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# Chapman Dialogues: Same Sex Marriage - Response to Professor Eskrdige

Lawrence Rosenthal



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# CHAPMAN UNIVERSITY SCHOOL OF LAW



## LEGAL STUDIES RESEARCH PAPER SERIES

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*THE CHAPMAN DIALOGUES: SAME SEX MARRIAGE:  
RESPONSE TO PROFESSOR ESKRIDGE*

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THE CHAPMAN DIALOGUES: SAME SEX MARRIAGE:  
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*Lawrence Rosenthal\**

Let me start by betraying my ideological bias. Personally, I see no objection, as a matter of policy, to same-sex marriage. To elaborate just a bit, after I was a prosecutor, and before I came to Chapman, I was Deputy Corporation Counsel for the City of Chicago, and my client was Richard M. Daley, Mayor of Chicago, a nice Irish boy. Yet, much to my surprise, it turned out that Mayor Daley supports same-sex marriage. Mayor Daley comes from a very traditional, south-side Chicago Irish family—but one in which there have been some ugly divorces in recent years, and he took the position that inasmuch as heterosexuals are doing their best to destroy the institution of marriage, if somebody wanted to strengthen the institution of marriage, he was all for it.<sup>1</sup> My own view, as a matter of policy, is that any legal regime that encourages stable and monogamous relationships is a good thing. And, there is, in my view, an avalanche of social science data to support that proposition.

But of course, Professor Eskridge asked us to consider achieving same-sex marriage not by means of a hard slog through the political process. He asked us to achieve same-sex marriage by means of judicial decisions interpreting the Constitution. On that issue, the thought I want to share with you and Professor Eskridge is: Be careful what you ask for.

The doctrinal theories Professor Eskridge advanced—I think at least some of them are perfectly plausible, if not better than plausible. Personally, however, I'm not sure that I share his enthusiasm for the notion that a denial of marriage to same-sex couples is a form of sex discrimination. I think it's a clever

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<sup>1</sup> "Marriage has been undermined by divorce, so don't tell me about marriage. You're not going to lecture me about marriage. People should look at their own life and look in their own mirror. Marriage has been undermined for a number of years if you look at the facts and figures on it. Don't blame the gay and lesbian, transgender and transsexual community." CHI. SUN-TIMES, Feb. 19, 2004, at 9.

argument and yet, we all know, at some level, that society's attitudes toward homosexual and lesbian relationships are quite different than its attitude toward women who want to transcend traditional gender roles. Justice Brennan once described sex discrimination as "an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>2</sup> Something very different is going on when it comes to discrimination on the basis of sexual orientation.

Professor Eskridge, I think, acknowledges that the opposition to same-sex marriage involves a deeply-rooted cultural norm about how people should find fulfillment in relationships—sexual fulfillment in particular—that is very different than the kind of romantic paternalism that underlay traditional attitudes about the proper roles of women. It involves something specific to homosexual relationships—indeed, a kind of animus toward those relationships that bears some similarity to the traditional animus toward interracial sexual relationships.

After *Brown v. Board of Education*<sup>3</sup> was decided in 1954, the law reviews were full of commentary about that decision. And much of it, in the early years, was critical of *Brown*. In particular, an important article appeared in the *Harvard Law Review*, written by Herbert Wechsler, one of the leading constitutional professors of the day, saying, as a matter of principle, he couldn't see why "separate but equal" violated the equality principle in the Equal Protection Clause.<sup>4</sup> And then, Charles Black, a member of the Yale Law School faculty, wrote one of the greatest law review articles of all time. As I recall, it was about nine pages. I wish those of us writing law review articles today could learn from that example. Let me read you just a brief excerpt:

I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of "equality" is just about on a level with the fiction of "finding" in the action of trover. I think few candid southerners deny this. Northern people may be misled by the entirely sincere protestations of many southerners that segregation is "better" for the Negroes, is not intended to hurt them. But I think a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future.<sup>5</sup>

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<sup>2</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

<sup>5</sup> Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

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After Professor Black's article appeared, the fighting in the law reviews about the soundness of *Brown* ended. Everyone understood that Black was speaking truth as a matter of social reality, which was more important than any type of abstract legal reasoning. And, as a matter of social reality, as Professor Eskridge acknowledges, we all know what underlies the reluctance to legalize same-sex marriage. It is a deeply rooted cultural disapproval of same-sex relationships. Now, you can say that that's constitutionally legitimate for the government to express its moral disapproval; or, you can say it's constitutionally illegitimate. I think that is the ground on which this legal debate should turn—but I don't think we have any doubt about what's going on. This debate is not about separate but equal; it is not about romantic paternalism; it is about society's view that homosexual relationships should not be condoned.

Should the Constitution then be read to regard this interest—this interest in enforcing cultural norms—as illegitimate? As I said, legally, Professor Eskridge makes a plausible case in support of his view. Just so, my principal reaction to his argument remains: Be careful what you ask for. Let me remind you of an opinion of the great pragmatist, Justice Holmes, that is little remembered today—a case called *Giles vs. Harris*, decided in 1903.<sup>6</sup> In *Giles vs. Harris*, the plaintiff alleged that, although Alabama law permitted African Americans to register to vote, in fact, there was a massive conspiracy underway to disenfranchise them. Registrars, for example, imposed all kinds of onerous literacy tests that were not imposed on non-minorities. As a result, the plaintiff, and all other African Americans, were not permitted to register to vote. The allegation was, in Montgomery, Alabama, not a single African American had been permitted to register. The complaint was dismissed and so, as the case went to the Supreme Court, all the allegations were taken as true. And of course, we know they were true. This is what Justice Holmes wrote:

The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form. . . . [R]elief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United

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<sup>6</sup> 189 U.S. 475 (1903).

States.<sup>7</sup>

Now today, if we even remember *Giles* at all, we probably would say it was not one of Justice Holmes' better performances. And yet, I wonder. What if the Supreme Court had announced in 1903 that all forms of racial subjugation were unconstitutional—"separate but equal" and all the rest—and that the great mass of Southern (and many Northern) laws and practices would have to be reformed? What would have happened? I suspect there would not have been a constitutional amendment to repeal the Fourteenth Amendment. But I suspect there would have been a campaign of massive resistance, as there was later, to which the North would not have been prepared to respond with legislation like the Voting Rights Act<sup>8</sup> and the Civil Rights Act.<sup>9</sup> I suspect a decision for the plaintiff in *Giles* would have gone unenforced. And I suspect our tradition of reverence for the judiciary—the tradition that judicial judgments are to be respected—might have turned out very differently. A different decision in *Giles* might have been the greatest constitutional disaster in the history of this country. The plaintiff in *Giles* was right, but that did not really matter when the political groundwork for a legal regime involving profound social transformation in much of the country had not yet been laid.

While the Massachusetts case that recognized the constitutional right to same-sex marriage has been a great victory for gays and lesbians in Massachusetts,<sup>10</sup> we've seen in dozens of other states constitutional amendments added that prohibit same-sex marriage,<sup>11</sup> and which will be very difficult to repeal. Gays and lesbians in those states have already paid a high price for the Massachusetts decision. If the California Supreme Court were to rule in favor of the plaintiff in the pending case,<sup>12</sup> perhaps it would be impossible for the opponents of same-sex marriage to amend the California Constitution.<sup>13</sup> But what will happen in other states, or in the United States

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<sup>7</sup> *Id.* at 488.

<sup>8</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445.

<sup>9</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>10</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

<sup>11</sup> Christi Goodman, *State of the Unions: The Debate to Define is Raging Around the Country in the Wake of Massachusetts' Court Decision*, STATE LEGISLATURES, Apr. 2004, at 26.

<sup>12</sup> *In re Marriage Cases*, 183 P. 3d 384 (Cal. 2008). The California Supreme Court has since decided the issue and found for the plaintiff, holding that the "retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples," and to the extent that such distinctions are drawn, they are unconstitutional. *Id.* at 452.

<sup>13</sup> As it happens, in the November 2008 election, voters in California, as well as Arizona and Florida, approved amendments to their state constitutions that prohibited same-sex marriage. See Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

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Congress? In the Congress, there have been substantial majorities in favor of a constitutional amendment to outlaw same-sex marriage as a matter of federal constitutional law.<sup>14</sup> Judicial decisions in favor of same-sex marriage have been a principal impetus of the movement to add to the United States Constitution a prohibition on same-sex marriage.<sup>15</sup> If the risk that same-sex marriage will be imposed on an unwilling public becomes more realistic as a result of judicial decisions, what will happen to the United States Constitution? And how difficult will it be to undo a Federal Marriage Amendment?

I agree with Professor Eskridge that very deeply rooted cultural norms are at stake here. But I wonder where that takes us. Can the Constitution, that functions as our organic law, that is meant to reflect a consensus about the norms governing society—can it really be used to attack deeply rooted cultural norms without causing an enormous backlash? Would judicial recognition of a constitutional right to same-sex marriage prior to the time that the necessary political groundwork has been laid become yet another more example of the law of unintended consequences, which operates with truly ferocious power when you are dealing with deeply rooted social institutions? I think about those well-meaning lawyers in Boston forty years ago who thought that busing was the appropriate remedy to racial segregation in the public schools. And yet, we know today that the law of unintended consequences operated with ferocity in Boston. Not only did busing lead to a re-segregation of schools as white students fled to private schools, but it de-legitimated the whole enterprise of integration, and eventually lost support even in the African-American community.<sup>16</sup> So, I say, be careful what you ask for.

I'm willing to accept the great bulk of Professor Eskridge's case. But where does it lead? Professor Eskridge understands that efforts will be made to secure constitutional amendments banning same-sex marriage; he tells us that he wants to reverse the burden of inertia. Yet, it may be that you reverse the burden of inertia only to have the deeply rooted cultural norms come back and impose some much greater burden on the advocates of

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<sup>14</sup> Only the House of Representatives voted on the merits of the proposed Federal Marriage Amendment, but on both occasions on which votes were held, the proposal secured substantial majorities, although short of the requisite two-thirds. See Thomas Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 563, 571 (2008).

<sup>15</sup> See *id.* at 540–46.

<sup>16</sup> For perhaps the leading account of the problems engendered by the desegregation litigation in Boston and elsewhere, see Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

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same-sex marriage. So when it comes to a judicial attack on this kind of deeply-rooted cultural norm, I say: Be careful what you ask for.

Thank you.