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Defending Liberty Pursuing Justice

Cultural Conflicts, Civil Rights, and Same-Sex Marriage

by Jon Goldberg-Hiller

Same-sex marriage, although of recent vintage, has been imagined on at least two divergent temporal pathways. As a legal idea, same-sex marriage was an innovation tested unsuccessfully for many years by individual litigants, until it was finally accepted by the Hawaii Supreme Court in 1993. Ruling in *Baehr v. Lewin*, that court acknowledged the precedent of *Loving v. Virginia* (a 1967 U.S. Supreme Court decision that ruled statutes against mixed-race marriages to be unconstitutional), as well as the relevance of the Hawaii constitutional prohibition against discrimination on the basis of sex, as compelling reasons to reject the refusal of state authorities to issue a marriage license to same-sex couples. From the perspective of a progressive logic of constitutional interpretation, the Hawaii court accepted the idea of same-sex marriage as less a novel invention (indeed, it never recognized a right to same-sex marriage) than as an unremarkable extension of what Justice Holmes once called the "path of the law." As another link in the analogical chain that has accompanied the slow (though certainly not linear) expansion of equal protection jurisprudence from race to gender and other categories of discrimination (Richards, 1999; Sunstein, 1994), same-sex marriage has melded into the slow temporal march of legal innovation, now juridically recognized beyond Hawaii in Alaska (1998), Vermont (1999), Ontario and British Columbia (2003), and Massachusetts (2003), as well as in parts of Europe and, likely, Taiwan in 2004.

A second temporal pathway has been composed by social groups concerned with the extension of civil rights law. The social construction of legal meanings that provided expansive equal protection logic to plaintiffs demanding recognition of same-sex marriage has been energetically opposed by some conservative social movements, state legislatures, Congress and the Executive. Where opposition to public recognition of gays and lesbians was once couched entirely in the languages of religious dogma or personal vilification, these tactics eventually proved to have little resilience against the cumulative force of legal precedent. The *Baehr* decision in Hawaii in 1993 surprised so many opponents of gay rights that it provided a condensation point for a different, more institutionally focused language designed to problematize the judiciary's articulations of the pace of social evolution. In the decade since, courts have been increasingly depicted by these groups as erupting impetuously with an elite agenda (a "runaway judiciary" in the language of Rep. Tom DeLay), hurling society against the timeless truths of "tradition," and usurping the appropriately slow processes of democratic deliberation. The last few years have seen one of the more protracted popular uprisings against courts during the past century. Certainly, the struggles against civil rights for African Americans were more vicious and violent. Nonetheless, the popular maneuvers against lesbian and gay rights have often targeted legal institutions rather than confronting rights claimants directly. According to Gamble (1997), more than twice as many popular referenda were held on gay rights issues (43 from 1977–1993) than on school desegregation and housing during the civil rights movement (18 from 1959–1989), and the public rejected gay rights claims about 80% of the time. Recently, popular majorities have derailed the same-sex marriage cases in Hawaii and Alaska, legislatures have passed anti-same-sex marriage legislation in 37 states and in Congress, and President George W. Bush has added his support to a constitutional amendment to limit marriage to a union between a man and a woman.

I believe that attention to the language used in these struggles against gay rights reveals a powerful set of political discourses propelling the nation beyond its recent pluralist, civil rights commitments. Liberal pluralism likely reached its apotheosis during the Warren Court, which frequently approached civil rights as innate, flexible, and immaterial; the recognition of new rights was rarely seen to denigrate the value or restrict the recognition of other rights. Today, these liberal

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IN THIS ISSUE

Analyzing *Lawrence v. Texas*

by Dale A. Carpenter

In *Lawrence v. Texas*, the Supreme Court held state sodomy statutes unconstitutional under the Fourteenth Amendment's Due Process Clause. Writing for a majority of five was Justice Anthony Kennedy. Justice O'Connor filed a concurring opinion holding sodomy laws targeted only at same-sex activity unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, dissented. Justice Thomas filed a brief separate dissent.

The background facts as presented to the Court were straightforward. Responding to a false report of a weapons disturbance, police in Houston, Texas, entered the apartment of John Lawrence. There they claimed to observe Lawrence and Tyron Garner, both adult males, having anal sex. Lawrence and Garner were arrested, taken to jail, and charged with violating Texas' Homosexual Conduct law prohibiting anal and oral sex between persons of the same sex. They were convicted and fined. Their appeal eventually reached the Supreme Court.

The Majority Decision

The majority opinion formulated the issue as involving "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." This framing of the issue involved applying the Court's substantive due process doctrine, under which the Court has protected a range of noneconomic, private activities. It also required the Court to reconsider its own decision upholding state sodomy laws in *Bowers v. Hardwick*, decided in 1986 by a 5-4 majority.

After reviewing its right-to-privacy precedents, the Court turned its attention directly to *Hardwick*. The majority first chided the *Hardwick* court for characterizing the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy..." This characterization of the issue, said the Court, "demeans the claim the individual put forward, just as it would demean a married couple were it said marriage is simply about the right to have sexual intercourse." In both *Hardwick* and this case, the Court emphasized, the laws at issue did more than simply prohibit a particular sexual act. "Their penalties and purposes," said the Court, "touch upon the most private human conduct, sexual behavior, and in the most private of places, the home."

The Court questioned *Hardwick*'s historiography. In order to show that there is no tradition of protecting homosexual sodomy, and thus no justification for protecting it under the Due Process Clause, *Hardwick* had argued that "[p]roscriptions against such conduct have ancient roots." Work by historians since *Hardwick* has shown, however, that this view is simplistic and misleading. In fact, said the Court, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." While sodomy laws in the states have prohibited a range of conduct, they have historically applied both to same-sex and opposite-sex conduct. Laws targeting gay couples did not appear until the last third of the 20th century. Moreover, sodomy laws "do not seem to have been enforced against consenting adults acting in private."

The Court relied instead on what it called "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." This emerging awareness could be seen in several legal developments over the prior half century, including the omission of crimes for consensual sexual conduct in the Model Penal Code, the publication of the Wolfenden Report in England recommending decriminalization of sodomy, the gradual decriminalization of sodomy in the American states beginning in 1961, the nonenforcement of sodomy laws in the minority of states that retained them, the decision of the European Court of Human Rights to invalidate sodomy laws, and the Court's own decisions in *Planned Parenthood v. Casey* (1992) and *Romer v. Evans* (1996), which seriously eroded *Hardwick* as a precedent.

The Court also pointed to the burdens the sodomy law imposed on the person. There were consequences for being convicted of violation. Besides the affront to the "dignity" of the person, conviction would require registration as a sex offender in several jurisdictions and revelation of the offense on job applications. This amounted, said the Court, to "state-sponsored condemnation." *Hardwick* itself "demeans the lives of homosexual persons."

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Stare decisis proved no barrier to overruling *Hardwick*. "Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so," declared the Court. *Hardwick* "was not correct when it was decided, and it is not correct today."

The only justification claimed by Texas for its sodomy law–promoting morality–could not "justify its intrusion into the personal and private life of the individual." "The petitioners are entitled to respect for their private lives," held the Court. "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."

Justice O'Connor's Concurrence

In a concurring opinion, Justice O'Connor joined the Court's judgment. However, instead of the Due Process Clause, she relied on the Equal Protection Clause. Instead of invalidating all state sodomy laws, her reasoning would invalidate only those laws, like Texas's, directed solely at same-sex conduct.

Ordinarily a classification is presumed constitutional under the Equal Protection Clause. It need only be rationally related to a legitimate state interest. Yet, under this "rational basis" review, not all state interests are considered "legitimate." O'Connor noted that classifications inhibiting "personal relationships" are especially vulnerable under rational basis review. She argued that the Texas sodomy law, by targeting only gays for criminality while making the identical conduct by others acceptable, exhibited impermissible animus against gays as a class. "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." Because Texas rarely enforced its sodomy law, she observed, it served "more as a statement of dislike and disapproval than as a tool to stop criminal behavior." Texas had no justification for the law other than this disapproval, so its law must fail.

Justice Scalia's Dissent

In dissent, Justice Scalia chastised the Court for abandoning *Hardwick* and for declaring that Texas's interest in morality was insufficient to justify its sodomy law. Laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" could likewise be justified only based on moral choices, he argued. The Court "effectively decrees the end of all morals legislation."

Scalia also chided the Court for ignoring standard substantive due process analysis. Under the Court's usual approach, a law is presumed constitutional and survives review so long as it survives rational basis review. The Texas law, Scalia argued, is rationally related to its legitimate interest in promoting morality.

In Lawrence, *the Court repeatedly affirmed the dignity of gay lives.*

Only when a law burdens a "fundamental liberty interest" must it survive strict scrutiny. Nowhere in its opinion, Scalia noted, did the Court "describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest.'"

Scalia also criticized the Court's use of history. It did not matter, he argued, that same-sex-only sodomy laws are a recent phenomenon. What matters is that homosexual sodomy has long been criminalized. That alone "suffices to establish that homosexual sodomy is not a right 'deeply rooted in our Nation's history and tradition.'"

The Court's decision, he argued, indicates it "has largely signed on to the so-called homosexual agenda...." In closing, Scalia warned that gay marriage would be next up on this agenda. "Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." There is simply no basis, other than a moral preference for traditional marriage, to deny the benefits of marriage to gay couples, he argued.

Justice Thomas's Dissent

In a separate dissent that he alone signed, Justice Thomas argued that sodomy laws are "uncommonly silly," a waste of "valuable law enforcement resources." Yet, since he could find in the Constitution no "general right of privacy," or as the Court terms it today, the "liberty of the person both in its spatial and transcendent dimensions," he could not join the Court in holding such laws unconstitutional.

Implications of the *Lawrence* Decision

Lawrence represents a sweeping change in the way the Court views the place of gay citizens in American life. Claims the Court found "at best, facetious" in 1986 in *Hardwick*, triumphed resoundingly in 2003 in *Lawrence*. Where the *Hardwick* court took a state law that banned both homosexual and heterosexual sodomy and used it to focus on homosexuals alone, the *Lawrence* Court took a state law that focused on homosexuals alone and used it to strike down laws that banned both homosexual and heterosexual sodomy. And it did so on the ground that striking down laws facially aimed at gays and straights was necessary to protect *gays* from further stigma.

Instead of relying on a narrow Equal Protection rationale to strike down the laws of the four states that targeted gay sex, the Court dramatically and unexpectedly revived substantive due process to strike down the laws of all 13 states with sodomy laws. Against claims by Texas that gays were a class defined by immoral conduct, the Court repeatedly affirmed the dignity of gay lives. Where *Hardwick* conceived of gays as *having sex, Lawrence* conceives of gays as *having relationships*. Page after page of the majority decision is devoted to a harsh critique of *Hardwick* for being wrong about history, wrong about doctrine, wrong about precedent, and wrong about facts. It is an extended and heartfelt apology to gays for the harm done by *Hardwick*.

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Should Same-Sex Marriage Be Legal? Yes

by David B. Cruz

All state and federal governments in the United States currently impose a mixed-sex requirement for civil marriage, refusing to allow same-sex couples to marry at law or to recognize same-sex marriages from jurisdictions (such as the Netherlands, Belgium, Quebec, and Ontario) that do allow same-sex couples to marry. This will probably soon change in Massachusetts, where the state's highest court has held the marriage exclusion to violate the state constitution. But it should change throughout the nation, for there is every reason to abolish this discriminatory limitation on the legal institution of marriage and no persuasive or constitutionally acceptable reason to maintain the exclusionary status quo.

First and foremost, marriage meets the same basic economic and emotional needs for lesbian, gay, and bisexual (or "lesbigay") people and their children as for heterosexually identified persons and theirs. Legal marriage is an important means by which people convey to each other and to the world various messages of love and commitment, yet this expressive resource is being denied to same-sex couples who could so use it. Moreover, to the extent that marriage is thought to promote relationship stability, and relationship stability to be a positive good, it would be good for society and not just for same-sex couples if people were allowed to marry regardless of their sexes. No one has made any persuasive showing that allowing same-sex couples to civilly marry would harm rather than benefit society.

Legally recognizing same-sex marriages is not just a good idea; it's the law, at least if the Constitution is correctly interpreted and applied to invalidate the mixed-sex requirement for civil marriage. That requirement both infringes lesbigay person's fundamental right to marry protected by the Due Process Clauses of the Constitution and impermissibly discriminates in violation of the Fifth and Fourteenth Amendment's guarantees of equal protection of the laws.

The opposing constitutional and other legal arguments are surprisingly weak. One of the most common arguments made and in the past frequently accepted by courts maintained that there was no discriminatory denial of the fundamental right to marry to lesbian, gay, and bisexual persons because "marriage" simply means a certain type of union of a man and a woman. This argument is patently inadequate, for it conflates a common but contested cultural conception of marriage with the legal definition. Yet it is precisely the permissibility of government's adopting a legal definition that excludes same-sex couples that has been challenged in the increasingly numerous suits brought under the U.S. Constitution and various state constitutions. Fortunately, state supreme courts in Hawaii (*Baehr v. Lewin*, 1996), Vermont (*Baker v. State*, 1999), and Massachusetts (*Goodridge v. Department of Public Health*, 2003) have rejected this circular "definitional" argument.

Homophobia cannot legally justify the exclusion of same-sex couples from civil marriage.

The definitional argument is less specious as applied to claims that the mixed-sex requirement denies same-sex couples the constitutional right to marry, which the U.S. Supreme Court has held is a fundamental right in cases such as *Loving v. Virginia* (1967), *Zablocki v. Redhail* (1978), and *Turner v. Safley* (1987). The preliminary issue is whether the right to marry should be understood to include a right to marry someone of one's own sex. Here, the majority cultural understanding might be supposed relevant. It should not, however, be accepted in the constitutional context. It is inappropriate to embed personal characteristics of competent citizens into the definition of a constitutional right. This is one lesson of *Loving*, where the Court rejected Virginia's effort to define marriage in a narrowly restrictive fashion based on the races of the parties. Defenders of the marital status quo frequently attempt to deny *Loving*'s relevance on a number of grounds, none successful. The argument that *Loving* only invalidated a criminal prosecution for someone who married a person of a different race, not affirmative state recognition of a private relationship, is true as far as it goes. What it fails to note, however, is that subsequent Supreme Court precedent on the right to marry held that the right applies even outside the negative criminal context. A superficially more plausible argument holds that *Loving* is irrelevant because race has nothing to do with the purposes of marriage but that sex—and the capacity to reproduce—does. This claim, however, relies on a romantic, fictional notion of the marriage laws we actually have. No mixed-sex couple needs to intend to have children, desire to have children, or even be capable of having children (in the sense of biologically siring them) to be allowed to marry civilly. Perhaps because this elementary point about our actual marriage laws is so irrefutable, marriage exclusionists such as popular columnist Maggie Gallagher resort to calling it names ("the unbeatable infertility argument") instead of forthrightly confronting the shortcomings in their position. It truly would not be difficult to limit marriage to those who become pregnant and their husbands if the purpose of civil marriage really were about procreation. At base, then, the reliance of marriage exclusionists on the procreation argument—as found, for example, in the Massachusetts dissenter's argument that the mixed-sex requirement serves to limit marriage to those who "hypothetically" could procreate without third-party involvement—really boils down to an effort to privilege heterosexuality, not procreation.

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Should Same-Sex Marriage Be Legal? No

by Lynn D. Wardle

Should same-sex marriage be legalized? I think it should not. The concept of marriage is founded on the factual reality that men and women are different in many very profound ways, and that the union of a man and a woman is different than the union of two men or of two women (or some other multi-party relationship). The integration of a galaxy of gender differences (profound and subtle, biological and cultural, psychological and genetic) between men and women constitutes the essence of marriage. The complementarity of the union of a man and a woman is at the very core of what makes marriage "marriage," and why marriage is so valuable to individuals and to society.

Marriage is not a mere "social construct," or mere "legal creation" of lawmakers. Marriage is a pre-legal institution. Marriage existed before societies were organized, and marriage still provides the basic social order upon which political societies are based. Marriage is the foundation for the family, the basic social unit of all societies. To legalize same-sex marriage would seriously weaken that social foundation.

Marriage is the essential structure through which the scripts for basic social roles are transmitted and refined. Legalizing same-sex marriage would create tremendous confusion and instability relating to the crucial social roles and responsibilities that are linked to the basic social institution of marriage.

The union of a man and a woman in marriage creates a unique relationship of unparalleled potential strengths and unequaled value to individuals and society. Lawmakers in all political societies (both ancient and modern) have conferred special legal status on the institution of conjugal marriage, precisely because the union of a man and a woman in marriage is so beneficial to society and its members. Marriage reduces tremendously the costs and burdens of social welfare, which otherwise must be borne by the state (or suffered by its citizens). Marriage provides tremendous educational, economic, social, political, medical, welfare, security, and citizenship benefits to society. Other kinds of adult intimate relationships (which may have some social value in themselves) simply do not provide the same or even comparable benefits to society or to individuals. To confer the label of "marriage" upon those alternative relationships would be tantamount to "false advertising" by the government, because that would erroneously suggest that individuals and society derive from such relationships the same benefits that flow from conjugal marriage. Legalizing same-sex marriage would create an incentive for persons to forego marriage and pursue an alternative relationship less beneficial to them and to society.

Proposals to legalize same-sex marriage are based upon misguided egalitarianism.

The proposal to legalize same-sex marriage is based upon misguided egalitarianism–the belief that in order to avoid offending people who choose alternative relationships, society should treat those relationships the same as or equivalent to marriage. In fact, however, all relationships are not equal. Children do not thrive equally well in all kinds of family relationships; the marriage of their father and mother undeniably provides the best environment for raising children. Children in different family structures do not succeed in educational measures equally; those raised by their married mother and father clearly do best. Women are not as safe from violence in all kinds of adult intimate relationships; marriage is clearly the most protective relationship of and for women. All family relationships are not equal in terms of providing economic equity for, and facilitating the prosperity of, the members of the family; conjugal marriage clearly is the most equitable and prosperous relationship. All relationships do not foster and promote the physical and mental health of their members equally well; again, conjugal marriage clearly enhances and protects the health of its members better than other forms of adult intimate relationships. Not all relationships are equal in protecting adults and children from exposure to the risks of drug and alcohol abuse; conjugal marriage provides the best protection. Not all relationships foster as much physical and emotional satisfaction and happiness; again, the union in marriage of a man and a woman is superior to all other relationships. On virtually every significant measure of human well-being related to relationships, the union in marriage of a man and a woman provides greater benefits both to individuals and to society. In light of the evidence, it is hard to understand how any rational person could conclude that same-sex relationships should be given the same legal status, benefits, and social label as conjugal marriage.

The argument that expanding the definition of marriage to include same-sex couples will benefit society because then same-sex relationships will have the same beneficial attributes as conjugal marriage is a flawed positivist illusion. It is like the story attributed to Abraham Lincoln: he is said to have once asked how many legs a dog would have if you counted a tail as a leg. To the response "five legs," Lincoln said, "No; calling a tail a leg doesn't make it a leg." Likewise, calling same-sex relationships "marriages" will not make them real marriages.

Another equality claim for same-sex marriage compares denial of same-sex marriage to the prohibition of interracial marriage. However, homosexual behavior is not comparable to race as a basis for marriage regulations. Race is unrelated to any legitimate purpose the law could have

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for regulating marriage; but homosexual behavior is directly related to the fundamental purposes of marriage laws–that is, the regulation of sexual behavior and protection of the mores that define the core identity, boundaries, and basic structure for the moral order of a society. As General Colin Powell put it: "Skin color is a benign non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument."

There is no gender discrimination in marriage because it requires a man and a woman to create this highly preferred institution. Conjugal marriage is the oldest gender-equality institution in the law, because the requirement that marriage consist of both a man and a woman emphasizes the absolute equality and equal necessity of both sexes for the most fundamental unit of society. The requirement of a man and a woman to create a marriage recognizes and underscores the indispensable and equal contribution of both genders to the basic institution of our society.

Some persons argue that same-sex marriage should be legalized as part of the right of privacy. But marriage is not a matter of mere personal privacy; rather, marriage is a public status, openly regulated by public law. Even if, as some assert, the state may have no interest in regulating private sexual behavior, the state undoubtedly has a very great interest in regulating the public status, public benefits, and public institution of marriage. Thus, the right to privacy does not support the claim to same-sex marriage.

Some same-sex marriage advocates assert that the principle of tolerance requires legalization of same-sex marriage. But this claim confuses "tolerance" with "preference." Our legal system categorizes relations in three ways–as "preferred," "tolerated," and "prohibited." Marriage is the classic example of a "preferred" relationship; historically, it is perhaps the most highly preferred personal relationship in law. Thus, the claim for same-sex marriage is not a claim for mere "tolerance," but for "special preference." While same-sex relations historically were "prohibited," in recent years they have moved out of that category into the "tolerated" category. But the principle of tolerance does not justify moving same-sex relations out of the "tolerated" class and into the "preferred" status.

Many Supreme Court cases interpreting provisions of the Constitution refer to the right to marriage as a fundamental right (or liberty), because the marriage relationship of husband and wife is "deeply rooted" in the history and traditions of our nation. The same cannot be said of same-sex relationships. There is no doubt that the term "marriage" historically has referred specifically to the union of a man and a woman, to a relationship between two consenting adults, and not to any relationship involving same-sex couples. Marriage as the inter-gender union of man and woman is one of the great constants in human history–across time and cultures. The claim that the "right to marry" includes the right of same-sex couples to marry is not only historically specious, but logically it simply begs the question–what is meant by "marriage?" Same-sex unions fail the test of both history and reason. The basic human right of marriage does not extend to same-sex unions, because the concept of marriage, by its very nature, is uniquely conjugal (heterosexual).

To radically redefine marriage will dangerously alter the foundation of our legal system. The founders believed that civic "virtue" was essential to maintain the form of democratic government they created when they established the Constitution of the United States. Their common understanding was that the "superstructure" of the Constitution rested upon a "substructure" of institutions and principles that would foster and inculcate civic "virtue" in the people. The institution of conjugal marriage was one of those foundational institutions upon which the Constitution was built. Change the meaning of "marriage" in such a profound way as to legalize same-sex marriage, and an equally profound shift in the constitutional superstructure is inevitable.

Unfortunately, many successful societies forget their foundations, forget the fundamentals, and forget how important basic institutions and principles are. They devalue and neglect them. Thus, in America today many people disparage marriage and speak of alternatives to marriage as if they were just as valuable to society. Such myopia is very dangerous. Certainly, marriage and families are troubled and struggling in America today. But that is hardly a sound reason for radically redefining marriage in a way that will undermine the essence of the institution. Indeed, the need to revitalize families, to strengthen and renew the institution of marriage, is a compelling reason to reject claims for same-sex marriage. Our families, our children, our nation deserve more, and need more, than same-sex unions offer. They deserve the legacy of conjugal marriage.

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What's wrong with that? It violates the fundamental imperative of impartial governance that underlies our constitutional order in general and the Equal Protection Clause in particular. Favoring the group of heterosexually identified persons over the group of lesbigay persons in this fashion amounts to disadvantaging the latter out of a sheer dispreference for them or, at best, a naked assertion of immorality defensible only in sectarian religious terms. That is unconstitutional, as Supreme Court decisions invalidating Colorado's anti-gay Amendment 2 to its state constitution in *Romer v. Evans* and striking Texas's "homosexual conduct" law in *Lawrence v. Texas* instruct. Homophobia and heterosexism thus cannot legally justify the exclusion of same-sex couples from civil marriage, however far they might go toward explaining the cultural resistance to abolishing the mixed-sex requirement.

The other great cultural determinant of many people's resistance to same-sex marriage appears to be religious. In the beliefs of many Americans, God has ordained that a marriage is a particularly honored, if demanding, form of relationship between a man and a woman. Adherence to such views is not unlawful; indeed, the right to believe in the divinely mandated heterosexual character of marriage is protected by the religious liberty guarantees of the First and Fourteenth Amendments. The problem here is that in the U.S. marriage is not just a religious institution; it is also a civic one, with civil marriage being a contractually-based status regulated by the government. The lawsuits filed on behalf of same-sex couples since the 1970s seek only access to civil marriage, not to any supposed right to have an unwelcoming church perform a religious marriage ceremony. That is a fight being waged internally to religious denominations; in light of the U.S. Constitution's disestablishment of religion (often described as our separation of church and state), it would be improper for law to intervene in such internal religious disputes.

By the same token, however, a religious belief that marriage must be mixed-sex, even if sincerely and fervently held by a majority of Americans, is an impermissible basis for limiting civil marriage to different-sex couples. Our laws in the U.S. must be based on secular reasons. When George W. Bush opines that it would interfere with the "sacred" institution of marriage to let same-sex couples marry, he is confusing religious and civil marriage (or else is simply unwilling to accept the fact that the U.S. is not a theocratic nation, even when it comes to our marriage laws). Legislators may act properly when they take religious beliefs into account when deciding how to vote–this is a much-contested claim in constitutional and political theory–but the laws they adopt must be defensible on secular grounds in order not to violate the constitutional disestablishment of religion. But as suggested above, the mixed-sex requirement for civil marriage is neither constitutionally defensible nor justified on policy grounds.

If it really is just a matter of majority religious beliefs about what "marriage" means that is keeping same-sex couples from legally marrying, perhaps legislatures might need to consider abolishing marriage as a legal category, as Martha Fineman and other legal scholars have suggested. Instead create civil unions (or use some other label) open to adult couples regardless of whether they are of the same or different sexes. This will eliminate the current unequal treatment of lesbigay persons, discriminatory access to civil marriage, and legally unequal availability of the powerful expressive resource that civil marriage is. If Americans are too attached to "marriage" to give it up as a legal category, then perhaps the time has come to get used to it as an inclusive category, not one that relegates lesbigay persons to a material and symbolic second-class citizenship status.

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But for all that, *Lawrence* is probably not a broadly libertarian decision. The Court repeatedly emphasized the privacy dimension of the liberty at stake. For example, there is no hint the Court will return to the days when it closely scrutinized state economic regulation as an infringement on the "liberty" protected by the Due Process Clause. Indeed, the Court did not even broadly declare that morality is no longer a permissible basis for law. By linking the right involved to the Court's own past recognition of fundamental privacy rights, the Court strongly suggests it is dealing with a special aspect of personal life that no ordinary state interest can intrude upon. This makes Justice Scalia's fears of judicially imposed sexual anarchy seem overblown.

Lawrence is a milestone in the Court's gradual journey toward seeing gay Americans as deserving the same respect and dignity other citizens enjoy. There are yet many miles to go before gays are treated as fully equal. Discrimination remains throughout the law–in the exclusion of gays from military service, in child custody and adoption laws, in immigration law, and in the exclusion of gay couples from marriage, to name only the most prominent examples. *Lawrence*, dealing with private behavior in a private place, commits the Court to no necessary outcome when these matters of public discrimination come before it, if they ever do. But, for the first time, the Court has declared at least a part of the lives of gay persons off limits to the prying eyes and regulatory hands of the state.

Films & Videos

"Scout's Honor"
A one-hour film by Tom Shepard that aired on the PBS documentary program *Point of View* on June 19, 2001. Chronicles the story of a straight 12-year-old scout who began a petition drive to overturn the Boy Scouts of America's policy of the exclusion of gays. The film offers a variety of perspectives on political activism and litigation, including *Boy Scouts of America v. Dale* (2000). See www.pbs.org/pov/pov2001.

"We're Here to Stay"
This 56-minute documentary by Liz Latham recounts the struggles, successes and failures of Hands Off Washington, a gay and lesbian civil rights group in Washington state. The film highlights footage of political events and rallies, press conferences, and interviews, including a special focus on the progress of a statewide initiative to protect employment rights for gays. See the film's website at www.lizardproductions.com/wereheretostay.html.

State Courts Address New Family and Workplace Questions

by Charles W. Gossett

Much of the media attention is currently focused on the issue of same-sex marriage. But there is much more legal activity involving gay, lesbian, bisexual, and transgendered (GLBT) citizens taking place in state courts. A significant portion of these cases are requiring courts to figure out how to apply existing family law to families headed by two people of the same sex, including custody disputes, adoption rights, and the dissolution of relationships. There are also a number of developments in the area of employment rights including discrimination against GLBT applicants and employees, benefits for same-sex couples and the transgendered, the awarding of government contracts, and the rights of faith-based agencies with government contracts. Given that these are still new issues for state courts, there is no clear pattern to the decisions across states.

Family Law and Gay Families

Gay and lesbian couples and couples involving one or more transgendered partner have been presenting state courts with disputes that require judges to make application of existing family law to same-sex couples. With respect to gay and lesbian couples, the principal areas of concern have involved adoptions, dissolution of relationships, and custody and support of minor children. Couples in which at least one of the partners is transgendered have required courts to determine, under state law, what makes a man a man or a woman a woman and then how that determination affects the issue presented to the court.

Adoption issues are confronted by gay and lesbian citizens in two ways. First, there is the question of whether or not a gay or lesbian should be allowed to adopt a child at all. Florida, for example, prohibits such adoptions by law, though that law was [unsucessfully] challenged by the American Civil Liberties Union.[1] The decision in *Lawrence v. Texas* removes any argument that gay and lesbian adults are, by definition, criminals or potential criminals and states that wish to deny individual gay citizens from adopting will have to find other justifications to support such laws. The other aspect of adoption that concerns gay and lesbian parents is the adoption of a child by a couple or, perhaps more commonly, the adoption of the biological child of one parent by that parent's partner. The issue, often referred to as "second parent adoption," can become complicated but desired by the parties, because they want to insure that the numerous legal issues that might arise for minor children from the death of one parent are resolved quickly. Among the issues that have to be resolved under various state laws is whether or not a parent of one sex can grant parental rights to another parent of the same sex without giving up completely his or her own parental rights. Several states—California, Massachusetts, New York, and Vermont—do allow this. Other states specifically forbid such arrangements.[2]

Many gay couples establish the functional, if not legal, equivalent of common law marriages. When those relationships dissolve, courts are often asked to intervene and settle disputes, principally over property but occasionally over child custody and visitation. "Palimony suits" have sometimes been used to resolve disputes in states where they are possible, but with states like Vermont and, more recently, California establishing legally recognized relationship statuses for people in same-sex relationships, the courts are going to be required to consider factors beyond the issue of "implied contracts" that a relationship might engender. That this issue has now been (or is being) addressed in at least three state court systems—Texas,[3] Iowa,[4] and Indiana[5]—is due largely to the fact that Vermont makes it very easy for nonresidents to come to the state and enter into a civil union, but requires a one year residency in Vermont prior to a court dissolving the civil union.[6] In Texas, the parties ultimately withdrew their petition from the court, and the Indiana case has been carefully designed to seek dissolution of a "non-marital partnership and/or joint venture."[7] The judge in the Iowa case, however, clearly articulated his belief that the U.S. Constitution's full faith and credit clause requires him to acknowledge the Vermont legal agreement entered into by the parties before him and then find a way to dissolve it (this was an uncontested case). Conservative interest groups have filed an appeal on the grounds that the judge exceeded his authority by originally granting dissolution as a divorce.[8]

Custody issues arise for gay men and lesbians in two different ways. One is for gay men and lesbians who are attempting to gain custody or visitation rights with respect to their natural or adopted children from marriages or relationships with people of the opposite sex. Alabama Supreme Court Chief Justice Roy Moore was blunt when he opined: "I write specially to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others."[9] Thus, gay and lesbian parents often feel they must overcome a presumption of unfitness in these cases. Similarly, meeting the terms of custody agreements that limit or prohibit child visitation while an "unrelated" adult is in the household has caused difficulty for gay and lesbian parents who are in long-term relationships of which their former spouses disapprove. In Georgia, a noncustodial lesbian parent and her partner entered into a civil union in Vermont and contended that they were now in compliance with the existing custody arrangement that only allowed the children to spend the night when the other adult also staying overnight was either related or married to the mother. The court refused to recognize the civil union as meeting the required conditions.[10] The question of custody also arises when a gay or lesbian couple has shared parenting responsibilities for a child (with or without the benefit of a second parent adoption) and the relationship dissolves. While mu-

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tually acceptable arrangements for visitation are often made, occasionally the issue winds up in the courts. Most cases involve non-biological parents who are seeking to maintain relationships with children they have helped to raise.[11] The success of such lawsuits has varied from state to state. Somewhat more unusual is when a custodial partner sues the former partner for child support, though several states, most notably Pennsylvania, have required child support from noncustodial partners.[12]

Citizens who have changed their gender identification over the course of their lives (i.e., the transgendered) have also posed some issues for state courts to deal with in the area of family law. The fundamental question that courts have to address is whether or not it is legally possible for a person born as one gender to later be considered a person of the other gender (the law takes a rather binary approach to this question–you have to be either one or the other). Depending on how that question is answered, the judicial rulings can result in some surprising conclusions. In Texas[13] and Kansas,[14] for example, state courts have ruled that transgendered (male-to-female) widows of biological males were not entitled to the rights afforded nontransgendered widows (e.g., to pursue a wrongful death suit or inherit when the spouse died intestate). Ohio has denied a marriage license to a man who was born as a woman (and whose Massachusetts birth certificate was legally changed to reflect the new sex) who wishes to marry a woman because it would be a same-sex marriage.[15] This same principle, however, has allowed male-to-female transgendered lesbians to obtain legal marriage licenses with biologically female lesbians, thus, to some eyes, permitting same-sex marriages in states that actually outlaw them. The same circumstance would arise if one party in a legal marriage were to undergo sexual reassignment surgery yet remain married to the original partner.[16]

Employment

There is still no federal law prohibiting discrimination in employment on the basis of sexual orientation. An increasing number of states and municipalities, however, have passed laws prohibiting such discrimination as part of their general employment laws applicable to all employers. More often, jurisdictions have adopted policies prohibiting discrimination in their own employment practices or those of businesses who contract with the government. The laws, of course, are used by both heterosexual and homosexual employees who believe that they have been discriminated against by their employers.

An emerging issue for state and local governments concerns the desire of President George W. Bush to foster greater involvement of "faith-based" institutions in the delivery of public services. American federalism has resulted in an arrangement where many services are financed in part by money from the federal government and also by money from state and/or local governments.[17] President Bush's initiative is aimed at eliminating what he sees as "discrimination" against religiously oriented organizations when governments award contracts to private vendors for delivering services like employment training, senior citizen meals, or drug counseling. Just before a major legislative push on this initiative began, it was revealed that presidential advisers had been in consultation with representatives of the Salvation Army about adding provisions that would prevent state and local governments from requiring "faith-based" institutions receiving government contracts to comply with state or local sexual orientation nondiscrimination laws. The ensuing furor was enough to derail the legislative movement of the president's legislation, although the administration has been encouraging the program anyway.

Two recent cases, however, may be mere precursors to a bigger battle on this issue. In the case of *Pedreira v. Kentucky Baptist Homes for Children* (KBHC), the federal district court upheld the right of KBHC to dismiss Alicia Pedreira because she was a lesbian, but the court allowed a case to go forward against the state of Kentucky on whether or not state funds could be used to buy services from such a discriminatory organization (not yet decided). In a similar case in Georgia, *Bellmore v. United Methodist Children's Home and the Department of Human Resources of the State of Georgia*, the plaintiffs reached an out-of-court settlement with both the Children's Home and the state. The likelihood of additional tests of the use of public funds to procure services from organizations that discriminate on the basis of sexual orientation is high.

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Gay Rights, Teaching, and the Classroom Environment

by Daniel R. Pinello

In August of 2003, Eric B. Rasmusen, a professor of business economics at Indiana University at Bloomington, argued that gay men should not be hired as schoolteachers. Among other things, he observed, "it puts the fox into the chicken coop. Male homosexuals, at least, like boys and are generally promiscuous. They should not be given the opportunity to satisfy their desires." Professor Rasmusen later added, "I think [male homosexuals] are attracted to people under age 18 more than heterosexual males are.... [W]hat is the ideal for homosexual men? For some it is certainly the mature, broad-shouldered, hairy 25-year-old. But my impression is that the 16-year-old beardless boy would attract more votes. And the 16-year-old beardless boy is not so different from an 8-year-old beardless boy as the 16-year-old girl is from the 8-year-old girl, so we should expect homosexuals to be far more tempted by 8-year-olds than heterosexuals are."

These entries on Professor Rasmusen's weblog stoked a campus furor. Gay students questioned whether they could be treated fairly in his classroom, with a political-science major remarking, "I don't think he should make that view public at IU, because it can affect the way students may be in his class. You may be distracted, thinking that 'he may know that I'm gay.'" The associate director of undergraduate services at IU's business school also worried about how Professor Rasmusen's comments might impact students: "What is going to happen to the closeted gay students in the business school? He has a right to say what he wishes. But at the same time, how do you invite an open discussion in your classroom when you issue such hateful words?" Professor Rasmusen defended his statements, noting that homosexuality does not come up in his courses: "I don't know why a homosexual student would be uncomfortable in my class. I wouldn't know their views on homosexuality." (The full story appears in the *Chronicle of Higher Education*, November 7, 2003.)

A business professor's publicly espoused belief that an inordinate share of gay men are pedophiles may not in fact impede his or her teaching. Topics directly touching lesbians and gay men may not arise often in economics. But switch the setting to law school—or notably for this forum, civil rights and liberties courses in the undergraduate curriculum—and a far different circumstance arises. Take Robert H. Bork, who recently launched a scathing public attack on *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court's same-sex-marriage ruling (*Forbes*, December 22, 2003). While on the U.S. Court of Appeals, Judge Bork upheld the constitutionality of consensual-sodomy laws and the exclusion of gay people from the military (*Dronenburg v. Zech*, 1984). Suppose he were still on the faculty at Yale Law School teaching civil liberties. Could lesbian and gay students feel comfortable in his classroom? Indeed, they might reasonably expect to face a special burden asserting their civil rights (e.g., not to be branded as criminals for expressing their emotional and erotic feelings; not to be discriminated against in the workplace, including the military; not to be denied spousal or parental rights) that many, if not most, of their classmates wouldn't encounter in the same immediate and personal way.

I try to remain a neutral referee in class discussions about gay rights.

This is especially true at the undergraduate level. Lesbians and gay men often come out of the closet in college, away for the first time from their typically heterosexually dominated home environments. Unlike their straight counterparts on campus, they haven't otherwise been socialized into their sexual orientation, but rather have to make do on their own in relatively quick order. Adolescence, starting in early teens or before for heterosexuals, often is postponed until 18, 19, or 20 for gay people. In short, lesbian and gay students may not uniformly have the ego strength or experience to attempt matching wits in class with a seasoned debater like Judge Bork who actively advocates denying their rights.

Yet this isn't an argument for some unique status—or prohibition—of debates about homosexuality in the classroom. In fact, the probability that lesbian and gay students will enroll in courses taught by faculty with paper trails of antigay advocacy is remote. Rasmusen and Bork represent the exception, not the rule. But their examples raise the more general issue of how professors should promote a vigorous exchange of viewpoints, while also respecting the experiences of all students in a classroom environment that's comfortable for all.

The best approach requires comprehending that a professor's primary classroom task is to teach analysis and understanding and not to foster particular positions on politically relevant issues. Methods of thinking, not indoctrination, should be the educational goal.

In spring semesters, I teach an upper-division undergraduate class on the law and politics of sexual orientation. The course is among four electives fulfilling a multicultural component in several popular majors at my college. As a result, both stu-

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Campus Climate for Lesbian, Gay, Bisexual, and Transgender People

by Susan R. Rankin

Sexual minority students on college and university campuses encounter unique challenges because of how they are perceived and treated as a result of their sexual orientation, gender identity, or gender expression. The challenges faced by lesbian, gay, bisexual, and transgender (LGBT) students may prevent them from achieving their full academic potential or participating fully in the campus community. Similarly, other campus community members, including LGBT faculty, staff, and administrators, may also suffer as a result of the same prejudices, limiting their ability to achieve their career goals and to mentor or support students. What are the specific challenges facing LGBT people on campus? How are institutions of higher education addressing these challenges?

The hostile environment that LGBT students, faculty, staff, and administrators often experience has been documented in numerous studies since the mid-1980s (see Rankin, 1998 for a review). Many LGBT campus members find that they must hide significant parts of their identity from peers and others, thereby isolating themselves socially or emotionally. Those who do not hide their sexual orientation or gender identity have a range of experiences including discrimination, verbal or physical harassment, and subtle or outright silencing of their sexual identities. While higher education provides a variety of opportunities for students and others, these are greatly limited for those who fear for their safety when they walk on campus, feel they must censor themselves in the classroom, are so distracted by harassing remarks that they are unable to concentrate on their studies, or are fearful every time they walk into a public restroom that they will be told to leave.

Results from a recent study of nearly 1,700 self-identified LGBT students, faculty, and staff suggest that the campus community is not an empowering place for LGBT people and that intolerance and harassment are prevalent (Rankin, 2003). The study's findings indicate that during the 2000–2001 academic year:

- 36% of LGBT undergraduate students and 19% of LGBT faculty and staff experienced harassment
- Derogatory remarks were the most common form of harassment (89%)
- 79% of those who were harassed identified students as the source of the harassment
- 20% of all respondents feared for their physical safety because of their sexual orientation/gender identity; 51% concealed their sexual orientation/gender identity to avoid intimidation
- 71% felt that transgender people were likely to suffer harassment, and 61% felt that gay men and lesbians were likely to be harassed
- 43% rated the overall campus climate as homophobic
- 41% said that their college or university was not addressing issues related to sexual orientation/gender identity
- 43% felt that the curriculum did not represent the contributions of LGBT people

This research also suggests that LGBT people of color were more likely than white LGBT people to conceal their sexual orientation or gender identity to avoid harassment. Many respondents said they did not feel comfortable being out in predominantly-straight people of color venues, but they also felt out of place in predominantly-white LGBT settings. Additionally, while the same proportion of non-transgender LGB men and women (28%) reported experiencing harassment, a significantly higher proportion of transgender respondents (41%) reported experiences of harassment.

Several colleges and universities have initiated structural changes—e.g., creating LGBT resource centers and LGBT studies programs. Many campuses have revised or created LGBT-inclusive administrative policies, such as domestic partner benefits and nondiscrimination policies.

To successfully address the challenges facing LGBT people on campus, however, there must be a shift in basic assumptions, premises, and beliefs in all areas of the institution. In the transformed institution, heterosexist assumptions are replaced by assumptions of diverse sexualities and relationships, and these new assumptions govern the design and implementation of any activity, program, or service. This sort of transformative change demands committed leadership in both policy and goal articulation. New approaches to learning, teaching, decision-making, and working in the institution are implemented. It will demand the formation of relationships between individuals who are radically different from each other. These transformed assumptions, premises, and beliefs will provide the environment with the catalyst for change.

The first step in transforming the campus climate is to conduct an assessment to determine the challenges facing LGBT people. Rankin (2003) proposes one paradigm that takes into account five important aspects of campus culture: access and retention; research and scholarship; intergroup and intra-group relations; curriculum and pedagogy, and university commitment/service. This paradigm is designed to assist the campus community in maximizing LGBT equity through the use of assessment tools and specific intervention strategies.

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notions frequently yield to new forms of political identity, which put a homogeneous community first. In this contemporary understanding, rights are valorized not as ends in themselves, but only as specific principles promoting identifiable social interests. I have characterized this discursive attention to popular community and its revived interests as a new sovereignty (Goldberg-Hiller 2002), one in which civil rights (especially gay rights) are understood to be more material than in their pluralist incarnation, more capable of conflicting with social imperatives or weakening traditional rights, values, and institutions.

Civil rights are not eliminated in this account but reemerge in an ironic fashion, through the depiction of a victimized and innocent majority requiring protection from inappropriate gay economic and political power and the judicial consorts who mistakenly protect it. Conservative activists in Hawaii illustrate this inversion: "I am getting tired of hearing about how homosexuals are so oppressed. In reality, it is the other way around."[1] "It almost seems that we're [straights are] being harassed."[2] Rejecting court-established rights in this manner paradoxically tends to re-center law through new ideas about political sovereignty: Congress and state legislatures, but especially churches, families, and voters now become the legitimate guardians of the people's rights. As the relevance of courts fades in this construction of democratic theory, rights for gays are frequently depicted as "special rights," a concept that subverts the constitutional jurisprudence of equal rights. Bolstering the accusation that lesbians and gays seek special rights, both groups are frequently depicted as wealthy, privileged, overly educated, and culturally elite. In this context of privilege, lesbians and gays can't easily demonstrate a *prima facie* case of discrimination; instead, they are vulnerable to accusations of duplicity in their allegations to be victims of discrimination. Rather than motivated by love, same-sex marriage is, like welfare fraud, "just another means of securing government benefits," in the words of former Senator Lauch Faircloth.[3]

The claim that lesbians and gays are asking for special treatment helps draw into debates over gay rights and same-sex marriage neo-liberal economic concerns about scarcity. The attorney general of Massachusetts argued in denial of same-sex marriage that the benefits of citizenship are due opposite-sex couples, who can be presumed to be more financially interdependent than gays while less demanding of costly reproductive technologies; for these reasons they were, therefore, more entitled to call upon "the Commonwealth's scarce resources."[4] The state of Hawaii put the economic cost of same-sex civil rights in the frame of another common budgeting idiom, a zero-sum accounting: "Every dollar spent on a same-sex couple, or a cohabiting couple, of necessity strips a dollar from the State's ability to assist married couples."[5] Such rhetoric imbues civil rights with a material quality, and–in an age of vastly increasing economic inequality and tight public budgets–struggles against same-sex marriage and other rights claims do surrogate duty legitimizing neo-liberal social policies. These struggles also facilitate a neo-republican challenge to liberal ideals of citizenship. Nineteenth century republican ideologies tied citizenship to productive norms and were suspicious of unearned economic status. Today, the perversity of the powerful demanding rights signals a violation of republican restraint to those dubious of the judicial argument that denial of marriage to same-sex couples impermissibly creates "second-class citizens."[6]

The future of lesbian and gay rights will increasingly be globalized.

The centrality of economics and citizenship to contemporary political debates means that contests over lesbian and gay rights frequently link to many other issues. They also link to other spaces in ways that suggest that the future of lesbian and gay rights will increasingly be globalized. For detractors of these newer rights claims, neo-liberalism has already been used ironically to redraw boundaries in several ways. In Hawaii, the same-sex marriage case was argued to be evidence of a neo-colonial abuse of the state courts by powerful and wealthy New York gay interests (never mind that the Mormon Church in Utah bankrolled much of the opposition). In addition, economic fears that tourists would cease arriving in protest at a gay Pacific Mecca helped drive voters to the polls in support of the amendment that ended judicial responsibility for this case. Even the Supreme Court of Canada, which recognized same-sex spouses in 1999, seems to have valued these rights more for their function of "alleviating the burden on the public purse"[7] than for the public recognition it would bestow (Boyd 1999). Maintaining international competitiveness through such efficiencies is an important neo-liberal value that can discipline liberal notions of citizenship, rights, and entitlements.

For supporters of same-sex marriage, global themes play a different role in reimagining citizenship. International human rights discourses can infuse national rights movements as they have recently in Taiwan, which is poised to legalize same-sex marriage in its "Human Rights Basic Law." The European Union provides another model, where extra-national sources of authority such as the European Court of Justice broaden the spatial imagination of legal authority, producing what Stychin (2003) has usefully called sexual citizenship. Culled from newer sources of modern authority–international and human rights frameworks among others–the appeal of sexual citizenship to lesbians, gays, and their supporters tends to render fluid the prior boundaries of nation and state around which sovereignty is most often imagined. When the U.S. Supreme Court or the Massachusetts high court acknowledge Canadian precedent, or when states confront same-sex marriages solemnized in Ontario or British Columbia, the globalization of rights permits sexual citizenship to expand the imagination of public boundaries with significant consequences for political struggle.

The fecundity of this politics against courts and civil rights seems now to have unbounded potential. Certainly, the international projection of American "freedom," fears of international economic re-

taliation, as well as the rhetoric of special rights, judicial tyranny, and, perhaps ironically, state sovereignty *not* to recognize marriage contracts will all do heavy lifting in the fight for a constitutional amendment banning same-sex marriage during the 2004 election year. The vows "for richer or for poorer" have never seemed to have so much at stake.

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[3] *Congressional Record (Senate; 104th Congress 2nd Session), Tuesday, September 10, 1996, 142* Cong. Rec *S10117.*

[4] *Brief of Defendants,* Goodridge v. Department of Public Health *(Massachusetts Supreme Judicial Court SJC-08860), pp. 122 and ff.*

[5] *State's legal brief,* Baehr v. Miike*, 1996, p. 34.*

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Gay Rights and Teaching

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dents personally interested in the subject and those satisfying degree requirements enroll, providing a hodgepodge of beliefs on gay rights. I try to remain a neutral referee in class discussions, which are often animated since New Yorkers aren't shy about voicing opinions. In the rare event both conservative and liberal viewpoints aren't presented in discussion, I announce I'm playing the role of devil's advocate and then raise the neglected perspectives. Occasionally, to maintain civility, I have to restrain debates that become too heated or personal. I generally achieve my neutrality goal. The mean score for the statement "The instructor deals fairly with different points of view" in college-administered student evaluations of the course is 4.6 on a five-point scale, with 1 being "strongly disagree" and 5 "strongly agree."

Starting this coming spring, however, my mask of impartiality may be in serious jeopardy. In June of 2003, Cambridge University Press published my book, *Gay Rights and American Law*. In the book I provide both qualitative and quantitative analyses of how appellate courts dealt with the struggle for lesbian and gay civil rights during the last two decades of the twentieth century.

Two of the volume's myriad empirical findings are relevant here. The first involves religion. Roman Catholic judges were 12% less likely than Protestant colleagues to vote in favor of gay rights claims–and 35% less supportive than Jewish judges. After noting that minority (i.e., African American and Latino) and women jurists were substantially more sympathetic (compared with majority and male colleagues, respectively) to gay people's legal claims, I determine that these results "fortify historically powerless group empathy as a dimension for analyzing judicial behavior toward lesbians and gay men." The findings bolster the notion that judicial officials from traditionally powerless communities empathize with the plight of other disfranchised groups. In contrast, though, American Catholics' nineteenth-century and early-twentieth-century experiences of invidious discrimination and political powerlessness had long faded from memory by late century. Instead, anti-homosexual church dogma filtered into Catholic judges' official action. . . . [T]hese data provide striking evidence of Catholic judges' hostility to lesbian and gay rights" (pp. 88–90).

The second pertinent finding concerns the impact of presidential party on federal judges. Jurists nominated by Republican presidents voted 26.7% of the time in favor of sexual minorities, while Democratic appointees did so at a rate of 60.2%–a difference of 125%. After citing six other recent scholarly studies documenting the Republican party's antigay policy positions and actions, I conclude that "gay people who vote for, or otherwise support, Republican candidates engage in acts of self-immolation" (p. 152).

Hence, like Rasmusen and Bork, I now have a relevant paper trail potentially subverting my persona of objective classroom arbiter. Moreover, Roman Catholics form the largest religious group in John Jay's undergraduate population, and with its criminal justice mission, the school probably attracts more Republicans than any other unit in the City University of New York. Thus, my published research may be personally offensive to a significant portion of students. Of course, a plausible defense is that the book's conclusions are empirically founded and not mere expressions of opinion. Yet that distinction may be too subtle to satisfy many undergraduates.

In any event, the task now will be to convince students that in the classroom I can still be a reliable observer and dispassionate analyst of political phenomena, even though my scholarship formulates specific preferences. In fact, I hope to turn my book's criticism of Catholic and Republican judges into a teaching opportunity. Unlike those jurists–who in my opinion were unable to recognize legal rights with which they personally disagreed–I can facilitate students' articulation and analysis of issues from perspectives at odds with my erstwhile private views. I'm optimistic that both they and I will end the semester with a greater appreciation of the classroom as a special place far different from the world outside.

Reviewed by Philip Dynia

The Gay Rights Question in Contemporary American Law by Andrew Koppelman. Chicago: The University of Chicago Press, 2002. 210 pp. Cloth $48.00. ISBN: 0226451003. Paper $17.00. ISBN: 0226451011.

Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement by Patricia Cain. Boulder, CO: Westview Press, 2000. 288 pp. Cloth $40.00. ISBN: 0813326184.

Andrew Koppelman, associate professor of law and political science at Northwestern University, remarks in his opening pages that "[n]ew books and articles on gay rights proliferate like dandelions on a spring lawn." He contrasts the present situation (to which he and Patricia Cain have made impressive contributions) to the mid-1970s, when there was still "virtually no legal literature on the status of gay people." At one point, Cain also contrasts the 1970s with the present, specifically in the realm of family law. She reports that at that time, family law judges were surprised by lesbian mothers demanding custody rights, and she quotes litigants and lawyers recalling instances in which "judges cross-examined lesbian mothers about their sex lives, unable to understand what exactly two women could do in bed."

These two examples reveal a great deal about the essential concerns of each author. Koppelman's inclinations are more theoretical and largely confined to what he himself calls "high theory," as exemplified by contemporary constitutional theory. While thoroughly conversant with much of that theory (each chapter has a brief section summarizing the theoretical essentials), Cain is more interested in how civil rights attorneys have used that theory to craft arguments at both the federal and state levels and in both the public and private spheres. Her approach is historical, starting in the early 1950s, and she attempts to show how arguments aimed at judges can also serve to educate the one court that matters most on the issue of gay rights–the court of public opinion.

Koppelman tells us that the 1950s were a time when American law seemed bent on totally marginalizing gays, and obviously those times are behind us. But gays still face a plethora of legal disabilities, and so, *the* gay rights question (Koppelman's italics) becomes how this state of affairs can be changed. This question arises in a "radically pluralistic society" with considerable disagreement about moral fundamentals, which in turn gives rise to a problem for the law–how to reconcile this deep disagreement with our commitment to live under a single legal regime. Koppelman notes three classic approaches to this problem: constitutional rights (Is one side of a controversy legally entitled to what it seeks?); morality (Is there one morally acceptable resolution to the controversy?); and conflict of laws (an approach which "assumes that political decision-making is not constrained by any legal or moral claim of right and that different resolutions can legitimately be reached in different parts of the country"). Koppelman considers all three and finds the current consensus views in each area faulty.

In the legal academy, the consensus is strongly in favor of gay rights (consider some of Justice Scalia's academic-lawyer bashing in his dissent in *Lawrence v. Texas*), with the strongest argument resting on the right to privacy, followed by the equal protection argument, and a minority position (considered the weakest) that relies on sex discrimination doctrine. Koppelman would turn these on their head, believing that the first two, while useful, are also flawed, and that the sex discrimination argument is the strongest.

In a chapter on equal protection and invidious intent, Koppelman both dissects and defends the Supreme Court's decision in *Romer v. Evans.* (In the process, he also gives an excellent sketch of contemporary equal protection doctrine.) He characterizes *Romer* as a case about "impermissible purpose" that fits well with doctrines making "purpose fundamental to the adjudication of equal protection claims." That invidious purpose is understandable in the context of American culture's "ubiquitous" hatred and stereotyping of gays, which the Court never discussed but must have been aware of. Thus, *Romer* has (potentially) much wider implications–*all* laws that discriminate against gays are products of the same defective political process and "should be presumptively unconstitutional."

Koppelman follows with a chapter on the right to privacy. For many, questions of lawmakers' motive are tangential to the real issues raised by the gay rights question–issues not of equality but of privacy. Certain private matters are none of the law's business. Koppelman argues that privacy is a weak basis for gay rights claims (familiar arguments that others have made)–no textual basis, not necessarily consistent with earlier privacy decisions, inappropriately requiring judges to decide what is important in life, crippling the state's ability to legislate on the basis of morality, and focusing too much attention on private conduct rather than the larger gay rights question of public status. Koppelman concedes that the privacy argument has "great rhetorical power" (recall Laurence Tribe addressing the Court in *Bowers v. Hardwick*–"the question in this case is not what Michael Hardwick was doing there but what the state of Georgia was doing there") and that it has produced "notable successes in litigation" (this written over a year before *Lawrence v. Texas*). And Koppelman believes it should be deployed when appropriate, but not to the neglect of other arguments. He then discusses, again with conciseness and a solid command of the case law and scholarly commentary, the evolution of privacy law, concluding that the Court's decision in *Bowers v. Hardwick* was consistent with the preceding privacy case law, especially if it is seen as infringing on an interest–"homosexual sodomy" in the words of Justice White–that the judges deem unimportant. "*Hardwick* can...be understood not as a

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constitutional anomaly, but rather as a reflection of an authoritarian tendency that was present in the privacy cases from the beginning." (Perhaps this explains why Justice Kennedy's opinion in *Lawrence v. Texas*–whatever one may understand it as saying–makes no reference to Justice Blackmun's *Hardwick* dissent, grounded as it is in the privacy cases, albeit with a very different understanding of them.)

Turning then to the argument that discrimination against gays is sex discrimination, Koppelman begins with a segment of the oral argument before the Vermont Supreme Court in *Baker v. State*, a case in which several same-sex couples claimed they had a constitutional right to marry. Justice Denise Johnson, pursuing the point that refusal to grant marriage licenses to the couples was discrimination, is quoted as asking the state's Assistant Attorney General: "Why are people being excluded from a marriage license here? A man can't marry a man because he's a man. A woman can't marry a woman because she's a woman. Why isn't that gender discrimination?" Koppelman posits that the argument that discrimination against gays is sex discrimination is as simple as that, though in what is one of his strongest chapters, he explains and refutes six fundamental objections to the argument. He also concedes that if courts have been unwilling to consider gays a suspect or quasi-suspect classification for equal protection purposes, it is even less likely that courts will accept the sex discrimination argument. As he quite correctly notes, if it is accepted, it "would entail that *all* laws discriminating against gays, notably marriage laws, must be swept away at a single stroke. Judges are understandably hesitant to begin down that road."

Koppelman next addresses the issue of morality and those who condemn homosexuality on moral grounds. The only argument in this realm that is "logically coherent and not empirically falsifiable" is the one offered by a group of philosophers he refers to as NNL, the "new natural law theorists." The chapter is an interesting excursion into moral philosophy, and this reviewer finds Koppelman's statements of the NNL position evenhanded and his criticism of their main points persuasive. Others more attuned to the philosophy of St. Thomas Aquinas and Plato (the elderly Plato of *The Laws*, not the young author of *The Republic*) might disagree. The question of whether there is anything "new" in the "new natural law theorists" may be left to another day.

Finally, Koppelman turns to the third approach and focuses on how the law should deal with the conflict of laws over gay rights and the "most profound topic of disagreement: same-sex marriage." This chapter–and the following chapter that provides a powerful skewering of the Defense of Marriage Act–are not only the strongest chapters but also the most relevant for the legal landscape that has emerged in the wake of *Lawrence v. Texas*. That decision and the more recent Massachusetts decision (*Goodrich v. Department of Public Health*) have encouraged gay rights groups to pursue a variety of legal challenges, but the immediate battleground clearly will be over same-sex marriage. Koppelman addresses the question of interstate marriage recognition by drawing an analogy to what was probably "the most profound disagreement in American history over marriage recognition"–the conflict of laws over interracial marriage. Again, his mastery of the relevant sources is solid, as is his conclusion that "[b]lanket nonrecognition of same-sex marriage... would be an extraordinary rule." Undoubtedly, supporters of same-sex marriage will find many useful arguments and even solace in this aspect of Koppelman's work, just as opponents will find many reasons why a federal constitutional amendment is the only answer to their concerns.

Koppelman argues that privacy is a weak basis for gay rights claims.

Cain's book, subtitled "The Role of Lawyers and Courts in the Lesbian Gay Civil Rights Movement," is one of the volumes in the "New Perspectives on Law, Culture, and Society" series. It is a solid and impressive addition to the collection. She begins, for comparative purposes, with a discussion of earlier civil rights struggles–those of African Americans, and then women. This may be familiar ground for both lawyers and lay people. She then discusses public interest lawyers and litigation strategy, with special attention to (the arguably less familiar) lesbian and gay public interest lawyering. In subsequent chapters she discusses the evolution of public rights and private rights in the period from 1950 to 1985, beginning with the emergence of gay and lesbian bars and their struggles for "public space"–efforts to avoid police harassment and entrapment of patrons. She also provides excellent summaries of the efforts of student groups to access public space in universities, as well as struggles by gay and lesbian federal and state public employees to retain their jobs. A chapter devoted to "when private becomes public" includes valuable material on early efforts to recognize gay marriages, immigration problems faced by gays, and cases dealing with gay and lesbian couples in which one sought to adopt the other so as to receive certain legal benefits.

The watershed is, of course, *Bowers v. Hardwick* in 1986. Her discussion of the decision itself is perfunctory; she is far more interested in the implications of that decision in a variety of the areas discussed above. Cain offers a valuable analysis of efforts after 1985 to use state constitutions to overturn state sodomy laws. She also presents excellent accounts of state cases dealing with family rights and child custody.

Like other gay and lesbian public interest lawyers of her generation, Cain is well aware of the terrible shadow *Bowers* cast over gay rights litigation in this period, and she offers a confident (and prescient) prediction that, after *Romer v. Evans*, *Bowers* is more likely to be overturned. She includes a discussion of the preliminary litigation in what would become *Lawrence v. Texas*, though ironically she doubts that case would be the vehicle that would ultimately lead to the demise of *Bowers*–an understandable oversight in an otherwise excellent study of this newest and most cutting edge civil rights movement. One can only hope for a second edition of this book in which Cain adds a chapter on the aftermath of *Lawrence v. Texas*. It will undoubtedly be a fascinating chapter, though it will also undoubtedly exhibit what has so often been true in the struggles she has so ably recounted–two steps forward, one step back.

Campus Climate for LGBT People
continued from page 11

What institutional actions would improve the campus climate for LGBT people? Rankin (2003) offers a series of recommendations for policymakers and program planners to maximize LGBT equity on campus. Among the recommendations are: (1) include sexual orientation and gender identity or expression in the institution's non-discrimination clause; (2) extend employee spousal benefits to domestic partners; (3) provide single-stall, gender-neutral restroom facilities; (4) integrate LGBT concerns into university documents and publications; (5) create a documentation form in police services for reporting hate crimes committed against LGBT people; (6) respond visibly and expeditiously to acts of intolerance directed at LGBT members of the community; (7) create a LGBT studies center or department; (8) expand LGBT-related library holdings; (9) promote the use of inclusive language in the classroom; (10) include sexual orientation and gender identity issues in new student orientation programs; and (11) create an office for LGBT concerns.

A written plan inclusive of the recommended actions should be created, including timelines, resources (both human and fiscal), people responsible for the implementation of the recommendations, and a system of accountability. Many of the "how-to" models for the proposed strategies may be found at www.lgbtcampus.org.

As more universities institute these strategies, they should also conduct surveys and other research before and after implementation so as to better understand the efficacy of the initiatives within their community and what other changes might be necessary. Furthermore, a future study looking at the same institutions as this investigation would be valuable in providing comparative data and greater understanding of the long-term effects and success rates of these programs.

As we move forward, it is clear from the results of this study that even institutions that have begun to create LGBT-inclusive policies and LGBT-specific programs will need to expand these efforts to ensure full participation of LGBT individuals in the campus community. Only then will institutions of higher education be able to achieve their goal of "creating inclusive educational environments in which all participants are equally welcome, equally valued and equally heard" (AACU, 1995, p. xxi).

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