

Gay-Marriage Backers, Admirably Open to Dissent

 realclearpolitics.com/articles/2014/04/23/gay-marriage_backers_admirably_open_to_dissent_122355.html

By Peter Berkowitz

RCP Contributor

April 23, 2014

According to an increasingly influential bloc of same-sex marriage supporters, Americans cannot reasonably disagree any longer. The Constitution obviously mandates it, they say; no sensible person can dispute the proposition that legalizing it is just and will advance the public interest. Explicitly opposing same-sex marriage, these proponents insist, places a person beyond the pale.

Friends of moderation and good sense, therefore, should laud the approximately 50 distinguished advocates of both gay marriage and freedom—including University of Minnesota Law School professor Dale Carpenter, American Enterprise Institute Senior Fellow Charles Murray, Brookings Institution Senior Fellow Jonathan Rauch, and star blogger Andrew Sullivan—who have issued a compelling public statement, “Freedom to Marry, Freedom to Dissent.”

Moved to action by the Brendan Eich affair, the signatories—coming from the political left, right, and middle—argue that opposition to gay marriage should not be considered an intolerable offense. On the contrary, they maintain, dissent—and not only in connection to gay marriage—should be cherished because it is a hallmark of freedom:

Sustaining a liberal society demands a culture that respects and welcomes robust debate, vigorous political advocacy, and a decent respect for differing opinions. People must be allowed to be wrong in order to continually test what is right. We should criticize opposing views, not punish or suppress them.

Their message could hardly be more timely.

In early April, two weeks after taking over as chief executive officer of the Silicon Valley software company Mozilla, Eich was forced to resign by a groundswell of condemnation from the pro-same-sex marriage community. His offense was to donate in 2008—when then-candidates Barack Obama and Joe Biden publicly opposed same-sex marriage—\$1,000 to support Proposition 8, a California ballot measure that restricted marriages recognized by the state to those between a man and a woman.

There is no evidence that Eich ever discriminated against employees based on sexual orientation. When the controversy erupted in March of this year, he insisted on his devotion to inclusiveness and diversity. But he compounded his offense in the eyes of some outraged

same-sex marriage supporters by declining to apologize for opposing gay marriage and refusing to recant.

On April 4, one day after Eich stepped down, New Yorker staff writer James Surowiecki defended the outcome, arguing that one must take into account the political sensitivities of the denizens of Silicon Valley. “At this point,” Surowiecki writes, “a tech company having a CEO who opposes gay marriage is not all that different from a company in 1973 having a CEO who donated money to fight interracial marriage: Even if there were plenty of Americans who felt the same way at the time, the CEO would still have been on the wrong side of history.”

This is a common analogy with a superficial logic, but it obscures more than it illuminates.

The legal prohibition in America on interracial marriage did not stem from marriage’s inner logic, and thus the struggle against it did not depend on changing marriage’s meaning. Rather, the prohibition reflected discrimination based on skin color, a practice that though originally protected by the Constitution was always antithetical to its most fundamental promise. Abolishing the prohibition was a function of understanding better and implementing more effectively the implications of the Constitution’s foundational promise of individual freedom and equality under law.

In contrast, marriage’s meaning in America was essentially bound up with long-held social norms—and the religious tenets of Christianity and Judaism—sanctioning a lifetime union between a man and woman culminating in conceiving, bearing, giving birth to, and raising children. Marriage, traditionally understood, rests on the premise of the complementarity of the sexes and the social imperative to care for the children one brings into the world.

Over the last 50 years, however, the social meaning of marriage has undergone a profound shift. The impact of the cultural upheavals of the 1960s—fueled in no small measure by the introduction of a cheap and effective birth control pill—has been nothing short of revolutionary. Whereas traditional marriage placed children and family at the core, today individuals very often seek marriage in the first place to achieve a combination of love, sex, and companionship, and only secondarily give thought to children. As non-reproductive sex has become the norm, the justifications—practical and constitutional—for excluding gays from participating in the institution of marriage have weakened.

But the arguments against gay marriage haven’t vanished. Some reflect traditional values—the critics say traditional prejudices—grounded in venerated religious texts whose authoritative interpretations are not easy to change. Some articulate entirely secular concerns about the consequences of expanding marriage’s definition for the institution’s role in providing a stable environment for children. And there is the federalism argument: The Constitution takes no position on marriage and therefore the question of same-sex marriage should be left up to the states.

These arguments, of course, come in many versions. The best are open to objections. They are not always advanced in good faith. And there will always be haters.

But arguments against gay marriage do not necessarily entail animus toward gays, and needn't be inconsistent with the protection of gay citizens' civil and political rights. Nor do they preclude the recognition of civil unions that recognize the dignity of gay couples and provide legal guarantees to secure same-sex partners' joint financial interests and property rights.

The signatories of "Freedom to Marry, Freedom to Dissent" do not go so far as to acknowledge the merit in arguments against same-sex marriage. Although they admirably affirm that "the test of our commitment to liberal principles is not our eagerness to hear ideas we share, but our willingness to consider seriously those we oppose," their public statement indicates that in their view their opponents have little to say that is reasonable. Unwavering in their commitment to same-sex marriage, they imply that those who disagree are at best benighted, ignorant, or confused. In this they perhaps fall short of Mill's admonition in "On Liberty" to recognize that one can confidently champion one's own side while also recognizing that in moral and political affairs there is almost always something significant to be said on the other side of the question.

Yet the signatories are also unwavering in their commitment "to the values of the open society and to vigorous public debate," which prominently includes the freedom to dissent, however erroneously, from what they themselves recognize is increasingly becoming the new orthodoxy about the rightness of same-sex marriage.

They solemnly warn that the enforcement through legal sanctions or social pressure of any orthodoxy—even one that they believe embodies truth and justice—damages the conditions under which freedom flourishes.

They unequivocally "reject the deeply illiberal impulse" that impels some supporters of same-sex marriage "to punish rather than to criticize or to persuade those who disagree." This, the signatories state bluntly, "is both wrong in principle and poor as politics."

They emphasize, furthermore, that it was the American constitutional tradition of free speech—which includes a legal regime and a moral and political culture—that maintained the conditions under which advocates of gay marriage could press their case and, over the last 25 years, rack up remarkable achievements for their cause.

Accordingly, they resolve to persist in taking the argument—civilly, respectfully—on behalf of same-sex marriage to those who differ with them.

By doubling down on the principles of freedom—at a time of increasing contempt on both sides of the aisle for those who disagree—while very much in the midst of the fray, the signatories to "Freedom to Marry, Freedom to Dissent" have performed the sorely needed

public service of widening the public space for reasonable disagreement on the great moral, legal, and political issues of the day.

Peter Berkowitz is the Tad and Dianne Taube senior fellow at the Hoover Institution, Stanford University. His writings are posted at PeterBerkowitz.com and he can be followed on Twitter @BerkowitzPeter.