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Lecture

SIX MYTHS THAT CONFUSE THE MARRIAGE EQUALITY DEBATE

William N. Eskridge Jr.*

I. INTRODUCTION

The “gay marriage” or “marriage equality” debate has been characterized by lavish claims inconsistent with historical materials or statistical data.¹ For example, many Americans have associated homosexuality with child molestation (and some still do). This is the most vicious anti-gay myth, not only because it is false, but also because it is an inversion of the data: lesbians are far less likely to molest children than straight or gay men, and even less than straight women; openly gay men are much less likely to molest children than either straight men, or especially, closeted bisexual or gay men.²

Consider six myths that continue to confuse the gay marriage debate today. Please note that bigots and homophobes do not have a monopoly on mythmaking. Decent people opposing and supporting marriage equality engage in all-too-human wishful thinking that leads them to accept myths and unsupported assertions. I believe in at least one of the likely myths that follow.

II. THE MYTHS OF SAME-SEX MARRIAGE

Gay marriage opponents claim that there is no historical precedent for same-sex marriage.³ They also allege that gay marriage will have a disastrous impact on the institution of marriage.⁴ Supporters of same-

* This paper was originally delivered as the Seegers Lecture in Jurisprudence at the Valparaiso School of Law on November 18, 2010. William N. Eskridge Jr. is the John A. Garver Professor of Jurisprudence at Yale Law School.

¹ Supporters of civil marriage for same-sex couples tend to understand the debate as one about “marriage equality,” where same-sex couples are treated the same as, and therefore formally equal to, different-sex couples. Opponents tend to understand the debate as one about gay “marriage,” as a novel right supplementing and perhaps undermining traditional marriage.

² See Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41 (1994) (providing statistics about child abuse and homosexuality).

³ See *infra* Part II.A (examining this argument and countering that gay marriage indeed has historical precedent).

⁴ See *infra* Part II.B (presenting this argument and explaining why gay marriage will not have this impact).

sex marriage tend to believe that marriage equality can only come through the courts.⁵ Same-sex marriage advocates also believe that Judeo-Christian religious beliefs are the main obstacle in the way of marriage equality.⁶ Opponents and supporters alike mistakenly believe the gay marriage debate requires an immediate resolution.⁷ Finally, supporters of same-sex marriage believe that gay marriage laws will be enacted throughout the nation in the next five to ten years.⁸ The following discussion seeks to dispel each of these myths.

A. No Society Has Ever Recognized Same-Sex Marriages

Start with the canard that dominated the same-sex marriage debate before the 1990s: officials and citizens were flabbergasted by marriage claims from lesbian and gay couples and denied the claims on the ground that “marriage” has always been a stable institution. They argued that marriage has been limited to one man and one woman who could, theoretically, procreate within their union.⁹ Perhaps surprisingly, this claim is false.

What is marriage for? Most of the historical purposes of marriage—economically efficient households, political alliances, romantic coupling, and rearing children—do not require that the partners be different sexes or capable of procreating within the relationship. Even religious tradition recognizes the plural goals of marriage. In *De Bono Coniugali*, the Roman Catholic Church’s leading explication of the procreative value of marriage, St. Augustine opined that sterile couples should enjoy marriages, because its *unitive* value independently justifies it within the Christian tradition.¹⁰ The evidence is now overwhelming that hundreds of thousands of lesbian and gay American couples are committed to one

⁵ See *infra* Part II.C (exploring the possibility that marriage equality will come through the courts, and arguing that it could come through the legislature as well).

⁶ See *infra* Part II.D (examining Judeo-Christian religious beliefs and arguing that these are not the main obstacle to marriage equality).

⁷ See *infra* Part II.E (explaining that the debate does not need to be resolved immediately).

⁸ See *infra* Part II.F (examining a possible timeline for gay marriage acceptance).

⁹ See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (holding that marriage statutes were written with the intention of marriage between a man and a woman, because that is how marriage has always been understood); JAMES DOBSON, *MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS WAR* (2004) (assuming that “marriage” has always been one man, one woman).

¹⁰ AUGUSTINE, *DE BONO CONIUGALI, DE SANCTA VIRGINITATE* 7 (P.G. Walsh ed. & trans., Oxford 2001); see also P.G. Walsh, *Introduction* to AUGUSTINE, *DE BONO CONIUGALI, DE SANCTA VIRGINITATE*, at xx-xxi (P.G. Walsh ed. & trans., Oxford 2001) (providing an exegesis of Augustine’s *DE BONO CONIUGALI*).

another, and about one-fifth of those couples are rearing children within their relationships.¹¹

Given the plural purposes of marriage, it would be surprising if no human society had ever recognized them. In fact, anthropologists report that most civilizations in human history have recognized same-sex relationships as marriages, regardless of how those societies defined marriage for different-sex couples.¹² The following civilizations recognized same-sex relationships as marriages or marriage equivalents: classical Greece; imperial Rome; medieval China and Japan; pre-colonial Africa (woman marriage); dozens of Native American tribes (*berdache* marriages); and modern Europe and Canada.¹³

The number of countries currently recognizing same-sex marriages has increased every year since 2000. As of January 2011, the list includes: The Netherlands; Belgium; Spain; Canada; South Africa; Norway; Sweden; Portugal; and Argentina.¹⁴

Of course, gay marriages have now been recognized in the United States as well. Same-sex marriages have been legally performed in the following states: Massachusetts since 2004; California for more than four months in 2008; Connecticut since 2008; Iowa since 2009; Vermont since 2009; New Hampshire since 2009; the District of Columbia since 2010; and New York since 2011.¹⁵ In addition, the attorneys general of Maryland and New Mexico have opined that their courts will do the same.¹⁶ Now that states are beginning to recognize same sex-marriage, the next question is how it will impact “traditional marriage.”

¹¹ 2010 Census Snapshot, WILLIAMS INSTITUTE, <http://williamsinstitute.law.ucla.edu/category/research/census-lgbt-demographics-studies/> (last visited Oct. 20, 2011).

¹² CLELLAN S. FORD & FRANK A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 130–31 (1951).

¹³ See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 15–50 (1996) (assembling evidence for the recognition of same-sex unions as marriages in the foregoing cultures).

¹⁴ Sheri Stritof & Bob Stritof, *Same-Sex Marriage FAQ – Gender-Neutral Marriage Laws*, ABOUT.COM (2011), <http://marriage.about.com/cs/samesexmarriage/a/samesex.htm>.

¹⁵ See generally D.C. CODE § 46-401-21 (2010) (allowing same-sex marriage in the District of Columbia); N.Y. DOM. REL. LAW § 10-a (McKinney 2011) (establishing marriage equality in New York); VT. STAT. ANN. tit. 15 § 18 (2010) (establishing same-sex marriage in Vermont); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that Connecticut residents have a constitutional right to enter into same-sex marriages); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (recognizing same-sex marriage in Iowa); *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003) (recognizing same-sex marriage in Massachusetts).

¹⁶ 95 Md. Op. Atty. Gen. 3, 2010 WL 886002 (2010); N.M. Op. Atty. Gen. 11-01 (2011).

B. *Gay Marriage Will Have a Big Impact on "Marriage"*

Political figures as diverse as Presidents William Clinton, a moderate Democrat, and George W. Bush, a conservative Republican, have agreed that marriage equality for gay people will undermine "traditional marriage" for everyone else. Some of the skeptics, such as former Senator Rick Santorum, say there is empirical evidence proving that gay marriage destroys the institution.¹⁷ Specifically, the defense of marriage critics claim that marital commitment has been undermined by "liberalizing" reforms—cohabitation and no-fault divorce—and that gay marriage would be another "liberalization," destabilizing marriage even further.¹⁸

There is a big logical problem with this kind of thinking. It may be that some liberalizing reforms, such as legalized cohabitation and no-fault divorce, have contributed to the decline of marriage as an institution, but gay marriage is not the same kind of "liberalization." In the previous liberalizations, the law allowed straight people to enjoy sexual relationships without long-term commitments; this decoupling of a sexual relationship from a lasting law-recognized commitment is what has undermined committed marriages. In contrast, lesbian and gay couples wanting to marry are seeking a linkage between their sexual relationships and lasting law-recognized commitment. Hence, they are *not* asking for further dilution of marital commitments, and it would be astounding to find that gay marriage *caused* a decline in marriage as an institution.

Senator Santorum and other supporters of the proposed 2004 Federal Marriage Amendment claimed that the marriage-like partnerships recognized for lesbian and gay couples in Denmark and other Scandinavian states from 1989 to 1995 caused marriage to collapse in those countries.¹⁹ This was a flagrant misstatement of the factual record.

¹⁷ The commentators are described and analyzed in WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE* 28-31, 35-41 (2006).

¹⁸ The leading source for this argument, relied upon by many opponents of same-sex marriage, especially in congressional debates, is Stanley Kurtz. See Stanley Kurtz, *Slipping Toward Scandinavia*, NATIONAL REVIEW ONLINE (Feb. 2, 2004, 9:17 AM), <http://old.nationalreview.com/kurtz/kurtz200402020917.asp> (furthering the argument made in Kurtz, *The End of Marriage*); Stanley Kurtz, *The End of Marriage in Scandinavia*, WEEKLY STANDARD (Feb. 2, 2004), <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp> [hereinafter Kurtz, *The End of Marriage*] (blaming same-sex marriage for increasing the separation between marriage and parenthood).

¹⁹ RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* 28-39 (2005); Kurtz, *The End of Marriage*, *supra* note 18. Kurtz's argument in *The End of Marriage in Scandinavia* was the primary argument adduced by GOP proponents of the Federal

Denmark recognized registered partnerships in 1989. In the two decades since recognition of such partnerships, the marriage rate in Denmark has gone up (after decades of decline); the divorce rate has gone down (after decades of rising); and the nonmarital birth rate has stabilized (after going up fourfold from 1971 to 1989).²⁰ These are *not* the numbers one would expect from a legal change that caused the “end of marriage.” The mischaracterization of the Scandinavian experience in 2004 and 2005, and its exposure, have not prevented opponents of marriage equality from making similar misrepresentations about the experience in this country.

On appeal from the federal California Marriage Case,²¹ defenders of California’s Proposition 8 claimed that “traditional marriage” in Massachusetts has suffered since 2003, when the courts recognized gay marriages.²² This is also a misrepresentation of the actual evidence, which is easily accessible from census data.²³ Not only has the Massachusetts marriage rate remained stable since 2003 (at 5.6 per 1000 people), but the divorce rate has gone down (from 2.5 in 2003 to 1.9 in 2009).²⁴ Thus, marriage did fine in Massachusetts after the state recognized gay marriages. Indeed, the evidence is even stronger when one examines the trends in the rest of the country (where marriage equality was not recognized anywhere else for several years). As a percentage of national rates, the Massachusetts marriage rate has gone up from 73% of the national rate in 2003 to 82% in 2009; the divorce rate has fallen from 66% of the national rate in 2003 to 57% in 2009.²⁵ Thus, *compared* with data from states refusing to recognize marriage equality, the data from Massachusetts suggests that marriage as an institution has flourished in Massachusetts.

It would be easy to say that gay marriage is doing great things for traditional marriage. Personally, I believe that marriage equality, and its reaffirmation of committed relationships, is a small (though perhaps

Marriage Amendment in 2004. See 150 CONG. REC. S7908, S7921, S8003-07 (2004) (inserting one of Kurtz’s articles into the Congressional record).

²⁰ ESKRIDGE & SPEDALE, *supra* note 17, at 173-75; see also *id.* at 175-78 (illustrating similar but less dramatic trends in the other early-adopting countries, specifically Norway and Sweden).

²¹ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (9th Cir. 2010) (declaring CAL. CONST. ART. I § 7.5, popularly known as Proposition 8, unconstitutional).

²² See Brief for Appellant at 98-102, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. appeal docketed, Sept. 17, 2010) (making this argument from the Massachusetts experience).

²³ The analysis in the text is documented, with references to the data, in Brief of Professors William N. Eskridge Jr. et al. as Amici Curiae Supporting Appellees, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Oct. 25, 2010).

²⁴ *Id.*

²⁵ *Id.*

short-term) shot in the arm for civil marriage more generally. The Danish and Massachusetts data are consistent with that proposition. But I would not ask the gentle reader to believe this, because it is supported by no affirmative evidence. My belief is better than the defense-of-marriage view, which is inconsistent with the available evidence, but it remains a personal speculation.

As an empirical matter, gay marriage probably has no significant causal effect on marriage, even in the short term. For one thing, only a modest number of gay couples are taking advantage of marriage in the jurisdictions recognizing same-sex marriages. More importantly, the driving factors in marriage data are the taste for commitment versus choice among straight people (who are a big majority in the United States as well as in Scandinavia). State allowance of sexual cohabitation and unilateral no-fault divorce have a greater effect on the institution of “committed marriage” than marriage equality.

If I am right about that, there is a deep irony. By scapegoating committed lesbian and gay couples for the decline of civil marriage, analysts deflect attention from the only plausible legal causes—legalized cohabitation and no-fault divorce. Analysts also undermine marital commitment by suppressing demands to address the legal reforms that might redound to the benefit of children and others harmed by the decline of marital commitment. Having dispelled the first two myths, it is now time to address whether recognition of same-sex marriage must come through the courts.

C. *Marriage Equality Needs Judicial Review to Succeed*

The civil rights cases brought by racial minorities popularized the idea that despised minority groups could still secure equal rights through constitutional litigation. The judiciary is the branch of government most likely to deliver equal rights to unpopular minorities because it is the monitor and critic of the sometimes dysfunctional democratic process.²⁶ Supporters of marriage equality follow the model of the civil rights cases, whereby an unpopular minority believes that full equal citizenship can be achieved through judicial review.²⁷ This is an

²⁶ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–77 (1980) (discussing the judiciary’s role in protecting minorities).

²⁷ See, e.g., ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 11–12 (2002) (arguing that marriage equality is supported by constitutional principles); WILLIAM N. ESKRIDGE JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996) (arguing that marriage equality is supported by constitutional precedents, starting with the Supreme Court’s invalidation of laws barring different-race marriage); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 613–15 (1995) (discussing how gay rights activists

attractive vision for members of the minority group who have faced real prejudice in the political process.

There are immediate problems with this notion. If a minority is subject to pervasive “prejudice,” why should the minority expect relatively aged judges to be less prejudiced than legislators? Sometimes they are; sometimes they are not. For example, the Warren Court that protected racial minorities through heightened judicial scrutiny handed down the most anti-gay decision in Supreme Court history: six justices (including Earl Warren) ruled that a Canadian who had enjoyed consensual sexual relations with men as well as women was, as a matter of law, a person “afflicted with psychopathic personality” and therefore deportable.²⁸

Assume that judges are usually more “enlightened” regarding social justice issues, a hypothesis that is plausible but far from established as a matter of fact. Will such “enlightened” judges protect minorities without regard to “politics”? At the Supreme Court level, commentators have found that the justices rarely stray far from popular opinion on matters of great political salience: from abortion to free speech, to rights for sexual as well as racial minorities.²⁹ Surely, state court judges are no braver than their federal counterparts, for most state judges are either elected or subject to removal at the voters’ behest.

In short, there is no reason to believe that judges will usually be much “ahead” of society in protecting minority rights on important issues, such as marriage. So judges should not be oversold by civil rights supporters. Likewise, legislators should not be undersold. While they are not likely to be ahead of the norms accepted in society, they are not so different from judges in that respect. For institutional competence and legitimacy reasons, legislators have often been able to go well beyond judges in protecting civil rights for minorities.³⁰

learned lessons from the civil rights movements and were not content in stopping their efforts short of equal marriage rights).

²⁸ *Boutilier v. INS*, 387 U.S. 118, 118 (1967) (internal quotation marks omitted). See MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE 57-93* (2010) (providing an excellent analysis of the cruel and homophobic features of the *Boutilier* opinion, fully consistent with anti-homosexual prejudices of that era).

²⁹ See PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008) (providing an issue-by-issue illustration of the notion that the Supreme Court’s opinions do not stray far from public opinion); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Opinions*, 87 AM. POL. SCI. REV. 87 (1993) (providing a similar examination).

³⁰ See Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2006) (requiring southern jurisdictions to obtain DOJ or D.C. Circuit “preclearance” for any change in voting rules or districts). Compare *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1961) (rejecting a constitutional challenge to a state literacy law that disenfranchised most voters of color in North Carolina), with Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973b (2006)

Outside of the United States, many countries have recognized same-sex marriage through legislative action and usually without courts playing a significant role: The Netherlands (2001); Belgium (2003); Canada (2005); Spain (2005); South Africa (2006); Norway (2008); Sweden (2009); Iceland (2010); Portugal (2010); and Argentina (2010).³¹ In addition, parliaments in many other countries have recognized registered partnerships and civil unions, such as Denmark (1989); France (1997); the United Kingdom (2004); Switzerland (2005); and Columbia (2009).³²

Marriage equality in the United States has just as often been recognized by legislators as by judges. Legislatures in three states and the District of Columbia have recognized marriage equality; high courts in three states have done the same.³³ An interesting case is Vermont. In 1999, the Vermont Supreme Court ruled that lesbian and gay couples could not be excluded from the wide array of legal rights, benefits, and duties of marriage, but left it to the legislature to decide how to remedy the inequality.³⁴ In 2000, the Vermont Legislature created civil unions, with almost all the same rights and duties of marriage.³⁵ Nine years later, the legislature extended marriage to lesbian and gay couples as well.

The Vermont experience illustrates two propositions. On the one hand minorities should not rely exclusively on judicial review to deliver equal rights to them, especially if society remains hostile to equality. On the other hand, when public opinion is changing or is flexible, judges can make a big difference by forcing equality issues onto the public agenda and reversing the burden of political inertia from the supporters of

(suspending literacy tests in selected jurisdictions). *See generally* BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT*, at ix–xi (2007) (noting that constitutional litigation was not effective in ensuring persons of color the right to vote, an experience that motivated the broad Voting Rights Act).

³¹ For a detailed country-by-country account of these developments, see WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* ch. 6, § 2 (3d ed. 2011).

³² *Id.*

³³ William N. Eskridge, *Foreword: The Marriage Cases – Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1785–86 n.3, n.9 (2009). Legislative recognition of gay marriage has occurred in Vermont (2009), New Hampshire (2009), Connecticut (2009), and the District of Columbia (2009). *Id.* That is larger than the list of states that have recognized marriage equality through judicial decisions, namely, Massachusetts (2003), Connecticut (2008), and Iowa (2009). *Id.* California is an interesting case because the legislature twice passed marriage equality bills, only to be vetoed by the governor, and the state supreme court recognized marriage equality as a constitutional matter in 2008, only to be overridden by a voter-approved constitutional amendment. *Id.* at 1835–38.

³⁴ *Baker v. State*, 744 A.2d 864, 911–12 (Vt. 1999).

³⁵ VT. STAT. ANN. tit. 15, § 1201–07 (2000).

equality to the opponents. For example, judicial opinions supporting equal treatment of lesbian and gay couples in Canada were critical in forcing marriage equality onto the public law agenda in that country, which ultimately motivated Parliament to legislate equality in 2005.³⁶ If public opinion can drive courts and legislatures to change the law, what is currently holding it back? Many believe it is religious faith.

D. Religious Faith Is the Main Obstacle to Marriage Equality

It is widely believed in progressive and academic circles that “religion” is the main obstacle to equal rights for gay people in general and to marriage equality in particular.³⁷ There can be little doubt that prominent faith traditions in this country read Scripture in ways that are not only hostile to equality for gay people, but also reflect and perhaps contribute to hostility toward gay people. Does that mean religion is inevitably opposed to equal treatment for gay people? No it does not.

Within the Judeo-Christian tradition, biblical support for homophobia is remarkably thin. The Levitical mandate against men “lying” with men applied only to anal sex and had no application to sex between women;³⁸ moreover, virtually no one, except for Orthodox Jews, follows the detailed Levitical mandates. Although some religious folks associate the Sin of Sodom with homosexuality,³⁹ biblical scholars have established this as a cautionary tale about sexual assault and rape.⁴⁰ The Old Testament, in short, has nothing to say about lesbian relationships and virtually nothing to say about sexual relationships between men. While it is true that the Old Testament generally assumes that sexual relationships will normally be between men and women, one cannot say that this assumption ought to be generalized into a normative rule demanded by Scripture. After all, even though the Old Testament treats polygamy as normal, no prominent Judeo-Christian faith tradition

³⁶ See Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985–2005) and Its Limits*, 49 MCGILL L.J. 1143, 1145 (2004) (discussing the progress Canada has made in obtaining equality for the gay, lesbian, and bisexual minority).

³⁷ See PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA’S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 3–4, 6 (2009), available at http://www.ncsu.edu/stud_affairs/glb/pdf/Prop%208%20Report.pdf (finding that the most prominent variable explaining voter support for California’s Proposition 8, which revoked marriage equality, was how often the voter attended church services).

³⁸ *Leviticus* 20:13.

³⁹ *Genesis* 19:5–29.

⁴⁰ See PETER COLEMAN, CHRISTIAN ATTITUDES TO HOMOSEXUALITY 24–25 (1980) (explaining how Sodom is associated with anal intercourse, but the Sin of Sodom in the Gospels “is regarded as idolatry, inhospitality, and general sinfulness, rather than homosexuality”).

generalizes from this assumption to treat polygamy as a religious imperative.

Nor does the New Testament have anything to say about committed lesbian and gay relationships. Christ's teachings were tolerant of sexual and gender minorities. Although He condemned adultery, Jesus had no words of condemnation for sexual minorities, and if anything, befriended such persons, such as Mary Magdalene.⁴¹ St. Paul vaguely condemned "unnatural" behaviors and "dishonorable passions" among women as well as men,⁴² but nothing in his letters addressed committed lesbian and gay relationships, presumably because such unions would have been incomprehensible to that first-century prophet. St. Paul's admonition in Romans is not nearly as specific as his endorsement of slavery.⁴³

To be sure, millions of Americans read these passages to conclude that God Hates "Fags" (the impolite word for "Homosexuals").⁴⁴ While these passages are read as anti-gay admonitions today by tens of millions of "religious" persons, there is no reason to believe that these passages will have the same meaning for most religious persons thirty years from now. As to social issues involving demonized minorities, such as this one, religious beliefs are highly dynamic. In the nineteenth century, for example, southern Protestants cited Noah's curse against the African descendants of Ham to preach that slavery was ordained by God.⁴⁵ In the twentieth century, those same religions invoked the Curse of Noah and other passages to proclaim God's Word in support of racial segregation and anti-miscegenation laws.⁴⁶ In the last two generations, however, even the most conservative and longtime racist religions have abandoned these renderings of Scripture, and most now support the notion that God Hates Racism.⁴⁷

⁴¹ *Matthew* 19:9 (condemning adultery); *id.* at 27:56, 27:61, 28:1 (illustrating the friendship between Jesus and Mary Magdalene).

⁴² *Romans* 1:26-28.

⁴³ *Ephesians* 6:5.

⁴⁴ See *GodHatesFags*, WESTBORO BAPTIST CHURCH, <http://www.GodhatesFags.com> (last visited Sept. 17, 2011) (synthesizing, in one page, all of the assertedly anti-gay passages in the Bible).

⁴⁵ *Genesis* 9:24-27; see STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY 68-70 (2002) (giving a history of the Noah's Curse argument, and its wide acceptance in southern religions).

⁴⁶ PAUL HARVEY, REDEEMING THE SOUTH: RELIGIOUS CULTURES AND RACIAL IDENTITIES AMONG SOUTHERN BAPTISTS, 1865-1925 (1997); ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW (1972).

⁴⁷ See, e.g., JOEL L. ALVIS, JR., RELIGION & RACE: SOUTHERN PRESBYTERIANS, 1946-1983 (1994) (tracing evolution of Southern Presbyterian religious doctrine, away from racist to anti-racist); ARMAND L. MAUSS, ALL ABRAHAM'S CHILDREN: CHANGING MORMON CONCEPTIONS OF RACE AND LINEAGE 231-65 (2003) (discussing how Mormons have tried to

Just as fundamentalist Christian beliefs swiftly evolved on race issues during and after World War II, they have also been evolving on sexuality and gender issues in the last generation. Following most Protestant denominations, the Conference of Catholic Bishops has opposed sexual orientation discrimination.⁴⁸ Even on the issue of gay marriage, where Catholic and most Protestant churches are opposed to full equality, religion-based opposition has cooled in the last five years, and increasing numbers of churches are becoming neutral or supportive.⁴⁹ Now that public opinion is beginning to shift, many on both sides of the debate believe the issue must be resolved immediately. This, too, is a myth that we ought to avoid.

E. Resolution of the Gay Marriage Debate Is Needed NOW!

In 2004, President George W. Bush and his allies who supported the Federal Marriage Amendment said the nation needed to resolve the issue of marriage equality by enshrining one man, one woman marriage in the United States Constitution through an amendment.⁵⁰ Pro-gay lawyers Ted Olson and David Boies brought the *Perry v. Schwarzenegger* litigation in 2008 to resolve this issue immediately by enshrining marriage equality in the U.S. Constitution through a Supreme Court opinion.⁵¹ Everyone in the gay marriage debate behaves as though he or

dispose of earlier practices, which have interfered with their relationships with black Americans); ALAN SCOT WILLIS, *ALL ACCORDING TO GOD'S PLAN: SOUTHERN BAPTIST MISSIONS AND RACE, 1945-1970* (2005) (tracing evolution of Southern Baptist religious doctrine, from racist to more neutral beliefs); W. Edward Orser, *Racial Attitudes in Wartime: The Protestant Churches During the Second World War*, 41 *CHURCH HIST.* 337, 337-53 (1972) (providing a sample of the rich historiography of religion's shift on issues of race).

⁴⁸ National Conference of Catholic Bishops, *To Live in Christ Jesus* (Nov. 11, 1976), reprinted in *HOMOSEXUALITY AND THE MAGISTERIUM: DOCUMENTS FROM THE VATICAN AND U.S. BISHOPS 1975-1985*, at 9 (John Gallagher ed., 1986).

⁴⁹ See William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Anti-Discrimination Norms*, 45 *GA. L. REV.* 657, 704-10 (2011) (explaining how the American Catholic Church has become more doctrinally respectful toward homosexuality).

⁵⁰ See *Bush Calls for Ban on Same-Sex Marriages*, CNN POLITICS (Feb. 25, 2004), http://articles.cnn.com/2004-02-24/politics/elec04.prez.bush.marriage_1_single-state-or-city-marriage-rights-marriage-licenses?_s=PM:ALLPOLITICS (reporting President Bush's endorsement of the Federal Marriage Amendment to suppress the marriage equality movement nationwide).

⁵¹ See Michael Winship, *Two Legal Foes Back Gay Marriage*, CONSORTIUMNEWS.COM (Feb. 26, 2010), <http://www.consortiumnews.com/2010/022610c.html> (describing the odd-couple legal partnership of Ted Olson, advocate for George W. Bush in the Supreme Court case that ended the 2000 presidential election, and David Boies, advocate for Al Gore in the same case, two attorneys who have teamed up to press the California lawsuit seeking recognition of a nationwide constitutional right for all lesbian and gay couples to marry).

she has the right answer to the debates, and seems to believe that this divisive issue needs to be resolved *now*. What's the rush?

Today, there is a substantial public consensus that citizens ought not be denied civil marriage rights because of race—but it took decades for “We the People” to arrive at that conclusion. For almost a century, Congress rejected constitutional amendments seeking to ban different-race marriage recognition across the country,⁵² while the Supreme Court rejected constitutional claims that would have required all the states to recognize such unions.⁵³ A national resolution did not become possible until the 1950s and early 1960s when all the state legislatures outside the south repealed their anti-miscegenation statutes.⁵⁴ Once states abandoned these policies everywhere except the south without any negative experiences, the Supreme Court felt it was politically safe to nationalize the anti-miscegenation rule in *Loving v. Virginia*.⁵⁵

Although many Americans believe, as I do, that laws discriminating against different-race couples were never defensible under the Equal Protection Clause, the process of cleansing American public law of such laws was necessarily (and unfortunately) a slow one. Here is the reason: issues that divide a country intensely, but evenly, are toxic for a democracy, because they threaten to alienate a large portion of the pluralist assembly.⁵⁶ Judicial decisions or constitutional amendments should not terminate the debate about these issues prematurely.⁵⁷ Instead, the issue needs to percolate until the polity is at rest—exactly as the country did on the different-race marriage issue.⁵⁸ Finally, if there is no immediate national resolution, one must wonder if same-sex marriage will be recognized across the nation in the near future.

Indeed, the lack of a national resolution has some genuine advantages for gay rights, because a state-by-state resolution will reduce

⁵² Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 627–34 (2004).

⁵³ See *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (upholding state law imposing special penalties on interracial relationships, including marriages).

⁵⁴ See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 244–80 (2003) (giving account of the survival and eventual demise of most anti-miscegenation laws by 1967).

⁵⁵ 388 U.S. 1, 12 (1967).

⁵⁶ See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 93–99 (1956) (suggesting that stable pluralist polity must avoid hard resolution of political divisions that are both intense and evenly matched).

⁵⁷ This was one of many errors of *Dred Scott v. Sandford*, 60 U.S. 393 (1856), which invalidated congressional efforts to limit the spread of slavery. This was also the big mistake of the Eighteenth Amendment, establishing the disastrous Prohibition experiment. See U.S. CONST. amend XVIII, *repealed by* U.S. CONST. amend. XXI (establishing prohibition).

⁵⁸ ESKRIDGE & SPEDALE, *supra* note 17, at 234–49 (making precisely this point).

backlash and create a more secure social foundation for marriage equality. For example, the nation can now learn from the Massachusetts experience: the sky did not fall after lesbian and gay couples were eligible for civil marriage licenses, and the evidence is clear that “gay marriage” has had no dire consequences for the institution of civil marriage. A state-by-state approach allows pioneer states to falsify stereotypes and outlandish claims by opponents of marriage equality. Furthermore, it encourages a more fact-based rather than rhetoric-based debate on the issue.

F. Gay Marriage Will Sweep the Country in the Next Five to Ten Years

Most of the “gayocracy” believe that our country has reached a tipping point: now that marriage equality has been uneventful in the states and countries where it has been recognized, and young people are strongly in favor of equality for lesbians, gay men, and bisexuals, it is only a matter of time before gay marriage sweeps this country. It is occurring in Europe and has already occurred in Canada. I personally believe this will happen, though not in the next five years (the time line assumed in the *Perry* litigation). But the evidence indicates that I may be engaged in wishful thinking, just as I have been saying this of everyone else. Consider some other *possible* scenarios, each of which may be as plausible as the “gay marriage sweeps the country” scenario.

1. Nation Divided

Especially if the Olson-Boies lawsuit were to reach the Supreme Court and the Court handed down a decision denying the constitutional basis for marriage equality, the nation could find itself segmented among: (1) states recognizing same-sex marriages; (2) states recognizing civil unions/domestic partnerships with all or almost all the same legal rights and duties of marriage; and (3) states with no institutional recognition of same-sex partnerships. As Andy Koppelman has demonstrated, a similar nation-divided framework governed different-race unions through the first two-thirds of the twentieth century.⁵⁹

2. Civil Unions for All

It is possible that both traditionalists and progressives would abandon civil marriage. As former Dean Kmiec has proposed, the state should get out of the marriage business, and everyone would end up

⁵⁹ ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 32-50 (2006).

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with domestic partnerships or civil unions.⁶⁰ In 2009, Nevada created domestic partnerships with almost all the same rights and duties of marriage, and they are available to different-sex, as well as same-sex couples. France and The Netherlands were early pioneers of this kind of new institution; many more straight couples have joined the new institution in each country. In the long term, the state might “divorce” traditional/religion-linked *marriage* from state/institutionalized *partnership*.

3. Menu of Civil Relationships

A third option is one that I think quite likely (and would be consistent with my hope that marriage equality will come in my lifetime). Everyone ends up with a menu of options (including marriage) from which to choose.⁶¹ In Europe, the emerging menu options are: (1) a contract regime for cohabiting couples; (2) a partnership regime with many noncontractual benefits and obligations; and (3) marriage, heavily endowed with legal rights and duties. Such a menu is already taking shape in the United States, and the gay marriage debate is generating new institutional forms for state relationship recognition and regulation.

III. CONCLUSION

Although the marriage debate is saturated by myths and legends, much is also clear to me. The issue of what legal treatment to accord lesbian and gay couples will vex the country for years to come. Resolution of this issue will be a matter of social as well as legal change. Legislatures and courts will be involved, and I think it likely that legislatures and even popular initiatives will play the key role in many states. Finally, although this is currently an issue for state debate, federal officials will continue to get involved.

⁶⁰ See Douglas W. Kmiec & Mark S. Scarberry, *Massachusetts Alternatives: Mending the Mistake Without Amending the Federal Constitution*, NATIONAL REVIEW ONLINE (Feb. 11, 2004), http://old.nationalreview.com/comment/kmiec_scarberry200402110925.asp.

⁶¹ The menu is developed in ESKRIDGE & SPEDALE, *supra* note 17, at 251–57.