2009

The Same-Sex Future

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(reviewing William N. Eskridge Jr. and Darren R. Spedale, Gay Marriage: For Better or for Worse?
What We've Learned from the Evidence (2009); Evan Gerstmann, Same-Sex Marriage and the
Constitution (2009); Robin West; Marriage, Sexuality and Gender (2009) and Douglas Laycock,
Anthony R. Picarello Jr., and Robin Fretwell Wilson, Same-Sex Marriage and Religious Liberty:
Emerging Conflicts (2009)).
The Same-Sex Future


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Just four years ago, political pundits were blaming gay rights activists and the Massachusetts Supreme Court for costing Democrats the 2004 presidential election. In 2003, the Massachusetts court had declared, in *Goodridge v. Department of Public Health*, that denying marriage to same-sex couples violated that state's constitution, marking the first time a state supreme court recognized the right of same-sex couples to marry. The decision touched off a widespread backlash; in 2004, eleven states passed referendums amending their constitutions to outlaw same-sex marriage. In 2006, another seven states followed suit. Nor was this a short-term phenomenon. During the last decade, forty-one states have passed statutes banning recognition of same-sex marriages, and twenty-six have amended their constitutions to that effect.

Yet in the last eight months, the tide appears to have dramatically turned. In October 2008, the Connecticut Supreme Court declared that denying marriage licenses to same-sex couples was unconstitutional discrimination on the basis of sexual orientation, even though Connecticut law already granted same-sex couples all the legal benefits and rights of marriage under the label of "civil unions." In April 2009, the Iowa Supreme Court unanimously ruled that Iowa's state ban on same-sex marriage denied equal protection of the law to gays and lesbians. The same month, the Vermont legislature enacted a law to make same-sex marriages legal, overriding the governor's veto. Maine enacted a same-sex marriage law on May 6, 2009. On June 3, New Hampshire followed suit. In New Jersey, the Supreme Court has required the state to extend to same-sex couples all the benefits and rights enjoyed by married couples, and the legislature is considering extending marriage itself to such couples. And the New York State Assembly has passed a bill to make marriage available to same-sex couples. The bill has the support of Governor David Paterson, though its chances of passage in the Senate remain uncertain.

A similar pattern is evident in Scandinavia and other parts of Europe. In 1989, Denmark became the first country in the world to grant official recognition to gay and lesbian couples as domestic partners. In
2001, the Netherlands became the first country to extend marriage to same-sex couples. Today, same-sex couples can be married in the Netherlands, Belgium, Spain, Norway, and Sweden, and can register their partnerships and obtain many of the benefits granted to married couples in the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland, and the United Kingdom.

Despite the dramatic recent progress in the United States, however, there remains substantial and heated public opposition. When the California Supreme Court declared in May 2008 that the state's constitution required recognition of same-sex marriages, the voters promptly amended the state's constitution via referendum to ban same-sex marriage. On May 26, 2009, the California Supreme Court upheld that amendment as a legitimate exercise of the people's referendum power, but preserved the 18,000 gay marriages that had been entered into during the interim. (Gay marriage proponents say that they hope to repeal the prohibition by referendum in the next election.) In Maine, opponents of same-sex marriage have vowed that they will seek to overturn the actions of their state representatives by popular referendum. Polls regularly report that a majority of the country is committed to the view that marriage should be limited to the union of a man and a woman, though support for same-sex marriage has increased in recent years. Perhaps reflecting the polls, both Barack Obama and Hillary Clinton opposed gay marriage in the 2008 election (though each supported civil unions).

1.

What explains the apparent trend toward legal recognition of same-sex marriage or civil unions? And how should we understand the sharp discrepancy between the law and the politics of same-sex marriage? Not so long ago, there was no discrepancy. As a legal and political matter, same-sex marriage was an oxymoron, or as some opponents have put it, a "moral impossibility." Hostility to the concept was widespread and blatant. In 1971, when Michael Wetherbee of the Minnesota ACLU argued that a gay couple had the right to marry under that state's constitution, one judge on the Minnesota Supreme Court actually turned his chair around and refused to face Wetherbee as he delivered his argument. Not a single judge asked a question. The court's unanimous decision denying the claim cited the book of Genesis to support its conclusion that marriage is properly limited to the union of a man and a woman.

A decade later, a federal judge ruled that a same-sex couple granted a license to marry by a county clerk in Boulder, Colorado, could not seek immigration benefits accorded to spouses. He reasoned that the definition of marriage had its origins in canon law, and "canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships." When a circuit court in Hawaii declared a state ban on same-sex marriage unconstitutional in 1996, the voters of Hawaii responded by amending their constitution to overturn the ruling. The same year, the United States Congress passed the Defense of Marriage Act, designed to ensure that same-sex marriages recognized by individual states would not be entitled to any federal marriage benefits, and could be disregarded by other states.

In 1999, however, the Vermont Supreme Court ruled that the state's refusal to grant the benefits associated with marriage to same-sex couples violated the clause of its state constitution that prohibits discrimination in the allocation of state benefits. The court left the precise form of remedy to the Vermont legislature, which responded with a compromise of sorts—it reserved marriage for opposite-sex couples, but created a new category, "civil union," that gave same-sex couples the same rights and benefits that married couples enjoyed.

Gay rights advocates have recorded an impressive string of court victories since then in New Jersey, Massachusetts, California, Connecticut, and Iowa. These decisions break important new ground, but what is most striking about them is how weak the arguments against gay marriage are; so much so that it
is difficult to see how courts could ever have ruled otherwise. Three arguments predominate: (1) the state is responsible for preserving the traditional conception of marriage; (2) limiting marriage to heterosexual couples furthers the state's interests in promoting procreation and/or healthy childrearing; and (3) the state has a legitimate interest in refusing to condone homosexual behavior that it deems immoral.

The first argument, based on preserving tradition, is circular: it seeks to justify the limitation of marriage to unions between a man and a woman on the ground that marriage always has been limited to unions between a man and a woman. As Judge Judith Kaye of the New York Court of Appeals has written, "The justification of 'tradition' does not explain the classification; it merely repeats it." In its gay marriage decision, the Connecticut Supreme Court explained that courts must look behind tradition to "determine whether the reasons underlying the tradition are sufficient." Tradition itself is not a justification for discrimination. After all, women were traditionally excluded from jury service and many professions, and blacks were traditionally denied the vote and relegated to segregation.

The fact that the tradition of marriage has been shaped by religious doctrine does not strengthen the objection. In fact, religious views on this question, like on so many others, are deeply divided. Some religions hold that marriage must be limited to the union of a man and a woman. But other religions, such as Buddhism, Unitarianism, and Reform Judaism, hold just as deeply that individuals should be free to marry those of their own sex. Under our Constitution, the state has no legitimate interest in endorsing one religious view over the other.[5]

A variant of the tradition argument maintains that the state has a legitimate interest in preserving the institution of marriage. But how exactly would extending the right to marry to same-sex couples undermine marriage? It would certainly change the institution, in the sense of including couples that were traditionally excluded. But the institution of marriage has already changed dramatically over the years. As Andrew Sullivan has argued:

> If marriage were the same today as it has been for 2,000 years, it would be possible to marry a twelve-year-old you had never met, to own a wife as property and dispose of her at will, or to imprison a person who married someone of a different race. And it would be impossible to get a divorce.[6]

Certainly there is reason to be concerned about the state of marriage today. Marriage rates are down, and the numbers of single-parent households and out-of-wedlock births are up. But as Yale law professor William Eskridge and Darren Spedale argue in *Gay Marriage: For Better or for Worse?*, this is more likely attributable to changes demanded by heterosexual couples than to any threat posed by same-sex marriages. The diminishing importance of marriage may well be connected to the fact that it is both legal and socially acceptable to live together outside of marriage, to have sex and bear and raise children outside of marriage, and to end a marriage through no-fault divorce.

But there is no reason to believe that granting marriage to same-sex couples who commit themselves to long-term relationships has in any way caused, or will do anything to accelerate, these trends. As Eskridge and Spedale remark, opposing same-sex marriage on this ground "would be like France's maintaining a Maginot Line against Luxembourg while the Nazis sip champagne in Paris."

Indeed, if one were truly committed to preserving the institution of marriage, it would make more sense to include same-sex couples who seek to become part of the institution. Opposing same-sex marriage is likely to lead to the proliferation of alternatives, such as civil unions and domestic partnerships, and those "marriage-lite" alternatives might then prove attractive to heterosexual couples, further reducing the centrality of marriage.

2.
When states are pressed to articulate the reasons underlying their interest in preserving "traditional" marriage, they most often claim that they seek to promote procreation and/or the welfare of children. Unlike preserving a discriminatory tradition for its own sake, these are unquestionably legitimate interests. The problem is that they seem wholly unrelated to a law that allows virtually any opposite-sex couple and no same-sex couple to marry.

As to procreation, no state limits marriage to couples who intend to have children, or denies marriage to couples who are infertile. Moreover, same-sex couples can and increasingly do have and raise children, through such means as in vitro fertilization, sperm donors, surrogate mothers, and adoption. Census data suggest that nearly 40 percent of same-sex couples were raising children in 2000. There is no reliable evidence that children of same-sex couples are worse off than children of opposite-sex couples. Indeed, many states that bar same-sex marriage permit same-sex couples to adopt and to take in foster children. Thus, denying the benefits of marriage to same-sex couples is not likely to advance procreation or children's well-being in any rational way.

The third principal justification advanced for denying marriage to same-sex couples asserts that homosexual sex is immoral, and that the state has a legitimate interest in withholding its imprimatur from conduct that society deems immoral. Some courts and gay rights advocates respond by reasoning that, like "tradition," "moral disapproval" standing alone is simply an insufficient justification for discrimination. In support of this proposition, they cite Lawrence v. Texas, the 2003 Supreme Court decision that declared unconstitutional a criminal law prohibiting homosexual sodomy. The Court in Lawrence reasoned that at least with respect to consensual sexual relations among adults, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." As Professor Evan Gerstmann of Loyola–Marymount College notes in Same-Sex Marriage and the Constitution, the Lawrence decision "arguably undercuts one of the best known reasons for banning same-sex marriage: moral disapproval of gay and lesbian relationships."

But Gerstmann uses the word "arguably" advisedly. The court in Lawrence took pains to note that whether the state could preserve marriage for opposite-sex couples was a different question. As Georgetown law professor Robin West acknowledges in Marriage, Sexuality, and Gender, "there is a difference between criminal bans on gay conduct, on the one hand, and the state facilitation of gay marriage, on the other." The state regularly makes choices about what to promote or endorse based on judgments about morality. Indeed, much of public education would be impossible if state officials could not make choices based on morality about what should, and should not, be taught. And while the Supreme Court has recognized a constitutional right that bars criminal prohibition of abortion, the Court has permitted the state to favor childbirth over abortion on moral grounds by providing health insurance coverage only for childbirth.

Other courts and commentators have rejected the moral disapproval argument by pointing to recent legal reforms as evidence that the state in question does not in fact officially disapprove of homosexual conduct. Thus, the California Supreme Court cited state laws prohibiting discrimination on the basis of sexual orientation and repealing criminal sodomy penalties to support its conclusion that "this state's current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals." The Massachusetts and Vermont Supreme Courts cited similar developments in their respective state laws to reject claims that denying benefits to homosexual couples furthered the states' disapproval of sexual relations between homosexuals.

3.

While the moral disapproval argument has fared poorly in the courts, it still seems to have traction in
American politics—and may well be one of the reasons for the disjuncture between the legal case for same-sex marriage and political resistance to it. West argues that same-sex marriage proponents should not rule morality out, as the courts have done, but take morality on. She convincingly articulates an affirmative moral case that the "good" of marriage—fostering intimacy and caregiving for dependents—applies equally to homosexual and heterosexual couples. In addition, she argues, gay sex is good for the same reasons that heterosexual nonprocreative sex is good—it "contributes to intimacy, builds trust, encourages openness, and shared responsibility.... It's not called 'making love' for nothing."

In politics, the moral argument is complicated by religious overtones. Judeo-Christian conceptions of permissible and impermissible sexuality have a profound influence on public attitudes toward marriage. A poll taken shortly after the Goodridge decision of the Massachusetts Supreme Court found that 53 percent of respondents considered marriage principally a religious matter, and only 33 percent considered it principally a legal matter. Among the former, there was overwhelming opposition to the concept of gay marriage; among the latter, a majority favored recognition of same-sex marriage.

Recent court decisions have stressed repeatedly that they address only the question of "civil marriage," a secular institution created and defined by the state, and leave untouched religions' freedom to define and implement "religious marriage" in their own terms. But as University of Michigan law professor Douglas Laycock argues in his essay in Same-Sex Marriage and Religious Liberty, the problem is more deep-rooted:

Part of the reason the same-sex-marriage issue is so intractable is that it arises in the context of our most fundamental and long lasting breach of separation of church and state.... In marriage, legal and religious institutions are thoroughly combined.

Laycock suggests that the marriage debate might be considerably less heated if religious and civil marriage were more clearly separated. To that end, he proposes that "civil marriage" should be performed by state officials only, and should determine all the civic benefits, rights, and duties that accompany marriage. "Religious marriages" would be performed by clerics, pursuant to their own rules and regulations, and would have no effect on state laws. Over time, these separate rituals and rules would reinforce the message that civil marriage and religious marriage are distinct institutions.

West offers a similar prescription, proposing that marriage reform advocates adopt a strategy aimed not at extending marriage to same-sex couples, but at replacing marriage with civil unions for all. She believes that such a legal development would help make clear the purely secular nature of the state's interest in long-term committed relationships, and would free the issue of the religious features that make reform so controversial. She envisions a future in which civil unions would be available to any two committed persons, without regard to sexual orientation. Marriage would also remain available, but West hopes that couples of all orientations would increasingly choose civil unions over marriage precisely because the former would be more consistent with notions of fairness and justice.

In addition, as West notes, there are many reasons to be critical about the institution of marriage, which has permitted society to shirk collective responsibility for dependent care by relegating it to the private sphere, where women shoulder a disproportionate share of the burden. A shift to civil unions might create an opportunity to reshape the institution to ameliorate some of marriage's negative effects; and including same-sex couples might help to undermine the stereotyped conceptions of gender that contribute to marriage's flaws.

West and Laycock may be correct as a theoretical matter that taking the religion out of civil marriage would be a marked improvement. But as a practical matter, there is no political constituency either for replacing marriage with civil unions or for separating civil and religious marriage. As long as marriage remains the preferred option, gay rights advocates are likely to insist that relegating same-sex couples to civil unions denies them equal respect, and with good reason. And even if one could
identify a constituency for separating civil and religious marriage, such a campaign would very likely provoke at least as much passionate opposition as the same-sex marriage movement has.

In *Gay Marriage*, Eskridge and Spedale also advocate a strategy focused on civil unions, although on more pragmatic grounds. Citing an article by Professor Kees Waaldjik, who helped develop the strategy behind the Netherlands' recognition of same-sex marriage, Eskridge and Spedale argue that the best way forward is incremental. On this view, states (or nations) are likely to recognize same-sex marriage only after a step-by-step process in which they first eliminate laws criminalizing homosexual sodomy, then amend anti-discrimination laws to cover sexual orientation, then extend some government employment–related benefits to same-sex partners of civil servants, and then enact a domestic partnership or civil union law. Where advocates press for same-sex marriage without that incremental foundation, they are likely to fail, or worse, to provoke a backlash, as did the pro-same-sex-marriage judicial decisions in Hawaii in the 1990s.

The recent state court decisions recognizing the right of same-sex couples to marry support the incremental thesis. As noted above, the California and Vermont courts relied on the history of gay rights legal reforms within their states to counter claims about moral disapproval of homosexuality. And in Connecticut and California, the fact that the legislature had already extended virtually all the benefits and rights of marriage to same-sex couples under the rubric of civil unions or domestic partnerships was crucial to the legal victories. Because there were no tangible differences between marriages and nonmarriage partnerships, both states found themselves defending a law that seemed to serve no purpose other than the patently illegitimate one of relegating same-sex couples to a second-class status.

The current same-sex marriage strategy in the United States is also incremental in a geographical sense, proceeding state by state rather than at the federal level. Gay rights advocates have made a conscious effort to keep the issue away from the federal courts, preferring to develop their arguments on state constitutional grounds or in state legislatures in order to shield them from review by the conservative United States Supreme Court.

Accordingly, these groups were widely critical of the recent lawsuit challenging California's Proposition 8 on federal constitutional grounds, even though it was filed by the team of Theodore Olson and David Boies, the lawyers who represented Bush and Gore, respectively, in the legal battle over the 2000 election. Advocates worry that the national political climate is not yet ready for the recognition of same-sex marriage. No federal gay rights bill has ever passed Congress. Discrimination on the basis of sexual orientation is not prohibited by federal law. And the most recent federal law addressing the issue, the 1996 Defense of Marriage Act, expressly limits federal marriage benefits to opposite-sex couples. During the election campaign, President Obama promised to repeal the Defense of Marriage Act and to end the military's "don't ask, don't tell" policy, but he has not taken initiative on either matter yet.

Olson and Boies may well have considered the legal arguments against gay marriage to be so weak as to practically invite a federal constitutional challenge. And California may be the best venue for such a suit, precisely because, as noted above, the state affords same-sex couples all the rights and benefits of marriage, leaving no justification for denying them the label "marriage" other than the bare desire to relegate gays and lesbians to a second-class status—a desire the Supreme Court condemned as illegitimate in both *Lawrence v. Texas* and *Romer v. Evans*, the 1996 ruling invalidating a Colorado anti–gay rights referendum. Still, the stakes are extremely high, and the risks of an adverse decision from the Supreme Court are considerable. Incrementalism would have been the smarter strategy.

Each incremental victory at the state level, moreover, helps to prepare the ground for eventual broader reform, for at least two reasons. First, opposition based on the contention that same-sex marriage is an oxymoron is plausible only so long as there is no such thing as same-sex marriage. Now that thousands of same-sex couples have been married, no one can claim that same-sex marriage is
simply unthinkable. Second, just as the increased visibility of gays and lesbians over the last generation has reduced fear and prejudice born of ignorance, so the fact that marriage has been extended to same-sex couples in several states and nations without any deleterious consequences is likely to undermine opposition based on fear of the unknown. While a majority of all Americans still oppose gay marriage, 57 percent of Americans under forty support it; time is on gay marriage's side.

Eskridge, Spedale, and West also argue that the best forum for achieving lasting victory is legislatures, not the courts. That seems less clear. There is no question that those seeking change cannot restrict their advocacy to the courts; a multitiered strategy is critical. But the recent court decisions suggest that it would be wrong to write off the judiciary. In view of the polls showing continued popular resistance to gay marriage, progress in the political realm is likely to be difficult. At the same time, the patent weakness of the legal arguments against recognizing same-sex marriage suggest that courts may be a more receptive forum. Polls show much less resistance to civil unions, and in some instances, majority support for that alternative. Thus, a state-by-state strategy that pursues civil unions politically, and same-sex marriage through the courts, may be most likely to succeed.

Moreover, as Gerstmann argues, judicial decisions can serve as a catalyst for political change. The first year after the Massachusetts Supreme Court approved same-sex marriage, a constitutional convention in Massachusetts voted 105–92 in favor of an amendment barring same-sex marriage. Massachusetts law requires such a vote two years in a row, however, and the next year, the amendment was voted down, 157–39. In 2007, the amendment again was defeated, 151–45. Today, 56 percent of Massachusetts voters approve of same-sex marriage. The supreme court decision took some time to sink in, but seems to have played a positive role in changing the political landscape.

As the United States Supreme Court has recognized, the history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." Just as the institution of marriage survived its extension to couples of different races in the 1960s, so it will survive its extension to couples of the same sex in the twenty-first century. If the inclusion of same-sex couples changes the institution, it is likely to be for the better, rendering it more consistent with ideals of fairness. For marriage itself, then, and more important for the constitutional principle of equality, the only just result is to accord equal dignity and respect to all those who choose to enter long-term, committed family relationships, irrespective of their sexual orientation.

—June 4, 2009

Notes

[5] Indeed, Ronald Dworkin has argued that because marriage, like religion, is an institution shaped by history but continually subject to reshaping by those who take part in it, we should be as intolerant of state laws freezing the meaning of marriage as we would be of state laws freezing the meaning of religion. See Ronald Dworkin, Is Democracy Possible Here? (Princeton University Press, 2006), pp. 87–89.

In re Marriage Cases, 43 Cal. 4th 757 (2008).

