

Slow going.

Equality Practice: Civil Unions and the Future of Gay Rights

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Equality Practice: Civil Unions and the Future of Gay Rights by William N. Eskridge, Jr. New York: Routledge, 2002, 280 pp, \$17.95 paper.

In November of 1990, Craig Dean and Patrick Gill sued the District of Columbia for refusing to issue them a marriage license. In the spring of the following year, three more same-sex couples sued Hawaii for the same reason. The marriage wars were on.

Although a minority of gay rights advocates and theorists see same-sex marriage as an unworthy goal, gay men and lesbians in this country have become increasingly vocal in their determination to secure the freedom to marry. Their opponents are equally determined to preserve marriage as a heterosexual institution.

William Eskridge, who holds an endowed chair at Yale Law School and is one of the country's most respected writers on sexuality, gender and the law, has participated prominently in these debates. In 1996, he published *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*. Its starting point was the Hawaii marriage case known as Baehr v. Lewin. He argued then that gays had achieved sexual liberty and that it was time for that liberty to mature into the civilized commitment of marriage. Same-sex marriage would be good for the country, Eskridge explained, because it would draw homosexuals into the mainstream of American life and fulfill the American promise of full equality for all citizens.

America, it would seem, disagrees. Employment non-discrimination statutes, domestic partner benefits, second-parent adoptions, gays in the military: none of these arouses the political resistance that the phrase "homosexual marriage" calls forth. Eskridge, who only a few years ago argued eloquently on behalf of same-sex marriage, has been looking out upon the political landscape and now calls for a principled retreat. *Equality Practice: Civil Unions and the Future of Gay Rights* is his attempt to articulate a legal and political strategy that can press the case for equal rights for gay men and lesbians while giving credence to the often hysterical resistance that same-sex marriage arouses. Press on, he counsels, but move slowly and compromise with the opposition.

This conciliatory attitude will not be to everyone's taste, but Eskridge plays the role of mediator rather than advocate. Sudden equality is never politically feasible. Nor is it desirable, he cautions, if it will produce a fierce "politics of preservation" that undermines the conditions for reciprocity and citizenship in the larger community. In other words, gay men and lesbians have a responsibility to the larger community as well as to their own, and in the interests of being good citizens they should accept something less than full equality when it comes to marriage: "Equality for lesbians, gay men, bisexuals, and their relationships is a liberal right for which there is no sufficient justification for state denial – but it is not a right that ought to be delivered immediately, if it would unsettle the community." The name Eskridge gives to this politically pragmatic and philosophically principled position that strives to move towards full civil rights for gays but to do it on little cat's feet so as to remain good members of the community in the process, is "equality practice."

To evaluate the path Eskridge wants the gay community to follow, it is helpful to recall how the marriage wars began. Despite the various cultural meanings that accrete around it, marriage is simply the union of procreative sex with a particular family form that enjoys preferred legal status. Gays have made significant gains in attaining sexual freedom. Despite the shameful 1986 United States Supreme Court

decision in *Bowers v. Hardwick* that declined to extend constitutional protection to sodomy between consenting adults, 37 states have repealed their sodomy laws. Gays have made similar progress on the family front. Homosexuality is no longer grounds for finding a parent unfit; homosexuals can adopt in every state but Florida; second-parent adoptions have been legalized by statute in three states and by appellate courts in seven, and are granted by judges at the trial level in fifteen more; visitation rights for the non-biological parent following the breakup of a same-sex relationship are now regularly granted; in Boston, when a lesbian bore a child that resulted from her partner's egg fertilized in vitro, a court decreed that both women could enter their names as "mother" on the child's birth certificate. But marriage? It would seem not.

What happened in Hawaii is instructive. In May of 1991, Ninia Baehr and Genora Dancel (along with others) filed a legal complaint in which they asked the state court to declare that Hawaii's marriage law violated that state's constitution because it denied homosexual couples the right to marry. Hawaii's constitution, like the federal constitution, guarantees citizens the equal protection of the laws. But Hawaii's equal protection clause is more elaborate than its federal counterpart. Whereas the US Constitution says simply that a state may not deny to any person the equal protection of the laws, Hawaii's constitution says that no person shall be denied the equal protection of the laws or be discriminated against because of race, religion, sex, or ancestry. This wording gave the plaintiffs in *Baehr v. Lewin* access to a broader set of protections than the federal constitution would supply. And by limiting their claims to those arising under Hawaii's own constitution, the plaintiffs guaranteed that their case would remain with the Hawaii state courts. After *Hardwick*, gay plaintiffs did not want to take an equal protection case into a federal court.

Eventually, Ninia Baehr and her partner found their case being argued before the Hawaii Supreme Court. What occurred there is a bit technical but worth examining because Eskridge's conciliatory position relies upon understanding exactly what has been happening as the same-sex marriage cases move through the judicial system. The court decided that for purposes of the state constitution, in responding to claims of discrimination based upon a person's sex, the courts must look very closely indeed at the discriminatory provision or behavior complained about, and if the state can't come up with an awfully good reason for it, the discriminatory provision or behavior will be declared illegal.

In legal language, the Hawaii Supreme Court held that the denial of the marriage license was based upon sex, and that sex is a suspect class that triggers strict scrutiny. What this meant was that there would be a trial at which the state would have to defend the marriage statute against the constitutional challenge. The state would have to show that limiting marriage to opposite-sex couples furthered a compelling government interest that could not be achieved by any less restrictive means. The state tried, and failed, to meet its burden. The trial judge ordered the state to issue marriage licenses to gay couples and then immediately put his order on ice to give the state a chance to appeal.

At this point, the political process took over with a vengeance. The Hawaii state legislature insisted that marriage meant a union between a man and a woman and denounced the judicial branch for usurping legislative prerogatives. Then the people were asked their opinion. The result was that the Hawaii state constitution – the very same document that had seemed to support the plaintiffs' complaint – was amended to reserve marriage to opposite-sex couples. If thy constitution offend thee, rewrite it.

Then in 1996 Congress passed, and President Clinton signed, the federal Defense of Marriage Act (DOMA) that not only limited marriage to the union of one man and one woman but cast aside long-settled constitutional law requiring states to recognize one another's laws, records and court judgments. All over the country, states began passing laws reserving marriage to heterosexuals and promising not to recognize any out-of-state record or court judgment inconsistent with this position. So much for the "full faith and credit" clause of the US Constitution, one of the central mechanisms of federalism.

As of this writing, 36 states have some form of DOMA, including Alaska and Hawaii. Gay men and lesbians in Hawaii got a law that established a category called "reciprocal beneficiaries." As the term implies, domestic partners are awarded certain benefits, but the law imposes upon them none of the obligations that spouses have towards one another. The term for this is "easy exit." Obviously not marriage.

The Hawaii experience set the stage for what happened in *Baker v. State*, the 1999 Vermont case that resulted in the civil union law. Eskridge clearly approves of the judicial and political process that yielded the civil union law. The three same-sex couples who were the *Baker* plaintiffs brought their discrimination claim under a Vermont constitutional provision that says that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Marriage laws transform a private agreement into a source of significant public benefits and protections, such as joint ownership of property, hospital visitation, health benefits, spousal support and property division upon divorce, and the ability to inherit from a spouse who dies without a will. The question as the court framed it was whether Vermont could exclude same-sex couples from the benefits and protections that its laws provided to opposite-sex married couples; and the answer it gave was a resounding "no."

But the court stopped short of awarding gays the right to marry. Instead, it gave the state legislature enough time to rectify, in what it called "an orderly and expeditious fashion." The result was Civil Union, a status that confers upon partners the full array of benefits and obligations that spouses get, but without the name. For same-sex marriage proponents, this represents a considerable advance over the Hawaii scheme. Eskridge offers a wealth of detail about how the political process unfolded in Vermont and presents it as an object lesson in how the "politics of recognition and equality" took on the "politics of preservation," and won. Sort of.

The problem, of course, is that while civil union might be equal to marriage it is not the same as marriage, though it is surely superior to the variety of documents that same-sex couples in the rest of the country are signing in an attempt to achieve by contract what the state confers automatically through marital status. Eskridge does not see in civil union a shadow of the separate-but-equal position that blacks in America have endured for so long; rather, he thinks that like the school desegregation cases, *Baker* advances the politics of recognition that will eventually yield for gays the Holy Grail of the license to marry.

Meanwhile, however, some states still have sodomy laws. Gays can have a civil union in Vermont and be arrested in Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, Virginia, Kansas, Oklahoma, Texas, Missouri and Michigan. More to the point (since criminal charges under sodomy laws, while technically possible, are unlikely) is that you can't order civil union to go. At least domestic partnership documents signed in one state are probably enforceable as contracts in another state. Not so the benefits conferred by civil union status. Last January, a Georgia court ruled that a woman had violated her divorce decree by having her children visit her while she was cohabiting with someone to whom she was not married – the partner in her civil union. More recently, a Connecticut court refused to dissolve a civil union between two men, explaining that even though Connecticut prohibits discrimination on the basis of sexual orientation, the anti-discrimination laws cannot be read to authorize same-sex marriage. Connecticut has no DOMA, but this appellate decision is the functional equivalent. It is being appealed.

Eskridge's argument draws upon two strands of American political theory as a way of structuring relationships among rights, remedies and responsibilities. One strand is liberalism, which organizes the state around rights. I have the right to as much liberty as is compatible with your right to liberty: in other words, my right to flail my arms stops where your nose begins. The other strand is communitarianism, which speaks not of rights but of the responsibilities that flow from a person's membership in communities. I might have the right to claim a social good, but if pursuing my claim upsets the community, perhaps I should ease up on the accelerator.

Where does this leave remedies? Lawyers are fond of saying that there is no right without a remedy. Eskridge does not want the gay community to abandon its rights-based claim to marriage, but he wants us to ease up on the accelerator and accept what he calls a communitarian remedy, one that will not upset the larger community. Civil union is such a remedy. He acknowledges that civil union is unequal to marriage, but styles this a "modest sacrifice of liberal principles." It is substantial equality. It is equality practice.

I don't know. Whether you want gay marriage or not – there is a strong critique from the Left as well as

from the Right – there is no calculus by which you can argue that discriminating against a category of citizens is consistent with the promise of a liberal state.

Readers of *Equality Practice* will determine for themselves whether Eskridge's book is an after-the-fact defense of civil unions and the people who accepted it, or a blueprint for (in)action going forward. Either way, his analysis is only part of the story, and perhaps not the most interesting part. For while one set of same-sex couples is waging a high-profile political fight for marriage, another set is quietly going into court seeking divorce.

Same-sex couples break up just as often as married couples do, and with much the same problems: how to divide property, how to apportion debt, what to do about the children. In some states, a non-biological parent is permitted to adopt her partner's child, thus acquiring a legal relationship that carries with it the same rights that would obtain at the end of a traditional marriage. In some states, an ex-partner can sue for access to her former partner's child. Throughout the country, these "de facto" parents are winning visitation rights over children with whom they have no legal relationship. Sometimes the courts reason that it is in the best interest of the child that she continue to have a relationship with someone who has been an important figure in her life. At other times, the court invokes a legal doctrine like *in loco parentis* or "parent by estoppel" to confer a status under which the partner can claim visitation. Recently, courts have begun to assess child support payments against the de facto parent.

Last February a Delaware court assessed child support payments against Carol Chambers, a non-biological parent. The court reasoned that she and her partner had a commitment ceremony, Carol helped to pay for the in-vitro fertilization that resulted in the partner's pregnancy, and the three of them lived together as a family. This made Carol a parent for purposes of the state's support statute. The court said that the events preceding the conception and birth constituted a symbolic act of procreation. Similar cases have yielded similar results in Pennsylvania and Massachusetts.

In 1997, two Florida women in a committed relationship, Emma Posik and Nancy Layton, entered into a support agreement that the court characterized as "a nuptial agreement entered into by two parties that the state prohibits from marrying. . . . They contracted for a permanent sharing of, and participating in, one another's lives." In addition to the explicit terms of the agreement, there was, the court said, "an implied agreement that [Posik's] lifetime commitment would be reciprocated by a lifetime commitment by Dr. Layton – and that this mutual commitment would be monogamous." The court also said that the obligation imposed on Posik to move in immediately with Layton and to stay there for the remainder of Posik's life was very similar to an "until death do us part" commitment. Sure looked like marriage to this Florida court, and by enforcing the agreement the court gave the women a divorce. And as this review was being written, a judge in Washington state said that the relationship between Julia Robertson and Linda Gormley was "sufficiently marriagelike" that the court would grant Gormley's request to divide the couple's property, allowing both women the same property rights given to a husband and wife in a divorce.

Marriage. The union of procreative sex with a particular family form that enjoys preferred legal status. Ms. Chambers was responsible for paying child support because of a symbolic act of procreation. Dr. Layton was bound by a nuptial agreement establishing a monogamous, reciprocal, lifetime commitment between two women who had contracted for a permanent sharing of one another's lives. And when Julia Robertson and Linda Gormley ended their "marriagelike" intimate domestic partnership, they were under a court order to divide their assets on the same terms that apply to a married couple.

One of the most important elements of marriage's preferred legal status is divorce: a predictable process in which property and debts are allocated, and child custody, support and visitation orders are issued by a judicial system that asserts jurisdiction over the dissolution of a committed domestic partnership. It would seem that gay couples are getting divorced. Could it be that same-sex marriage is already here?

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