BOOK REVIEW

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

Arthur S. Leonard†


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 couples.

† Professor, New York Law School; Editor-in-Chief, Lesbian/Gay Law Notes. The author acknowledges research assistance by Charles Wertheimer, New York Law School, Class of 1997.

‡ Professor, Georgetown University Law Center.


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.
couples\(^5\) 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 Constitution\(^6\)—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


\(^6\) 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.


\(^8\) 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. Cty 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. 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, and the President signed it into law before the election.

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, 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 marriage sparked a fury of media commentary. The verdict renewed
efforts to pass bills against same-sex marriage in state legislatures, 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. 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.

Craig R. Dean and Patrick G. Gill filed suit in the Superior Court of the District of Columbia on November 26, 1990. 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, which bans discrimination in public services on the basis of sex and sexual orientation. 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. 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.


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.*

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. 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. 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. However, the scholarship on which Eskridge relies to make this point is controversial. 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.


idence 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

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. 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. The more "liberal" denominations have progressed to the point of allowing their clergy to perform religious ceremonies for same-sex couples. 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. Eskridge bolsters his argument with an Appendix entitled "Letters from the Faithful on the Legal Recognition of Same-Sex Marriage," consisting of letters from religiously-observant advocates of same-sex marriage that were submitted to the court in Dean v. District of Columbia.

Eskridge next addresses the debate over marriage as it has played out within the lesbian and gay community. 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. At that time, such ferocious hostility toward "open" homosexuality prevailed in society that gay rights proponents saw the concept of officially recog-
nized marriages for same-sex couples as an absurd pipe dream.\textsuperscript{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.\textsuperscript{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.\textsuperscript{42}

This debate, ongoing during the 1980s, surfaced formally in \textit{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.\textsuperscript{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."\textsuperscript{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

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

\textsuperscript{41} See cases cited \textit{supra} note 1.


\textsuperscript{44} See Stoddard, \textit{supra} note 43, at 13; Ettelbrick, \textit{supra} note 42, at 20.
and gay press. Their debate was played out in a steady stream of commentary during the next few years.\footnote{See \textit{Eskridge}, \textit{supra} note 16, at 234-35 nn.39-41. For a synopsis of Ettelbrick's current views, see Paula L. Ettelbrick, \textit{Wedlock Alert: A Comment on Lesbian and Gay Family Recognition}, 5 J.L. & POL'Y 107 (1996).}

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.\footnote{See Linda Wheeler, \textit{2,000 Gay Couples Exchange Vows in Ceremony of Rights}, WASH. POST, Oct. 11, 1987, at B1.} 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.\footnote{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, \textit{Same-Sex Couples and the Federal Tax Laws}, 1 LAW & SEXUALITY 97 (1991).} 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.\footnote{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, \textit{Employee Benefits for Domestic Partnership Families}, in \textit{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, \textit{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, \textit{supra}, app. at 578-81.} 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.\footnote{See \textit{Eskridge}, \textit{supra} note 16, at 62-66.} Second, the lengthy catalog of legal rights adhering to
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.\textsuperscript{50} Eskridge observes that lesbians and gay men cannot obtain some of the most important societal rights except through marriage.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{55}

\textsuperscript{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.

\textsuperscript{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, \textit{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).

\textsuperscript{52} See \textit{Eskridge}, supra note 16, at 70-74.

\textsuperscript{53} See id.

\textsuperscript{54} See id. at 75-80.

\textsuperscript{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 themselves\(^59\) 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.
\(^{60}\) 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.
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, as well as in religious debates. 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. 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.” 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. Same-sex couples can have children, either through alternative insemination or adoption, and are perfectly capable of raising them. 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.” 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. Recent research has uncovered Roman Catholic and Greek Orthodox liturgy from the Middle Ages that was apparently used to bless same-sex unions. 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-
ble, committed relationships. 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.

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. 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."

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. 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.

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."

---

74 See id. at 100-04.
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.\textsuperscript{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.\textsuperscript{82} And, as Judge Chang found in \textit{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.\textsuperscript{83} Eskridge reinforces this argument by using anecdotes about actual same-sex couples and their children.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{87} Finally, allowing same-sex marriage would be more efficient than the alternative suggested by some pragmatists of adjusting individual government poli-


\textsuperscript{81} \textit{See} \textit{ESKRIDGE}, \textit{supra} note 16, at 109-11.

\textsuperscript{82} \textit{See id.} at 111-12.


\textsuperscript{84} \textit{See} \textit{ESKRIDGE}, \textit{supra} note 16, at 112-14.

\textsuperscript{85} \textit{See id.} at 115-16.

\textsuperscript{86} \textit{See id.} at 116-18.

\textsuperscript{87} \textit{See id.} at 118-20.
cies on an ad hoc basis to accommodate same-sex couples.\textsuperscript{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.\textsuperscript{89}

Eskridge next takes on the constitutional arguments concerning same-sex marriage,\textsuperscript{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.\textsuperscript{91} After first sketching the development of the constitutional privacy doctrine through cases on sterilization and contraception, Eskridge turns his focus to \textit{Loving v. Virginia}\textsuperscript{92} and \textit{Zablocki v. Redhai}\textsuperscript{93} and relies upon them as the key sources of precedent for his argument.\textsuperscript{94} In \textit{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 \textit{Loving}'s analysis in \textit{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:

\textit{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 \textit{not} gay marriage?"\textsuperscript{95}

\textsuperscript{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, \textit{Sex and Reason} 311-15 (1992).
\textsuperscript{89} See Eskridge, \textit{supra} note 16, at 120-22.
\textsuperscript{90} See \textit{id.} at 123-52.
\textsuperscript{91} See \textit{id.} at 124-42.
\textsuperscript{92} 388 U.S. 1 (1967).
\textsuperscript{93} 434 U.S. 374 (1978).
\textsuperscript{94} See Eskridge, \textit{supra} note 16, at 124-33.
\textsuperscript{95} \textit{Id.} at 128 (quoting \textit{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*. 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.

In light of the strong arguments in favor of a constitutional right to marry, why have state courts consistently rejected this claim? 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. 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*. 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 counter-argument that the state allows sterile or celibate couples to marry as irrelevant. In addition, later courts have cited *Bowers v. Hardwick* as...
a basis to deny the existence of a gay right to marry, a trend that Eskridge decries as a misuse of that decision.\textsuperscript{102}

Eskridge then discusses the various justifications that states might advance in attempting to satisfy the requirements of strict scrutiny.\textsuperscript{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.\textsuperscript{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.\textsuperscript{105}

Eskridge gives only passing notice to the Hawaii Attorney General's centerpiece argument on remand in \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{108} Can "compulsory heterosexuality"\textsuperscript{109} be a compelling state interest for purposes of due process or equal protection review? Eskridge's negative response

\textsuperscript{102} See \textit{Eskridge}, \textit{supra} note 16, at 136-37.
\textsuperscript{103} See id. at 137-43.
\textsuperscript{104} See id. at 139-99.
\textsuperscript{105} See id. at 199.
\textsuperscript{107} See \textit{Eskridge}, \textit{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, \textit{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, \textit{supra}, at 884.
\textsuperscript{108} See \textit{Eskridge}, \textit{supra} note 16, at 142-43.
\textsuperscript{109} Id. at 143.
is strengthened by the Supreme Court's recent decision in *Romer v. Evans*, 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. 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. 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. 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.

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. 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*. 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. The state of Virginia sought to "essentialize" marriage by characterizing racially-mixed marriages as "unnatural," just as states resistant to same-sex marriage have argued that marriage is, in essence, a heterosexual institution. Eskridge argues that *Loving*'s rejection of this attempt to "essentialize" marriage is instructive for same-sex marriage cases. 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-

\---

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. 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. 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. 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. 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.

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. 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.

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. The Supreme Court has held that classifications reflecting "archaic and stereotypic notions" about the sexes are subject to heightened scrutiny under equal protection. 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.
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.\textsuperscript{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 \textit{Romer}) and analyzes the argument that anti-gay discrimination is actionable under the Equal Protection Clause.\textsuperscript{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.\textsuperscript{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.\textsuperscript{135} In effect, America has erected a double standard that tolerates open expressions of heterosexual desire but condemns open expressions of homosexual desire.\textsuperscript{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.\textsuperscript{137} Eskridge concludes, ironically drawing on the arguments of Supreme Court Justice Antonin Scalia,\textsuperscript{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.”\textsuperscript{139} This definition of state parental obligation requires the states to allow gay citizens to marry. “Justice as well as law requires nothing less.”\textsuperscript{140}


\textsuperscript{133} See Eskridge, \textit{supra} note 16, at 176-82.

\textsuperscript{134} See id. at 183-91.

\textsuperscript{135} See id. at 183-85.

\textsuperscript{136} See id. at 185-88.

\textsuperscript{137} See id. at 188-90.

\textsuperscript{138} See id. at 183-91.

\textsuperscript{139} For Justice Scalia’s negative views on the issue of gay rights, see his dissenting opinion in \textit{Romer v. Evans}, 116 S. Ct. 1620, 1629-37 (1996) (Scalia, J., dissenting).

\textsuperscript{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.


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.

*Id.* at 544.