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## Single-Sex “Marriage”: The Role of the Courts\*

Lino A. Graglia\*\*

As a Burkean conservative, I entertain a strong presumption against change in long-standing basic social arrangements and institutions. However, I will not directly discuss the merits of the single-sex “marriage” issue, as I can make no claim to special competence in family law. Instead, I will discuss the question whether the refusal of legislatures to grant some or all of the legal benefits of marriage to persons of the same sex is prohibited by either the federal or state constitutions.

It might be noted at the outset that the question must surely strike anyone not schooled in constitutional law as strange. Is it really possible that the people of the United States or any state, by adopting a constitution, precluded themselves from defining marriage as the union of a man and a woman and from granting a privileged status to such unions? Further, how can it be that distinguishing between marriage and same-sex unions is forbidden by our constitutions and yet no one ever noticed it until just now? The answer, unfortunately, is that in the make-believe world of constitutional law all things are possible.

The central question of constitutional law is the question of the proper role of judges in our system of government. This is the only question common to the myriad issues of social policy—abortion, prayer in the schools, race discrimination, the rights of the criminally accused, pornography, and so on—decided by judges in the name of constitutional law. Every law constitutes a social policy decision made in the ordinary political process; every ruling of unconstitutionality constitutes a rejection of that policy choice and the substitution of a different policy choice by judges. The American people, through the process of representative self-government, express their policy preferences by electing legislators who, on the principle of separation of powers, are supposedly the sole possessors of lawmak-

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ing authority. The policy choices made by elected legislators actually prevail in our system, however, only insofar as they are not, in the name of constitutional law, rejected by our judges.<sup>1</sup>

The willingness and ability of our judges to have the final say on issues of basic social policy is well illustrated by the recent decisions regarding the meaning and social value of marriage by the Oregon Court of Appeals in *Tanner v. Oregon Health Sciences University*<sup>2</sup> and by the Supreme Court of Vermont in *Baker v. State*.<sup>3</sup> The judgment of Western society—indeed, of most human societies—has always been that the union of a man and a woman as the nucleus of a family, hopefully for life, is essential to the maintenance of a stable, or even a viable, society. Such unions have, therefore, been given a unique status—established, encouraged, and protected by innumerable laws, customs, and practices—making marriage as fundamental an institution to our society and culture as any we have. Many of our modern-day judges, however, acting solely on the basis of their own notions of social progress and the scope of their lawmaking authority, have decided that this is all an unfortunate relic of a less enlightened and less well-intentioned past.

How does it happen that these judges, who, after all, have generally been raised and educated in our society, should have such a radically different view of the meaning and value of marriage? Most importantly, what is the source of their authority to make their view determinative such that we are bound to accept and respect it? The answer to the first question is that they are merely affirming their adherence to what they consider the more prestigious side in a cultural conflict. William F. Buckley famously stated that he would rather be governed by the first two thousand names in the Boston phone book

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1. An analogy might be drawn with the situation formerly existing in some South American countries where elections would be held but the results permitted to stand only to the extent that they proved acceptable to a military junta. See, e.g., *Clandestine Group Calls for Ouster of Junta*, UNITED PRESS INT'L, Nov. 20, 1982, at AM Cycle (Argentina); *Bolivians Ponder Revolt: Who Won?*, N.Y. TIMES, Aug. 10, 1981, at A4 (Bolivia); Edward Schumacher, *For Bolivia, Chaos Rules*, N.Y. TIMES, Sept. 10, 1981, at A11 (Bolivia); UNITED PRESS INT'L, Sept. 29, 1980, at AM Cycle (El Salvador).

2. 971 P.2d 435 (1998) (holding that unmarried homosexual couples qualify as a suspect class for purposes of the privilege and immunities clause of the Oregon Constitution, and that a university's denial of insurance benefits to the domestic partners of its homosexual employees violated the Oregon Constitution).

3. 744 A.2d 864 (1999) (holding that the exclusion of same-sex couples from benefits and protections incident to marriage under state law is a violation of the Vermont Constitution).

than by the two thousand members of the Harvard faculty.<sup>4</sup> This is surely one of his wisest observations. The Harvard faculty, brilliant as all the members undoubtedly are, live immersed in a world of words that enable them to imagine situations and reach conclusions so removed from our social norms that to ordinary persons they would be literally unthinkable. Brilliance, unfortunately, is not the only, or perhaps even the most essential, element of good judgment. On the contrary, it often leads to an overestimation of one's wisdom and goodness and ability to rethink and remake the world.

The most serious defect of the form of government we have permitted to evolve from the form of government created by our state and federal constitutions is that in effect we *are* now being ruled by the Harvard faculty, albeit only through judges, persons once removed from and not necessarily all quite as brilliant as that faculty. Our judges, all educated (or at least processed) through college and law school, are the products of Harvard (and, perhaps even worse, Yale), its equivalents, and its many lesser imitators.

The salient fact of our society at the present day, as many others have noted,<sup>5</sup> is that we are engaged in a culture war. It is a war between our cultural elite, the intelligentsia, and aspiring intelligentsia (what has been called the "chattering class")—the dominant force in our universities and media of communication—on the one hand, and the ordinary American citizen on the other.<sup>6</sup> The average citizen holds views on a wide range of issues of basic social policy—for example, on capital punishment, prayer in the schools, the permissibility of religious symbols in public places, enforcement of the criminal law, assignment of children to neighborhood schools, the suppression of pornography, flag burning, and specifically relating to the

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4. See William F. Buckley, Jr., *Au Pair Case No Reason to Condemn Courts*, HOUSTON CHRON., Nov. 8, 1997, at 36, quoted in Lino A. Graglia, *Panel IV: Roundtable Discussion: The Revitalization of Democracy—Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165, 171 (2000).

5. For example, Justice Scalia, dissenting in *Romer v. Evans*, stated:

The Court has mistaken a *Kulturkampf* for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.

517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (citation omitted) (citing the majority opinion).

6. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996).

point of the conference for which this article was prepared, homosexuality and marriage—that are anathema to our cultural elite. The difficulty with our system of representative self-government, as the intelligentsia sees it, is that everyone gets to vote, with the result that the views of the unenlightened masses are likely to prevail.<sup>7</sup>

The function of constitutional law, in the view of our cultural elite and as it has largely operated in recent decades, is to keep this from happening. The first and most important thing to understand about constitutional law is that it has very little to do with a constitution. It has become essentially a device or ruse for policymaking by judges. Such policymaking is much preferred by our cultural elite to policymaking by the elected representatives of the people because judges, given a free hand in policymaking, can generally be relied on to serve as the mirror, mouthpiece, and enacting arm of liberal academia in general and liberal legal academia in particular. Law professors, overwhelmingly well to the left of the American public, are to judges as the *New York Times* drama critic is to a playwright.

The second (and final) understanding necessary to a full understanding of constitutional law is that rulings of unconstitutionality over the past four decades have not been random in their political impact; on the contrary, they have overwhelmingly served to further the policy preferences of those on the extreme left of the American political spectrum. If one wishes to so radically change the meaning of marriage, for example, as to no longer require the presence of a man and a woman, one has virtually no chance of succeeding by appealing to an American legislature. The prospect of success is enormously enhanced, however, if the issue can somehow be removed from the control of legislators and decided instead by judges using the magic and mystery of constitutional law. This is the only reason constitutional law has become so pervasive and important and is so enthusiastically supported and defended in legal academia.

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7. For example, Justice William Brennan stated the following in a speech he gave at Georgetown University on October 12, 1985:

The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. Unabashed enshrinement of majoritarianism would permit the imposition of a social caste system or wholesale confiscation of property so long as approved by a majority of the fairly elected, authorized legislative body . . . .

Faith in democracy is one thing, blind faith quite another . . . .

William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 436–37 (1986).

This magic and mystery is nicely illustrated in the *Tanner* and *Baker* decisions, each holding that some or all of the benefits bestowed by law on marriage must also be bestowed on certain arrangements between same-sex couples.<sup>8</sup> In each case the judges wrote opinions, as is required by convention, purporting to explain the basis of their decisions. As in almost every case involving a ruling of unconstitutionality, however, the judges faced the impossible task of showing that their rulings constituted an exercise of the judicial rather than the legislative function, that they resulted from the application of law—pre-existing, authoritative rules—rather than from nothing more than the judges' own personal policy preferences.

What legal, as opposed to purely personal, justification could the *Tanner* and *Baker* judges possibly offer for their decisions? Where is it written, do you suppose, in the Oregon and Vermont constitutions that their legislatures may not prefer marriage to same-sex liaisons? In each case, the judges purported to interpret and apply a provision of their state constitution that is taken to replicate or parallel and usually to extend the Equal Protection Clause of the United States Constitution.<sup>9</sup> The Oregon court relied on Article I, section 20 of the Oregon Constitution,<sup>10</sup> which provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."<sup>11</sup> The Vermont court relied on Chapter 1, Article 7 of the Vermont Constitution,<sup>12</sup> which provides 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."<sup>13</sup>

In each case, the judges read these provisions as if they imposed a general requirement of equality, even though no such requirement is possible. The law does not and cannot treat all persons—young and old, weak and strong, rich and poor, male and female, and so on—as

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8. See *Tanner v. Or. Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

9. The Fourteenth Amendment provides: "No State shall . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV.

10. *Tanner*, 971 P.2d at 445.

11. OR. CONST. art. I, § 20.

12. *Baker*, 744 A.2d at 869–70.

13. VT. CONST. ch. 1, art. 7.

equal in all regards. The very purpose of law is to classify (discriminate among) people for different treatment; for example, burglary statutes distinguish burglars from nonburglars. Blacks, women, and eighteen-year-olds have the right to vote, while aliens and felons do not, not because of any principle or requirement of equality (or “equal protection”), but because they were given the right by the Fifteenth, Nineteenth, and Twenty-Sixth Amendments, respectively.

There is no requirement of equality other than the tautology that all people must be treated in accordance with their legal rights.<sup>14</sup> When judges decide that some homosexual unions have the same legal status as marriage, they are not, as they invariably claim, enforcing a legal or constitutional requirement of equality—there is none. What they are doing instead is legislating for homosexuals rights other than those granted by the legislature.

Decisions extending marital rights to homosexual unions do so on no other basis or authority than the fact that full societal acceptance, if not endorsement, of homosexuality is the current *cause célèbre* in today’s academia. The primary function of judicial opinions explaining these decisions is to deny or conceal this fact and to perpetuate the fraudulent claim that they are the commands of pre-existing law. Thus, the Vermont Supreme Court began its opinion by insisting that it was merely performing its “constitutional responsibility to consider the legal merits” of the plaintiffs’ claim.<sup>15</sup> Its decision, it told us, is “grounded and objective, and not based upon the private sensitivities or values of individual judges.”<sup>16</sup> The court’s only reason for making this claim, of course, is that it is so obviously untrue. The business of courts, it assured us, quoting Justice Souter, is “constitutional review, not judicial law making.”<sup>17</sup> This insistence was to be expected from Justice Souter, because he is probably the judge on the present Supreme Court who is most willing and ready to engage in law making, just as repeating it was to be expected from the notoriously activist Vermont Supreme Court. It is no surprise that a court willing to remake the public school system of Vermont

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14. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

15. 744 A.2d at 867.

16. *Id.* at 879.

17. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 768 (1997) (Souter, J., concurring)).

to bring it into accord with current academic views on the subject<sup>18</sup> would also be willing to remake the law of marriage to achieve the same end.

There is no surer sign of a court's determination to evade or defy the text of a law, constitution, or other document than the court's assertion of reliance on the document's "spirit" rather than its literal terms. This is what the Vermont Supreme Court relied on, for example, when it held that "spouse" in a Vermont law included a same-sex homosexual partner.<sup>19</sup> In *Baker*, the court spoke of the need "to discover . . . the *core value*" and "distill the essence" of Article 7.<sup>20</sup> The core value and essence that it then discovered and distilled, amazingly but predictably, converted Article 7 into a prohibition of the legislature's continuing to define marriage as the union of a man and a woman.

Judicial talk of "spirit," "core values," and "essences" is simply conventional rigmarole meant to obfuscate the fact that the court is effectively writing into law a policy decision the legislature did not make and would not make. The *Baker* decision is supported not by any spirit or essence of Vermont law, but by nothing more than the judges' personal view, in accord with current elite opinion, that the reasons for preferring marriage to homosexual partnerships in granting legal benefits are vestiges of a darker time. It is very difficult to see, however, why the people of Vermont should agree that on so basic an issue of social policy it is the view of the judges, a committee of five lawyers, rather than the views of the people's elected representatives, that should prevail.

The reasoning by which the Oregon Court of Appeals disallowed a law that effectively granted to married couples and their families certain advantages not granted to persons in other communal arrangements, including homosexual partnerships, is equally unimpressive. With perfect circularity, the court held, in effect, that the legislature's favoring of marriage over homosexual unions is unconstitutional because the legislature favors and has always favored marriage.<sup>21</sup> By granting certain benefits only to married couples and defining marriage as a union of a man and a woman, the Oregon legis-

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18. See *Brigham v. Vermont*, 692 A.2d 384 (Vt. 1997).

19. See *In re B.L.V.B.*, 628 A.2d 1271, 1274 (Vt. 1993).

20. 744 A.2d at 874 (citation omitted).

21. See *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998).



lature made homosexuals, the court found, an historically disadvantaged group.<sup>22</sup> But historic disadvantage, according to the court, is a defining characteristic of a “suspect” classification which must be given strict (“particularly exacting”) scrutiny by judges.<sup>23</sup> Strict scrutiny means that the law will be presumed unconstitutional and upheld only if the legislature offers justifications the judges consider sufficient, a nearly impossible task, especially when the challenged distinction is based on moral, traditional, or broad social grounds, rather than on empirically demonstrable utilitarian considerations. More simply, strict scrutiny means that the judges have decided to make themselves the final policymakers on the issue involved.

By adopting their state constitutions, the people of the states precluded themselves, they have learned to their astonishment many years later, from continuing to grant to the marital relationship the central privileged status it had always had as the basis of our civilization. This is so, however, not because of anything the people have done or meant to do, but only because a few lawyers in robes, sharing and willing to impose the views of a cultural elite, have abused the power of their office in order to declare it so. What, then, can the people do? Are they really in thrall to the views of five up-to-date, politically correct lawyers willing to legislate in the guise of interpreting the state constitution? The people of Vermont and Oregon can, of course, attempt to obtain the supermajority necessary to amend their state constitutions to overturn the work of their advanced-thinking judges, as was done in Hawaii, but this means that the judges’ view on any social policy issue prevails as long as the small minority needed to defeat a constitutional amendment supports that view.

It should be noted that the legal situation in Hawaii was somewhat different from that in Vermont and Oregon. In *Baehr v. Lewin*,<sup>24</sup> the Supreme Court of Hawaii held that the claim that denial of a marriage license to a same-sex couple violated the Hawaii Constitution stated a cause of action. The Hawaii Constitution explicitly prohibits discrimination on the basis of sex in regard to “civil rights.” The *Baehr* court held, correctly in my view, that denial of marital rights to same-sex couples is sex discrimination (John may

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22. See *id.* at 443.

23. *Id.* at 446.

24. 852 P.2d 44 (1993).

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marry Mary because he is a man, Joan may not because she is a woman) and, at least arguably correctly, that the right to marry is a civil right.

As a participant some years ago in the debates on the proposed Equal Rights Amendment to the United States Constitution, I argued that a constitutional prohibition of sex discrimination would inevitably lead to the argument that denial of the right to marry to same-sex couples is unconstitutional and that the argument could be expected often to succeed. The argument was dismissed as ludicrous by proponents of the Equal Rights Amendment, but this is what happened in Hawaii. Laws, people must learn, particularly laws stated in sweeping terms, are dangerous things.

The only effective solution to the problem illustrated by the *Baker* and *Tanner* decisions is amendment of the state constitutions, not merely to overturn these particular unwanted policy decisions, but to remove definitively from judges the policymaking power they have assigned themselves in the guise of interpreting the state constitution. State constitutions, like the Federal Constitution, do not explicitly provide for judicial review, the extraordinary and unprecedented power of judges to substitute their policy views for those of elected legislators. Judges acquired the power only by finding it to be "implied" in written constitutions.<sup>25</sup> State constitutions should be amended to make clear that judges have no such power and that the people of the states are sufficiently confident in their power of self-government to be willing to risk it without the supervision and guidance of their judges. There is no single step the people of any state could take that would contribute more to the restoration of representative self-government and the political health of both their state and the country.

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25. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("This theory is essentially attached to a written constitution . . .").

