Is Same-Sex Marriage Inevitable?

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Legal issues involving the intersection of same-sex attraction and family policy are arising with such frequency that the recent meeting of the Family Law section of the American Association of Law Schools addressed the topic. In "The End of Marriage as We Know It?" they discussed the recent decision of the Massachusetts Supreme Judicial Court to redefine marriage as the union of any two persons (*Goodridge v. Department of Public Health*). With each new legal journal published, more articles on the topic are added to the voluminous literature--most favoring a redefinition of marriage to include same-sex couples.

The academic discussion both reflects and contributes to a sense that a redefinition of marriage is inevitable and likely to come soon. This sense of inevitability is assiduously promoted by advocates of same-sex marriage because it can influence judges, politicians and others who may come to believe that they ought not oppose a redefinition of marriage for fear of ending up on the "wrong side of history."

The greatest boost to this effort came with the 2003 decision of the Massachusetts Supreme Judicial Court that the Commonwealth's definition of marriage was unconstitutional, mentioned above. The decision went into effect in the spring of 2004, preceded by a media frenzy when the mayor of San Francisco (followed by local officials in other states) began issuing marriage licenses to same-sex couples. The high profile failure of a proposed amendment to the U.S. Constitution that would define marriage as the union of a man and a woman, in the face of a filibuster, made the argument of inevitability seem more plausible.

On the other hand, the approval of state marriage amendments (by significant margins) in fourteen states in 2004 and early 2005 could be seen as a rebuff to the belief that same-sex marriage is inevitable. The advocates of redefinition, though, have a response to this. They characterize the states with marriage amendments as the equivalent of segregationist holdouts who somehow haven't gotten the message that "marriage equality" is the wave of the future.

This comports with their longstanding strategy of confining most of their effort to litigation rather than legislation. This strategy has been chosen in part because of the belief (supported by significant evidence) that judges will be more sympathetic to their claims than elected officials. It also helps to justify their choice to pursue their major cases in jurisdictions they believe will be sympathetic (and less able to quickly amend their constitutions). Those, like Massachusetts, accept their claims; those that do not (like the states with marriage amendments) can be dealt with in later court actions.

Recently, there have been some significant court cases that have bolstered the inevitability argument. In California, a San Francisco trial court ruled (in March 2005) that the definition of marriage as the union of a man and a woman is irrational (*In re Consolidated Marriage Cases*). Thus, he struck down California's marriage law which had been approved by sixty percent of California voters in 2000. A month earlier, a New York trial court relied on an analogy to racist laws which forbade interracial marriage to hold that New York's marriage law was unconstitutional (*Hernandez v. Robles*). In May 2005, a federal court in Nebraska relied on some extremely novel legal theories to hold that the Nebraska marriage amendment violated the federal constitution (*Citizens for Equal Protection v. Bruning*). No one perusing these cases could be blamed for thinking there may be an inevitable trend at work.

However, there have been a series of very significant countervailing developments which would argue for a very different conclusion. For instance, while the New York case noted in the preceding paragraph was widely reported, it is less well known that there were four other decisions by New York courts in the past few months. In each of these cases, the courts came to the opposite result and upheld the state marriage laws against constitutional challenges (*Shields v. State*, *Seymour v. Holcomb*, *Samuels v. Department of Health*, *Kane v. Marsolais*). A federal court in Florida ruled in January 2005 that the federal Defense of Marriage Act (which defines marriage as the union of a man and a woman in federal law and allows states to refuse recognition to out-of-state same-sex marriages) is completely consistent with the U.S. Constitution (*Wilson v. Ake*). Appeals courts in Indiana (*Morrison v. Sadler*) and New Jersey (*Lewis v. Harris*) have issued strong opinions which articulate well the state's interests in marriage. Particularly, the fact that marriage channels the very

real attraction between men and women into a social institution whose purpose is to ensure that as many children as possible are provided an opportunity to be reared by their own mother and father who are committed to each other and their children.

All of the opinions striking down marriage laws and a number upholding these laws are now being appealed. While it is impossible to predict exactly what will occur in coming months and years, strong opinions rejecting the constitutional claims for a redefinition of marriage suggest that same-sex marriage may not be inevitable at all. In fact, we may find that Massachusetts may be left alone to pursue its social experiment while its sister states go about the work of strengthening marriage as the foundation of the family, which in turn will strengthen the society of which it is the fundamental unit.