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SAME-SEX MARRIAGE: PRO AND CON

A READER

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The Example of California

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From "Aloha Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages." From The Stanford Law Review, *February 1995*

The largest state in the union—and the one with the closest ties to Hawaii—has an extremely consistent record of always recognizing marriages of a sister state. Here is a preview of the legal precedents in the state that could set the agenda for what happens in the rest of the country.

In addition to analyzing legislative declarations of state policy regarding homosexuality, one can examine cases involving analogous marriage-recognition issues to determine the relative strength of a state's marriage validation policy. For example, although California law does not permit same-sex marriage, California's courts have concluded that the state has a very strong marriage validation policy. California validated out-of-state mixed-race marriages seventy-three years before it overturned its own antimiscegenation statute, and it has long recognized marriages between people too young to marry in California but legally married elsewhere. Even a bigamous marriage and a marriage in violation of a California communicable disease control law have been validated. What's more, the state even validates marriages by California residents who deliberately evade California law. California's validation policy is so strong that it

would be very difficult to argue the existence of a state policy against same-sex marriage strong enough to support invalidation. This conclusion is buttressed by California's explicit validation statute, its lack of a sodomy law, its employment antidiscrimination law, and the state constitution's explicit guarantee of privacy.

Unlike California, however, some states have either weak marriage validation policies or none at all. If a state consistently denied recognition to out-of-state marriages which were contrary to local law, without regard for the characteristics of the marriage or the policy underlying the local ban, that state or a private party would probably have a strong argument for invalidating same-sex marriages, particularly if the state has other indicia of a strong policy against homosexuality. Few states, however, can be said to refuse recognition consistently to locally illegal out-of-state marriages. Frequently, the factual context of an action appears to weigh as heavily in the courts' decision making as any general state policy against recognition.

The Courts, Gay Marriage, and the Popular Will

DAVID FRUM

From the Weekly Standard, *October 30, 1996*

A young conservative bemoans what he sees as the inevitability of same-sex marriage. And he posits a post-Hawaii strategy: reinforcement of antisodomy laws.

During the great debate over ratification of the Equal Rights Amendment, Phyllis Schlafly used to cause sophisticated eyes to roll with her prediction that the amendment would inspire the courts to create a new right of gay marriage. It was just twenty years ago, but this warning then seemed so self-evidently ludicrous as to blast Schlafly's credibility among journalists and other respectable folk.

It turns out Schlafly was right. It's on grounds of sex discrimination, not discrimination against homosexuals, that the plaintiffs in *Baehr v. Lewin*, the now-famous case involving gay marriage in Hawaii, may win the right to wed. And it's because claims of sex discrimination are involved that the Defense of Marriage Act, which has passed both houses of Congress and is due to be signed by the president this week, may prove vulnerable.

As liberal as the Hawaiian courts are, even they refused to swallow the argument that a gay couple refused a marriage license had been discriminated against because they were homosexual. The Hawaiian Supreme Court's May decision in *Baehr v. Lewin* conceded that the local constitution could not be stretched as far as that. But, the court went on to chirrup, the constitution could be stretched in a different direction: Hawaii's practice of denying marriage licenses to men who want to marry men and women who want to marry women constituted *sex* discrimination. Sex discrimination is prohibited under the Hawaiian state constitution. And with that, the Hawaiian Supreme Court sent the case back to the trial courts to give the state an opportunity to justify this discrimination.

Other plaintiffs in other states have tried this argument but were rebuffed because state courts hesitated to read equal-rights clauses in their state constitutions about sex as literally as they read equal-rights clauses about race and religion. Judges have felt constrained to recognize what most sensible non-

judges recognize: that sex is not analogous to race, that there are important differences between men and women the law must respect and honor. Most of us would be troubled if we learned that in traffic accidents between whites and nonwhites, the courts of our state found in favor of white drivers 95 percent of the time. But only a fanatic would be troubled to find that the local courts found for the mother in 95 percent of child-custody disputes.

Alas, American lawyers being what they are, it was only a matter of time before five such fanatics found themselves in control of a state supreme court somewhere. It happened to be Hawaii's. *Baehr v. Lewin* probably won't receive its final adjudication until 1998 or 1999. But everyone should prepare for the worst. The Hawaiian courts will subject the state's arguments to the standard of scrutiny that lawyers call "strict": strict in theory, the old dictum runs, but fatal in fact.

It was to insulate the other forty-nine states from the caprice of the Hawaiian judiciary that Congress adopted the Defense of Marriage Act.

It has become commonplace to argue that the Defense of Marriage Act violates the Constitution—specifically, the Full Faith and Credit clause, which appears in Article IV. Never before in the annals of American history has that clause been so cited; advocates of gay marriage claim that Article IV would require every state to accept the validity of a Hawaiian homosexual wedding. And because the Defense of Marriage Act authorizes states to deny the validity of that wedding, advocates of gay marriage contend that it is unconstitutional.

That argument is flimsy. Here's the clause in full: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such

acts, records, and proceedings shall be proved, and the effect thereof." The language is clear: The Constitution does grant Congress plentiful authority over the mutual legal obligations of the states.

So the Defense of Marriage Act is safe from Article IV. But it is vulnerable nonetheless, because it arguably falls afoul of the Supreme Court's strict new interpretation of the U.S. Constitution's guarantee of sexual equality.

What a minute, you might wonder. What guarantee of sexual equality is that? Didn't the Equal Rights Amendment lose? Amazingly, the answer is—yes, it did, but that doesn't matter anymore. America's judges are not the sort of people to let a little thing like the defeat of a constitutional amendment stop them from radically reconstructing society.

In the mid-1970s, the Supreme Court decided to ignore the verdict of the ratifying process that denied the ERA a place in the Constitution. Instead, it began interpreting the Fourteenth Amendment as if ERA had prevailed. At first, in a ritual nod to constitutional politesse, the justices observed some caution. Plaintiffs who complained they had been denied the equal protection of the laws because of their sex would get a slightly cooler judicial reception than plaintiffs making a similar complaint about race. Sex became a new, "intermediate" category of scrutiny. But in practice, "intermediate" scrutiny soon proved indistinguishable from the "strict" scrutiny of race-discrimination cases.

And this spring, when it decided to mandate the gender integration of the Virginia Military Institute, the Supreme Court finally and frankly inscribed the rejected ERA into the Constitution. The court laid down the rule that in all but the most extreme instances, the law must refuse to take any notice of the differences between the sexes.

Taking notice of the difference between the sexes is, however, precisely what the Defense of Marriage Act is meant to do. So, sometime after 1998 or 1999, there will be a new court battle. Two men or two women married in Hawaii will seek to force another state to recognize their relationship. When that state cites the Defense of Marriage Act and resists, the act's constitutionality will be challenged. If Justice Ruth Bader Ginsburg still commands a majority for the extreme understanding of the Fourteenth Amendment she displayed in the VMI case, the Defense of Marriage Act may well go down.

Especially since this Supreme Court seems to have quietly decided that sexual orientation is itself a category worthy of special attention, like race or—now—sex. It's hard to understand exactly what the court held in its murky and undisciplined ruling this year in *Romer v. Evans*, the Colorado gay-rights referendum case. At a minimum, though, the court has traveled a long way from *Bowers v. Hardwick*, the 1986 "sodomy" case that recognized the right of states to criminalize homosexual behavior. In *Romer v. Evans*, the court denied a state the right to exclude homosexuals from the special protection of its civil-rights laws.

The court's reasoning in *Romer v. Evans* bodes especially ill for the Defense of Marriage Act. The Colorado referendum, the Supreme Court said, was invalid because it was motivated by an "animus" against homosexuals. It offered no evidence of such animus; apparently the mere fact that homosexuals were the unique targets of the law proved it. And of course, homosexuals are the unique targets of the Defense of Marriage Act too.

Does this mean the defense of traditional marriage is doomed? Far from it—provided that Americans and their lawmakers are prepared to muster their resolve now. The great precedent here is the court's attempt to outlaw the death penalty in 1974. Over the following two years, more than thirty states

rewrote their criminal laws in ways designed to satisfy the court's stated objections to the capital penalty. Confronted with a powerful national consensus, the Supreme Court backed down. And while it has never reconciled itself to the death penalty—while it and the lower federal courts still sabotage the penalty's application to the utmost of their ability—it has accepted the sentence's ultimate constitutionality.

And so here. American courts and law schools have been hugely influenced by the teachings of Ronald Dworkin, who has argued that the American Constitution should be interpreted in terms of "evolving standards of decency." Translate that to "cramming down the throat of a hostile public as much liberalism as possible short of impeachment." It's the job of state legislators and Congress to help the judiciary understand where that line will be drawn.

The need to draw that line is why the Senate's close vote on the bill sponsored by Sen. Ted Kennedy to forbid employment discrimination against homosexuals—devised as an effort to derail or defang the Defense of Marriage Act and brought to a vote the same day—was so misguided.

True, the bill went down to defeat by a one-vote margin. But at a moment when the courts are trying to decide how much they can get away with, it was (to say the least) spectacularly unhelpful to the cause of marriage and the family for the Senate to send the courts so ambiguous a signal. Some senators, with their instinct for horse-trading, may have seen the Kennedy bill as a reasonable compromise—they could vote for the Defense of Marriage Act *and* the Kennedy bill and thus appear broad-minded. But courts don't operate by horse-trading; courts operate by taking principles to their logical (or, nowadays, their most extreme possible) conclusion.

That's what has happened north of the border. Inspired by the same sympathetic motives as the forty-nine senators who

voted in favor of the Kennedy anti-discrimination bill, eight of the ten Canadian provinces gave homosexuals the benefit of their anti-discrimination statutes in the 1980s. Since then, Canadian courts—who are even more impressed with the output of America's radical law professors than U.S. courts—have gone to work, Dworkin-style, fabricating something extraordinarily close to gay marriage. Governments are obliged to pay pensions, relocation expenses, and other benefits to the "partners" of homosexual civil servants; homosexuals may sue each other for support after their relationships dissolve; they may adopt each other's biological children; and they may even adopt children as couples. And whenever a government objects (usually pretty insincerely) to the latest innovation, the courts cite the jurisdiction's own human-rights statutes for justification.

States and Congress need to begin now making unmistakably clear the seriousness of their commitment to marriage and the family. Sixteen legislatures have already affirmed their commitment to the traditional understanding of marriage; pressure should be brought on the remaining states to do the same. Hawaiians may need to amend their constitution.

In extremis, states may even want to consider one final, distasteful expedient: reaffirming or re-enacting sodomy laws. In the best spirit of tolerance, half the states repealed their sodomy laws in the early 1970s, and the other half stopped enforcing them. That was the right thing to do: These laws not only invade precious rights of personal privacy, they confer dangerously arbitrary powers on the police as well.

But the fact is, these laws remain constitutional. And—should the courts ever make it necessary—they can serve as a legal weapon of last resort. First, in a state with a sodomy law, gay marriage could not be legally consummated. Second, a state with a sodomy law can, if challenged in court to defend its "sex discrimination" in a gay-marriage case, do what Colorado and

Hawaii could not in defending their "discriminatory" legislation: cite a compelling state law-enforcement interest, the prevention of a criminal act. Third, and most serious, the reaffirmation by states of a sodomy law would signal the courts that their attack on marriage risks triggering a legal convulsion even grimmer than that touched off by the decision in *Roe v. Wade*.

Americans are a tolerant people. The overwhelming majority generously upholds the good old principle of live and let live. In recent years, homosexuals have asked for better police protection, hundreds of millions of dollars for AIDS research, equal treatment in the workplace, and an end to the sneering spirit of cruelty in which their condition was too often discussed in the past. And by and large their requests have been granted. Millions of Americans already cheerfully accept that their homosexual friends enter into romantic relationships, and wish them nothing but happiness. To an unprecedented degree, Americans give the most generous possible answer to E. M. Forster's haunting question: Is there so much love in the world that you want to deny anyone any portion of it? And in giving that generous answer, they have helped to form a more generous country.

But Americans are also deeply attached, as they should be, to the fundamental institutions of Judeo-Christian civilization. They are living in the third decade of a crime and welfare crisis largely attributable to the collapse of marriage. They are coming to appreciate the damaging consequences of casual divorce to two generations of children. They sense, if they do not understand, that marriage is an institution that rests on a recognition of the cultural and biological differences between men and women, and that the call for gay marriage is the culmination of the intellectual and political campaign to deny and suppress those differences. They feel—they are right to feel—anger and outrage when it's proposed to them to abolish marriage and re-

place it with a new unisex partnerhood, casually entered into and as casually dissolved.

And the sooner and more bluntly the people's representatives confront the courts with the power and permanence of those feelings, the more likely it is that American society will be spared a destructive and unnecessary conflict.