
MARRIAGE: AN ACHIEVEMENT OF CENTURIES FOR THE PROTECTION OF WOMEN AND CHILDREN

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Many people believe that our notions of marriage should be revised so as to extend to same-sex couples. I am not one of them. But I do think, and a few advocates of same-sex marriage agree, that if such a change – the word “radical” is over-used, and is no longer adequate to describe the roots-on-up social transformation that is proposed in this debate – is to befall us, it should do so only after, and as the result of, a long process of give and take in the *political* process.

THE PROCESS

I highlight the word “political” because that is precisely where this fight has for the most part *not* been fought. It has been a debate, and a rather one-sided one, I might add, within legal academia and toney coastal urban living rooms, imported thither into the courts.¹

Does the recent United States Supreme Court decision in *Lawrence v. Texas*² require same-sex marriage? Logically it does. In *Lawrence* we find not much constitutional reasoning – as distinct from self-conscious pomposity plainly aimed at the history books – but the decision says at

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1. The Massachusetts Supreme Judicial Court decided *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), three weeks after I gave this talk. In its decision, a four to three vote, the Commonwealth’s highest court held that the Massachusetts Constitution requires same-sex marriage. *Id.* at 968. On this basis, leveraged by the Full Faith and Credit Clause of the United States Constitution, it is now proposed that this decision be effectively nationalized. The pattern of non-democratic, non-political decision-making continues; by political decision-making, I mean decision-making in which the ordinary citizen, not just the legal and judicial elites, play a major role.

2. 123 S. Ct. 2472 (2003).

least this: morality is never a rational basis for legislation,³ and legislation that “demeans” anyone’s intimate associations is suspect. Such a doctrine, if taken seriously, would render all laws unconstitutional, but that is another topic; moreover, by these rules, as Justice Scalia points out, marriage would be only the first of many legal institutions to need radical revision.⁴

Yet the Court left itself numerous rhetorical escape hatches. These safety valves are like telephones in the popular sci-fi movie, *The Matrix*: ways out when you need them. If and when the question of same-sex marriage is squarely presented to the Court, if for any reason the Court does not feel like going that far, it can always point to these dicta and say, well of course, we never meant *Lawrence* to be taken that far.

So far the latter view is winning in the courts; the question of whether *Lawrence* requires same-sex marriage has been considered by state courts in New Jersey and Arizona, and both have decided that it does not.⁵

Thus, I share Professor Strasser’s view that, on the one hand, there is no principled reason for the Supreme Court, after *Lawrence*, to refrain from requiring same-sex marriage, but that on the other hand, there is no principled reasoning to expect the Court to engage in principled reasoning. After *Planned Parenthood v. Casey*,⁶ one might very well have thought that the right of personal autonomy announced in *Casey* would be broad enough to include physician-assisted suicide. Judge Reinhardt of the Ninth Circuit certainly thought so.⁷ Nevertheless, when the Court reviewed the

3. *See id.* at 2480-81.

4. *Id.* at 2496 (Scalia, J., dissenting) (noting that the Court’s “reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”).

5. *Goodridge*, when it came down, maintained the pattern as far as *Lawrence* is concerned: though of course it cited *Lawrence*, it did not technically rely on it; it relied instead on the Massachusetts Constitution and its own notions of the requirements of fairness. *See generally* Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. 2003) (upholding the constitutionality of the state’s limitation of marriage to man and woman based on rational basis); *Lewis v. Harris*, No.15-03, 2003 WL 23191114 (N.J. Super. Ct. 2003) (unpublished opinion). The New Jersey Superior Court Judge concluded:

This court is satisfied that the State’s interest does not interfere with a recognized fundamental right, that the prohibition against same-sex marriage does not offend the equal protection guarantees in the State Constitution, and that the reasons advanced by the State are sufficient to withstand judicial scrutiny. The appropriate avenue for a change in the meaning of marriage is the Legislature, where social changes of the magnitude contemplated by the amended complaint are best addressed.

Lewis, 2003 WL 23191114, at *28.

6. 510 U.S. 1309 (1994)

7. *Compassion in Dying v. Washington*, 79 F.3d 790, 801 (9th Cir. 1996) *rev’d* *Washington v. Glucksberg*, 521 U.S. 702 (1997). “In deciding right-to-die cases, we are

Ninth Circuit's decision in *Washington v. Glucksberg*,⁸ it announced, without analysis, that the rights protected in *Casey* simply do not go that far. In future cases involving same-sex marriage, the Court is free to adhere to the *Casey-Lawrence* line of cases or to revive the *Michael H.*⁹-*Glucksberg* line of cases.

I also share with Professor Strasser the inevitable mirth over the "Scalia role-reversal." Since *Lawrence*, gay groups have been stressing Justice Scalia's declaration, espoused in his *Lawrence* dissent, that *Lawrence* dismantles the legal underpinnings of traditional marriage; self-described "Ninomaniacs,"¹⁰ like myself, have been drawing attention to the escape hatches that the Court left itself in *Lawrence* to avoid being constrained to follow that decision's logical implications in future cases.

THE ACTUAL ISSUE: UNDERSTANDING MARRIAGE

Up to this point, I have been talking about process. Nevertheless, considerations of process are of secondary concern to results-oriented activists. If the goal is important enough, we are told, only bigots would insist on process; therefore, we cannot ignore the question of whether the change proposed is important, or desirable, or even tolerable.

We have to talk about what marriage is and does. Allow me to briefly discuss *Zablocki v. Redhail*¹¹ briefly, since Professor Strasser brought it up. This case is indeed the high-water mark of the Court's "right to marriage" cases. I have written elsewhere¹² about why I do not think the Court ever recognized a "right to marriage" in the strong sense in which the term is currently being used.

I would like to add this about *Zablocki*: the vision of marriage that it embodied is deeply flawed, from the point of view of the social function of marriage. *Zablocki* struck down a statute that had been designed to protect "first families"; that is, the families that men form before they get tired of them and move on to another woman, thereby founding a "second family." The statute in *Zablocki* basically said: Look, if you want to get married, you have to show either that you have no already-existing family support

guided by the Court's approach to the abortion cases." *Id.*

8. 521 U.S. 702 (1997).

9. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion) (holding that the reach of substantive due process is restrained by legal tradition).

10. I edit a weblog entitled "Ninomania." This weblog can be accessed at <http://ninomania.blogspot.com>.

11. 434 U.S. 374 (1978).

12. David M. Wagner, *The Constitution and Covenant Marriage Legislation: Rumors of a Constitutional Right to Divorce Have Been Greatly Exaggerated*, 12 REGENT U. L. REV. 53 (1999-2000).

responsibilities or that if you do, you will be able to go on meeting them even after the marriage. The obvious beneficiaries of this law are first wives and their children, discarded under the no-fault divorce regime and now economically imperiled by the ex-husband's intended second marriage.

Now, there were more effective ways to protect the interests of the "first family," and the Court in *Zablocki* (as part of the "least restrictive means" portion of strict scrutiny) suggested a few. I am not concerned enough to rehabilitate that particular statute; however, I do want to suggest that, in context, the "right to marriage" that *Zablocki* protected was really a "right to *get married*," considered as something indefeasible, proof even against such obstacles as, say, an existing marriage. This marriage is of the sort that was satirized in certain memorable lines from Leonard Bernstein's Broadway opera *Candide*.¹³

Clearly, what made those lines from Bernstein's operetta funny when the show was first produced in the 1950s was that marriage, as described by the optimist character Dr. Pangloss, is so far from fulfilling its social role. I therefore turn now to the story of that role. I am not the best person to tell it because it has been told better by Harvard sociologist James Q. Wilson,¹⁴ by influential social theorists George Gilder¹⁵ and Maggie Gallagher,¹⁶ and

13. LEONARD BERNSTEIN & RICHARD WILBUR ET AL., *CANDIDE* act 1, sc. 1 (Lillian Hellman ed., Random House 1957) based on FRANCOIS-MARIE ACOUET DE VOLTAIRE, *CANDIDE* (1759). The lines read:

Candide:

Since marriage is divine, of course,
We cannot understand, sir,
Why there should be so much divorce.
Do let us know the answer.

Chorus:

Do let us know the answer.

Dr. Pangloss:

Why, marriage, boy,
Is such a joy,
So lovely a condition,
That many ask no better than
To wed as often as they can,
In happy repetition.

Chorus:

A brilliant exposition!

Id.

14. See generally JAMES Q. WILSON, *THE MARRIAGE PROBLEM* (2002).

15. GEORGE GILDER, *MEN AND MARRIAGE* (1993).

by columnist and *blogueuse* Eve Tushnet.¹⁷ Ultimately, it is not their story, and they do not claim that it is: it is part of the story of humankind. In particular, it is the story of a young mother.

She may be primeval, at the dawn of marriage itself; or she may be someone who visited a welfare office or a crisis pregnancy center this morning. Either way, she has the same problem: she has a baby (born or soon to be so), and raising him or her is going to be a lot harder – for the mother and the baby alike – if she does not succeed in getting the father to play a role in helping both her and the baby. Maybe she is lucky and he actually wants to. But what if he does not? She can try to persuade him; that might work – for a while. She might in effect bribe him with continuing sexual access, but that is not going to work over the long haul because younger competitors enter the sexual market every day. So what can our young mother do?

There is one other strategy open to her, but she cannot implement it alone. It is that of setting up a thick web of social rewards and expectations, valorizing the men who dedicate themselves to their children and of the mothers of their children, and stigmatizing those who do not. This act of social construction (if you insist on calling it that) requires not only the participation of the entire society, but also the passing of centuries.

Success will come, alas, centuries too late to help the young mother with whom we started. But maybe, maybe, we can help her similarly-situated sisters down the ages. Maybe, that is, unless anyone were to stop the process and reverse it, teaching that marriage is not about tying men to the children they have sired or may sire, but rather, about the moment-to-moment happiness of the couple who gets married; that, plus a bunch of legal benefits. If that were to happen – and of course it has – the system will unravel in much less time than it took to put it together.

At another conference at which I spoke, an opposing panelist spoke up at this point and said: “You conservatives are in a hopeless contradiction on this. You’re full of sympathy for that poor unwed mother and her poor child when it’s a matter of protecting traditional marriage, yet you don’t support the government programs that could also help them.”

“Well yes,” I said, “if she cannot marry the father, she can at least marry the government. This is why the traditionalist case here has a libertarian angle: if husband-fathers are not there, the government will have to be. The decline in the ability of marriage to fulfill its traditional role means the

16. MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE* (1994); MAGGIE GALLAGHER, *ENEMIES OF EROS* (1989).

17. See EVETUSHNET.COM, at <http://eve-tushnet.blogspot.com> (last visited Mar. 2, 2004); MarriageDebate.com, at <http://www.marriagedebate.com/mblog.php> (last visited Mar. 2, 2004).

growth of government.” Those in the audience who saw nothing wrong with the growth of government were presumably unimpressed, but I was just glad that this point – usually a hard one to get across – had been made for me by an opponent.

Perhaps you think at this point that the culprit-category I have identified consists entirely of same-sex marriage advocates. Not at all. In fact, they are latecomers to the dismemberment of marriage. Before them came the architects of the no-fault divorce revolution. And all the authors and directors who have glamorized adultery (going back to the Tristan story in the Middle Ages – this is *not* a new problem) deserve their places in the rogues’ gallery. Even contraception is not un-problematic in this context: if not the contraceptive itself, then at least the mainstreaming of it, the transformation of it into a universal bourgeois pharmaceutical, from something hidden behind the counter to something displayed to all and sundry alongside the aspirin and the vitamins. Cultural signals matter. I acknowledge my debt to the postmodern theorists for having taught us this.

All these trends were probably necessary before same-sex marriage could be taken seriously. As matters stand now, there’s a certain rough justice in gay people’s complaint. Straights, not gays, have separated marriage from permanence, exclusivity, and procreativity. Gays are not demanding what I would call the traditional form marriage, but the picked-over hull that we still call “marriage,” and at times it’s hard to see why the rest of us shouldn’t just give it to them.

The reason is that we cannot rest content with that picked-over hull. Even without the present push for same-sex marriage, the restoration of marriage would be urgent. The direction to move in is not to scuttle the ship that has been reduced to hull, but to rebuild it. Because the women and children still need it to sail in.

Macbeth, late in the play, says: “I am in blood [s]tepped in so far that should I wade no more, [r]eturning were as tedious as go o’er.”¹⁸ Of course, he never should have killed Duncan; he should have never killed Banquo. We understand how he could feel that he has passed some sort of point of no return. Yet when we find that he now proposes to slaughter Macduff’s family, we still want to scream “NO.”

18. WILLIAM SHAKESPEARE, *MACBETH* act 3, sc. 4 (David Bevington ed., 1997).