's constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The case was remanded to the trial court to determine if the state could prove a compelling state interest to justify the discrimination. The trial judge, Honorable Kevin S.C. Chang, held in a carefully reasoned opinion that the state failed to demonstrate a compelling interest in precluding same-sex marriages. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The case was then appealed again to the Hawaii Supreme Court. But the state legislature in 1997 passed a bill placing a referendum on the ballot amending the Hawaii Constitution to give the legislature the authority to restrict marriage to opposite-sex couples. 1997 Haw. Sess. Laws, House Bill 117. The Hawaii referendum was approved by the voters on November 2, 1998, while the case was still pending before the Hawaii court. HAW. CONST. art. I, § 23. Subsequent to the vote, the court, on December 9, 1999, reversed the decision of the trial court stating: "The marriage amendment validated HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples." Baehr v. Miike, 1999 Haw. LEXIS 391 at *6, 994 P.2d 566 (Haw. 1999).

tection against employment discrimination and their call for the repeal of consensual sodomy laws. The very idea that lesbians and gay men had the same human desires for romantic love, formation of marital partnerships, and raising children was too much for many to accept. After all, isn't homosexuality just about sex? Instead of viewing the Hawaii case and what it represented as a demonstration of the growing integration of the gay community into the norms and mores of the larger culture, it was somehow transformed into a threat to heterosexual marriage. In order to prevent whatever was about to happen in Hawaii from crossing the Pacific, Congress and President Clinton rushed into action and passed the Defense of Marriage Act (DOMA). It wasn't marriage, however, that needed defending; it was and is the view that there is full citizenship for some and less citizenship for others. In the eyes of many federal and state officials, liberty for gay people and their families was not to be allowed to develop; it was to be constrained. Once before in American history, the hard-fought battle to achieve liberty was prematurely crushed by the Southern states' enactment of what came to be known as the infamous Black Codes. In that time, the federal government worked as an ally of black people to abolish the Codes, though it would take another hundred years to end racial bias in the law. American citizenship, we learned over many difficult years, could not be less than full—or so we thought. Somehow this lesson, in the eyes of many, has no relevance to gay people.

Before beginning our analysis, it is useful to consider the concept of marriage itself because it is integral to our understanding of family.[2]w

financial and emotional needs of one another. Romantic love in our times and sexual relations are typically important constituents of the marital union as well as a desire to raise children together, however they are not requisites. Having children may represent our grasp for the brass ring of eternity, but we have come to recognize that giving love and providing values to the children in the families we make and choose is what is vital—not the mere transfer of genes.

All states allow opposite-sex couples to express a caring, interdependent commitment through the formality of marriage. There was, of course, a time in our history when black couples as well as interracial couples were excluded from marriage. Fortunately, we came to understand the wisdom that race must have no role in marriage qualifications. Today, public opinion excludes only same-sex partners from the marital relationship.[3] In understanding the breadth of permitted marriages today from young to elderly, from fertile to infertile, from desiring children to deciding not to have children, and from love to convenience, there is nothing intrinsically unique in heterosexual marriages that warrants exclusion of gay and lesbian couples from the same legal status. We, as a society, have come to understand that race is one of the small variations in our human family. Instead of fearing this difference, we now embrace it. We have yet to understand sexual orientation in this same way. As this article proceeds with its analysis below, the reader will want to ask whether the wisdom gained in dealing with race has something to teach us in dealing with same-sex relationships.

3. Of course, I am not considering age and close blood relations which apply to all classes of citizens. In a February 2005 CBS News/NY Times nationwide poll, 57% of those polled favored either legal marriage or civil union recognition for same-sex couples, whereas 41 % were opposed to any legal recognition, and 2 % were unsure. PollingReport.com, *CBS News/New York Times Poll*, at http://www.pollingreport.com/civil.htm (last visited Jun. 5, 2005).