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BOOK REVIEW

GOING FOR THE BRASS RING: THE CASE FOR SAME-SEX MARRIAGE

Arthur S. Leonard†

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. \$25.00.

INTRODUCTION

In 1996, the issue of same-sex marriage burst into the consciousness of the American public. Although lesbian and gay litigants and their lawyers began bringing the issue before the courts a quarter of a century earlier,¹ all attempts to secure same-sex marriage rights through litigation had been unsuccessful until 1993. In that year, the Hawaii Supreme Court ruled, in *Baehr v. Lewin*,² that the Hawaii Constitution might be construed to compel the state to issue marriage licenses to same-sex couples.³ After the court granted the state's motion for clarification and issued a second opinion confirming its first,⁴ it remanded the case to the state circuit court for trial. The Hawaii legislature promptly amended the state's marriage law to assert its understanding that marriage should only be available to opposite-sex

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¹ See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed on other grounds*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

² 852 P.2d 44 (Haw. 1993).

³ In *Baehr*, the Hawaii Supreme Court rejected the argument that the plaintiffs, three same-sex couples, had a fundamental right to marry under the state constitutional right of privacy, which it found to be co-extensive with the federal constitutional right of privacy. However, the court concluded that limiting the right to marry to opposite-sex couples created a sex-based classification. The Hawaii Constitution, unlike the Federal Constitution, expressly forbids sex discrimination. In a ruling of first impression, the court held that sex is a suspect classification under the state constitution. Consequently, the burden falls on the state to prove that any sex-based classification is necessary to serve a compelling state interest and narrowly tailored to achieve that interest. See *Baehr*, 852 P.2d at 55-67.

⁴ See *id.* at 74-75.

couples⁵ but refrained, at that time, from attempting to overrule the court by constitutional amendment.

There the matter sat as the trial date was repeatedly postponed until 1996, when opponents of same-sex marriage—perhaps reacting to pretrial publicity and speculation that same-sex marriages lawfully consummated in Hawaii would have to be honored in other states under the Full Faith and Credit Clause of the United States Constitution⁶—began to introduce bills in various state legislatures declaring same-sex marriages to be unauthorized and violative of the states' public policies. Although more than thirty state legislatures considered such bills, only sixteen passed them.⁷ Congressional opponents of same-sex marriage introduced and then passed the Defense of Marriage Act of 1996.⁸ The Act sought to relieve states of any obligation under the Constitution to recognize same-sex marriages from other states, and introduced into the United States Code for the first time a definition of marriage for purposes of federal law.

Same-sex marriage appeared likely to become a major issue in the 1996 presidential campaign, as Republican candidates seeking votes in the Iowa caucuses attended or endorsed a nationally-televised rally

⁵ See HAW. REV. STAT. ANN. § 572-1 (Michie Supp. 1996).

⁶ U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

⁷ See Lisa Keen, *21 State Legislatures Mull Same-Sex Marriage Ban*, WASH. BLADE, Feb. 7, 1997, at 1. States that passed laws in 1996 explicitly banning same-sex marriage and, in most cases, asserting that same-sex marriages performed in other states would not be recognized in their state, include: Alaska, ALASKA STAT. § 25.05.013 (Michie 1996); Arizona, ARIZ. REV. STAT. ANN. § 25-101 (West Supp. 1996); Delaware, DEL. CODE ANN. tit. 13, § 101 (Michie Supp. 1996); Georgia, GA. CODE ANN. § 19-3-3.1 (Michie Supp. 1996); Idaho, IDAHO CODE § 32-209 (1996); Illinois, 1996 Ill. Legis. Serv. 324 (West); Kansas, KAN. STAT. ANN. § 23-101 (1995); Michigan, 1996 Mich. Legis. Serv. 324 (West); Missouri, 1996 Mo. Legis. Serv. 172 (Vernon); North Carolina, N.C. GEN. STAT. § 51-1.2 (Supp. 1996); Oklahoma, OKLA. STAT. ANN. tit. 43, § 3.1 (West Supp. 1996); Pennsylvania, 1996 Pa. Legis. Serv. 124 (West); South Carolina, S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 1996); South Dakota, S.D. CODIFIED LAWS § 25-1-1 (Michie Supp. 1996); and Tennessee, TENN. CODE ANN. § 36-3-113 (1996). In addition, the governors of Alabama and Mississippi issued executive orders commanding executive branch officers of those states to refrain from recognizing same-sex marriages. See *Alabama Same-Sex Marriages Banned by Governor*, L.A. TIMES, Aug. 31, 1996, at A17; Ronald Smothers, *Mississippi Governor Bans Same-Sex Marriages*, N.Y. TIMES, Aug. 24, 1996, at 7.

⁸ Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (to be codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). The Act does two things: (1) it provides that no state is required to recognize same-sex marriages performed in other states, and (2) it provides that for purposes of all federal laws, marriage shall be defined as the union of one man and one woman. See *id.* For a detailed discussion of the Defense of Marriage Act, see *A Recommendation Against the Passing of H.R. 3396; S. 1740: A Bill to Define and Protect the Institution of Marriage*, 51 REC. ASS'N B. CITY N.Y. 654 (1996) (Report of the Committees on Lesbians and Gay Men in the Legal Profession; Sex and Law; and Civil Rights).

against same-sex marriage.⁹ But President William J. Clinton's prompt endorsement of the Defense of Marriage Act, which was co-sponsored in the Senate by leading Republican presidential contender and Senate Majority Leader Bob Dole, effectively removed the same-sex marriage issue from the presidential campaign. Both houses of Congress passed the bill by overwhelming margins during the summer,¹⁰ and the President signed it into law before the election.¹¹

Meanwhile, in Hawaii, the *Baehr* case finally went to trial on September 10, 1996, the same day the Defense of Marriage Act passed the Senate. Although the national media did not focus much attention on the trial,¹² the December 3, 1996 release of Circuit Judge S.C. Chang's holding that the state had failed to meet its burden to justify the exclusion of same-sex couples from the institution of the marriage¹³ sparked a fury of media commentary.¹⁴ The verdict renewed

⁹ See Richard L. Berke, *With the Field Now Scrambled, Iowans Prepare to Vote*, N.Y. TIMES, Feb. 11, 1996, at 26 (noting that Republican presidential candidates either participated in, or sent letters of support to, a rally against same-sex marriage sponsored by a Christian group in Des Moines, Iowa).

¹⁰ The House approved the bill by a vote of 342-67 on July 12, 1996. The Senate approved the bill by a vote of 85-14 on September 10, 1996. See 142 CONG. REC. H7,505 (daily ed. July 12, 1996); 142 Cong. Rec. S10,129 (daily ed. Sept. 10, 1996). In both cases, the voting followed extended, vociferous floor debate.

¹¹ President Clinton signed the bill just after midnight on September 21, 1996. See *Clinton Draws Criticism from Gay Activists*, CHI. TRIB., Sept. 23, 1996, at 6.

¹² As one reporter commented:

Hawaiian authorities were expecting such a media circus, they imposed strict rules to prevent chaos in the court, even instituting a lottery for admission. But very few of the spectators who squeezed into Judge Kevin Chang's tiny First Circuit courtroom were reporters from the national press. The result was that those trying to follow the trial from across the country struggled with an almost total media blackout, even though the proceedings began on the very day that the U.S. Senate passed the inflammatory Defense of Marriage Act, an act prompted by this very trial.

Gabriel Rotello, *Courtship Rituals*, OUR, Jan. 1997, at 106, 107.

¹³ *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Lawrence H. Miike, the Director of the Hawaii Department of Health, was substituted for his predecessor as named defendant.

¹⁴ See, e.g., Ellen Goodman, *A Step Down the Aisle*, BOSTON GLOBE, Dec. 8, 1996, at D7; James Kunen, *Hawaiian Courtship—Gay Marriage May Become Legal in the Islands Without Necessarily Coming to a Chapel Near You*, TIME, Dec. 16, 1996, at 44; David Mixner, *No One Has to Send a Gift—I Have a Right to Marry—Even if Others Disapprove*, TIME, Dec. 16, 1996, at 45; Mike Royko, *Court Ruling Makes Hawaii Even a Better Honeymoon Locale*, CHI. TRIB., Dec. 5, 1996, at 3; Mike Royko, *Gay Marriage Today, Polygamy Tomorrow*, CINCINNATI POST, Dec. 13, 1996, at 23A; Robert Scheer, *A Warped View of What's Proper as Family Life*, SAN DIEGO UNION & TRIB., Dec. 13, 1996, at B7; Daniel Sneider, *Judges Raise Conservative Hackles But Scholars Say Court is Fulfilling its Constitutional Duty*, CHRIST. SCI. MON., Dec. 6, 1996, at 3; Andrew Sullivan, *Hawaiian Aye: Nearing the Altar on Gay Marriage*, NEW REPUBLIC, Dec. 29, 1996, at 15; Cal Thomas, *Courts Undermine a Holy Institution*, ST. LOUIS POST-DISP., Dec. 6, 1996, at 21C; George Will, *Even Conservatives Resort to Courts*, ST. LOUIS POST-DISP., Dec. 9, 1996, at 7B.

efforts to pass bills against same-sex marriage in state legislatures,¹⁵ and it increased the likelihood that opponents of same-sex marriage in Hawaii will attempt to place a constitutional amendment on the state ballot to overrule the decision of their highest court.

In the midst of the furious same-sex marriage debates of 1996, a voice of calm reason emerged from the pages of *The Case for Same-Sex Marriage* written by William N. Eskridge, Jr.¹⁶ Professor Eskridge is deeply involved in this debate; he was counsel for the plaintiffs in the other great same-sex marriage case of the early 1990s, *Dean v. District of Columbia*.¹⁷

Craig R. Dean and Patrick G. Gill filed suit in the Superior Court of the District of Columbia on November 26, 1990.¹⁸ They claimed that the District's marriage ordinance could be construed to allow same-sex marriage, and that the failure to allow same-sex marriage would violate the District's Human Rights Act,¹⁹ which bans discrimination in public services on the basis of sex and sexual orientation.²⁰ Dean, a lawyer, represented the couple alone until Professor Eskridge offered to take the case pro bono. The Superior Court rejected the plaintiffs' challenge, holding that the District of Columbia's marriage law should be construed consistently with the court's perception of the historic meaning of marriage in Western Civilization: the union of one man and one woman.²¹ As such the Human Rights Act, according to the Superior Court, did not require the city to authorize licenses for same-sex marriages. The District of Columbia Court of Appeals agreed with the Superior Court's holding, and it also rejected

¹⁵ According to a legislative update released via the Internet by Boston's Forum on the Right to Marriage on December 16, 1996, opponents of same-sex marriage were expected to introduce new bills in California, Colorado, Florida, Indiana, Montana, North Dakota, Texas, Virginia, and Wisconsin. A petition drive in Maine has collected enough signatures to place a measure against same-sex marriage on that state's ballot, and a similar drive has been launched in Oregon. And Hawaii legislators have begun talking about a state constitutional amendment to overrule the widely-anticipated decision by the Supreme Court affirming Judge Chang's ruling. See Forum on the Right to Marriage, *Legislative Update* (visited Dec. 16, 1996) <<http://www.calico-company.com/formboston/>>. The New Jersey legislature began hearings on a same-sex marriage ban during December 1996. See Ralph Siegel, *N.J. Senate Committee Approves Bill Banning Same-Sex Marriages*, PHILA. INQUIRER, Dec. 17, 1996, at B10.

¹⁶ WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

¹⁷ 653 A.2d 307 (App. D.C. 1995).

¹⁸ See Arthur S. Leonard, *Gay Washingtonians Sue for Marriage License*, 1991 LESBIAN/GAY LAW NOTES 3; *Homosexuals' Suit Seeks Marriage License*, N.Y. TIMES, Nov. 27, 1990, at A19.

¹⁹ D.C. CODE ANN. § 1-2501 (1992).

²⁰ See *Dean*, 653 A.2d at 309.

²¹ See *id.*

the same kind of sex discrimination argument that the Hawaii Supreme Court accepted in *Baehr*.²²

Eskridge's litigation team put together comprehensive briefs on the history of same-sex marriage and the legal arguments that could be mounted in support of their case.²³ In *The Case for Same-Sex Marriage*, Eskridge takes these litigation materials as his starting point. He then expands and elaborates on them to present a thorough argument for the proposition that the state should eagerly support the efforts of same-sex couples who wish to get married, and he argues that federal constitutional requirements of due process and equal protection require the state to allow same-sex marriage. The book carries the full apparatus of legal scholarship, but is, in essence, a Brandeis brief for same-sex marriage. The essence of Eskridge's argument is that allowing same-sex marriage would be a sound policy decision in light of the benefits that would flow to society and same-sex marriage participants. As the book's subtitle indicates, Eskridge believes that admitting lesbian and gay Americans to the privileged circle of marital couples will assist in assimilating them into the societal mainstream, thereby reducing the civil strife that currently attaches to the issue of homosexuality.

I

THE VOICE OF REASON: THE CASE FOR SAME-SEX MARRIAGE

After a brief introduction to his subject, Eskridge presents a revised and expanded version of his earlier law review article on the history of same-sex marriage.²⁴ Concisely reviewing a growing body of scholarship on certain non-Western and premodern Western societies, Eskridge attempts to show that a variety of cultures have accepted the concept of the legal recognition of same-sex marriage.²⁵ However, the scholarship on which Eskridge relies to make this point is controversial.²⁶ The concept of marriage varies over time and place to such an extent that it would be impossible to assert with great confi-

²² See *id.* at 331-56. Judge Ferren, writing in partial dissent, would have remanded the case for a trial to determine the appropriate level of scrutiny for sexual orientation discrimination claims under the Equal Protection Clause. See *id.* at 356-58.

²³ An intermediate development of these materials can be found in a law review article written by Professor Eskridge. See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

²⁴ See ESKRIDGE, *supra* note 16, at 15-70; Eskridge, *supra* note 23.

²⁵ ESKRIDGE, *supra* note 16, at 15-70.

²⁶ The most important sources cited by Eskridge include: JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* (1980); JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994); KENNETH J. DOVER, *GREEK HOMOSEXUALITY* (1978); DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988). For a discussion of the controversy surrounding this scholarship, see ESKRIDGE, *supra* note 16, at 223 n.37 (referencing some of the scholarly critiques of Boswell's work).

dence that the premodern and non-Western relationships that Eskridge cites can be treated as more than rough analogues for modern Western marriage, with its vast array of legal rights and responsibilities. Marriage is a socially-constructed institution that becomes more complex every time a governmental body enacts a new law or regulation that classifies individuals by their marital status. Critics of historical scholarship may correctly argue that reliance on the examples of berdache marriages among Native Americans or same-sex commitment ceremonies found in Catholic liturgy collections from the Middle Ages do not prove that those societies in fact treated the marital status of same-sex couples the same as that of opposite-sex couples. But establishing identical treatment is not really Eskridge's reason for summoning the historical record. Rather, Eskridge seeks to show, and indeed succeeds in showing, that societies other than modern Western society have found it appropriate, in some circumstances, to accord a status akin to marriage to same-sex couples; thus, the idea is not totally new.

Eskridge also catalogues the changes in social views underlying the widespread hostility toward same-sex relationships in modern Western societies.²⁷ In the United States, an indeterminate number of same-sex couples have found ways to live together despite social hostility, but these relationships "have occurred primarily in the interstices and at the fringes of society."²⁸ Eskridge highlights a few examples that have surfaced in the historical record of same-sex couples who had maintained extended relationships, usually disguised in some way, prior to the modern gay liberation movement.²⁹ After Stonewall,³⁰ in 1969, growing numbers of lesbians and gay men decided to become more open about their relationships, and advocates of legally recognized same-sex partnerships became more common. Eskridge quickly sketches the developments leading to the contemporary movement for legal same-sex marriage, which has progressed in Europe to the point where several Scandinavian countries have established a legal registered partnership that carries most of the rights and responsibilities of marriage and is available for same-sex couples.³¹

²⁷ See ESKRIDGE, *supra* note 16, at 37-50.

²⁸ See *id.* at 37.

²⁹ See *id.* at 37-44.

³⁰ Stonewall is shorthand for the police raid and ensuing public demonstrations that occurred in Greenwich Village, New York, in June, 1969. These events are commonly believed to have sparked the modern gay and lesbian liberation movement in the United States. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 1 (1983).

³¹ See ESKRIDGE, *supra* note 16, at 49-50. The European countries mentioned by Eskridge that afford some type of family recognition to same-sex couples include Norway, Sweden, and Denmark. See *id.* at 50. The Dutch Parliament has established a commission to recommend legislation on the subject, after endorsing in principle the concept of same-sex marriage. See *id.* at 50. Iceland passed registered partnership legislation in June, 1996,

Eskridge focuses his attention not only on the legal policy debates accompanying these developments, but on the debates occurring within religious bodies as well.³² The modern marital relationship has roots in both religious and civil developments in premodern times. Many people see the religious and civil aspects of marriage as closely intertwined. Although civil marriage, performed by a judge or government official, is available in most cultures, many prefer that ministers, priests, or rabbis who are licensed by the government perform their marriages. If civil marriage for same-sex couples were to become available, religious bodies would surely face requests to their clergy to perform such ceremonies for same-sex couples. Anticipating these developments, and responding to requests from same-sex couples to perform religious ceremonies of commitment that presently lack any legal status, national organizations of many of the Protestant and Jewish denominations in the United States have been grappling with the question for years.³³ The more "liberal" denominations have progressed to the point of allowing their clergy to perform religious ceremonies for same-sex couples.³⁴ Eskridge shows that even the most conservative, fundamentalist Christian denominations, although officially forbidding clergy to engage in such activities, have examples of "renegade" clergy who have performed them.³⁵ Eskridge bolsters his argument with an Appendix entitled "Letters from the Faithful on the Legal Recognition of Same-Sex Marriage,"³⁶ consisting of letters from religiously-observant advocates of same-sex marriage that were submitted to the court in *Dean v. District of Columbia*.³⁷

Eskridge next addresses the debate over marriage as it has played out within the lesbian and gay community.³⁸ The pre-Stonewall movement for gay rights in the 1950s and 1960s did not concern itself with marriage. The more immediate issues confronting the movement were the decriminalization of homosexual conduct and an end to officially sanctioned discrimination against homosexuals.³⁹ At that time, such ferocious hostility toward "open" homosexuality prevailed in society that gay rights proponents saw the concept of officially recog-

after Eskridge's book appeared, and the Finnish government was studying the issue as well. See *International Notes*, 1996 LESBIAN/GAY LAW NOTES 103, 103-04.

³² See ESKRIDGE, *supra* note 16, at 46-48.

³³ See *id.* at 47.

³⁴ See *id.*

³⁵ See *id.* at 48.

³⁶ *Id.* at 193.

³⁷ See *id.* app. at 193 (quoting from letters collected by plaintiffs in *Dean v. District of Columbia*, No. CA 90-13892 (D.C. Sup. Ct. Dec. 30, 1991)).

³⁸ See ESKRIDGE, *supra* note 16, at 51-85.

³⁹ See *id.* at 52-53.

nized marriages for same-sex couples as an absurd pipe dream.⁴⁰ Indeed, it was common for gay rights organizations of the 1950s and 1960s to be very secretive, with members using only first names.

After Stonewall, however, "coming out" became an important component of the fight for civil equality. For some gay people, this meant seeking open access to all the institutions of society, including civil marriage. Same-sex couples who were denied marriage licenses filed several lawsuits in the early 1970s.⁴¹ However, these lawsuits were not filed by gay legal organizations, which were then in the early stages of formation and primarily focused on discrimination and sodomy-law reform. Furthermore, some organization leaders strongly questioned the value of gay people participating in what was seen as the quintessential heterosexual institution of marriage. For example, one aspect of the liberationist philosophy, particularly embraced by some lesbian feminist theorists, embodies a rejection of traditional social structures, and calls instead for gay people to evolve their own family forms, tailored to their own needs, in order to avoid falling into the stereotypical gender roles of traditional marriage.⁴²

This debate, ongoing during the 1980s, surfaced formally in *Out/Look* magazine with a pair of articles by Thomas B. Stoddard, then the Executive Director of Lambda Legal Defense and Education Fund, Inc., and Paula L. Ettelbrick, then Lambda's Legal Director.⁴³ Stoddard called for a renewed effort by the gay movement to attain access to legal marriage, while Ettelbrick argued that marriage was not the "path to liberation."⁴⁴ Stoddard and Ettelbrick took their debate on the road, addressed community meetings in several major cities around the country, and received extensive coverage in the lesbian

⁴⁰ See, e.g., Tom Ammiano, *Who I Am: Being a Gay Man in the City*, S.F. EXAMINER, Feb. 9, 1997, at W11.

⁴¹ See cases cited *supra* note 1.

⁴² See Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, reprinted in LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 20-26 (Suzanne Sherman ed., 1992).

⁴³ See Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK NATIONAL GAY AND LESBIAN Q., Fall 1989, reprinted in LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 13-19 (Suzanne Sherman ed., 1992); Ettelbrick, *supra* note 42, at 20. Stoddard retired from Lambda in 1992 and became active in the Campaign for Military Service during 1993. After Congress enacted a new policy on military service by gay people late in 1993, Stoddard retired from active law practice but continued to teach on a part-time basis at New York University School of Law until his death from AIDS in February, 1997. Ettelbrick left Lambda to become a policy specialist for the National Center for Lesbian Rights, and she has most recently been employed as Legislative Director of the Empire State Pride Agenda, a New York state-wide lobbying organization, while teaching part-time at University of Michigan School of Law and New York Law School.

⁴⁴ See Stoddard, *supra* note 43, at 13; Ettelbrick, *supra* note 42, at 20.

and gay press. Their debate was played out in a steady stream of commentary during the next few years.⁴⁵

But the debate among the movement leaders proved irrelevant for many in the lesbian and gay community who saw the issue in intensely practical terms. A same-sex marriage ceremony presided over by the Reverend Troy Perry, founder of the Universal Fellowship of Metropolitan Community Churches, outside the national headquarters of the Internal Revenue Service during the 1987 National March on Washington for Lesbian and Gay Rights, drew thousands of participants, some dressed in formal marriage attire.⁴⁶ The location of this event was no coincidence, because the tax laws remain a major impediment to financial equality between same-sex couples and legally married opposite-sex couples.⁴⁷ The large and enthusiastic turnout reflected the mounting passion of many lesbians and gay men for the right to obtain same-sex marriage.

Those who opposed same-sex marriage from within the lesbian and gay movement on theoretical grounds advocate domestic partnership, a form of nonmarital legal recognition, accompanied by a campaign to revise individual government policies as necessary to take account of nonmarried partners' interests.⁴⁸ The response of Eskridge to domestic partnership proponents is two-fold. First, only access to marriage will provide true "equal citizenship" for same-sex couples.⁴⁹ Second, the lengthy catalog of legal rights adhering to

⁴⁵ See ESKRIDGE, *supra* note 16, at 234-35 nn.39-41. For a synopsis of Ettelbrick's current views, see Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996).

⁴⁶ See Linda Wheeler, *2,000 Gay Couples Exchange Vows in Ceremony of Rights*, WASH. POST, Oct. 11, 1987, at B1.

⁴⁷ For example, same-sex couples cannot file joint returns and, upon the death of one member of the couple, the survivor cannot benefit from the exemption from taxation of a substantial portion of his or her inheritance that would be accorded a legal spouse. Perhaps more significantly, in light of the recent spread of domestic partnership benefit plans, the value of benefits provided to the partners of lesbian and gay employees is considered taxable income of the employee, while such benefits provided to legal spouses are excludable from taxable income. See generally, Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991).

⁴⁸ Advocates of domestic partnership have achieved some measure of victory over the past few years with the recognition of same-sex couples by numerous municipalities and employers, as well as by some state governments. See Arthur S. Leonard, *Employee Benefits for Domestic Partnership Families*, in 48 N.Y.U. ANNUAL CONFERENCE ON LABOR PROCEEDINGS (forthcoming 1997). One ardent advocate of domestic partnerships sought to persuade the Hawaii legislature that adopting a broad domestic partnership bill might satisfy that state's courts sufficiently to head off the pending same-sex marriage case. See generally Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 LAW & SEXUALITY 541 (1995) (including a proposed framework for comprehensive domestic partnership legislation and a draft bill for Hawaii). A bill based on Coleman's proposal, 1995 Hawaii Sen. Bill No. 2419, passed the Hawaii Senate in 1996 but did not reach the floor in the House. See Coleman, *supra*, app. at 578-81.

⁴⁹ See ESKRIDGE, *supra* note 16, at 62-66.

marriage should be available to same-sex couples wholesale through one act of marriage, rather than through piecemeal law reform and private legal planning, as would be required with the more limited domestic partnership proposals.⁵⁰ Eskridge observes that lesbians and gay men cannot obtain some of the most important societal rights except through marriage.⁵¹ Furthermore, Eskridge acknowledges that legal marriage brings responsibilities as well as rights, and he argues that the responsibilities imposed on married same-sex couples would be good for them as well as for society. Eskridge argues that “the duties and obligations of marriage directly contribute to interpersonal commitment,” and thus that the relationships of married same-sex partners are likely to be much more enduring than the nonmarital relationships to which such couples are now limited.⁵² And he asserts that such long-term commitments are usually good for the individuals involved in them, observing that in the time of the AIDS crisis social institutions that promote stable relationships will benefit society as well as the individual participants.⁵³

Eskridge then refutes the notion that marriage is a “rotten institution” that would prove disadvantageous for lesbians and gay men, arguing that this socially-constructed institution is constantly changing, and that opening it up to same-sex couples will provide the opportunity to change it further.⁵⁴ A more telling argument against making same-sex marriage the main goal of the lesbian and gay rights movement is that attaining this goal may contribute to marginalizing those lesbian and gay couples who prefer not to marry. Conceding this point, Eskridge argues that marriage need not be an exclusive goal; domestic partnership should remain on the table for both opposite-sex and same-sex couples who wish to define their relationships differently from traditional marriage but whose relationships should also be recognized for certain purposes on grounds of equity.⁵⁵

⁵⁰ See *id.* at 66-70. Eskridge provides a list of fifteen “rights and benefits associated with marriage,” but many of them are merely summary statements representing several distinct rights. See *id.* at 66-67. Eskridge’s list is similar to one provided by Georgia Supreme Court Justice Leah Sears-Collins in her concurring opinion in *Van Dyck v. Van Dyck*, 425 S.E.2d 853, 855 (Ga. 1993) (Sears-Collins, J., concurring), which includes thirteen items and alludes to others.

⁵¹ For a detailed discussion of the central rights and responsibilities of marriage and how they might apply to same-sex couples, see David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996). The Government Accounting Office has identified more than a thousand provisions in federal statutes which base a right, entitlement, or responsibility on marital or spousal status. See GAO/OCG, 1997 WL 67783 (Jan. 31, 1997).

⁵² See ESKRIDGE, *supra* note 16, at 70-74.

⁵³ See *id.*

⁵⁴ See *id.* at 75-80.

⁵⁵ See *id.* at 77-80

Finally, Eskridge confronts the argument that marriage is an "assimilationist" goal of privileged, middle-class lesbian and gay Americans who are unconcerned with the more "liberationist" aspirations of the gay rights movement. This argument states that if marriage becomes available, affluent gays and lesbians will simply assimilate into mainstream society. The result would be the further disempowerment of gender rebels, people of color, and those of limited means, all of whom rely upon the participation of the lesbian and gay middle class to maintain a viable progressive political movement.⁵⁶ Eskridge responds with several arguments. For one, he doubts that married same-sex couples "would be just like married straight couples" or that gay and lesbian culture would "cease to be distinctive," pointing out ways in which the "families of choice" of gay people will differ from those of their blood relatives.⁵⁷ More significantly, Eskridge maintains that in the short term, society will likely treat same-sex married couples as exotic.⁵⁸ Coming to the heart of his argument, Eskridge maintains that access to legal marriage will result in a strengthening of gay people's commitments to each other, reinforcing their family ties to the ultimate benefit of themselves⁵⁹ and the community.⁶⁰ Eskridge emphasizes the special importance of this notion to gay men, seizing upon the common stereotype that gay men are more promiscuous than lesbians, and thus more in need of social reinforcement to make their relationships work.⁶¹ He also counters the argument that people of color and those of limited means in the gay community would be less likely to benefit from marriage, pointing out that polls do not show less enthusiasm for marriage among these groups.⁶²

Eskridge next turns to what he calls "mainstream objections to same-sex marriages," which he divides into several broad categories: "antihomosexual emotions"; "definitional objections"; "'stamp of approval' objections"; and "pragmatic objections."⁶³ Eskridge eschews any attempt to deal with the first objection, asserting that his argument is aimed not at those who irrationally hate and/or fear homo-

⁵⁶ See *id.* at 80-83.

⁵⁷ *Id.* at 81.

⁵⁸ See *id.*

⁵⁹ Cf. *Many Just Say No to Drugs, Drinks After They Say "I Do,"* CHI. TRIB., Feb. 3, 1997, at 2.

⁶⁰ See ESKRIDGE, *supra* note 16, at 82.

⁶¹ See *id.* at 83.

⁶² See *id.* Indeed, some of the important social benefits that may be significant for these groups are readily accessible to married persons, especially parental rights. Eskridge observes that one of the major problems encountered by lesbian mothers in custody and visitation disputes is the courts' view of their relationships with their partners as illicit. Same-sex marriage, according to Eskridge, would remove this problem. See *id.* at 83-84.

⁶³ See *id.* at 87-122.

sexuals, but rather at fair-minded people who have not made up their minds on the same-sex marriage question.⁶⁴

Definitional objections to same-sex marriage assert that because the term "marriage" has traditionally been applied solely to opposite-sex couples, it is inapplicable to same-sex partners. This is a recurring theme in the pre-*Baehr* court decisions rejecting claims for a constitutional right for same-sex couples to marry,⁶⁵ as well as in religious debates.⁶⁶ Eskridge examines the historical evidence, and then he offers a clever refutation to historical arguments based on genetics by pointing out the genetic anomalies that can blur gender lines in some cases.⁶⁷ Philosophical objections to same-sex marriage rest largely on the contention that the purpose of social recognition for marriage is to create the ideal setting for procreation and raising children, an argument premised on "natural law."⁶⁸ Eskridge argues that there are no necessary links among procreation, childrearing, and marriage. Not all of those who procreate are married. Sterile, opposite-sex couples can marry and then adopt children.⁶⁹ Same-sex couples can have children, either through alternative insemination or adoption, and are perfectly capable of raising them.⁷⁰ Finally, religious tradition is not monolithic in opposition to same-sex marriage. After observing that in the United States religious precepts are not supposed to provide the basis for secular law, Eskridge argues that "[t]here is no univocal Judeo-Christian tradition against same-sex marriage."⁷¹ Not only does the Old Testament fail specifically to condemn same-sex marriages, but Jesus says nothing about them one way or the other in the New Testament.⁷² Recent research has uncovered Roman Catholic and Greek Orthodox liturgy from the Middle Ages that was apparently used to bless same-sex unions.⁷³ Perhaps more to the point, several contemporary religious leaders have argued that the Christian and Jewish faiths should embrace same-sex couples who wish to form sta-

⁶⁴ See *id.* at 87 ("[V]isceral distaste is not susceptible to argument based on reason and facts.").

⁶⁵ See *id.* at 89.

⁶⁶ See *id.* at 90.

⁶⁷ See *id.* at 93-94. Eskridge refers to "intersexual" people, sometimes called "hermaphrodites," whose physical appearance appears to blend features of both genders, and to others born with extra X or Y chromosomes that express themselves through distortion of genitalia. See *id.*

⁶⁸ See *id.* at 96-98.

⁶⁹ See *id.*

⁷⁰ See *id.* at 110-11. Indeed, if a same-sex couple prevails on a relative to donate sperm or to be the "surrogate" mother, the couple can produce a child who is genetically related to both same-sex parents.

⁷¹ *Id.* at 99.

⁷² See *id.* at 99-100.

⁷³ See *id.* at 100 (citing JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994)).

ble, committed relationships.⁷⁴ In an Appendix, Eskridge reproduces excerpts from statements in support of same-sex marriage prepared by ministers, priests, and rabbis for submission to the court in *Dean v. District of Columbia*.⁷⁵

The "stamp of approval" objection comes from those critics who contend that by authorizing same-sex marriage, the state will necessarily send the message that homosexuality is acceptable and that homosexual relationships are of equal value to heterosexual relationships.⁷⁶ Proponents of this argument contend that same-sex marriage and homosexuality are always "bad," and that society should not make available to homosexuals a social institution that is seen as "good, even blessed."⁷⁷

Eskridge responds that although society clearly does send a message that marriage is a desirable institution by granting it many legal and social privileges, the state does not express approval of any particular type of marriage or of how the participants in marriages conduct their lives.⁷⁸ Indeed, historical restrictions on the right to marry have been so reduced through legislative and judicial action that, as Eskridge observes:

Virtually any man and woman of any persuasion or perversion can qualify nowadays, and even if they do not technically qualify, they can still get a license if they are brazen enough. . . . If the couple wants to break the rules and sticks together on their rule breaking, they can be legally married all their lives.⁷⁹

Given the ease with which just about any opposite-sex couple can obtain a marriage license in most states, Eskridge argues, "it is unsurprising that marriage law is not a vehicle for conveying moral approval or disapproval of any particular form of marriage."⁸⁰

⁷⁴ See *id.* at 100-04.

⁷⁵ See *id.* app. at 193-217 (quoting from letters collected by plaintiffs in *Dean v. District of Columbia*, No. CA90-13892 (D.C. Sup. Ct. Dec. 30, 1991)).

⁷⁶ See *id.* at 104-05.

⁷⁷ *Id.* at 104.

⁷⁸ See *id.* at 105-09.

⁷⁹ *Id.* at 106.

⁸⁰ *Id.* at 107. As an example of this proposition, Eskridge notes:

Although every state freely gives marriage licenses to people convicted of rape, no one regards this state tolerance as a stamp of approval for rape. Although every state freely gives marriage licenses to people convicted of child molestation, no one regards this state tolerance as a stamp of approval for child molestation.

Id. at 107. One might add, somewhat incredulously, that a marriage license is apparently available to someone who murdered a previous spouse. See *Ward v. Ward*, 1996 WL 491692 (Fla. Dist. Ct. App. Aug. 30, 1996). Mr. Ward murdered his first wife, then remarried after serving his prison term. He divorced his second wife and married a third time. After his most recent remarriage, he sought custody of his daughter from his second marriage on the ground that his traditional marital household was preferable to a lesbian household—his second wife having begun a relationship with another woman. See *id.* at *1. In the

Eskridge argues further that same-sex marriage is good for the participants. In doing so, he cites social science research indicating that same-sex couples gain the same psychological benefits from their relationships that opposite-sex couples do.⁸¹ Eskridge then contends that prohibiting same-sex marriage is actually antifamily, because it condemns same-sex couples, whose sexual orientation is not something the state can affect in any way, to deprivation of those benefits of family life that accompany a socially and legally recognized relationship.⁸² And, as Judge Chang found in *Baehr v. Miike*, denying those same-sex couples that have children the right to marry also deprives their children of the benefits of having two officially-recognized parents.⁸³ Eskridge reinforces this argument by using anecdotes about actual same-sex couples and their children.⁸⁴

Pragmatists, who may be open to the arguments in favor of same-sex marriage, nonetheless counsel caution and delay, raising practical concerns about precipitate change in one of society's most basic institutions.⁸⁵ Eskridge responds to this position with three arguments. First, extending the existing institution of marriage to same-sex couples need not require any changes in current marriage law, other than revision of a few pronouns in some state domestic relations statutes. This is because, according to Eskridge, there are no discernible legal incidents of marriage that do not apply with equal effect to both members of same-sex couples.⁸⁶ Second, same-sex marriage would actually prove to be cost-effective for society. The civilizing effect of marriage may actually contribute to reducing the spread of sexually-transmitted diseases. Moreover, existing domestic partnership studies show that same-sex couples are, on average, less expensive to insure against health care costs than opposite-sex couples.⁸⁷ Finally, allowing same-sex marriage would be more efficient than the alternative suggested by some pragmatists of adjusting individual government poli-

course of the litigation, Ward's daughter from his first marriage alleged that she had been subjected to sexual abuse by him. See Monica Davey, *Lesbian Mother: Father Who Killed*, ST. PETERSBURG TIMES, Jan. 31, 1996, at 1A; Monica Davey, *Value Clash in Custody Battle*, ST. PETERSBURG TIMES, Feb. 2, 1996, at 1B; Bill Kaczor, *Killer Has Custody of Daughter Because His Ex-Wife is a Lesbian*, NEW ORLEANS TIMES-PICAYUNE, Feb. 3, 1996, at A4; Myriam Marquez, *Nice, New Wife Does Not Make Convicted Killer a Better Parent*, ORLANDO SENTINEL, Feb. 2, 1996, at A10. The trial judge decreed that the father's heterosexual household was preferable to the mother's lesbian household, even though the father was a convicted wife-murderer. See *Ward*, 1996 WL 491692, at *2. The appellate court affirmed this decision. See *id.* at *5. Has the state stamped its approval on Mr. Ward's lifestyle?

⁸¹ See ESKRIDGE, *supra* note 16, at 109-11.

⁸² See *id.* at 111-12.

⁸³ 1996 WL 694235, at *17-18 (Haw. Cir. Ct. Dec. 3, 1996).

⁸⁴ See ESKRIDGE, *supra* note 16, at 112-14.

⁸⁵ See *id.* at 115-16.

⁸⁶ See *id.* at 116-18.

⁸⁷ See *id.* at 118-20.

cies on an ad hoc basis to accommodate same-sex couples.⁸⁸ Allowing same-sex marriage, after all, adjusts all pertinent policies in one fell swoop through the simple process of redefinition of the pertinent status.⁸⁹

Eskridge next takes on the constitutional arguments concerning same-sex marriage,⁹⁰ and he asserts that the existing case law is wrong in concluding that neither due process nor equal protection principles developed under the Federal Constitution require the states to issue marriage licenses to same-sex couples.⁹¹ After first sketching the development of the constitutional privacy doctrine through cases on sterilization and contraception, Eskridge turns his focus to *Loving v. Virginia*⁹² and *Zablocki v. Redhail*⁹³ and relies upon them as the key sources of precedent for his argument.⁹⁴ In *Loving*, the Supreme Court struck down a state law penalizing interracial marriage on two alternative grounds. First, the Court found that equal protection required strict scrutiny of the racial classification contained in Virginia's marriage law. According to the Court, the state's justifications for its law were insufficient to meet this standard of review, being concerned primarily with maintaining white racial supremacy by preventing "race mixing." Second, the Court held that the right to marry is a fundamental right protected by the Due Process Clause, once again invoking strict scrutiny of any law that would block access to this right. The Court elaborated on the second strand of *Loving's* analysis in *Zablocki* and applied a strict scrutiny standard to strike down a Wisconsin law requiring divorced residents to provide proof of compliance with any outstanding child support obligations before they could obtain a new marriage license. Eskridge concludes:

Zablocki establishes a doctrinal structure logically applicable to other cases: A state law or practice that places a "direct legal obstacle in the path of persons desiring to get married" denies those persons the equal protection of the laws unless the state policy is "supported by sufficiently important state interests and is closely tailored to effectuate only those interests." This means that the burden of persuasion as to same-sex marriage lies with the opponents. The issue is not "Why gay marriage?" but is instead "Why *not* gay marriage?"⁹⁵

⁸⁸ The prime example of a pragmatist who acknowledges the arguments in favor of same-sex marriage but is unwilling to endorse it is Richard Posner. See RICHARD POSNER, *SEX AND REASON* 311-15 (1992).

⁸⁹ See ESKRIDGE, *supra* note 16, at 120-22.

⁹⁰ See *id.* at 123-52.

⁹¹ See *id.* at 124-42.

⁹² 388 U.S. 1 (1967).

⁹³ 434 U.S. 374 (1978).

⁹⁴ See ESKRIDGE, *supra* note 16, at 124-33.

⁹⁵ *Id.* at 128 (quoting *Zablocki*, 434 U.S. at 387 n.12, 388).

Furthermore, the Court upheld the constitutional right of a prisoner to marry in *Turner v. Safley*.⁹⁶ By acknowledging that the state could refuse to allow prisoners to have sex with their spouses while incarcerated, the Court implicitly rejected any contention that procreation is an indispensable attribute of marriage. Eskridge emphasizes that the Court is normally quite deferential to state authorities in ruling on constitutional claims by prisoners, so its willingness to strike down a state's ban on prisoner marriages clearly indicates that the constitutional right to marry is a very strong one.⁹⁷

In light of the strong arguments in favor of a constitutional right to marry, why have state courts consistently rejected this claim?⁹⁸ Eskridge observes that a significant early cluster of same-sex marriage cases predated *Zablocki* and *Turner*; once these early cases were on the books, it was easy for later courts to cite them as precedent disfavoring same-sex marriage claims without having to engage in careful analysis of new developments.⁹⁹ The early cases, brought by individual litigants rather than by public-interest law firms, lacked the kind of full factual records characteristic of good test-case litigation, such as the detailed record before the trial court on remand in *Baehr*.¹⁰⁰ The universal right-to-marry claim has consistently been countered with the assertion that the marital right is limited to couples who are at least theoretically capable of procreation; courts brush aside the counterargument that the state allows sterile or celibate couples to marry as irrelevant.¹⁰¹ In addition, later courts have cited *Bowers v. Hardwick* as

⁹⁶ 482 U.S. 78 (1987).

⁹⁷ See ESKRIDGE, *supra* note 16, at 129-30.

⁹⁸ Even the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), rejected the argument that the Due Process Clause of the Hawaii Constitution embodies a right to marry for same-sex couples. The court held that, under Hawaii precedents, it must construe the Hawaiian Due Process Clause in parallel with the Federal Due Process Clause. *See id.* at 56. Eskridge notes that the *Baehr* court construed *Zablocki* narrowly, and totally ignored *Turner*, in reaching its conclusion that the ability to engage in procreational sex was somehow a predicate for eligibility for marriage. *See* ESKRIDGE, *supra* note 16, at 131.

⁹⁹ A good example of this phenomenon is *In re Estate of Cooper*, 564 N.Y.S.2d 684 (1990), *aff'd*, 592 N.Y.S.2d 797 (App. Div. 1993), in which the court relied on the reasoning of *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), without discussing the intervening Supreme Court decisions on marriage. Indeed, the court summoned *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case upholding Georgia's sodomy law against constitutional challenge, as support for the proposition that public policy did not require the state to authorize same-sex marriages.

¹⁰⁰ In *Baehr*, the Lambda Legal Defense and Education Fund, Inc. joined local trial counsel at the appellate level and participated in planning and presenting the case on remand before the trial court.

¹⁰¹ *See* *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (dismissing as an exception heterosexual couples who are unable to produce children and stating that marriage is a protected institution because of the value that society places on propagation); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (explaining that the Supreme Court recognized marriage as a fundamental right because of its connection to reproduction and that only heterosexual couples have the ability to procreate).

a basis to deny the existence of a gay right to marry, a trend that Eskridge decries as a misuse of that decision.¹⁰²

Eskridge then discusses the various justifications that states might advance in attempting to satisfy the requirements of strict scrutiny.¹⁰³ He counters the most popular argument—the state interest in fostering procreation—by arguing that excluding same-sex couples from marriage does not advance this goal, because there is no evidence that gays who cannot marry their same-sex partners will turn to opposite-sex partners with whom they can conceive children simply in order to marry.¹⁰⁴ He also discounts the claim that denial of same-sex marriage rights might encourage bisexuals to marry opposite-sex partners in order to procreate, arguing that, even if this claim is true, the total effect on procreation would be “negligible” and hardly sufficient to justify disqualifying large numbers of homosexuals from marrying.¹⁰⁵

Eskridge gives only passing notice to the Hawaii Attorney General’s centerpiece argument on remand in *Baehr*: that the state has a compelling interest in maximizing the possibility that children will be raised in the best possible environment, namely the traditional family environment.¹⁰⁶ Eskridge responds that no evidence supports the state’s contention that opposite-sex married couples provide the best environment for raising children. As support, he cites studies showing that children raised in two-parent lesbian households turned out as well as those raised in traditional households, and tended to be psychologically better off than children raised by single heterosexual mothers.¹⁰⁷

The various arguments raised by Hawaii and other states are, according to Eskridge, makeweights for the most likely motivation behind states’ resistance to the legalization of same-sex marriage: promotion of heterosexuality and the avoidance of creating an appearance of approval or sanction of homosexuality.¹⁰⁸ Can “compulsory heterosexuality”¹⁰⁹ be a compelling state interest for purposes of due process or equal protection review? Eskridge’s negative response

¹⁰² See ESKRIDGE, *supra* note 16, at 136-37.

¹⁰³ See *id.* at 137-43.

¹⁰⁴ See *id.* at 138-39.

¹⁰⁵ See *id.* at 139.

¹⁰⁶ See *Baehr v. Miike*, 1996 WL 694235, at *3-10 (Haw. Cir. Ct. Dec. 3, 1996).

¹⁰⁷ See ESKRIDGE, *supra* note 16, at 139-40. Eskridge also effectively counters the argument raised by the Hawaii Attorney General that a tourist boycott of the state might result from a court order requiring the state to authorize same-sex marriages, relying on a study conducted by Professor Jennifer Brown. See *id.* at 141-42 (discussing Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriages*, 68 S. CAL. L. REV. 745 (1995)). Brown argues that a small state with a tourist-centered economy would enjoy a tourist income windfall of between \$3 and \$4 billion by virtue of being the first state to allow same-sex marriage. See Brown, *supra*, at 834.

¹⁰⁸ See ESKRIDGE, *supra* note 16, at 142-43.

¹⁰⁹ *Id.* at 143.

is strengthened by the Supreme Court's recent decision in *Romer v. Evans*,¹¹⁰ in which the Supreme Court ruled out animus against homosexuality as a legitimate state interest, thus striking down a measure that specifically discriminated against homosexuals.¹¹¹ Eskridge finally rebuts the "slippery slope" argument—the proposition that allowing same-sex marriage inevitably leads to allowing polygamous, incestuous, and intergenerational (child/adult) marriages.¹¹² Here, Eskridge's rebuttals are sometimes less convincing, partly because he would allow some types of marriages, such as marriages between adult cousins or adopted siblings who are not biologically related, that are presently forbidden in most states.¹¹³ Ultimately, however, Eskridge demonstrates that there are sound reasons, unrelated to categorical animus, that justify maintaining bans on such marriages even if states allow same-sex marriages.¹¹⁴

Eskridge devotes a separate chapter to explicating the rationale adopted by the Hawaii Supreme Court in *Baehr* for subjecting Hawaii's marriage law to strict scrutiny: that excluding same-sex couples adopts a sex-based classification that is constitutionally suspect.¹¹⁵ He draws a strong analogy between the race discrimination analysis employed by the Supreme Court in *Loving* and the sex discrimination analysis urged in *Baehr*.¹¹⁶ Eskridge emphasizes that in *Loving* the Supreme Court rejected the same basic type of reasoning that courts have used to sustain bans on same-sex marriage.¹¹⁷ The state of Virginia sought to "essentialize"¹¹⁸ marriage by characterizing racially-mixed marriages as "unnatural,"¹¹⁹ just as states resistant to same-sex marriage have argued that marriage is, in essence, a heterosexual institution.¹²⁰ Eskridge argues that *Loving's* rejection of this attempt to "essentialize" marriage is instructive for same-sex marriage cases.¹²¹ Critics of same-sex marriage who say that marriage is strictly for opposite-sex couples—because that's the true nature of marriage—fail to over-

¹¹⁰ 116 S. Ct. 1620 (1996).

¹¹¹ See *id.* at 1628-29. Eskridge relies on the same cases that the Supreme Court relied upon in *Romer*, most prominent among them being *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court stated that "objectives such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests." *Id.* at 446-47 (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

¹¹² See ESKRIDGE, *supra* note 16, at 144-52.

¹¹³ See *id.* at 151.

¹¹⁴ See *id.* at 144-51.

¹¹⁵ See *id.* at 153-82.

¹¹⁶ See *id.* at 153-54.

¹¹⁷ See *id.* at 153-54.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 155 (quoting *Scott v. Georgia*, 39 Ga. 321, 324 (1869)).

¹²⁰ See *id.* at 154.

¹²¹ See *id.* at 159-62.

come *Loving's* rejection of such definition-based arguments.¹²² Furthermore, Eskridge notes, the Court rejected Virginia's argument in *Loving* by piercing the statute's polite language to find the unsavory core justification: maintenance of a system of racial apartheid in Virginia.¹²³ The state of Virginia argued that because its miscegenation law treated blacks and whites equally, there was literally no violation of the principle of equal protection.¹²⁴ The Court rejected this argument by holding that whenever the state uses race to classify people, its purposes are suspect and thus require some racially-neutral justification in order to sustain the law.¹²⁵ In this case, Virginia's only justification for the statute was clearly based on the principle of racial supremacy, the desire by the white majority to avoid "mongrel[ization]" of the white race by preventing procreation by mixed-race couples.¹²⁶

State denial of same-sex marriage erects a sex-based classification just as miscegenation laws erect a race-based classification. Eskridge maintains that the ban on same-sex marriage is even more discriminatory than the ban on interracial marriage; the Virginia statute did not entirely deny African-Americans the right to marry, only the right to marry white people.¹²⁷ Although the law was maintained as an expression of racial supremacy, it did allow marriage within the stigmatized group. To the contrary, bans on same-sex marriage completely deprive gay people of the right to marry within their own group as part of the stigmatization process.¹²⁸

Eskridge then advances the argument that discriminatory treatment of lesbians and gay men by the government is actually a form of sexism, intended to reinforce gender-role stereotyping.¹²⁹ The Supreme Court has held that classifications reflecting "archaic and stereotypic notions"¹³⁰ about the sexes are subject to heightened scrutiny under equal protection.¹³¹ Eskridge shows how litigants can use the Court's rulings to construct a theory under which policies that have the effect of discriminating against gay people fall within the

¹²² See *id.* at 163.

¹²³ See *id.* at 158-59.

¹²⁴ See *id.* at 164.

¹²⁵ See *id.* at 159.

¹²⁶ See *id.* at 158-59.

¹²⁷ See *id.* at 160.

¹²⁸ See *id.* at 161.

¹²⁹ See *id.* at 162-72.

¹³⁰ See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

¹³¹ See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (employing heightened scrutiny to strike down, as gender discrimination, a statute prohibiting the sale of 3.2% beer to males under 21 and to females under 18).

sphere of anti-sex discrimination precedent.¹³² Eskridge then argues that sexual orientation discrimination itself raises issues of constitutional dimensions (a point reinforced by the Supreme Court's recent decision in *Romer*) and analyzes the argument that anti-gay discrimination is actionable under the Equal Protection Clause.¹³³

In his concluding chapter, Eskridge delves into the thoughts and feelings underlying the persistent refusal of a large majority of the public to embrace same-sex marriage, even in the face of such strong logical arguments in its favor.¹³⁴ Ultimately, he contends that the answer lies in America's ambivalence about sex, suggesting that although American society has evolved to a position of "tolerance" of private sexual practices, the public is not comfortable about public "flaunting" of sexuality that departs from the perceived mainstream.¹³⁵ In effect, America has erected a double standard that tolerates open expressions of heterosexual desire but condemns open expressions of homosexual desire.¹³⁶ Some people may believe that officially sanctioning same-sex marriages is tantamount to a license to flaunt "abnormal" behavior.

On the other hand, Eskridge contends, it seems clear that in a society that exalts marriage and premises many important legal rights and responsibilities on the marital status of a couple, maintaining the current barrier against same-sex marriage relegates gay people to second-class citizenship.¹³⁷ Eskridge concludes, ironically drawing on the arguments of Supreme Court Justice Antonin Scalia,¹³⁸ that "the good state must be like the good parent. It must protect every citizen in a fair and equal way, and it must invade no citizen's liberty just because he or she is unpopular."¹³⁹ This definition of state parental obligation requires the states to allow gay citizens to marry. "Justice as well as law requires nothing less."¹⁴⁰

¹³² See ESKRIDGE, *supra* note 16, at 165-72. He does this with considerable help from two law review articles on the relationship between gender and sexual orientation in constitutional theory: Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994), and Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

¹³³ See ESKRIDGE, *supra* note 16, at 176-82.

¹³⁴ See *id.* at 183-91.

¹³⁵ See *id.* at 183-85.

¹³⁶ See *id.* at 185-88.

¹³⁷ See *id.* at 188-90.

¹³⁸ For Justice Scalia's negative views on the issue of gay rights, see his dissenting opinion in *Romer v. Evans*, 116 S. Ct. 1620, 1629-37 (1996) (Scalia, J., dissenting).

¹³⁹ ESKRIDGE, *supra* note 16, at 191 (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)).

¹⁴⁰ *Id.* at 190-91.

CONCLUSION

In *The Case for Same-Sex Marriage*, Professor Eskridge mounts a strong logical argument for state recognition of same-sex marriages.¹⁴¹ Some of the nuances of this argument are new, but numerous law review articles and appellate briefs have voiced most of it before.¹⁴² Why has such a strong, logical case met with repeated rejection in the courts and outright hostility in state legislatures and Congress? The answer must be that when it comes to marriage, logic is not the prime motivator of the makers of public policy.

Marriage carries a symbolic value in our society that far transcends the pragmatic considerations surrounding the decision whether to allow same-sex couples to marry. Opponents of same-sex marriage argue that allowing same-sex couples to marry will send a signal that homosexuality is no longer an officially stigmatized phenomenon, but rather a mere "difference," one of many that make up the accepted diversity of the human condition, no more morally significant than race or sex in determining human worth. The opponents are correct. This is why the campaign to win the right to marriage for same-sex couples has emerged as the key issue for the lesbian and gay rights movement in the 1990s.¹⁴³

¹⁴¹ As noted at the outset, Eskridge's book, developed from litigation materials used in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), is a Brandeis brief for same-sex marriage. As such, it tends to underplay the alternative forms of recognition for lesbian and gay families outside of marriage, although Eskridge does acknowledge them to some extent. See *supra* notes 37-40 and accompanying text.

¹⁴² See Otis R. Damslet, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555 (1993); Richard J. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456 (1994); Jennifer L. Heeb, *Homosexual Marriage, The Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347 (1993); William M. Hohengarten, *Same-Sex Marriage and the Right to Privacy*, 103 YALE L.J. 1495 (1994); Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER J. PUB. L. 461 (1995); Scott K. Kozuma, *Baehr v. Lewin and Same Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy*, 30 WILLAMETTE L. REV. 891 (1994); Claudia A. Lewis, *From this Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995); Jeffrey J. Swart, *The Wedding Luau—Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities*, 43 EMORY L.J. 1577 (1994); Erik J. Toulon, *Call the Caterer: Hawaii to Host First Same-Sex Marriage*, 3 S. CAL. REV. L. & WOMEN'S STUD. 109 (1993); James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993); Kevin Aloysius Zambrowicz, *"To Love and Honor All the Days of Your Life": A Constitutional Right to Same-Sex Marriage?*, 43 CATH. U. L. REV. 907 (1994).

¹⁴³ More than a decade ago, Professor G. Sidney Buchanan made this point quite forcefully. See G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541 (1985). Buchanan argued:

If the government may not distinguish between same-sex and opposite-sex conduct in the area of marriage, it is difficult to use the societal interest in protecting and fostering the marriage institution as a basis for justifying that distinction in other areas of the civil law. In this sense, therefore, the same-sex marriage issue is a linchpin issue. If it is resolved against the power of government to limit marriage to opposite-sex unions, against the

Is it naive to believe that the goal of granting same-sex couples the right to marry—the right to be accepted as equals with their opposite-sex peers—might actually be achieved soon? Perhaps so, but the progress of the *Baehr* case and the slow changing of minds that may accompany its unfolding suggest that what would have appeared a pipe dream to gay activists of the 1950s now appears within grasp. One regrets that those who most need to see the full array of evidence Eskridge sets forth so compellingly are those least likely to read it: those who have not fully made up their minds and are open to persuasion through logical argument. For readers already inclined toward governmental recognition of same-sex marriage, the book provides a powerful confirmation that such a result would be consistent with our constitutional principles and ultimately beneficial to American society as a whole.

power of government to confine marriage to its traditional opposite-sex moorings, then the legal system, as a practical matter, will have lost its capacity to make distinctions between same-sex and opposite-sex conduct in any walk of life. Government would be constitutionally straitjacketed into a requirement of total equality in the regulation of same-sex and opposite-sex conduct.