

The real world of gay marriage

by Susan_Estrich

In an ideal world, gay marriage would be won at the ballot box. Voters would recognize that they have absolutely nothing to lose by allowing their fellow citizens the same rights to marry that heterosexual men and women now enjoy. Even many prominent conservatives (say, Sarah Palin) have come to recognize that it is wrong, heartless even, to deny gay couples the right to sign up for health benefits or to make critical medical decisions for their partners.

But calling it a "domestic partnership" rather than a "marriage" is a slap in the face, either a distinction without a real difference (and thus unjustified) or a sign of inferior status, of lesser rights and second-class citizenship that cannot be justified by any interest of the states. Religions are free to marry whomever they want; what the Bible does or doesn't say, however, is not the province of the State. No one is telling the Mormon Church what it can do with respect to gay marriage. The Mormon Church should not be telling us.

Judges are not giraffes. They can only stick out their necks so far and so many times before their legitimacy gets called into question. The Supreme Court's decision in *Roe v. Wade* has saved the lives of countless women who might have died from back-alley abortions. But has it strengthened the legitimacy of the Supreme Court? I don't think so.

Roe is one of the reasons that judicial nominations have been politicized to the point that many of the nation's most outstanding lawyers and scholars, both conservative and liberal, are now unconfirmable. Justice John Paul Stevens, the Court's senior member, was the last Justice to be confirmed in a routine hearing that focused only on his qualifications and not on his ideology. Ironically, the National Organization for Women opposed him because of an appellate opinion he authored about discrimination against flight attendants, but no one really cared, and he has since become one of the best friends opponents of discrimination have on the Court.

This is not to say the Massachusetts Supreme Judicial Court and the California Supreme Court were wrong when both held that state prohibitions on gay marriage violate their state constitutions. Had I been a judge, I would have voted with the majority in both cases. Where the populace doesn't act, where discrimination remains the law of the land, it is the business of the courts to decide.

Brown v. Board of Education, holding in 1954 that separate but equal was inherently unequal in matters of race, was the right decision. In Massachusetts, however, the gay marriage decision has, after some very vocal denouncement, actually found public acceptance. Massachusetts residents have come to see that there are economic benefits to be had from the state's attractiveness as a wedding destination for gay couples. But a poorly run referendum campaign in California has led both sides back to the California Supreme Court, where the issue this week is not gay marriage per se, but whether the voters have the authority to overrule the Supreme Court by referendum.

Opponents of gay marriage will not be arguing for a right to discriminate; they'll be arguing that majority rules, that democracy demands respect for the will of the people. The argument the other way is only incidentally addressed to human rights: On its face, it's about the vague distinction between an amendment to the Constitution, which requires only a majority vote, and a revision, which can be enacted only by a more cumbersome procedure.

Is singling out a single group by their sexual orientation a fundamental revision of the constitutional scheme? I think so. But the reality is that the original decision was 4-3, and success for the advocates of gay marriage demands that not one of the four majority Justices changes their mind. I am hopeful, but not optimistic.

In Massachusetts, the original proponents of gay marriage have gone to federal court to claim that the Defense of Marriage Act, which bars recognition of gay marriages for purpose of federal taxes and federal benefits, is unconstitutional. Whatever happens in California, the courts are going to be key decision makers in this battle for equal rights for the foreseeable future. But hopefully, at least within the next decade, the public will come to see that there is nothing to fear from allowing our fellow citizens the right to marry, and the courts will be able to pull back to a less visible, and less vulnerable, place.

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