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SHOULD THERE BE HOMOSEXUAL MARRIAGE? AND IF SO, WHO SHOULD DECIDE?

*Richard A. Posner**

THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT. By *William N. Eskridge, Jr.* New York: The Free Press. 1996. Pp. 296. $25.

Professor Eskridge[1] has established a well-deserved reputation as our leading legal academic specialist on statutory interpretation. Lately, his interests have expanded to take in the legal rights of homosexuals. In *The Case for Same-Sex Marriage*, he argues that marriage should be permitted between persons of the same sex — and indeed that the Constitution should be interpreted to entitle persons of the same sex to marry. As the title indicates, this is a work of advocacy, but it is not just a book-length brief. It is a work of deep and scrupulous (though not flawless) scholarship — unstrident, unpolemical, and written with extreme lucidity and simplicity so that it is fully accessible to the nonlawyer. Except for the treacly vignette of lesbian love with which the book opens,[2] it is a model of advocacy scholarship.

The book argues two cases, not sharply distinguished. The first is the case for legislative reform: state marriage statutes (or their interpretation) should be changed to permit people of the same sex to marry. The argument that Eskridge mounts in favor of such reform is (after a rocky beginning) a powerful one, and it would not trouble me if a state were persuaded by it and adopted such a law.

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* Chief Judge, United States Court of Appeals for the Seventh Circuit, and Senior Lecturer in Law, University of Chicago. A.B. 1959, Yale; LL.B. 1962, Harvard. — Ed. I thank Lawrence Lessig, Martha Nussbaum, and Cass Sunstein for many very helpful comments on a previous draft. Needless to say, they are not to be taxed with my mistakes and conclusions. I should add here that I use the terms "homosexual marriage" and "same-sex marriage," which I regard as synonymous, interchangeably; Eskridge prefers the latter.

1. Professor, Georgetown University Law Center; Visiting Professor, Yale Law School.

2. A pretty transparent ploy. Heterosexuals are less troubled by lesbian than male-homosexual relationships, and only partly because the former do not contribute to the spread of AIDS. Heterosexuals are also less troubled by homosexuals who, like Ninia and Genora, the carefully "foregrounded" plaintiffs in the Hawaiian same-sex marriage litigation and "stars" of Eskridge's vignette, are ostentatiously mainstream in everything except sexual orientation. *See* pp. 1-5; Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *recons. granted in part,* 875 P.2d 225 (Haw. 1993), *and appeal after remand sub nom.* Baehr v. Miike, 910 P.2d 112 (Haw. 1996), *on remand,* No. Civ. 91-1394, 1996 WL 694235, 65 USLW 2399 (Haw. Cir. Ct. Dec. 3, 1996).

The second case that Eskridge argues is that the courts in the name of the Constitution should force acceptance of same-sex marriage on all the states at once. That case I find unconvincing.

Let us see how Eskridge argues these cases (as I say, he does not distinguish sharply between them). He begins, after trying to put us in a receptive mood with the story of Ninia and Genora, with a history of same-sex marriage. The point of the historical account is to show that same-sex marriage is not quite the novelty that most Americans think it is. To show this requires Eskridge to ransack the historical and anthropological record. He doesn't come up with much to advance his case. The fact that Nero "married" a young man, the unfortunate Sporus, after having him castrated (one of Eskridge's examples of the historicity of same-sex marriage) (p. 22), is unlikely to strike many Americans as a happy augury of same-sex marriage; nor is the fact that ritual pederasty in Melanesia is viewed as an initiation into heterosexual marriage (p. 33); nor that "woman marriage," in which a woman assumes the role of husband of another woman (or women), is common in tribal Africa (pp. 33-35); nor that in our own country women "passing" as men have sometimes obtained a marriage license and married a man (pp. 37-39). Eskridge in this part of the book, chapter 2, is treating practice as normative for us even if it is the practice of a society, such as that of ancient Rome, or Aztec Mexico, many of whose practices are deeply repellent to us (pp. 21-30). If whatever has been a common social practice is therefore a moral practice, then infanticide, human sacrifice, cannibalism, and slavery are moral. And homosexual marriage has nowhere been a *common* practice, even in societies in which homosexuality was common.

Eskridge is a careful scholar. But one must always beware a legal advocate doing history or anthropology. Eskridge does not maintain a clear line between homosexual relationships and homosexual marriages, nor between homosexual relationships and nonerotic male bonding, as when he calls Patroclus Achilles' lover, which may have been what Shakespeare thought (see *Troilus and Cressida*), but is not what Homer says or implies.[3] Eskridge also speculates that because the ancient Mesopotamian legal codes did not prohibit homosexuality yet regulated marriage heavily, maybe same-sex marriage was permitted implicitly. But Illinois decriminalized sodomy more than thirty years ago, yet still does not

3. *See* K.J. DOVER, GREEK HOMOSEXUALITY 196–99 (2d ed. 1989). Eskridge at one point does distance himself from John Boswell's heavily criticized view that medieval "enfraternization" rituals were homosexual, p. 223 n.37, but elsewhere he says that "there is some likelihood that the brothers so joined enjoyed relationships of affinity and erotic possibilities." P. 27. I'm not sure what he means by "erotic possibilities." And at times he appears to equate nonerotic "same-sex unions" with homosexual relationships on the theory that what's really important about marriage is companionship, not sex. *See, e.g.*, pp. 17, 35.

recognize same-sex marriage. Eskridge's single most questionable historical claim is that we can infer that "same-sex intimacy was common in [ancient] Egypt" from the denunciation of the Egyptian practice of same-sex marriage in Leviticus (p. 19). Nothing is more common than to ascribe sexual abominations to your enemies. Whether there is *any* accurate history in the early books of the Bible is open to serious doubt,[4] and if there is any, it is unlikely to concern the sexual practices of Egyptians.

Eskridge's canvass of historical materials is impressively thorough and has value independent of its advocacy function. But in addition to the mistakes of detail that I have mentioned, the causal inferences that he draws from the historical record are questionable, including his explanation for why, beginning in the thirteenth century under the leadership of the Roman Catholic Church, Western nations became and remain dead set against recognizing homosexual marriage. Eskridge speculates that growing urbanization and the rise of the nation-state rendered homosexuals prominent and threatening (p. 36). But why? Cities traditionally are more tolerant of sexual and other deviance than rural areas; *Stadtluft macht frei,* as the Germans say. And why should a nation feel threatened by homosexuals? I have set forth elsewhere what I believe to be a more persuasive explanation for the historical rise of intolerance of homosexuality in the West.[5] The rise coincided, though only very roughly, with the rise of companionate marriage, marriage in which the spouses are expected to be close companions — ideally, each other's best friends — rather than the woman's being merely the breeder of the man's children. The institution of companionate marriage tends to extrude homosexuals — who can blend invisibly into a system of noncompanionate marriage, where nothing more than occasional sexual relations are expected, but who may be uncomfortable in a companionate relationship with a person of the opposite sex. For the first time they stand out, conspicuously different and therefore a natural object of suspicion and hostility. If this is right, it suggests that Eskridge's examples of same-sex marriage, all of which are drawn from cultures that do not emphasize companionate marriage, have very limited relevance to the case for recognizing same-sex marriage in our society. It does not follow that same-sex marriage should be forbidden, only that history and anthropology do not furnish persuasive precedents for Eskridge's position.

Tolerance for homosexual relationships need not imply recognition of homosexual marriage, but intolerance will certainly doom it.

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4. *See* ROBIN LANE FOX, THE UNAUTHORIZED VERSION: TRUTH AND FICTION IN THE BIBLE 175-90 (1992). Eskridge acknowledges this possibility. P. 19.

5. *See* RICHARD A. POSNER, SEX AND REASON 117, 125–26, 156–61 (1992).

So Eskridge is right to point out at the end of his historical-anthropological chapter that there is increasing tolerance of homosexual relationships in the United States and other Western countries. More and more homosexuals are "out of the closet" and many of them are living openly in long-term homosexual relationships that resemble marriage. A number of ministers and rabbis, and even some Catholic priests, are willing to perform homosexual marriage ceremonies. And Hawaii may be moving toward official recognition of homosexual marriage.[6] The shift in public opinion in favor of a legal change (allowing homosexual marriage) that would have seemed completely unthinkable just a few years ago is as yet slight, but not so slight as to render Eskridge's project quixotic. He has more than Nero to build on.

Chapter Three of the book seems at first glance sectarian, at least to a heterosexual reader, for it is entitled "The Debate Within the Lesbian and Gay Community." Eskridge no doubt believes that unless homosexuals present a united front on the issue of homosexual marriage, heterosexuals will be disinclined to support it. Yet an argument for why homosexuals should support homosexual marriage might be an argument for why heterosexuals should oppose it. Eskridge points out that with an increasing fraction of a worker's income comprised of fringe benefits that often are available to the worker's spouse, the pecuniary advantages of marriage have increased, especially (he might have added) the pecuniary advantages of childless marriage, as children have become extremely expensive to raise. But what is a benefit to the homosexual is a cost to the society as a whole, if we assume that the employer cannot (and he cannot, for practical as well as legal reasons), through an adjustment of wages or other means, make each worker pay for his or her own fringe benefits. But because there are so many more heterosexuals than homosexuals — Eskridge does not repeat the ridiculous overestimate of homosexuals as constituting ten percent of the population[7] — and because a much smaller fraction of homosexuals than of heterosexuals will marry, the costs of homosexual marriage to the heterosexual community, certainly on a per capita basis, would be small.

Access to spousal fringe benefits is one of fifteen significant marital rights that Eskridge discusses (pp. 66–70), and he makes a strong case that the denial of these rights to homosexual couples imposes arbitrary and unfair hardships on homosexuals. A notable example is that

6. *See Baehr*, 852 P.2d at 44.

7. Three percent is the highest responsible estimate of the percentage of the sexually mature population that has a predominantly homosexual orientation. *See* POSNER, *supra* note 5, at 294-95; RICHARD A. POSNER, OVERCOMING LAW 555 & n.6 (1995).

> [u]nder federal law a noncitizen is privileged to enter the United States and ultimately to become a citizen if she or he marries an American citizen. This is an enormous benefit of marriage in our transnational world. Same-sex couples denied this benefit often must go to great lengths just to be together. [p. 68]

Eskridge notes the informational value of the marriage option — because marriage is costly to get out of, willingness to marry is a signal of commitment — and also, of course, the hope that homosexual marriage would curb male homosexual promiscuity, a major factor in the spread of AIDS.[8]

Eskridge points to survey data that indicate that most homosexuals, both male and female, would like to marry a person of their own sex (pp. 78-79). And he rightly is impatient with leftwingers' denunciations of marriage as a "patriarchal" institution, denunciations that in any event have little pertinence to a marriage between persons of the same sex (pp. 75-80). It is the very conservatism of marriage as an institution that should attract support for homosexual marriage from conservative heterosexuals, desirous of "civilizing," of embourgeoising, the homosexual community — turning homosexuals into the Republicans they ought to be.[9] Homosexuals, especially male homosexuals, tend to be at once affluent[10] and childless, so they should be natural supporters of limited government.

Eskridge further argues that without the right to marry persons of the same sex, homosexuals will not enjoy full legal equality with heterosexuals. This inequality is the main reason he rejects the compromise of allowing homosexuals to enter into "domestic partnerships" that would confer on the partners all or most of the legal and financial advantages of marriage — without the word. His point about formal equality is not entirely correct. There is no legal barrier to homosexuals' marrying persons of the opposite sex; in this respect there is already perfect formal equality between homosexuals and heterosexuals. But he is right that the practical effect of

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8. I have argued elsewhere that AIDS provides a reason for recognizing homosexual marriage, *see* TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE 179–80 (1993), but the more I think about the matter the less confident I am. Because males are more promiscuous than females (see, for example, the evidence discussed in POSNER, *supra* note 5, at 91–96), male homosexual marriage is likely to be a good deal more "open" than heterosexual marriage. A married homosexual couple would be more likely to eschew safe sex than the unmarried, since insistence on safe sex by either spouse would bespeak mistrust of the other. If homosexual marriage thus reduced safe sex, AIDS might rise.

9. Similar reasoning led Thomas Grey to predict, ingeniously although incorrectly, that the Supreme Court would invalidate the laws criminalizing homosexual sodomy. *See* Thomas C. Grey, *Eros, Civilization and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83, 97.

10. This is widely believed, though hard evidence is lacking. *See* POSNER, *supra* note 5, at 300-01; POSNER, OVERCOMING LAW, *supra* note 7, at 339-40.

the law's refusal to recognize homosexual marriage is to exclude many homosexuals from a fundamental social institution. He calls this refusal "the most blatant evidence that gay and lesbian citizens must sit in the back of the law bus, paying for a first-class ticket and receiving second-class service" (p. 65).

But that of course is where many heterosexuals *want* homosexuals to be. The principal opposition to homosexual marriage comes from people who believe that for the state to recognize such marriage would be to place a stamp of official approval on homosexuality. Eskridge discusses this objection at length, but I do not think he refutes it. He points out correctly that since rapists and child molesters, along with "transvestites, bisexuals, and other gender benders can obtain marriage licenses, usually without any fuss," it cannot be that giving a homosexual couple a marriage license would connote official approval of homosexuality (p. 105). But there is a difference between approving a *form* of union and approving particular individuals who are utilizing that form. Obviously the fact that a man wearing a dress can marry a woman wearing a suit, or a rapist his victim, does not entail that the state must allow a man to marry three women at once, or his cat, or his sports car. Eskridge also argues that some same-sex marriages would be just as good in terms of love, compatibility, mutual support, and other dimensions of a mutually beneficial human relationship as many conventional marriages. I would accept this claim even without the survey evidence that Eskridge cites, but again it does not meet the objection of people who do not want the state to be seen as placing a stamp of approval on homosexuality.

Their objection is based on two beliefs, one of which I believe to be correct (though Eskridge does not), the other of which I believe (along with Eskridge) to be incorrect, though many people disagree. The first belief is that it is a disadvantage to be homosexual, regardless of whether the society is tolerant or intolerant of homosexuals. The more intolerant, the greater the disadvantage; but some disadvantage would remain even if the remaining legal disabilities were removed.[11] The second belief, the wrong one, is that homosexuality is a choice, one that can be influenced by law and public opinion. The evidence is very strong that homosexual orientation is genetic.[12] It can be "overcome" in the sense that most homosexuals are capable not only of refraining from homosexual activity if the perceived costs are prohibitive but also of engaging in heterosexual sex and "passing" as heterosexual; but the psychological costs of either strategy are very high. If this is right, and if we

11. *See* POSNER, *supra* note 5, at 303–07. The main disadvantage, of course, is that two persons of the same sex cannot both be the biological parents of the same child.

12. *See* POSNER, *supra* note 7, at 572 n.25.

define a "homosexual" as a person who has a homosexual orientation rather than as a person of heterosexual orientation who may happen to have engaged in homosexual activity on occasion, then the number of homosexuals is essentially invariant to public policy. If so, and if the concern about same-sex marriage is that by placing its imprimatur on homosexuality the state would encourage some teenagers to adopt a homosexual orientation (something parents worry about), there is little point in immiserating homosexuals in order to maintain a posture of official disapproval of homosexual activity.

I do think (Eskridge is vague about this) that homosexual couples ought not be granted the identical rights of adoption as heterosexual couples without further study of the effects of such adoption — not on the sexual orientation of the child, which I believe to be invariant to the adoptive parents' orientation as to other environmental factors, but on the child's welfare in the broadest sense. Apart from this reservation, I find Eskridge's argument for recognizing homosexual marriage quite persuasive — but only as an argument addressed to a state legislature. His arguments for recognizing a federal constitutional right to same-sex marriage, which are pressed in the last two chapters of the book, are unconvincing. They are good lawyers' arguments — cleverly distinguishing same-sex marriage from polygamous and incestuous marriage; building bridges from the Supreme Court's decisions striking down state laws against interracial marriage and allowing prisoners to marry (marry, but not have sex — so *Bowers v. Hardwick,*[13] in allowing states to forbid homosexual sex, should not be taken as authority for not allowing homosexuals to marry!); speculating that "[a]s women made gains in politics and the marketplace, middle-class anxiety about gender and the family was displaced onto another object: the homosexual" (p. 168) (thus grounding opposition to homosexual marriage as a form of hostility to sexual equality); and, of course, balancing the benefits of homosexual marriage against the costs to important state interests and finding that the former predominate.

There is nothing wrong with these arguments, except — a crucial except, however — the tacit assumption that the methods of legal casuistry are an adequate basis for compelling every state in the United States to adopt a radical social policy that is deeply offensive to the vast majority of its citizens and that exists in no other country of the world, and to do so at the behest of an educated, articulate, and increasingly politically effective minority that is seeking to bypass the normal political process for no better reason than impatience, albeit an understandable impatience. (Americans

13. 478 U.S. 186 (1986).

are an impatient people.) A decision by the Supreme Court holding that the Constitution entitles people to marry others of the same sex would be far more radical than any of the decisions cited by Eskridge. Its moorings in text, precedent, public policy, and public opinion would be too tenuous to rally even minimum public support. It would be an unprecedented example of judicial immodesty. That well-worn epithet "usurpative" would finally fit.

I do not mean to sound unduly cynical about legal reasoning, so deftly deployed by Eskridge. It is not *just* the bag of lawyers' tricks. It employs methods of argument that since Aristotle have been accepted as useful tools for guiding judgment in areas where exact logical or scientific methods are unusable and public policy toward homosexuality is one of those areas. But it is a mistake to suppose that legal reasoning alone can underwrite so profound a change in public policy as Eskridge envisages. No nation in the world, no state of the United States with the uncertain and incipient exception of Hawaii (by no means a typical state, in any event), recognizes homosexual marriage and equates it to heterosexual marriage. An overwhelming majority of the American people are strongly opposed to it; even the homosexual community is divided over it (hence chapter 3 of Eskridge's book). A complex and by no means airtight line of argument would be necessary plausibly to derive a right to homosexual marriage from the text of the Constitution and the cases interpreting that text — a tightrope act that without a net constituted by some support in public opinion is too perilous for the courts to attempt. Public opinion may change — Eskridge's book may help it change — but at present it is too firmly against same-sex marriage for the courts to act.

This is not to say that courts should refuse to recognize a constitutional right merely because to do so would make them unpopular. Constitutional rights are, after all, rights against the democratic majority. But public opinion is not irrelevant to the task of deciding whether a constitutional right exists. When judges are asked to recognize a new constitutional right, they have to do a lot more than simply consult the text of the Constitution and the cases dealing with analogous constitutional issues. If it is truly a new right, as a right to same-sex marriage would be, text and precedent are not going to dictate the judges' conclusion. They will have to go beyond the technical legal materials of decision and consider moral, political, empirical, prudential, and institutional issues, including the public acceptability of a decision recognizing the new right.

Reasonable considerations also include the feasibility and desirability of allowing the matter to simmer for a while before the heavy artillery of constitutional rightsmaking is trundled out. Let a state legislature or activist (but elected, and hence democratically

responsive) state court adopt homosexual marriage as a policy in one state,[14] and let the rest of the country learn from the results of its experiment. That is the democratic way, and there is no compelling reason to supersede it merely because intellectually sophisticated people of secular inclination will find Eskridge's argument for same-sex marriage convincing. Sophisticates aren't always right (the scientific evidence that sexual orientation is invariant to environmental factors including toleration is strong but not conclusive), and judges must accord considerable respect to the deeply held views of the democratic majority. When the Supreme Court moved against public school segregation, it was bucking a regional majority but a national minority (white southerners).[15] When it outlawed the laws forbidding racially mixed marriages,[16] only a minority of states had such laws on their books. Only when all but two states had repealed their laws forbidding the use of contraceptives even by married couples did the Supreme Court invalidate the remaining laws.[17] It created a right of abortion against a background of a rapid increase in the number of lawful abortions.[18] Were the Court to recognize a right to same-sex marriage today, it would be taking on almost the whole nation.

Many constitutional theorists would say, with Ronald Dworkin, that the task of the courts should be to do what is right, regardless of the consequences, or at least that the *theorist* should say what is right even if he then advises the judges to duck the issue because it is too hot. I do not myself see a sharp line in constitutional law between what is right and what is acceptable. The judiciary is not a debating society. If most parents fear that recognizing same-sex marriage may distort the sexual development of their children or (otherwise) undermine the family, this is a datum that bears on a judgment whether the Constitution should be interpreted to override the refusal of the states to authorize same-sex marriage. Similarly, if no other country in the world authorizes such a thing, this is

14. I recognize the possibility that the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, may make it difficult to confine the experiment to one state as homosexuals from other states flock in to get married there. It is only a possibility. The clause is applicable only to judgments, and marriage may not be a judgment. Moreover, states have not been required, under traditional conflicts of law principles that are available to inform interpretation of the Full Faith and Credit Clause, to recognize marriages that deeply offend their own public policies — polygamous marriages are a common example — provided that the state has a significant territorial connection to the parties to the marriage. But whatever difficulty the Full Faith and Credit Clause poses for experimenting at the state level with same-sex marriage, it hardly argues for immediate nationalization of the issue by the Supreme Court's recognizing a federal constitutional right to enter into such a marriage.

15. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

16. *See* Loving v. Virginia, 388 U.S. 1 (1967).

17. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

18. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 179 (1991).

a datum that should give pause to a court inclined to legislate in the name of the Constitution. One would have to have more confidence in the power of reason than I do to decide novel issues of constitutional law that lie well removed from the constitutional text and history to be willing to ignore what the people affected by the issues think about them.

It thus is to me a significant weakness of Eskridge's book that it does not examine the pragmatic objections to constitutionalizing the question of same-sex marriage. He wants the courts in the name of the Constitution to require every state and the federal government, at a stroke, tomorrow if possible, to confer all fifteen perquisites of the married state on parties to homosexual marriage, including full rights of adoption, plus the symbolic crown — the name "marriage." The country is not ready for Eskridge's proposal, and this must give pause to any impulse within an unelected judiciary to impose it on the country in the name of the Constitution.