

What to Do About Same-Sex Matrimony

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Conservatives in the US say gay marriage undermines the institution itself, but how consistent is this? The writer teaches at George Mason University School of Law and is a fellow at Stanford's Hoover Institution.

The most compelling case conservatives make against gay marriage is not compelling enough to justify changing the United States Constitution to ban it.

By separating matrimony from parenting and by implicitly rejecting the idea of the natural complementarity of the sexes, gay marriage, the most powerful conservative argument against it runs, will further undermine marriage, which has long been at risk and is the most vital institution in society for the formation of character in children and the transmission of values to the next generation.

Conservatives may well be right about the consequences of gay marriage but, as conservatives need hardly be reminded, there are always countervailing considerations.

One is the mistake of treating the constitution, America's fundamental law of the land, as an instrument of social policy. Another is the natural momentum for conferring upon gays, as did the Supreme Court of Massachusetts, "the protections, benefits, and obligations of civil marriage," striking down a state law restricting marriage to a man and a woman.

But there is another less obvious consideration. The law generally does not prohibit practices on the grounds that they harm marriage, especially if the practice can be seen as enhancing equality in freedom.

There are good conservative reasons to believe that the invention of a cheap and reliable birth control has weakened marriage. The pill greatly reduces a key cost associated with premarital sex - unwanted pregnancy. And thus it removes a powerful inducement to marriage: the promise of regularly available sex. Yet nobody wants the state to take action to curb use of the pill.

Cohabitation before marriage, conservatives argue, also weakens marriage. Living together, especially attractive to the young, mobile and ambitious, normalizes the idea that marriage is one lifestyle option among many, an expression of personal commitment rather than a sacred obligation. While lamenting this development, conservatives do not wish to pass laws to restrict it.

No-fault divorce also appears, from a conservative perspective, to diminish respect for the sanctity of marriage. It fosters the idea that marriage is a contract like all other contracts which one can break at will, incurring thereby only the liability, as in all breaches of contracts, for the monetary damages awarded by a court. But most conservatives agree that it is too late in the day to return to a more demanding regime.

The abolition of the civil action for alienation of affection contributes to the devaluation of marriage. Conducting an affair with another person's spouse no longer represents an injury cognizable by law. It is more akin to stealing another person's best friend.

Neither society as a whole, nor any significant subset of conservatives, clamor for changes in the law of torts to make seducers of spouses legally liable for coming between man and wife.

THE TRADITIONAL foundation of marriage has been shaken as well by the movement over the last 40 years of women out of the home and into the workplace. Success in professional life makes women less financially dependent on men, so less in need of marriage as a source of economic security, and provides women with more opportunity to experiment romantically, thus more tempted to proceed in life without marriage's constraints and without its benefits.

Yet conservatives these days are more likely to defend the choice of those women who decide to stay at home than argue against women who choose to work. In so doing, conservatives affirm, and indeed expand the meaning of, the liberal principle of choice.

Now if you believe that the birth control pill, cohabitation before marriage, no-fault divorce, laxness concerning adultery, and the movement of women out of the home and into the workplace undermine marriage - as many conservatives do - and yet you are unwilling to support legislation to prohibit these practices because of the cost to individual freedom, how in good faith can you single out gay marriage for legal prohibition?

One answer is that in contrast to gay marriage, the aforementioned practices do not involve formal state approval, either symbolically or through the conferring of financial benefits. They call only for the state to mind its own business. In contrast, proponents of gay marriage seek both the symbolic legitimation and the financial benefits that the law confers through marriage.

In fact, in minding its own business the state makes a powerful statement of moral and political principle: The organization of intimate relations is a matter of personal choice.

Now that bigotry against gays is on the run; express legal liabilities have been lifted (with the notable exception of the military's "don't ask, don't tell" policy); popular culture has increasingly embraced gays; and the question of gay marriage has been brought out into the open by vigorous public debate, the admittedly speculative harms critics

associate with gay marriage will, in more and more people's minds, be outweighed by the rock-solid principle of respect for individual choice.

While majorities in the US may not yet be ready for gay marriage, larger majorities will oppose legislation that smacks of anti-gay animus.

This is not to approve of the 4-3 decision by the Massachusetts court. The court imperiously denied any rational basis whatsoever to legislation restricting marriage to a man and a woman. Unlike the prohibitions on interracial marriage properly struck down by the US Supreme Court in 1967 in *Loving v. Virginia*, the prohibition on gay marriage, as the Massachusetts dissenters argued, is connected to valid policy questions.

The color of one's skin has no bearing on the essential purpose of marriage. But gay marriage raises concerns about parenting, child-rearing, and the structure of the family which lie at the very heart of marriage's purpose.

Nevertheless, because of the force of arguments about individual freedom and equality before the law, other state legislatures will likely soon do on their own what the Massachusetts legislature will do under the compulsion of its highest court. They will grant gays the protections, benefits and obligations of civil marriage.

Many thoughtful Democrats and Republicans favor civil unions but doubt the wisdom of gay marriage. Their doubts are reasonable, but there are at least equally strong reasons to wonder whether the Constitution - liberal principles in the large sense - and changing background social norms justify enshrining their doubts in law.