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## Same-Sex and the City

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Essay

**\*191 SAME-SEX AND THE CITY**

Robert R.M. Verchick [FN1]

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SIX MONTHS AFTER GAYS AND LESBIANS began tying the knot in Massachusetts, American voters responded with a crushing blow, approving, in eleven states, constitutional amendments outlawing same-sex marriage. [FN1] The honeymoon— in case you hadn't noticed—is over. The new year will soon see a new flock of law review articles on the subject, assessing this latest chapter of what Justice Scalia calls our “kulturkampf,” [FN2] a struggle that seems bound to include the Bush Administration's push for a proposed amendment to the federal Constitution banning same-sex marriage [FN3] and at least twenty new lawsuits in eleven states seeking to allow the same. [FN4]

In preparation for these events, I decided to take a brief look at the issues through the lens of state and local governance. What I found was an array of overlapping interests that will pit cities against their home states, states against the federal government, and force Americans once more to assess the true value of secular marriage.

**Cities and States**

In their new book, *The Gay and Lesbian Atlas*, [FN5] demographer Gary Gates and researcher Jason Ost of the Urban Institute raise a question essential to anyone hoping to understand the jurisdictional politics of the same-sex marriage debate: Where *do* all of these gay couples live? [FN6] The answer is not obvious. In contrast to Justice Stone's famous gloss on political minorities, gays are not a “discrete and insular” \*192 class. [FN7] They are anonymous and diffuse. For straights, this fact makes gay demographics easy to stereotype but difficult to understand.

Drawing from mountains of data collected in the 2000 census, Gates and Ost conclude that American gay couples live, well, *everywhere*, which is to say in 99.3 percent of all U.S. counties. But, for those interested in cities, there is another key finding: compared to straight couples, gay couples are more likely to live in areas that are urban and more racially diverse. [FN8] The states with the most same-sex couples are (in order) California, New York, and Texas, all states with large metropolitan areas. [FN9] The remaining top-ten includes a rough balance of red and blue states: Florida, Illinois, Pennsylvania, Georgia, Ohio, Massachusetts, and New Jersey.

Urban areas with the highest concentrations of same-sex couples are both predictable and not. No one would be surprised to learn that San Francisco, Seattle, and Austin make the top ten. But would you have guessed Atlanta and Albuquerque? Furthermore, the distribution of gay couples varies according to other characteristics. Same-sex couples with children (representing a quarter of all gay couples) [FN10] are more highly concentrated in Memphis, for instance, than in Fort Lauderdale. My new home state of Louisiana hosts the second highest concentration of African-American same-sex couples in the country. (Mississippi ranks first.) And you will find a higher proportion of senior gay couples in Bismark, North Dakota, than in Honolulu.

What does this mean? One thing this means is that the relative tolerance and anonymity associated with urban areas appear to attract many same-sex couples. This is true in cities known for their gay culture (Key West, San Francisco) as well as for cities with more buttoned-down images (Bismark, Memphis). The legal controversies to come will unfold in places like these.

A second point is that cities, perhaps more than their home states as a whole, have a greater interest in promoting gay rights, including gay marriage and civil unions. This is partly because a larger portion of city folk live as gay couples; and cities have historically played the controversial\*193 role of securing for their inhabitants the right of free association. [FN11] But gay rights makes good business sense too. Many cities now see their own economic and cultural success as tied to the gay community.

To many city planners, gays and lesbians represent good value. On average, partnered gays are more educated than their straight peers. [FN12] And while a partnered gay person earns less on average than a partnered straight person, gays tend to have more disposable income, a fact attributable to their generally having fewer dependents. [FN13] Because of these trends, many city leaders consider gay couples to be the perfect “urban pioneers.” In the words of Danny Wan, a councilman in Oakland, California, a gay community can “turn a tumble-down neighborhood into an economic and social hot spot ... boasting a panoply of coffee shops, bookstores, bars and movie houses.” [FN14] According to Richard Florida, author of the bestseller, *The Rise of the Creative Class*, [FN15] cities with stable gay communities also attract straight, highly educated “knowledge” workers who see a city's “gayness” as a proxy for tolerance, diversity, and hospitality. [FN16]

It is little wonder, then, that many cities seem to be doing whatever they can to entice more gays and lesbians into their neighborhoods. Last year Baltimore launched an advertising campaign targeting young professionals, specifically focusing on gays and lesbians. [FN17] Other cities focus on legal benefits as a means of protecting current gay residents and attracting more; they offer partnership registration programs, employment benefits for same-sex partners, and anti-discrimination laws. [FN18] Even the cartoon city of Springfield, home of the Simpsons, is reportedly poised to legalize gay marriage in order to accommodate one of the show's regular characters. [FN19]

\*194 But here is the rub: many of the cities whose cultures and economies are most tied to gay communities, now find themselves in states whose laws are putting the squeeze on same-

sex couples. Of the ten cities with the highest concentration of gay couples, only three—New York City, Albuquerque, and Jersey City—are in states that have *not* enacted a statutory or constitutional ban on gay marriage. [FN20] Of the ten cities with the highest concentration of African-American couples, *all* are in states with statutory or constitutional bans on gay marriage. [FN21] While so far only one state, Massachusetts, expressly allows same-sex marriage, [FN22] it is reasonable to assume that states with express provisions against gay marriage will be less accepting of the gay community in general. Same-sex marriage thus pits city against state, creating a sub-federal disruption that endangers the stability and economic health of both.

### States and the Federal Government

In addition to the tensions between cities and their home states, same-sex marriage stirs controversy among sibling states. If a legally married gay couple from, say, Massachusetts, relocated to Ohio, would an Ohio court be required to recognize that marriage? President Bush believes that, under the Full Faith and Credit Clause of the U.S. Constitution, [FN23] states like Ohio could be forced to acknowledge such imported marriages even where local law forbids them. In prepared remarks delivered last year, he explained: “Decisive and democratic action is needed, because attempts to redefine marriage in a single state or city could have serious consequences throughout the country.” [FN24]

The federal Defense of Marriage Act, [FN25] enacted during the Clinton Administration, was supposed to prevent these “serious consequences” by essentially exempting marriage laws from the Full Faith and Credit Clause. But President Bush worries that “activist courts” [FN26] might find \*195 this dodge unconstitutional, which, as far as I can tell, it is. [FN27] Upon such a finding, according to the President, “every state would be forced to recognize any relationship that judges in Boston or officials in San Francisco choose to call a marriage.” [FN28]

Imagine: “officials in *San Francisco*” approving “*any relationship*” for “*every state*”—well, you can see how this might upset a certain type of person, namely anyone who does not carry a hemp bag and subscribe to *Mother Jones*. For this reason, the president called for an amendment to the federal Constitution making straight marriage the law of the land. [FN29] Against this backdrop, the amendment appears less an imposition of moral orthodoxy than simply a way of inoculating states like Ohio from the infectious laws of minority states and cities. It's just an amendment preserving states' rights.

But the states-rights argument does not hold water. While it is true the Full Faith and Credit Clause urges a certain harmony across state lines, the clause, as now understood, exerts only a gentle force, roughly coterminous with that of the Fourteenth Amendment's Due Process Clause. [FN30] Under that standard a state judge would be free to apply her state's more limited definition of marriage so long as her state had sufficient interest such that application of the law “[was] neither arbitrary nor fundamentally unfair.” [FN31]

The requirement of a state interest in heterosexual unions explains the recent rush by many states to pass statutes banning gay marriage. Such bans seek to memorialize a state

“policy” against gay marriage, which can then be used to justify a choice-of-law decision favoring the forum state. The strategy will probably work. Andrew Koppelman, who has researched extensively the history of choice-of-law as it relates to marriage, notes:

Unless [a state restriction on marriage] violated some substantive constitutional provision (as, it was eventually held, the prohibition of interracial marriage did), *states have never been constitutionally prevented from withholding recognition from foreign marriages where those marriages violated their own strong policies.* [FN32]

\*196 Alas, “officials in San Francisco” will not be writing marriage laws for the rest of America anytime soon.

In truth, advocates of a federal marriage amendment are probably less concerned with the foreign laws a judge might be *forced* to apply, and more concerned with the foreign laws a judge might *choose* to apply. America's experience with miscegenation laws suggests why. After the Civil War, Southern states fought passionately against interracial marriage. Such marriages were criminalized, declared “unnatural,” and blasted as immoral and ungodly. [FN33] Yet for all the racism and ugly invective, Southern courts did not uniformly refuse to acknowledge interracial marriages legally performed in other states. Koppelman finds, for instance, that Southern courts often recognized the mixedrace marriages of residents relocating from states that permitted such unions. [FN34] They did so not out of deference to the federal Constitution, but out of deference to their states' own choice-of-law rules, which valued stability and a party's settled expectations. Five years from now, it's not hard to imagine a court from a state legally opposed to same-sex marriage doing exactly the same thing.

For those interested in stopping gay marriages from flying in under the radar screen, a constitutional amendment outlawing same-sex marriage in all states minimizes the migration “threat” by reducing the number of existing gay marriages. Still, an amendment would probably not dissolve the valid marriages already celebrated in Massachusetts. And legally married gays from Belgium, the Netherlands, and perhaps other countries [FN35] will continue to visit and reside in the United States, no doubt demanding accommodations from local officials and even state courts.

Whatever the effect of a proposed marriage amendment, it should be clear that the intent has little to do with federalism or states' rights. If anything, the marriage amendment *undercuts* state power, first, by barring states that wish to allow gay marriage from pursuing that option and, second, by refusing to allow state courts the use of their own \*197 choice-of-law doctrines to resolve migratory disputes. If federalism is not behind the Administration's push for a marriage amendment, what is? The answer, of course, is “moral values.”

### **The Value of Marriage**

This essay does not intend to enter the moral thicket of gay nuptials. But it is worth observing two facts about marriage in the history of the United States. First, absent the violation of a substantive, fundamental right, the contours of marriage have been left to the states. This warrants a skeptical eye toward any proposed amendment to the federal constitution. Second, of the many changes to secular marriage in American history, nearly all of them have made

marriage more, not less, accessible. Thus, government has consistently eased the definitions of secular marriage, making it more inclusive, more plentiful, and easier to enter and exit—in a word, *cheaper*, if not cheapened.

We take so many of these changes for granted that it is hard to imagine what marriage, even a few generations ago, could legally mean: a union in which spouses were matched by religion and race; in which wives relinquished their property, contractual rights, and protections against domestic rape; in which divorce (even for reasons of physical abuse) was difficult and remarriage after divorce nearly impossible. In this most traditional union among Man, Woman, and the State, the contractual terms are loosening and the role of the State is gradually melting away.

For this reason many advocates of gay marriage have trouble understanding what the other side is so upset about. The most familiar argument against gay marriage—that its recognition would “devalue” straight marriage—is terribly abstract. How exactly *does* a gay marriage celebrated in Boston, more than a thousand miles away from my home, devalue the relationship I have with my wife? Yet, I acknowledge that legitimate values can be both abstract and telescopic. I live even farther away from Alaska's pristine coastal plains, yet Big Oil's push to run a root canal through that tundra still drives me up the wall. [FN36]

What opponents of gay marriage fear, I think, is that by further relaxing the prerequisites for secular marriage, the institution becomes less exclusive and, therefore, less valuable. For members of the “marriage\*198 club” exclusivity is its own reward. It allows the member to feel more “committed” than nonmembers, less selfish, more responsible, and more socially (if not biologically) productive. Membership also facilitates at least an illusion of community. All those other married folks out there, however different from me superficially, have made the same legal commitment to a partner as I have. True or not, I can at least imagine that their households have the same aspirations, the same morning routines, the same squabbles as mine does. At least we have *that* in common.

This relationship between exclusivity and value has an analog in America's vision of the residential suburb. The value of the suburb also depends on its exclusivity—the ability of community planners to attract only those residents who share a commitment toward a particular neighborhood vision. That exclusivity protects property values and promotes the same semi-illusory sense of community. You may know the names of only three people in your subdivision, but somehow all of your individual decisions to make the suburb your home unite you in a common enterprise devoted to family, good education, and personal security. The suburbs promote a false “we” feeling, in which residents, in sociologist Richard Sennett's words, “imagine that they know all about each other, and their knowledge becomes a vision of how they must be the same.” [FN37]

But there is a competing value system, suggested by the urban community, which bases its currency on inclusion rather than exclusion. In this market, the value of community flows from diversity. Jumbled together on the streets of San Diego or Chicago, it is evident enough how varied a city's population can be. But these citizens are also joined by a vision. Their city's success and affluence depends on the ability of countless groups of diverse people to co-

operate for material and intangible gain. Don't romanticize it. There are plenty of urbanites who will never understand, feel comfortable with, or even like many of the people they see everyday. And cities will always peddle their own limited forms of exclusionary living through churches, condos, clubs, and the like. But living in a city inevitably means living in intimacy with others, learning from others, and pooling the talents and skills of others, all on a daily basis. For many, such relational intimacy is priceless.

\***199** This counter-vision of value through inclusion suggests a moral argument in favor of same-sex marriage. To be a member of the “marriage club” does not suggest that all members share the same morality, ambitions, or good sense—if it did, we could not explain Britney Spears—but rather that all members of the club share a faith that eventually, against all conceivable odds, diversity begets civic growth.

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[FN1]. Greg Hitt, *Election 2004: Voters Mostly Voice Opposition to Gay Marriage*, WALL ST. J., Nov. 3, 2004, at A5.

[FN2]. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting).

[FN3]. See George W. Bush, Remarks, “President Calls for Constitutional Amendment Protecting Marriage” (Feb. 24, 2004) available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

[FN4]. Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, available at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058>.

[FN5]. GARY GATES & JASON OST, THE GAY AND LESBIAN ATLAS (2004).

[FN6]. In keeping with the journalistic trend, I use the term “gay” to refer both to homosexual men and to lesbians. I use the terms “same-sex couple” and “gay couple” interchangeably.

[FN7]. *United States v. Caroline Products Co.*, 304 U.S. 144, 152 n.4 (1938).

[FN8]. Gary Gates, *In Cities, Suburbs, and the Sticks: Gary Gates Uncovers the U.S. Communities that Same-Sex Couples Call Home*, Sept. 4, 2004, available at <http://www.urban.org/url.cfm?ID=900734>.

[FN9]. Urban Institute, *Facts and Findings from The Gay and Lesbian Atlas* (presenting data from GATES & OST, *supra* note 5), available at <http://www.urban.org/url.cfm?ID=900695>. All rankings of cities and states described in this paragraph and the following one are drawn from the same source.

[FN10]. Gates, *supra* note 8.

[FN11]. GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 52-53 (1999).

[FN12]. Gates, *supra* note 8.

[FN13]. *Id.*

[FN14]. *Id.* (quoting Danny Wan). Oakland, California, has the second highest concentration of same-sex couples in the nation. Urban Institute, *supra* note 9.

[FN15]. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2002).

[FN16]. Christopher Swope, *Chasing the Rainbow: Is a Gay Population an Engine of Urban Revival? Cities are Beginning to Think So*, GOVERNING, Aug. 2003, available at <http://governing.com/textbook/gays.htm>.

[FN17]. *Id.*

[FN18]. Urban Institute, *The Demographics of Diversity: Why Cities Are Courting the Gay and Lesbian Community*, June 3, 2003, available at <http://www.urban.org/url.cfm?ID=900634>.

[FN19]. *Simpsons Gay and Proud*, DETROIT FREE PRESS, July 30, 2004, available at 2004 WL 84996777. As this essay goes to press, the character's identity is still a secret. But if you've been watching Fox, you may know by now.

[FN20]. See Gates, *supra* note 8; Peterson, *supra* note 4.

[FN21]. See Gates, *supra* note 8; Peterson, *supra* note 4. The states are Alabama, Arkansas, Georgia, Louisiana, North Carolina, and South Carolina. (Some states have more than one city in the top ten.) Gates, *supra* note 8.

[FN22]. Peterson, *supra* note 4.

[FN23]. The provision reads:

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1.

[FN24]. Bush, *supra* note 3.

[FN25]. Pub. L. No. 104-199.

[FN26]. Bush, *supra* note 3.

[FN27]. See generally Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

[FN28]. *Id.*

[FN29]. *Id.*

[FN30]. See *Sun Oil v. Wortman*, 486 U.S. 717, 729-30 n.3 (1988).

[FN31]. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).

[FN32]. ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 131 (2002) (emphasis added).

[FN33]. See *id.* at 108.

[FN34]. *Id.* at 109-10.

[FN35]. Belgium and the Netherlands have legalized same-sex marriage. *Gay Unions Common in the Netherlands*, CNN.com, Mar. 4, 2004, available at [http://www.cbc.ca/story/canada/national/2004/09/24/samesex\\_ns040924.html](http://www.cbc.ca/story/canada/national/2004/09/24/samesex_ns040924.html). Six Canadian provinces also allow same-sex marriage. *Nova Scotia Legalizes Same-Sex Marriages*, CBC NEWS, Sept. 24, 2004, available at [http://www.cbc.ca/story/canada/national/2004/09/24/samesex\\_ns040924.html](http://www.cbc.ca/story/canada/national/2004/09/24/samesex_ns040924.html).

[FN36]. The fancy name attached to this phenomenon is “existence value.” For more on that subject, see Robert R.M. Verchick, *Feathers or Gold? A Civic Economics for Environmental Law*, 25 HARV. ENVTL L. REV. 95, 104 (2001).

[FN37]. FRUG, *supra* note 11, at 119 (quoting RICHARD SENNETT, THE USES OF DISORDER: PERSONAL IDENTITY AND CITY LIFE 39 (1970)).  
37 Urb. Law. 191

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