

Q: Would legal recognition of same-sex marriages be good for America?

Yes: Marriage will normalize social relations between gay and straight people throughout the culture.

BY WILLIAM N. ESKRIDGE JR.



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Same-sex marriage is good for gay people and good for America and for the same reason: It civilizes gays and it civilizes America. For most of the 20th century, lesbians, gay men and bisexuals have been outlaws. The relevant law was the criminal code — not just sodomy prohibitions, which virtually defined gay men and lesbians, but also disorderly conduct, lewdness and vagrancy statutes, infractions of which led to penalties in employment and licensing.

The relevant law today is not only in antidiscrimination statutes but increasingly in family law as well. Virtually no one in the gay and lesbian community would deny that this “civilizing” shift in the law reflects enormous progress and that such progress is incomplete until gay people enjoy the same rights and responsibilities as straight people.

Marriage is the most important right the state has to offer, in part because being married entails dozens of associated rights, benefits and obligations. As a formal matter, law’s civilizing movement will not be complete until the same-sex married couple replaces the outlawed sodomite as the paradigmatic application of law to gay people.

The law’s gradual decriminalization of homosexuality finds a parallel in gay lives. As gay men and lesbians shed their outlaw status, they increasingly integrate into (as opposed to being closeted from) the larger society and its spheres of business, religion, recreation and education. Recognizing same-sex marriages would contribute to the integration of gay lives and the larger culture.

Marriage would contribute to this integration because same-sex couples would be able to participate openly in this long-standing cultural institution. Such participation would

establish another common tie between gay and straight people. Gays and lesbians already are coworkers, teachers, students, public officials, fellow worshipers and parents; they share institutions of employment, religion and education with the rest of the population. Once gays are permitted to marry, they also could share the aspirations, joys, anxieties and disappointments that

straight couples find in matrimony. In time, moreover, same-sex marriage likely will contribute to the public acceptability of homosexual relationships. The interpersonal commitments entailed by same-sex marriages ought to help break down the stereotypes straights have about gays, especially about gay and bisexual men.

History repeatedly testifies to the attractiveness of domestication born in interpersonal commitment, a signature of married life. It should not have required the AIDS epidemic to alert us to the problems of sexual promiscuity and to the advantages of committed relationships. In part because of their greater tendency toward bonding in committed pairs, lesbians have been the group least infected by the virus that leads to AIDS and have emerged in the nineties as an unusually vital subculture. To the extent that males in our culture have been more sexually venturesome (more in need of civilizing), same-sex marriage could be a particularly useful commitment device for gay and bisexual men.

Since at least the 19th century, gay men have been known for their promiscuous subcultures. Promiscuity may be a consequence of biology (men naturally may be more promiscuous than women; if so, all-male couples would exaggerate this trait) or it may be the result of acculturation (the peculiar way Western society defines virility). In the world of the closet, furtive behavior that not only is practically necessary but also addictively erotic may increase the likelihood of promiscuity.

Whatever its source, sexual variety has not been liberating to gay men. In addition to the costs wrought by disease, promiscuity has encouraged a cult of youth worship and has contributed to the stereotype of homo- (continued on page 26)

No: Don't let homosexual activists subvert the cornerstone of civilized society.

The enduring significance of the institution of marriage was posed in three lines from Samuel Butler's epic, *Hudibras*, well over three centuries ago: "For in What stupid age or nation/ Was marriage ever out of fashion?"

BY BOB BARR



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Well, we now know the answer to Butler's query: Hawaii, 1996.

I recently was stunned to learn that Hawaii is close to giving legal recognition to homosexual marriages. It all began in 1991 when three homosexual couples sued the state of Hawaii, arguing that Hawaii's exclusion of same-sex couples from the statutory definition of marriage was invalid either under the U.S. Constitution or the Hawaii Constitution. When the lawsuit goes to trial this summer, a Hawaii trial court is expected to rule in favor of the couples.

This led me to think that I might have slept through one or more of my law classes at Georgetown University 20 years ago. So, I pulled out my 1968 edition of *Black's Law Dictionary* to look up the legal definition of "marriage." My memory did not fail me. The law dictionary defined marriage as "the civil status, condition or relation of one man and one woman united in law whose association is founded on the distinction of sex." Wanting to be certain the intervening 20 years had not wrought an upheaval in this legal institution, I checked a current law dictionary, several other dictionaries, a thesaurus and an encyclopedia. All backed up my recollection of marriage as a legally recognized and judicially preferred union of a man and a woman.

In remembering this definition of the term I am not alone. Marriage always has commonly and legally been recognized as the union of a man and a woman, not a man and a man or a woman and a woman. The regulation — and protection — of that marriage relationship has been a fundamental obligation of government since before Christ. Aristotle recognized this more than 2,000 years ago, and our Supreme Court has done so consistently throughout our own history. The high court has ruled consistently that marriage is a fundamental liberty that cannot be denied, for example, on account of race.

If one reviews the long line of Supreme Court cases recognizing the importance to our society of marriage as its cornerstone, one rarely will find the justices taking the time to note, in their opinions, that the term "marriage" means a union between a man and a woman. They don't do so because there has been no need to do so; it has been self-

evident through all of modern history. No longer.

In just one generation, homosexual activists have, through political power and intimidation — and cleverly crafted court challenges — created the need for the Supreme Court to confront the obvious and reaffirm it. Thus, the court in 1986 faced the question of whether the Constitution granted a fundamental and protected right to engage in homosexual behavior. In that case, involving a challenge to Georgia's sodomy laws, the court found that not only was there no such constitutionally guaranteed right to homosexual behavior, but also that such behavior could not be used as the basis for marriage.

One might think that would have been the end of the matter. Not so. The battle goes on and we must confront the challenge. If we don't, or if we fail, the door will have been blasted open to challenges to laws outlawing polygamy and sexual relations between adults and children and to laws limiting marriage to people not closely related. If the homosexuals successfully defeat the legal recognition of marriages as limited to heterosexual couples and replace it with the "any loving relationship" pabulum they spout, marriage will become meaningless. And, once that happens, it will be virtually impossible to place any other limits on marriage or sexual relations.

Of course, the advocates of same-sex marriage retort: Why place limits? Why stop "normal" behavior? You see, in their view, those who believe in maintaining the institution of heterosexual marriage in the America of 1996 are the "extremists," because they see themselves as "normal." I have been labeled an extremist by letters I have received since introducing the Defense of Marriage Act. This is rather odd, given the fact that the president has indicated through White House spokesman Michael McCurry that he supports the measure. Bill Clinton, an extremist?

The fact of the matter is that homosexual behavior is not normal behavior. Homosexual activists are asking us to "normalize" abnormal behavior, even though, by definition, it just can't be done. And we are being asked to believe that same-sex marriages will bring every group in society closer together. Ah yes, and we will all go off in the sunset with birds singing, with no more wars and no more hatred, because homosexual couples can now marry each other.

Perhaps some same-sex advocates are naive enough to believe this utopian nonsense, but, when all is said and done, homosexual advocates are simply seeking more power — political, economic and cultural. Unfortunately, through inaction or conflict avoidance, government at every level already has surrendered a great deal of power to the vanguard of the homosexual revolution. But now homosexual culture warriors are at the castle gates. There are no more lines in the sand to be erased.

Is there an appropriate role for the Congress; one that does not meddle in the affairs of the states; one that respects principles of federalism? Yes, there is. *Congress is, should and must be* a part of this battle. We have no choice in view of the fact that homosexual activists intend to take marriage licenses granted homosexual couples in Hawaii as early as this summer, travel elsewhere and (continued on page 27)

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sexuals as people who lack a serious approach to life. (Indeed, a culture centered around nightclubs and bars is not one that can fundamentally satisfy the needs for connection and commitment that become more important as one ages.) A self-reflective gay community ought to embrace marriage for its potentially civilizing effect on young and old alike.

Same-sex marriage also would civilize Americans. Ours is a "creole" culture created out of many constituent groups, each of which blends into the larger culture only after adding its own distinctive flavor. American society is a synergy of Chinese, English, Mexican, Native American, Puerto Rican, African, Jewish, Japanese, Irish, Italian, Filipino and gay influences. Yet some segments of our society have, at times, militantly opposed some of these groups; witness our history of anti-Semitism, nativist sentiment against immigrants and racial prejudice. Time after time, group hatred has been replaced by group acceptance and cooperation. People learn and grow by cooperating with others. Our country has profited from the heterogeneity of the populace. The history to which we Americans point with pride is a history of accommodation and inclusion. The history we would rather forget and should try to correct is our history of prejudice and exclusion.

Bisexuals, gay men and lesbians are citizens of the United States. Notwithstanding the ill treatment of this community in the past, its members love this country and have contributed in every way to its success. A civilized polity assures equality for all its citizens. There can be no equality for lesbians, gay men and bisexuals in the United States without same-sex marriage. The Supreme Court repeatedly has held that a civilized polity can restrict the fundamental right to marry only if there is a compelling

reason to do so. The state cannot restrict the right to marry on the basis of punitive grounds or prejudice. For example, in 1967 the Warren court struck down Virginia's law prohibiting people of different races from marrying.

The Warren court was not alone in protecting the right to marry. The Burger court required states to permit remarriage of "deadbeat dads" in 1978. The Rehnquist court in 1987 struck down a state's restrictions on marriage by prison inmates. The court reasoned that prisoners have the same right to marry and to achieve the emotional, religious and economic benefits of the institution that other citizens have. The court further held that restrictions on that right must be justified by something more than dislike of prisoners or generalized concerns about prison discipline. This unanimous decision reflects broader features of marriage law and suggests the civilizing consequences of recognizing same-sex marriage. When the state recognizes a couple's right to marry, it offers a recognition of the couple's

citizenship, not a seal of approval for their lifestyle.

Citizenship in a heterogeneous polity entails state tolerance of a variety of marriages, and states are not a bit choosy about who receives a marriage license. Convicted felons, divorced parents who refuse to pay child support, delinquent taxpayers, fascists and communists all receive marriage licenses from the state. The Supreme Court stands ready to discipline any state that denies these citizens their right to marry, yet no one believes that the license constitutes state approval of felony, default on support obligations, tax delinquency, communism or fascism. People considered sexually deviant also obtain marriage licenses routinely. Pedophiles, transvestites, transsexuals, sadists, masochists and hermaphrodites can obtain marriage licenses in every state — so long as they can persuade the state that they are heterosexual pedophiles, transvestites, transsexuals, sadists, masochists and hermaphrodites. Gay people constitute virtually the only group in America whose members are not permitted to marry the partner they love. This is intolerable.

The state justifications for prohibiting same-sex marriage ultimately boil down to three kinds of reasons. The first, if rarely stated, reason is prejudice against lesbians, gay men and bisexuals. As a matter of politics, homophobia is not a

productive state policy, for it engenders a competition of spite and vengeance — the antithesis of a civilized polity. Civilizing America means taking homophobia off the national agenda — by constitutional decision-making, if necessary.

A second reason, advanced by members of Congress who have introduced the Defense of Marriage Act, is little better. They see marriage as endangered by the possibility of same-sex marriages. To be sure, marriage as an institution is under siege, but it is straight people and not gays who have made marriage a mess. Indeed, the legal structure that undermines marriages is

the availability of quick and easy divorces. As a matter of federal statutory law, easy Nevada divorces are entitled to full faith and credit in other states, including states seeking to preserve more-lasting marriage ties. If the members of Congress really wanted to "defend" marriage, they would seek to negate full faith and credit for Nevada divorces (the current situation), not for Hawaii same-sex marriages (a future scenario at best).

Why do these members of Congress pick on gay people? If they were truly interested in policing interstate recognition of "bad" marriages, why does their Defense of Marriage Act not police marriages that actually are bad? Under Virginia law, a man who rapes and impregnates a 14-year-old girl can be relieved of his crime if he agrees to marry the girl. Virginia's "rapist marriage" will be recognized in other states. Why doesn't Congress defend marriage against "rapist" and "child-molestation" marriages?

A final reason often advanced for the prohibition of same-

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sex marriage is to foster family values in the state by reserving marriage for those who want to procreate and raise a family. This is a much more attractive value than homophobia, but it does not support existing state bars to same-sex marriage. Families are as heterogeneous as they are wonderful: They include couples with children, single mothers, grandparents with grandchildren and a niece or nephew, and just couples. Families need not be heterosexual, and they need not procreate. The state always has allowed couples to marry even though they do not desire children or are physically incapable of procreation. Would anyone deny a marriage license to an octogenarian couple? Marriage in an urbanized society serves companionate, economic and interpersonal goals independent of procreation, and the Supreme Court's most recent marriage decision (involving prisoners) reflects that reality.

Moreover, many same-sex couples do have and raise children. Some bring children from prior marriages and relationships into the same-sex household. Lesbians have chil-

dren through artificial insemination, and gay men have children through surrogacy and other arrangements. In most states, same-sex couples are permitted to adopt children, and many take advantage of this opportunity. Every study that has been conducted of children raised in lesbian or gay households has found that the children have been raised well. Some studies have found that children of lesbian couples are better adjusted than children of single heterosexual mothers, presumably because there are two parents in the household. If this finding can be generalized, it yields the ironic point that state prohibitions against same-sex marriages may be antifamily and antichildren. The civilizing influence of family values, with or without children, ultimately may be the best argument for same-sex marriage. ●

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challenge other states to recognize their same-sex marriages under the full-faith-and-credit clause in Article 4, Section 1 of the Constitution. Thus, once Hawaii recognizes same-sex marriages, other states will be asked to do the same, with unpredictable results.

Although the homosexual activists plan to use the full-faith-and-credit clause as a legal sledgehammer, the very same provision of the Constitution provides the rest of us the weapon to defeat them. The final clause explicitly grants the Congress the power to determine the "effects" of the provision.

The Defense of Marriage Act, which I have introduced with a group of Republican and Democrat representatives, addresses this threat to the basic building block of society in the most appropriate, direct and limited way possible. It is a reaction to extremists, not an overreaction.

The Defense of Marriage Act does not force any view of marriage on any state. It does not force any state to define marriage in one way or another. It presumes — perhaps erroneously, insofar as recent polls suggest that by a wide margin even the citizens of Hawaii do not agree that legal status ought to be granted same-sex marriages — that each state will continue to define marriage in heterosexual terms as its citizens wish.

The proposed law addresses two limited but important issues. First, it says that no state can be forced, under the full-faith-and-credit clause, to accept the notion of same-sex marriage. The act would recognize that if citizens of my home state of Georgia, for example, don't want to accept same-sex

marriages, we don't have to; no matter what the courts in Hawaii decide. In this sense, the Defense of Marriage Act is, pure and simple, a defense of state's rights.

It is essential that Congress take this action. We simply cannot rely upon the federal courts to protect state policies from an overextension of the full-faith-and-credit clause. And, like some Hawaii state judges, some of today's federal judges also are capable of bizarre rulings. Witness the recent refusal of a federal judge in New York to admit into evidence 80 pounds of cocaine found in the trunk of a defendant's car.

Second, in exercising its legitimate role of defining the scope of federal laws and privileges, the Defense of Marriage Act defines "marriage" as the union of one man and one woman only, for purposes of federal — not state — laws. This is important, for example, to prevent homosexual couples from abusing federal-benefits laws intended for husbands and wives.

Some in Congress as well as their ultraliberal allies will try to convince a majority in the Congress and the president that "marriage" means anything and, therefore, nothing. I don't believe they will succeed. On the other hand, if someone had suggested to me 10 years ago that some of our courts would sanction same-sex marriages and that the national media would demonize those who argued against such "marriages," I would have said they were crazy. Yet, here we are, facing just such a cultural onslaught by extremists. Lawmakers cannot stand on the sidelines and assume that marriage, the building block of society, will endure this latest siege intact. ●

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