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Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage

Marc A. Fajer[†]

The Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*¹ has spurred considerable national debate regarding state recognition of same-sex marriage.² *Baehr* held that Hawaii's refusal to issue marriage licenses to same-sex couples qualified as sex discrimination under the Hawaii Constitution and remanded the case to the trial court to allow the state to try to demonstrate that it had a compelling state interest to justify the discrimination.³ Concerned about an influx of same-sex couples married in Hawaii, most states have considered, and many have adopted, explicit statutory provisions that prohibit state recognition of such marriages.⁴ In addition, the U.S. Congress passed,⁵ and President Clinton signed under cover of night,⁶ the Defense of Marriage Act.⁷ This legislation denies same-sex spouses federal benefits that accrue to married people and permits states to refuse to recognize same-sex marriages performed under the auspices of other states.⁸ This past December, the trial court in *Baehr* decided that the state had failed to meet its burden on remand.⁹

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1. 852 P.2d 44 (Haw. 1993).

2. Although in this debate people sometimes refer to "gay marriage" or "homosexual marriage," see, e.g., *id.* at 51 n.11, that appellation is not really accurate in this context. States deny marriage licenses to two people of the same sex and issue licenses to one man and one woman. In neither case do they ask about the sexual orientation of the parties. Thus, the state will issue a license to a gay man marrying a lesbian, but not to two heterosexual women. See *id.* at 49-50, 51 n.11, 53 n.14; cf. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 64 (1996) (stating that "state will issue a marriage license to a transsexual only if [it] can persuade itself that the transsexual is actually marrying someone of a different 'sex'"). To emphasize this point, this Review will refer to "same-sex marriage" and "different-sex marriage."

3. 852 P.2d at 67.

4. See David A. Kaplan & David Klaidman, *Winning a Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24, 29; Carl Weiser, *Bill Would Limit Gay Marriages' Scope*, ITHACA J., May 9, 1996, at 1.

5. See Eric Schmitt, *Senators Reject Both Job Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 11, 1996, at A1.

6. See Todd S. Purdum, *Gay Rights Groups Attack Clinton on Midnight Signing*, N.Y. TIMES, Sept. 22, 1996, at 12.

7. Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996).

8. See *id.*

9. See Carey Goldberg, *Hawaii Judge Ends Gay-Marriage Ban*, N.Y. TIMES, Dec. 4, 1996, at A1.

Although its order that the state issue marriage licenses to the plaintiffs has been stayed pending appeal,¹⁰ the increasing likelihood of state-sanctioned same-sex marriage in Hawaii suggests the issue will remain a hot topic.

For advocates for lesbian, bisexual, and gay (les/bi/gay) rights, the public controversy stirred by *Baehr* presents important tactical issues. Polls show that a majority of Americans oppose same-sex marriage.¹¹ In the next few years, the debate over state recognition of same-sex marriage will continue in legislatures,¹² in courts,¹³ and among the population as a whole.¹⁴ In the course of this debate, state and federal lawmakers may do more than refuse to recognize these relationships. They may also issue broad statements of public policy favoring "traditional" marriages or condemning homosexuality that could be used, like the decision in *Bowers v. Hardwick*,¹⁵ to harm les/bi/gay people in a variety of other legal contexts.¹⁶ Thus, for advocates of same-sex

10. See *Hawaii's New Frontier*, BOSTON GLOBE, Dec. 8, 1996, at D3.

11. Kaplan & Klaidman, *supra* note 4, at 29; *Middle Americans Are More Accepting Now of Equal Rights for Gays, Polls Show*, DETROIT NEWS, Dec. 13, 1996, at E3.

12. See, e.g., Kaplan & Klaidman, *supra* note 4, at 29 (noting that bills to ban same-sex marriage are pending in seven states); Mark Silva, *Majority of State Senators Vow Not to Recognize Gay Marriages*, MIAMI HERALD, Feb. 3, 1997, at 5B (discussing bill introduced in Florida legislature to prohibit recognition of same-sex marriages conducted in other states).

13. Law reviews already contain discussions of legal issues that will arise if a same-sex couple seeks to force another state to recognize their Hawaiian marriage. See, e.g., Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397 (1995); Note, *In Sickness and In Health, in Hawaii and Where Else?: Conflict of Laws and the Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038 (1996).

14. Hawaii itself may have a referendum on a state constitutional amendment to undo the result in *Baehr*. See *Honolulu, Not Honolulu*, THE ADVOCATE, Mar. 4, 1997, at 17. Anti-gay activists may seek to take advantage of the public discomfort with this issue and put initiatives prohibiting same-sex marriages on other state ballots to force gay activists to undertake expensive state-wide political fights. As of February 1997, legislators in Maine and Washington were considering putting anti-gay marriage proposals to state-wide popular votes. See *Legislature 1997: Bill Bars 'Gene Discrimination' in Insurance*, NEWS TRIB. (Tacoma, Wash.), Feb. 28, 1997; Francis X. Quinn, *Partisans Eye Effect of Same-Sex Marriage Ban on Gay Rights Bill*, ASSOCIATED PRESS POLITICAL SERVICE, Feb. 24, 1997, at A13.

15. 478 U.S. 186 (1986). As Mary Dunlap has noted, "One common judicial approach to gay/lesbian claims of discrimination after *Hardwick* is to invoke *Hardwick* as categorically precluding such claims." Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1, 17 (1994). For examples of the use of *Bowers* to reject a variety of gay rights claims, see *id.* at 17-19, 25-26.

16. Similarly, individual couples are likely to bring lawsuits with or without the blessing of national les/bi/gay advocacy organizations. See, e.g., Brian Kohn, *Gay Couple Sues Ithaca for License*, ITHACA J., Apr. 2, 1996, at 1 (describing marriage lawsuit begun despite advice of gay organizations); *Vowing to be Wed*, THE ADVOCATE, March 18, 1997, at 16 (describing lesbian couple considering suit against New Mexico over denial of marriage license). Indeed, the couple in *Baehr* itself received no support from the national organizations until after the Hawaii Supreme Court's decision in May 1993. See John Gallagher, *Love & War*, THE ADVOCATE, July 23, 1996, at 22, 24. Their lawyers obviously have a duty to represent these couples zealously. Moreover, the gay community has a strong interest in seeing that these couples get expert legal help to avoid the creation of bad precedents. Otherwise, state reporters will become littered with cases containing rules and language that may hinder gay and lesbian litigants for years to come. See 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, 611 (1994) ("The wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades.").

Same-Sex Marriage

marriage, careful consideration of the rhetoric they choose to employ will be vital.¹⁷

Professor William Eskridge provides a helpful contribution to this difficult process with his thorough and accessible book, *The Case For Same-Sex Marriage*,¹⁸ which provides both legal and policy arguments supporting state recognition of same-sex marriages. Eskridge targets people of good will who have open minds about same-sex marriage,¹⁹ but it seems likely that the book will be most (and best) used as a compendium of arguments for advocates doing the hard front-line work of talking about the issue with friends, relatives, neighbors, and co-workers. Most of the arguments Eskridge presents seem appropriate and likely to be as effective as possible given the number of people who already have firm views about the question.²⁰ Perhaps because of Eskridge's attempt to tailor his arguments for this intended audience, however, some of his points appear to ignore concerns of important segments of the gay community.

Advocating on behalf of a group is a perilous business.²¹ One person speaking in favor of gay rights to a non-gay audience obviously cannot "represent" the views of all les/bi/gay people. However, those audience members who rarely interact with openly gay individuals are likely to perceive the speaker as speaking for a unified group. This likely audience response in turn creates some responsibility in the speaker with regard to divergent views

17. Events largely have forced les/bi/gay people, however unwillingly, to engage in a debate with gay advocates about state-recognition of same-sex marriage at this time. See Gallagher, *supra* note 16, at 27-28 (reporting belief of activists that les/bi/gay leaders and organizations do not have control over national political agenda and thus are stuck with marriage as important issue). Thus, the focus of this Review will be on the process of choosing arguments for this debate, rather than on whether same-sex marriage should be a priority for les/bi/gay activists. Other questions related to the marriage issue (for example, the relative merits of seeking domestic partnership benefits as well or instead) are beyond the scope of the Review. In keeping with this focus, I will use "advocates" to refer to people arguing in favor of state-recognition of same-sex marriage to primarily non-gay audiences, rather than to people advocating on behalf of les/bi/gay rights generally.

18. ESKRIDGE, *supra* note 2.

19. See *id.* at 87.

20. See *id.* (conceding that there is little to say to people who simply dislike gay people or who have already made up their minds on the issue); see also Tom Stoddard, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, N.Y.L.J., June 18, 1996, at 2 (book review) (suggesting there are few people truly undecided on issue of same-sex marriage); Neil A. Lewis, *A Modest Proposal*, N.Y. TIMES, Sept. 8, 1996, § 7 at 14 (suggesting book will be unlikely to persuade opponents of same-sex marriage).

21. See Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63, 80 (1991) (warning of dangers of ascribing views to subgroups within gay movement). The problem of group representation obviously occurs for other disadvantaged groups. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-93 (1976) (exploring tension in desegregation litigation between client needs and ideals and incentives of advocacy organizations); Harlon L. Dalton, *Reflections on the Lesbian and Gay Marriage Debate*, 1 LAW & SEXUALITY 1, 5-6 (1991) (describing criticism of feminist movement for failing to represent women of color and criticism of civil rights lawyers for insufficiently taking into account needs of communities they represented).

commonly held within the gay community.²² To be respectful of those in the community with whom they disagree, speakers should attempt not to overstate the strength or weakness of support for a particular position, and should try to frame arguments in a way that does not unduly marginalize or ignore large segments of the community.²³

Achieving this kind of respectful representation will be challenging in the context of same-sex marriage because the gay community has long been divided about the merits of this issue. Although polling data suggest that a majority of lesbians and gay men would like to see state recognition of same-

22. See Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 38 (1991) ("[T]hose of us who have the privilege to speak and to be heard must do so responsibly, focusing not so much on our power as a license to speak for others, but as imposing a duty to speak with them.").

The argument here assumes that many non-gay people will treat any openly les/bi/gay person speaking in favor of gay rights as essentially speaking for all les/bi/gay people. This Review will use "the gay community" to refer to the imputed constituency of openly les/bi/gay advocates for same-sex marriage, recognizing that the widely diverse American les/bi/gay population clearly does not participate in anything much resembling a single "community."

There are other assumptions one might have about how non-gay audiences will view same-sex marriage advocates. For example, audiences might view transgendered people as part of the relevant constituency because they often are linked to les/bi/gay people both by insiders, see, e.g., URVASHI VAID, *VIRTUAL EQUALITY*, ix (1995), and outsiders, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 607-11 (1992). Transgendered people also have a strong interest in the outcome of the same-sex marriage debate. If the state stops requiring that a marriage include one person of each sex, transgendered people who wish to marry will no longer face the complicated legal inquiry courts currently employ to determine whether they count as male or female. See ESKRIDGE, *supra* note 2, at 93-94. Despite the overlap of interest, my instinct is that the connection presently is not so strong in the public mind that audiences will assume les/bi/gay speakers represent transgendered people. Similarly, the issue of homosexuality is a sufficiently large and discrete part of public discussion today that it seems unlikely that audiences would view les/bi/gay speakers as representing a larger coalition of progressives or "minority groups." Of course, if a speaker becomes aware that her audience believes she represents a larger group of people, then she ought to try to treat the views of these additional imputed constituents respectfully when framing her arguments.

It also would be possible to assume that non-gay audiences will understand advocates for same-sex marriage as representing only some portion of the gay community. However, much of the rhetoric and stereotyping about les/bi/gay people tends to treat us all as though we thought and behaved alike. See, e.g., Fajer, *supra*, at 532, 607-08. Moreover, the book itself makes arguments that seem to be framed on behalf of all les/bi/gay people. See ESKRIDGE, *supra* note 2, at 9-10. Thus, it seems fair to treat this group as the relevant constituency.

Perhaps the ideal solution to the problem of trying to represent a diverse community is the inclusion of many voices in the relevant discourse. A single individual does not have to stand for the entire gay community when many les/bi/gay voices are speaking. Unfortunately, openly les/bi/gay individuals often will find themselves the only gay-identified voice in important settings for educational conversation such as the workplace or family gatherings. In addition, when non-gay organizations invite speakers to present gay perspectives, they may not see the need to include several disparate points of view. Thus, in the ongoing debate about same-sex marriage, les/bi/gay individuals frequently will be placed in the sort of representative role that is the focus of much of this Review.

23. See *id.* at 43 (arguing that representation of gay community entails responsibility to appreciate diversity of community). The need for respectful advocacy seems heightened when an identifiable segment of a community raises a dissenting position based in part on their group difference. This is true of the debate about gay marriage where a disproportionate number of critics are lesbians, see ESKRIDGE, *supra* note 2, at 83, and their criticisms often relate to the historical relation between marriage and the oppression of women. See *infra* text accompanying notes 92-97.

Same-Sex Marriage

sex marriage,²⁴ some activists have argued that marriage should not be a priority for the gay community.²⁵ Thus, careful advocates for same-sex marriage, while arguing (on behalf of many) for state recognition, must try to rely on points that do not unduly marginalize the concerns of the many others in the community less certain that marriage is desirable.²⁶

Part I of this Review presents Eskridge's major arguments. Part II identifies three sets of concerns about the book and is designed to encourage gay rights advocates engaged in the legal and political debate over same-sex marriage to think about how best to argue effectively while still representing the gay community as fully as possible. First, Section II.A suggests that some of the arguments in the book will fuel, rather than allay, the concerns of progressive activists who believe that same-sex marriage will reinforce or reinvent existing structures of privilege and oppression. In particular, the argument that same-sex marriage will help to "civilize" gay men tends to

24. See ESKRIDGE, *supra* note 2, at 78-79; David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 449-50 (1996); Wolfson, *supra* note 16, at 583.

25. See, e.g., Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 20 (Suzanne Sherman ed., 1992) [hereinafter LESBIAN AND GAY MARRIAGE]; Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1536 (1993). The discussion within the gay community about the relative importance of marriage can be seen as part of a larger debate over strategy. See VAID, *supra* note 22, at 37-38; Jane S. Schacter, *Skepticism, Culture, and the Gay Civil Rights Debate in a Post-Civil Rights Era*, 110 HARV L. REV. 684, 697 (1997); Bruce Bawer, *The Road to Utopia*, THE ADVOCATE, Sept. 20, 1994, at 80. To overgeneralize, the fundamental disagreement is whether the most appropriate long-term strategy for the movement is to try to demonstrate that most lesbians and gay men share common American values in order to appeal to average Americans and achieve acceptance into the mainstream culture, see, e.g., John W. Berresford, *A Gay Right Agenda*, in BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY 106-08 (Bruce Bawer ed., 1996); Bawer, *supra*, at 80, or to try to ally with other progressive interests, particularly movements for race, class, and gender equality, to create coalitions to create progressive change and transform American society. See, e.g., TORIE OSBORN, *COMING HOME TO AMERICA* 189, 204-10, 224-32 (1996); VAID, *supra* note 22, at 209, 274-306. Not surprisingly, many of those who advocate a focus on common values see recognition of same-sex marriage as crucial. See ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 185 (1996). By contrast, those who focus on progressive coalitions often express concern about the patriarchal origins of marriage and the possibility that marriage will primarily benefit members of the community already relatively privileged by class, race or gender. See *infra* text accompanying notes 92-102.

26. A few les/bi/gay people may believe strongly that same-sex marriage should not be allowed under any circumstances. They may either believe that marriage is an institution that is too rotten for anyone to participate in, or that marriage is inappropriate for same-sex couples. These positions have not played a major role in the debate on marriage within the gay community. Even those who oppose treating marriage as a priority for the gay community generally believe that same-sex couples should be allowed to marry if they so choose. See ESKRIDGE, *supra* note 2, at 62, 75. Activists concerned with respectful representation obviously will have a hard time incorporating an absolute anti-marriage position into their arguments, but they should at least acknowledge that support for same-sex marriage is not universal. Similarly, the ideal of respectful representation advocated here creates no duty for those completely opposed to same-sex marriage to support it merely because many or most les/bi/gay people do. However, the ideal suggests that opponents acknowledge the strength of les/bi/gay support for state-recognized marriage if the issue arises when they are speaking in a capacity in which they will be seen as representing the gay community.

marginalize those who choose not to marry, especially those who reject marriage because they disagree with the mainstream values it is seen to embody.

Section II.B addresses the distinction between private marriage ceremonies (which same-sex couples can have) and state-recognized marriages (which they cannot). The book does not focus much on private ceremonies. This relative lack of emphasis, particularly in conjunction with the “civilization” argument, tends to marginalize the many same-sex couples who already consider themselves married. It also ignores a possible characterization of the marriage issue that might be politically helpful: that many same-sex couples seek not so much the right to marry as the right to have their (already existing) marriages treated equally.

Section II.C discusses the claim that recognition of same-sex marriages would not constitute endorsement of homosexual relationships by the state. Advocates may find use of this argument problematic on two grounds. First, it overlooks the position of those les/bi/gay people who want state recognition precisely because they see it as an official statement that same-sex relationships can be the same as traditional marriages. Second, the claim seems so likely to be disbelieved by Eskridge’s intended audience that it could undermine the credibility of his other arguments.

The tactical concerns raised in Part II do not seriously limit the importance and helpfulness of Professor Eskridge’s work. Moreover, each of the tactical choices in question can be justified as an effective way to reach a skeptical audience. However, the need to craft arguments that appeal to moderate, undecided, non-gay people does not eliminate the responsibility to speak as inclusively as possible to audiences likely to view the speaker as representing the entire gay community. This is not merely a question of civility; it also has practical political consequences. Although respectful representation will not eliminate the often significant disagreements about goals and strategies, it should facilitate future communication between diverse members of the gay community and increase their ability to work together on issues where they do agree. Thus, advocates considering how best to utilize Eskridge’s arguments should find it useful to explore further which rhetorical strategies can persuade successfully without rejecting or alienating important segments of the always fractious gay community.

I. PROFESSOR ESKRIDGE’S ARGUMENTS

Much of *The Case for Same-Sex Marriage* is aimed at a lay audience not immersed in the same-sex marriage debate and largely unfamiliar with many aspects of les/bi/gay lives. Thus, the book contains few arguments that are not already laid out in some form in the legal literature discussing les/bi/gay rights and same-sex marriage. Its strength lies instead in its compilation of a great

Same-Sex Marriage

deal of useful research and argument into one source that is quite accessible to lay readers. This Part summarizes the book's major arguments, beginning with the constitutional arguments, moving on to non-constitutional policy arguments aimed primarily at non-gay people, and concluding with responses to concerns within the gay community that marriage is an inappropriate goal for activist energy.

A. Constitutional Arguments that States Must Recognize Same-Sex Marriage

Eskridge devotes two chapters to laying out the position that a state's refusal to recognize same-sex marriage violates the U.S. Constitution on Due Process and Equal Protection grounds.²⁷ He argues that this refusal is subject to heightened judicial scrutiny under three different theories. First, it infringes the right to marry, which the Supreme Court has characterized as fundamental.²⁸ Second, by making state benefits contingent upon the sex of the recipients—a woman can receive marital rights for marrying a man, but a man cannot—the state commits sex discrimination subject to intermediate scrutiny under the Fourteenth Amendment's Equal Protection Clause.²⁹ Third, classifications based on sexual orientation should themselves be subject to heightened scrutiny because they are generally irrational and because gay men and lesbians constitute a "subordinated minority."³⁰

Eskridge then asserts that the states do not have any interest that is sufficiently important or sufficiently tailored to the same-sex marriage ban to survive heightened scrutiny.³¹ He focuses primarily on possible state interests suggested by Hawaii during the course of the *Baehr* litigation, specifically interests in avoiding the appearance of state approval of homosexuality and in the creation and protection of children.³²

27. See ESKRIDGE, *supra* note 2, chs. 5 and 6.

28. See *id.* at 127-33; *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). In the course of elaborating the fundamental right argument, Eskridge also addresses the common claim that recognition of same-sex marriage would necessarily require the state to allow polygamous or incestuous marriages, or marriages with children. He provides plausible ways to distinguish each of these situations from same-sex marriage. See ESKRIDGE, *supra* note 2, at 144-51.

29. See ESKRIDGE, *supra* note 2, at 162-72. For extended treatments of this argument, see Fajer, *supra* note 22, at 617-50; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); and Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

30. See ESKRIDGE, *supra* note 2, at 179; *id.* at 172-81. Although he acknowledges that the ban on same-sex marriage does not facially discriminate against les/bi/gay people, he argues that the operation of the same-sex marriage ban falls on them so disproportionately that it constitutes sexual orientation discrimination. See *id.* at 172-73; see also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that facially-neutral statute with vastly disproportionate effect on Chinese-Americans constitutes race discrimination).

31. See ESKRIDGE, *supra* note 2, at 137-52.

32. He also discusses another argument that Hawaii considered making: that recognition of same-sex marriages "will alter the State of Hawaii's desirability as a visitor destination." *Id.* at 141. He dismisses this argument as both insufficiently compelling to trump a fundamental right and as likely to

The state's first claim was that permitting same-sex marriage would convey the idea that the state approves of homosexuality and that the state has a compelling interest in avoiding the appearance of such approval. Eskridge argues first that conveying disapproval of an unpopular group is not a legitimate state interest.³³ He also rejects the premise that granting marriage licenses to same-sex couples would constitute state endorsement or approval of homosexuality.³⁴ The basis of his argument is that the state barely investigates applicants for marriage licenses:

You can get a marriage license without any demonstrated or actual skill at social or sexual intercourse, without knowledge about or concern for the rules of sex and companionship, without good vision or a well-functioning body, and without a scintilla of moral scruple (you can even be in jail!). However evil, perverted, or incompetent you might be, the clerk will still give you the marriage license, because the clerk and the state do not care about your character, morality, or competence.³⁵

Because the bureaucratic licensing process incorporates such a limited inquiry, Eskridge contends that it cannot constitute implicit endorsement or approval of same-sex relationships.³⁶

With regard to the claim that the state needs to encourage procreation, Eskridge maintains that encouraging population growth is hardly an important interest in today's world.³⁷ More significantly, the Supreme Court's contraception and abortion decisions strongly suggest that fostering procreation is not a strong enough state interest to overcome a fundamental right.³⁸ In addition, even if a state's procreation interest is important enough for constitutional purposes, the ban on same-sex marriage does not further it particularly well.³⁹ As Eskridge remarks, "[D]oes the state expect that gay people will be so discouraged by the bar they will go out and procreate up a storm? If that is the state's aspiration, it is an irrational one."⁴⁰

be factually untrue. *Id.*

33. *See id.* at 143; *see also* *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

34. *See* ESKRIDGE, *supra* note 2, at 105-09, 143.

35. *Id.* at 106-07; HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 42 (1995) ("As a practical matter, enforcement of marriage regulation has been so lax that it rarely has stifled individual freedom of choice."); *see also* Ettelbrick, *supra* note 25, at 25 (arguing that states issue marriage certificates without considering actual relationship between parties).

36. *See* ESKRIDGE, *supra* note 2, at 11-12, 63-64, 105-09. Section II.C assesses the strength and usefulness of this argument.

37. *See id.* at 138.

38. *See id.*

39. *See id.* at 138-39.

40. *Id.* at 138. The state's argument must be that, denied same-sex marriage, many les/bi/gay people would enter different-sex marriages and procreate. However, the argument is difficult to credit even if you believe that most people who would enter same-sex marriages either are bisexual or are comfortable enough with the other sex to marry despite limited sexual attraction. It seems to assume that people involved in a same-sex relationship important enough to raise thoughts of marriage will be so

Same-Sex Marriage

Hawaii also argued that it needed to ban same-sex marriage because “a child is best parented by its biological parents living in a single household.”⁴¹ The concern here seems to be that children of one of the two spouses or adopted children would be harmed if raised by married gay and lesbian couples. Eskridge points out that while there is some evidence that children are better off in two-parent households,⁴² “[t]here is no evidence that children are better off being raised by their biological parents.”⁴³ Thus, this interest would not be sufficient to allow the state to overcome heightened scrutiny.

The chapters on the constitutional issues present well-crafted legal arguments but do not assess the likelihood that a conservative federal judiciary would adopt them. The history of gay rights litigation in the United States suggests that good arguments often are not sufficient to overcome judicial prejudice.⁴⁴ However, legal events subsequent to the book’s publication lend strength to Eskridge’s arguments. On remand, the Hawaii trial court in *Baehr* specifically rejected the state’s argument that its interest in the protection of children was furthered by the ban on same-sex marriage. It also found more generally that the state had failed to meet its burden of showing that recognition of same-sex marriage would harm an important government interest.⁴⁵

More importantly, the Supreme Court’s recent opinion in *Romer v. Evans*⁴⁶ held that mere animus against homosexuals is not a permissible state interest.⁴⁷ Thus, as Eskridge argues, a state will have to articulate a reason other than mere popular disapproval for treating same-sex marriage differently from unions between a man and a woman. As he suggests, this may not be easy. Moreover, the *Evans* majority implicitly rejected Justice Scalia’s broad reading of *Bowers v. Hardwick*. Scalia argued that the state’s power to criminalize same-sex sexual activity under *Bowers* necessarily implies the power to place virtually any civil disabilities on les/bi/gay people.⁴⁸ The

discouraged by the lack of state-recognition that they: (1) will leave their partner; (2) will find a person of the opposite sex to marry; and (3) once armed with an appropriately equipped spouse, will procreate. In the alternative, perhaps the thought is that marriage is so important that, in light of the state’s refusal to sanctify same-sex relationships, some people will eschew them entirely and actively seek out different-sex partners in order to achieve a marriage. Neither scenario seems very plausible today, *see id.* at 139 (arguing that additional procreation resulting from effect of marriage ban on bisexuals is “negligible”), especially given the large number of same-sex couples participating in marriage rituals despite the absence of state-recognition. *See infra* text accompanying notes 132-134.

41. ESKRIDGE, *supra* note 2, at 139.

42. *See id.* at 139-40.

43. *Id.* at 140.

44. *See* Duclos, *supra* note 22, at 56 (noting “deep-seated and visceral anti-lesbian and anti-gay feeling in the judiciary”).

45. *See Baehr v. Lewin*, 65 U.S.L.W. 2399 (Haw. Dec. 17, 1996).

46. 116 S.Ct. 1620 (1996).

47. *Id.* at 1628-29. Also, Eskridge’s invocation of the dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *see* ESKRIDGE, *supra* note 2, at 189, gains credibility from a similar citation by the majority opinion in *Evans*. 116 S.Ct. at 1623 (citing *Plessy*, 163 U.S. at 539 (Harlan, J., dissenting)).

48. *Evans*, 116 S.Ct. at 1631-33 (Scalia, J., dissenting); *see* ESKRIDGE, *supra* note 2, at 135 (analyzing broad reading of *Bowers*); KRAUSE, *supra* note 35, at 46 (arguing that recognition of same-

rejection of this position makes it easier for gay advocates to separate sodomy from civil ceremony and to assert that *Bowers* does not foreclose arguments that the U.S. Constitution requires the states to recognize same-sex marriage.⁴⁹

B. *Non-Constitutional Arguments in Favor of Same-Sex Marriage*

In addition to the constitutional claims, the book includes a variety of policy arguments supporting state recognition of same-sex marriage. Eskridge argues that same-sex marriage provides a number of benefits both for les/bi/gay individuals and for American society as a whole. In addition, he directly addresses common assertions made by non-gay opponents of same-sex marriage.

1. *Benefits for Lesbians, Bisexuals, and Gay Men*

Professor Eskridge believes that same-sex couples would receive numerous important benefits from state-recognized marriage. First, same-sex couples would receive the same intangible benefits that different-sex spouses get from engaging in committed, long-term relationships.⁵⁰ These intangibles include the emotional benefits that stem from intimacy and commitment,⁵¹ the creation of stable households in which to raise children,⁵² and a structure in which

sex marriage "seems precluded" in any jurisdiction that criminalizes same-sex sexual behavior). Eskridge recognizes that *Bowers* might be a major impediment to his constitutional arguments and provides advocates with several grounds for limiting or distinguishing the case to minimize its impact on the same-sex marriage debate. See ESKRIDGE, *supra* note 2, at 134-37; see also Marc A. Fajer, *Bowers v. Hardwick, Romer v. Evans, and the Meaning of Anti-Discrimination Legislation*, 2 NAT'L J. OF SEX. ORIENT. L. 208, 209-10 (1996), <<http://sunsite.unc.edu/gaylaw>> (arguing that Justice Scalia's position that *Bowers* should have governed *Evans* rests on faulty logic).

49. This is not to say the issue is settled. *Evans* makes much of the immense breadth of the statute it strikes down, see 116 S. Ct. at 1628-29, and is distinguishable on that basis from any narrowly focused state discrimination against homosexuals, arguably including a simple refusal to recognize same-sex marriage. See Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 345-58 (1997). On the other hand, advocates certainly could try to argue that these refusals are in fact quite broad given the large number of disparate benefits tied to marriage. See *infra* text accompanying notes 54-57.

50. See ESKRIDGE, *supra* note 2, at 109-10. Same-sex couples may also receive many of these benefits from committed relationships without the sanction of the state. See *infra* text accompanying notes 136-139. However, one intangible effect the book does not mention can only come from state recognition: Same-sex couples may receive additional emotional benefits to the extent that the state's decision to license same-sex marriages helps remove some of the stigma attached to homosexuality in American society.

51. ESKRIDGE, *supra* note 2, at 17, 72-74, 82. Eskridge bolsters this point with studies that found that long-term same-sex relationships "generated a great deal of satisfaction for the participants." *Id.* at 7. In addition, he notes that historically, people have entered into same-sex unions where they have been allowed to do so because "they loved one another and desired the intimacy that close companionship offers." *Id.*

52. See *id.* at 7, 17, 110-14.

Same-Sex Marriage

couples can form an effective economic unit by combining assets and sharing labor.⁵³

Second, state-recognized marriage has important legal consequences.⁵⁴ A variety of legal benefits flow from marriage.⁵⁵ Those who are legally married also receive a variety of economic benefits provided by private employers and insurance companies.⁵⁶ State recognition would provide same-sex couples with access to this "marriage benefits package."⁵⁷

In addition to providing emotional and legal benefits to same-sex couples, Eskridge claims that state recognized same-sex marriage will have the additional positive effect of "civilizing" the gay community, particularly gay men.⁵⁸ He deliberately plays on the multiple possible meanings of "civilize" in this context: to change "from the criminal law to the civil law;" to "integrate into the law and customs of society;" and to "tame" or "domesticate."⁵⁹ Regarding the first two meanings, Eskridge notes that as regulation of homosexual relations moves from criminal to civil law, les/bi/gay people become increasingly integrated into social and cultural institutions.⁶⁰ In particular, participation in an important cultural institution like marriage "would establish another common tie between gay people and straight people" and would "likely contribute to the public acceptability of homosexual

53. See *id.* at 7, 17.

54. See Chambers, *supra* note 24, at 447 ("Laws that treat married persons in a different manner than they treat single persons permeate nearly every field of social regulation in this country . . .").

55. For partial lists of these benefits, see, e.g., ESKRIDGE, *supra* note 2, at 66-67; RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 125 (1992); Suzanne Sherman, *Introduction to LESBIAN AND GAY MARRIAGE*, *supra* note 25, at 7-8; Duclos, *supra* note 22, at 52-53; Dunlap, *supra* note 21, at 86. In addition to benefits provided directly by the state, commentators have suggested that les/bi/gay people would improve their position in litigation over parental rights if their relationships were formally recognized. See Chambers, *supra* note 24, at 461-70; Kathryn E. Kovacs, *Recognizing Gay and Lesbian Families: Marriage and Parental Rights*, 5 *LAW & SEXUALITY* 513, 533-38 (1995); see also *Adoption Setback*, *THE ADVOCATE*, May 16, 1995, at 12 (reporting New York state court ruling that same-sex partners may not adopt each other's children because they are not legally married). The state also places some duties on those it recognizes as married. See ESKRIDGE, *supra* note 2, at 70. For a comprehensive survey of the legal consequences of marriage, beneficial and otherwise, see Chambers, *supra* note 24, at 452-85.

Some of the benefits the state provides automatically along with marriage are also available through wills, durable powers of attorney, and other private contracts. See ESKRIDGE, *supra* note 2, at 68-69, 83 n.g. However, preparing these legal documents can require considerable expenditure of time and money so some commentators believe that they are available primarily to the relatively well-to-do and legally sophisticated. See *id.* at 83 n.g.; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIAN AND GAY MARRIAGE*, *supra* note 25, at 13, 16; Dalton, *supra* note 21, at 6.

56. See Fajer, *supra* note 22, at 577; Sherman, *supra* note 55, at 7-8; Stoddard, *supra* note 55, at 15. Generally speaking, a same-sex couple's characterization of its relationship or contractual rights inter se will not create a duty in an employer or insurer to provide these benefits. However, at least one state labor board has held that an employer's decision to provide benefits only to legally married spouses of employees and not to same-sex couples violated a sexual orientation non-discrimination law. See *Grievance of B.M.*, Vt. Labor Relations Bd., Docket #92-32 (June 4, 1993).

57. See ESKRIDGE, *supra* note 2, at 66-70, 116.

58. See, e.g., *id.* at 9-10.

59. *Id.* at 8 n.a.

60. See *id.* at 9-10.

relationships.”⁶¹ Thus, marriage is civilizing in the sense that it “provid[es] couples with social support and integrat[es] them into the larger culture.”⁶²

Eskridge makes separate arguments relating to the final, and as he acknowledges, “most provocative,”⁶³ meaning of “civilization.” He notes that gay male subcultures have often incorporated an element of promiscuity that he believes ultimately is detrimental to the participants.⁶⁴ He suggests that the relatively hard-to-break bonds created by state-sanctioned marriage will help encourage same-sex couples, and particularly gay men, to stay settled in relationships. Those bonds will help to foster the kind of stability and commitment that he sees as part of “civilization.”⁶⁵ As he states, “[a] self-reflective gay community ought to embrace marriage for its potentially civilizing effect.”⁶⁶ The importance of this concept to Eskridge is indicated by the book’s subtitle, “From Sexual Liberty to Civilized Commitment.”⁶⁷

2. *Benefits to American Society*

Eskridge claims that same-sex marriage will “civilize” not only the gay community but non-gay American society as well.⁶⁸ He maintains that the country benefits when it accepts members of diverse groups and incorporates elements from their distinct cultures.⁶⁹ If it were to eliminate discrimination against lesbians, gay men and bisexuals and include them as it has included various ethnic and religious groups in the past, he contends, the nation would be “civilized.”⁷⁰ He argues that “[a] civilized polity assures equality for all its citizens”⁷¹ and that access to marriage is a necessary part of equal citizenship.⁷² Thus, America cannot be truly civilized without granting same-sex

61. *Id.* at 8-9. He believes acceptability would increase at least in part because marriages would help counter stereotypes of les/bi/gay people. *Id.* at 9. Although he is not specific, his subsequent discussion, *see id.* at 9-10, suggests that he refers to the common beliefs that les/bi/gay people are sex-driven, promiscuous, and incapable of engaging in stable relationships. *See also* Fajer, *supra* note 22, at 537-46.

62. ESKRIDGE, *supra* note 2, at 16; *see also id.* at 48 (stating that religious same-sex marriage ceremonies “civiliz[e] gays into the deep emotional and spiritual traditions of religion.”). He argues further that most les/bi/gay people desire these connections to the rest of the community. *Id.* at 79.

63. *Id.* at 8 n.a.

64. *See id.* at 9-10. Specifically, he argues that promiscuity facilitates the spread of disease, encourages “a cult of youth worship,” contributes to stereotypes that gay people lack seriousness, and cannot “satisfy the needs for connection and commitment that become more important as one grows older.” *Id.* at 10.

65. *See id.* at 71-72, 83-84.

66. *Id.* at 10.

67. Sections II.A and II.B discuss some of the strategic implications of the invocation of “civilization” in the same-sex marriage debate.

68. *See id.* at 10-11; *see also id.* at 1.

69. *See id.* at 10.

70. *Id.* Eskridge does recognize that the inclusionary tradition he invokes does not involve easy acceptance of new groups. *See id.* (noting repeated examples of “group hatred” and “our history of prejudice and exclusion”).

71. *See id.*

72. *See id.* at 62-66.

Same-Sex Marriage

couples the same marriage rights as different-sex couples. In addition, Eskridge contends that state recognition of marriage would itself further facilitate this “civilizing” process by encouraging same-sex couples to be open about their sexuality which in turn would tend to change the anti-gay attitudes of people around them.⁷³

3. *Responses to Common Anti-Marriage Arguments*

Among the most helpful features of the book is its detailed documentation of facts intended to help counter the most basic and recurrent anti-marriage arguments. For example, according to Eskridge, “the most common objection” to same-sex marriage is that “it is unprecedented. ‘This just can’t be! It has never been done and therefore never should be done.’”⁷⁴ In response, he provides a chapter documenting the history of socially-sanctioned same-sex relationships in various cultures around the world.⁷⁵ Without overstating the parallels to marriage in any particular case,⁷⁶ Eskridge offers strong evidence to rebut the claim that marriage can only mean the union of one man and one woman.⁷⁷ Standing alone, this research obviously will not convince anyone that the United States should recognize same-sex marriage today. Instead, it “demonstrates that same-sex marriages are neither unprecedented nor unnatural”⁷⁸ and may encourage opponents to examine the normative bases for denying recognition to same-sex marriages instead of rejecting them outright.⁷⁹

Another common argument employed by opponents of same-sex marriage is its supposed inconsistency with religious values.⁸⁰ The book presents evidence that many American Christian and Jewish leaders and congregations

73. *See id.* at 82; *see also* Fajer, *supra* note 22, at 598-602 (discussing costs to gay community when lesbians and gay men conceal their sexual orientation).

74. ESKRIDGE, *supra* note 2, at 6; *see id.* at 87, 89-96.

75. *See id.* ch. 2. In addition, he argues that genetic and social ambiguities about who is male and who is female render the state’s bright-line rule against same-sex marriage much less coherent than it initially appears. *See id.* at 92-94.

76. *See, e.g., id.* at 26-27 (carefully noting criticism of John Boswell’s work on Christian same-sex unions in middle ages).

77. For a discussion of cases making this argument, *see* Dunlap, *supra* note 21, at 68.

78. ESKRIDGE, *supra* note 2, at 7.

79. *See id.* at 91. Eskridge also suggests that this material can be used affirmatively to demonstrate that same-sex unions in other cultures have served the same functions that society claims are served by traditional marriages. *See id.* at 7.

80. *See id.* at 98-99; *see also, e.g.,* Sharon Divine, *Opinion*, THE COLUMBIAN, June 2, 1996, at B8 (“The perversion, degradation and sodomy that once made us blush are now flaunted before the eyes of a nation that was first conceived on Christian principles.”); Kim A. Lawton, *Clinton Signs Law Backing Heterosexual Marriage*, CHRISTIANITY TODAY, Oct. 28, 1996, at 80 (quoting Robert Knight, Family Research Council Director of Cultural Studies, as saying, “If you are a devout Christian, Jew, or Muslim, or merely someone who believes homosexuality is immoral and harmful, and the law declares homosexuality a protected status, then your personal beliefs are now outside civil law”); Schmitt, *supra* note 5, at A11 (quoting Senator Byrd’s use of “the Holy Bible” in supporting his vote for Defense of Marriage Act).

support and perform same-sex marriage ceremonies.⁸¹ In addition, Eskridge includes a collection of letters from clergy supporting same-sex unions.⁸² Like the historical evidence, this material alone is unlikely to change anyone's mind. It is most useful as a counterargument to the position that same-sex marriage is so immoral that all religions oppose it.⁸³ Eskridge's evidence illustrating disagreements among religious sects and leaders about same-sex unions highlights the impropriety of reliance on religious arguments to resolve this issue in a secular state.⁸⁴ His arguments force opponents operating in good faith (so to speak) to defend their position with secular policy reasoning.

A third common objection to same-sex marriage is that marriage is inextricably linked with procreation. Because the participants in same-sex relationships cannot procreate together, they should not marry.⁸⁵ However, as Eskridge demonstrates, the state does not in fact limit marriage to those who try to procreate.⁸⁶ Contending that procreation is no longer the primary goal of marriage, which instead serves a variety of personal and legal functions,⁸⁷ Eskridge argues that the inability to procreate does not preclude state recognition of same-sex marriage.

Lastly, Eskridge rejects a series of pragmatic objections to state recognition of same-sex marriage. He demonstrates that the legal incidents of marriage, although perhaps designed for heterosexuals, generally apply to same-sex marriage "without strain."⁸⁸ He also provides evidence that allowing same-sex spouses to share in employee benefits does not significantly affect the costs of the relevant plans.⁸⁹ Finally, he rejects the argument that public opposition to same-sex marriage makes intermediate steps like domestic partnership necessary.⁹⁰ In the end, Eskridge sees the sacrifice of equality as too great to allow this kind of compromise.⁹¹

81. See ESKRIDGE, *supra* note 2, at 46-48, 100-04.

82. See *id.* at 193-217.

83. See *id.* at 99 ("There is no univocal Judeo-Christian tradition against same-sex marriage."). Eskridge also includes alternate explanations and interpretations of religious texts commonly cited as demonstrating hostility to homosexuality. See *id.* at 99-100, 101-02.

84. See *id.* at 99. In other words, even in a secular state, we might be comfortable with the argument that when all religions ban a practice, it is probably fair to treat the practice as immoral or to at least assume that there is a good reason for the ban. Cf. Duncan, *supra* note 49, at 357 (relying on unanimity of rejection of same-sex marriage by governments to support validity of ban). Once Eskridge demonstrates the differences between religious views on same-sex marriage, especially among and within mainstream religious bodies, the use of religious argument necessarily implies the primacy of some religious views over others, and is therefore improper in a secular state.

85. See ESKRIDGE, *supra* note 2, at 96.

86. See *id.* at 12-13, 96-98.

87. See *id.* at 96-98; see also KRAUSE, *supra* note 35, at 46 ("Many modern marriages bypass . . . child rearing . . .").

88. See ESKRIDGE, *supra* note 2, at 118; *id.* at 116-18.

89. See *id.* at 118-19.

90. See *id.* at 120-21.

91. See *id.* at 122.

C. *Responses to Concerns About Marriage Voiced by Lesbians and Gay Men*

Eskridge uses a chapter of the book to articulate and try to answer the arguments of “marriage-skeptics,” activists who believe that marriage should not be a major priority for the les/bi/gay rights movement.⁹² The marriage-skeptics are those concerned that marriage reinforces existing gender, class, and race privileges.⁹³ They worry about aspiring to belong to an institution that has a strong property-based, patriarchal history.⁹⁴ As one commentator has summed up this argument, marriage is “an oppressive institution, which lesbians and gay men should condemn, not join.”⁹⁵ Furthermore, because it seems possible that “those individuals who most benefit from the socioeconomic advantages of marriage are members of the middle class,” women and members of some ethnic and racial groups are less likely to share in the benefits.⁹⁶ Thus, skeptics express concern that the quest for marriage simply ignores the needs of those already less privileged.⁹⁷

Marriage-skeptics also worry that advocacy for state recognition will marginalize unmarried les/bi/gay people in a variety of ways. To some extent, non-gay society already marginalizes the unmarried.⁹⁸ The process of arguing

92. See *id.*, ch. 3. I use the term “marriage-skeptics” to convey the idea that those lesbians and gay men who express these views rarely argue that gay people should never get married or should actively oppose state-recognition. See *supra* note 26. Rather, they express concerns about the importance of the institution of marriage to the struggle for equality. See *infra* text accompanying notes 92-102.

93. See, e.g., Duclos, *supra* note 22, at 58-59; Dunlap, *supra* note 21, at 78.

94. See ROBSON, *supra* note 55, at 126; LESBIAN AND GAY MARRIAGE, *supra* note 25, at 31, 55, 128-29; Duclos, *supra* note 22, at 48-49; Chris Bull, *Till Death Do Us Part*, THE ADVOCATE, Nov. 30, 1993, at 40, 43; see also Dunlap, *supra* note 21, at 69-71 (describing history of oppression of women in and through marriage). Nan Hunter and others have argued that gay marriages, based on the equality of the participants rather than traditional gender roles, might destabilize existing understandings of marriage. See Nan D. Hunter, *Marriage, Law, & Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 16-19 (1991); OSBORN, *supra* note 25, at 97; Stoddard, *supra* note 55, at 19. However, the relatively small number of same-sex couples (and perhaps their children raised amidst egalitarian relationships) seems unlikely to have a sizable impact on an institution as established as gendered, heterosexual marriage. See ESKRIDGE, *supra* note 2, at 76; Duclos, *supra* note 22, at 47; see also Ettelbrick, *supra* note 25, at 26 (stating same-sex marriage “may ‘minimally’ transform the institution of marriage”) (emphasis added).

95. Hunter, *supra* note 94, at 11 (citation omitted); see also Polikoff, *supra* note 25, at 1541 (expressing concern that advocates for same-sex marriage “will valorize the current institution of marriage” despite its hierarchical, gendered nature).

96. Duclos, *supra* note 22, at 55; see also ROBSON, *supra* note 55, at 126 (“[T]he benefits of lesbian marriage mainly accrue to lesbians of a certain class.”); Dunlap, *supra* note 21, at 78 (“Even when a system changes, those most excluded may enjoy the benefits of that change last, if at all.”); Ettelbrick, *supra* note 25, at 24 (claiming privileged couples “are more likely to want the right to marry”).

97. See Ettelbrick, *supra* note 25, at 22, 26.

98. See Chambers, *supra* note 24, at 485 (summarizing ways in which federal and state governments privilege married persons); Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 210-20 (1988) (discussing ways law and society disfavor unmarried people); see also Ettelbrick, *supra* note 25, at 23 (claiming that process of arguing for same-sex marriage would “perpetuat[e] the elevation of married relationships”).

for marriage necessarily includes arguments that same-sex couples are essentially the same as traditional married couples;⁹⁹ this process is likely to ignore or devalue those who choose not to follow the traditional model.¹⁰⁰ If the state does recognize same-sex marriage, those who choose to marry might come to be seen as “good gays” and those who eschew marriage as “bad gays.”¹⁰¹ In addition, relatively privileged lesbian and particularly gay male couples, once married and (perhaps) accepted by mainstream society, might feel less need to be politically active on behalf of those who are less privileged.¹⁰²

In response to the marriage skeptics, Eskridge argues that recognition of marriage should be a priority for les/bi/gay activists. Most importantly, he believes that activists should support state-recognized same-sex marriage simply because most gay men and lesbians want it.¹⁰³ He also reiterates that recognition of marriage will likely have beneficial effects on the participants and on American society.¹⁰⁴ In addition, he believes that “marriage is so important to American culture that any group liberation movement is going to have to deal with it.”¹⁰⁵

Eskridge also responds directly to a number of the specific concerns about privilege and marginalization.¹⁰⁶ He rejects the claim that marriage is

99. See Ettelbrick, *supra* note 25, at 22-23; Polikoff, *supra* note 25, at 1540-41, 1549.

100. See Duclos, *supra* note 22, at 50; Ettelbrick, *supra* note 25, at 23; Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L. REV. 511, 538-39 (1990); see also LESBIAN AND GAY MARRIAGE, *supra* note 25, at 33 (quoting member of lesbian couple expressing concern that current movement for gay marriage is “taking place in an environment of reactionary traditional values”); Polikoff, *supra* note 25, at 1546 (noting that “[l]ong-term, monogamous couples would almost certainly be the exemplars of the movement” to legalize same-sex marriage). Similarly, arguing in favor of marriage might undermine attempts to sever economic benefits from marital status. See Polikoff, *supra* note 25, at 1549.

101. See OSBORN, *supra* note 25, at 96-97; ROBSON, *supra* note 55, at 126; see also Dunlap, *supra* note 21, at 80 (asserting that marriage option may “bring discrimination and stigma upon those who choose not to marry”); Ettelbrick, *supra* note 25, at 24 (arguing that if state recognizes same-sex marriage, unmarried lesbians and gay men “would clearly face increased sexual oppression”).

102. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 128; Ettelbrick, *supra* note 25, at 25-26; Bull, *supra* note 94, at 40, 45-46; see also ESKRIDGE, *supra* note 2, at 78 (conceding that if state-recognized marriage were available, many gay people would lose interest in lobbying for domestic partner benefits). Married same-sex couples might even come to view unmarried gay men and lesbians “as a threat to their newfound ‘respectability.’” Dalton, *supra* note 21, at 5.

103. See ESKRIDGE, *supra* note 2, at 78-79, 84-85; see also OSBORN, *supra* note 25, at 97 (stating that desire of huge numbers of gay men and lesbians to get married renders debate about appropriateness of marriage “mostly academic”). Similarly, commentators have suggested that the popularity of same-sex wedding ceremonies limits the importance of the debate over the value of same-sex marriage. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 217; Dunlap, *supra* note 21, at 72.

104. See ESKRIDGE, *supra* note 2, at 82.

105. *Id.* at 77.

106. An additional set of arguments in response to the progressive critique stem from the very limited inquiry that the state makes before granting marriage licenses. See *supra* text accompanying notes 34-36. Eskridge makes reference to at least one of these arguments in a footnote, see ESKRIDGE, *supra* note 2, at 83 n.g., but he might have emphasized them more. One argument relates to the way the legal system currently evaluates same-sex couples. In cases in which the strength of a relationship is at issue for purposes of determining property or parental rights, courts have tended to look for evidence

Same-Sex Marriage

intrinsically “rotten” and cites changing attitudes toward inter-racial marriages and marital rape to demonstrate that it is an evolving institution.¹⁰⁷ He also responds to the claim that marriage will tend to assimilate the already-privileged into mainstream society and “leave the least empowered . . .

that the couple displays stereotypical indicia of traditional marriage like monogamy and mingling of financial assets. *See, e.g.,* *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989); *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (Sup. Ct. 1986); *see also* Kovacs, *supra* note 55, at 537-38 (arguing that where courts examine same-sex relationships to determine rights of parties, “those most likely to be successful” asserting rights based on the relationship “are those that most closely resemble heterosexual marriage”). Progressive critics claim that these cases reinforce existing privileges and argue that same-sex couples should not have to demonstrate financial security and sexual exclusivity in order to have the state recognize their existence. *See* ROBSON, *supra* note 55, at 132-33, 139; Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories,”* 4 LAW & SEXUALITY 83, 103-10 (1994).

State-recognized marriage could provide protection for couples who might fare poorly under judicial scrutiny. Couples who wish to have the state view them as a joint entity can marry without inviting intrusive inquiry into their means, mores, or monogamy, thus eliminating some of the privileges created by more fact-sensitive standards. *See* Kovacs, *supra* note 55, at 538. Indeed, less-privileged couples, often unable to afford legal help in drafting wills, durable powers of attorney, or contracts regarding the division and disposition of property, *see supra* note 55, may be more likely to benefit from easy access to the package of rights that attends marriage. *See* ESKRIDGE, *supra* note 2, at 83 n.g.; *see also* Chambers, *supra* note 24, at 489 (“[M]any lower-income same-sex couples will find great benefits in marriage.”); Dunlap, *supra* note 21, at 89 (asserting that multiple oppressions experienced by less privileged individuals may make them more likely to marry); Rosenblum, *supra*, at 111 (“[S]ome queers outside the sexual normality of traditional marriage might nonetheless wish to take advantage of the economic and social benefits.”); Stoddard, *supra* note 55, at 16 (stating that same-sex marriage “would assure that those [gay couples] at the bottom of the economic ladder have a chance to secure their relationship rights, too”). Although some less-privileged individuals might lose eligibility for certain government benefits if they marry, *see* ESKRIDGE, *supra* note 2, at 70; Chambers, *supra* note 24, at 473-74; Tazia Gover, *For Love or Money*, THE ADVOCATE, Jan. 21, 1997, at 66, 68, it seems likely that the added financial benefits of marriage would outweigh these costs for some couples. *See* Chambers, *supra* note 24, at 475-76.

Another similar use of same-sex marriage might appeal to progressive marriage-skeptics. If same-sex marriages are allowed, two women who are living in financially strained conditions could marry to take advantage of the package of benefits that the state, private employers, and insurers provide for married couples and their children. For example, one of the women might have a job that provides comprehensive health care while the other does not. The women need not be in love nor even have any homosexual desires; the state would not ask why they were marrying. While ideally the state would provide sufficiently for all its citizens so that such arrangements would be unnecessary, nothing about the politics of 1997 suggests that this goal will be realized soon. Despite the symbolic questions same-sex marriage raises for progressive critics, it may be the most feasible method of obtaining benefits for poor and working class people. *Cf.* Chambers, *supra* note 24, at 451 (suggesting that marriage skeptics are focused on “the negative meanings they attach to the institution” rather than to the actual legal consequences it would bring about).

Advocates operating in mainstream politics will probably avoid these arguments about use of same-sex marriage by non-traditional couples. The specter of people whose relationships do not much resemble idealized marriage “fraudulently” obtaining a marriage license to obtain the marriage benefits package seems likely to scare a skeptical non-gay audience. Indeed, Eskridge may have chosen not to emphasize this type of argument because, as noted in the introduction, the intended audience of his book is people undecided about same-sex marriage (most likely moderate, non-gay people), not progressive les/bi/gay activists.

107. *See* ESKRIDGE, *supra* note 2, at 76-77. Similarly, he suggests that the evolving nature of family law means that the recognition of same-sex marriage is unlikely to preclude the creation of other legal mechanisms for recognizing relationships that do not take the form of traditional marriage. *See id.* at 79-80.

behind.”¹⁰⁸ Eskridge points out that there is no evidence that privileged couples are more likely than others to marry.¹⁰⁹ Moreover, he argues that married same-sex couples are unlikely to become truly assimilated. First, les/bi/gay life experiences will likely yield different attitudes toward important elements of marriage like division of roles and arrangements surrounding the decision to have children.¹¹⁰ Second, these couples are unlikely to become complacent about their rights because the short-term consequence of state recognition is more likely to be backlash than social acceptance.¹¹¹

Unfortunately, the responses to the concerns about privilege are rendered a bit less convincing because arguments in the book aimed at the public at large, particularly the focus on “civilization,” can be read to endorse some of the aspects of marriage that most worry the marriage-skeptics. Part III will address this problem and some of the other difficulties attendant upon trying to persuade the non-gay majority while respectfully representing the diverse views of the gay community.

II. RESPECTFUL REPRESENTATION AND SAME-SEX MARRIAGE

The concern about “respectful representation” that is the focus of this Review is in no way raised by the tone of Professor Eskridge’s writing or by his descriptions of opposing viewpoints. His treatment of those with whom he disagrees is indeed respectful in the sense that he takes them seriously on their own terms and he does not make facile jokes at their expense. He clearly understands that the effectiveness of advocacy for an unpopular group is likely to be enhanced by careful, civil discourse.¹¹² Despite its careful, positive tone, however, the book contains some arguments that may trouble same-sex marriage advocates concerned with fairly representing the wide range of views about marriage found in the gay community. The subsequent discussion explores some of the tensions between representation and advocacy raised by the book’s approach to the same-sex marriage debate.

A. *The Rhetoric of “Civilization”*

An important element of the book is the rhetoric of “civilization.”¹¹³ The use of this rhetoric might well be seen as an effective tactic in the quest for state recognition of same-sex marriage. Many non-gay people share a stereotype of les/bi/gay people as sex-obsessed and promiscuous and therefore

108. *Id.* at 81 (referring to Paula Ettelbrick’s argument).

109. *See id.* at 82-83, 83 n.g.

110. *See id.* at 81.

111. *See id.*

112. This is not to suggest that angry protest and direct action are unimportant or counter-productive, but merely that civil discourse is one particularly useful tactic.

113. *See supra* text accompanying notes 58-67.

Same-Sex Marriage

incapable of forming lasting relationships.¹¹⁴ Instead of engaging in quixotic direct attacks on this deeply-held belief, advocates who talk of civilization focus on the role marriage plays in encouraging conformity to mainstream values involving commitment and stability.¹¹⁵ This approach is likely to appeal to some mainstream non-gay people because it both affirms their values and suggests that the gay community needs their help to achieve conformity to those values. However, this appeal to mainstream values may disturb les/bi/gay people who are already uncertain about the utility of marriage.¹¹⁶

First, this strategy apparently concedes that sexual activity outside of marriage is “uncivilized” and therefore inappropriate.¹¹⁷ It can easily be read as adopting the model of monogamy as a necessary predicate for serious relationships.¹¹⁸ Although some les/bi/gay people may believe in that model,¹¹⁹ others feel strongly that society simply should have no say at all in their choices about sexual activity.¹²⁰ Certainly some activists will view the use of civilization rhetoric as an endorsement of Puritan values and a rejection of a celebration of the joy of sharing pleasure that they view as central to their gay identities.¹²¹

In addition, civilization rhetoric reinforces the tendency of society to marginalize the unmarried.¹²² Providing many benefits exclusively to married couples may seem more justified if couched in terms of rewarding those who have adopted civilized norms and punishing those who have rejected them. Civilization rhetoric is thus likely to arouse the fears of marriage-skeptics that state recognition will further stigmatize those who choose not to marry and will encourage those who do marry to distance themselves from the “uncivilized” people who do not.¹²³

114. See *supra* note 64.

115. See ESKRIDGE, *supra* note 2, at 114-15.

116. See SULLIVAN, *supra* note 25, at 112 (noting that progressives may oppose arguments for same-sex marriage that celebrate traditional families).

117. Eskridge is self-consciously playing with the multiple meanings of “civilize.” See *supra* text accompanying note 59. Given the non-gay belief that les/bi/gay people are sex-crazed and promiscuous, see *supra* note 61, it seems likely that readers usually will interpret the term to mean “tame” or “domesticate.” The analysis in the next two Sections assumes that this interpretation predominates.

118. See ESKRIDGE, *supra* note 2, at 9-10 (suggesting that it would be beneficial for gay men to replace “sexual variety” with “connection and commitment”).

119. See SULLIVAN, *supra* note 25, at 183 (“[M]any lesbian and gay male relationships are virtual textbooks of monogamous commitment.”).

120. See ROBSON, *supra* note 55, at 64 (stating lesbians “want to be able to say that our sexuality is no one’s business”); *id.* at 70 (arguing discourse about lesbian sexuality must “not be defined by the terms set by the dominant legal culture”).

121. See Bull, *supra* note 94, at 40, 45 (quoting author of lesbian erotica to this effect); Michael McAllister, *Author Marshals Arguments for Same-Sex Marriage*, STAR-TRIB. (Minneapolis-St. Paul), June 30, 1996, at 17F (arguing that “civilization” argument “denies the liberating aspects of sexual freedom in the 1970s”).

122. See *supra* text accompanying note 98.

123. See *supra* text accompanying notes 98-102.

Some members of the gay community may eschew marriage because they disapprove of its patriarchal roots or because they reject monogamy.¹²⁴ Although explicitly acknowledging that marriage is not for everyone,¹²⁵ the book's rhetoric leaves those who choose not to marry in the shadow world of the uncivilized. It implicitly rejects the life choices of many in the community and is likely to confirm the fear that marriage will separate the community into "good gays" and "bad gays."¹²⁶ Widespread use of this rhetoric could alienate marriage-skeptics and make future joint political action more difficult.¹²⁷ A number of the important arguments that support same-sex marriage might be seen as related to the book's civilization claims. These include the desire of many gay and lesbian couples to wed and the variety of intangible benefits marriage may provide for them.¹²⁸ Advocates concerned about respectful representation may wish to think hard about ways to make these arguments without employing rhetoric that suggests that all les/bi/gay people want or need to conform to traditional sexual mores.

More generally, respectful representation of a diverse community requires resisting the temptation to overstate community support for contested positions, even if unqualified assertions of those positions might appear to be more powerful arguments. For example, the unqualified use of patriotic or pro-family rhetoric¹²⁹ may be helpful when lobbying Congress, but is likely to alienate individual gay men and lesbians whose treatment by either the government or their biological families has given them powerful reasons to disagree. Advocates may have difficulty deploying the rhetoric of civilization without implicitly overstating the support for the mainstream values that such rhetoric suggests.

124. See *supra* text accompanying notes 92-93.

125. See ESKRIDGE, *supra* note 2, at 70.

126. See *supra* text accompanying note 102.

127. The concern about marginalization and alienation here is narrowly directed at the civilization rhetoric. Eskridge himself took the trouble to lay out and address the arguments of the marriage-skeptics and has displayed concern about diversity issues within the gay community in other writing. See William N. Eskridge, *Outsider-Insiders: The Academy of the Closet*, 71 CHI.-KENT L. REV. 977, 986 (1996) (discussing possibility that white, gay men can write from perspective of insider by hiding their sexual orientation in way that lesbians, bisexual women, and gay people of color cannot).

128. See *supra* text accompanying notes 50-53.

129. See, e.g., ESKRIDGE, *supra* note 2, at 10 ("Notwithstanding our ill treatment in the past, we love this country . . ."); *id.* at 12 ("Families are as heterogeneous as they are wonderful . . ."); *id.* at 13 (referencing "[t]he civilizing influence of family values"); *id.* at 183 ("Most same-sex couples . . . are nice people who share America's values.").

A further concern for progressives might be Eskridge's invocation of Justice Scalia's call for formal equality. See *id.* at 190 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1775 (1989)). After all, Justice Scalia has used this argument to attack programs like affirmative action that many progressives feel are necessary to achieve substantive equality. See, e.g., *Adarand Constructors v. Peña*, 115 S.Ct. 2097, 2118 (1995) (Scalia, J., concurring).

Same-Sex Marriage

B. *Ritual v. Recognition*

In his first chapter, Eskridge describes at some length the romance between two of the plaintiffs in *Baehr v. Lewin*.¹³⁰ After describing the scene in which one of the women proposes and gives the other a ring to symbolize commitment, he continues:

At this point most couples would announce their engagement to their families, friends, and coworkers. Most couples would set a date for the ceremony and obtain a marriage license. These steps were not possible for Nina and Genora. Lesbian and gay couples are not allowed to marry in the United States. Still, [they] were prepared to consider themselves committed to each other.¹³¹

This characterization of the situation of the two women is misleading. Many same-sex couples today get married in the sense that they have wedding ceremonies,¹³² often blessed by clergy,¹³³ and then consider themselves to have made a permanent commitment to each other.¹³⁴ The only step same sex couples cannot take is to obtain a marriage license and, with it, state-recognition and the marriage benefits package.

The difference between the ritual of marriage and the state's recognition of marriage is not highlighted in the book.¹³⁵ This Section will address the

130. ESKRIDGE, *supra* note 2, at 1-3.

131. *Id.* at 2.

132. See, e.g., LESBIAN AND GAY MARRIAGE, *supra* note 25, at 99-237 (relaying interviews with same-sex couples who have had marriage ceremonies); OSBORN, *supra* note 25, at 96 (noting that phenomenon of marriage ceremonies "has now become widespread among both gay women and men"); Dunlap, *supra* note 21, at 72 (describing marriage ceremony in conjunction with 1987 March on Washington that "drew participation by thousands of lesbians and gay men"); Charles Isherwood, "With This (Freedom) Ring, I Thee Wed," THE ADVOCATE, Sept. 6, 1994, at 59, 60 (quoting filmmaker stating "I've filmed lots of weddings for gay, lesbian, and bisexual couples"); April Witt, *Same-Sex Couples to Say 'I Do' in Love Celebration*, MIAMI HERALD, Feb. 15, 1997, at 1G (describing planned mass wedding for 150 same-sex couples); see also TESS AYERS AND PAUL BROWN, THE ESSENTIAL GUIDE TO LESBIAN AND GAY WEDDINGS (1994) (providing guidance for couples planning same-sex wedding ceremonies).

133. See ESKRIDGE, *supra* note 2, at 46-48; LESBIAN AND GAY MARRIAGE, *supra* note 25, at 5-6, 241-79 (relaying interviews with clergy of various denominations who preside over religious ceremonies sanctifying same-sex unions).

134. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 235 (relaying lesbian's characterization of her marriage as "a commitment until we die"); SULLIVAN, *supra* note 25, at 183 ("[M]ore and more [same-sex couples] have committed themselves to one another for life."); Bull, *supra* note 94, at 40, 42 (describing decision by gay male couple to hyphenate their last names after commitment ceremony to symbolize "a lifetime commitment to each other").

135. Eskridge notes the distinction in the context of exploring same-sex unions in other cultures. See ESKRIDGE, *supra* note 2, at 17. He also briefly describes evidence of the existence of long-term same-sex relationships in the last 30 years but does not mention marriage rituals in this context. See *id.* at 45. Finally, in his discussion of the role of religion in the debate, he describes religious same-sex union ceremonies. See *id.* at 46-48. Although he suggests that these religious unions may have the mutual civilizing functions he attributes to same-sex marriage generally, see *id.* at 48, the book nowhere discusses the significance of rituals, religious or otherwise, to the present debate about same-sex marriage in the United States.

significance of this difference. First, it will recount some of the benefits same-sex couples receive from participating in private rituals. Then it will explain why state recognition remains important despite the prevalence of these rituals. Finally, it will discuss the tactical implications of choosing to emphasize these rituals in the current public debate.

The book's failure to focus on ritual is somewhat surprising because participants view their ceremonies as conferring some of the "civilizing" benefits Eskridge sees as important.¹³⁶ For example, the formality of the occasion helps emphasize the seriousness of what the couple is undertaking.¹³⁷ Having gone through a significant ceremony, the participants may treat the relationship as more permanent, feel some reluctance to walk out on a commitment made so publicly, and work harder to maintain it through troubled times.¹³⁸ The ritual also sends the political message to family and friends (and others made aware of the marriage) that the couple considers their relationship equivalent to that of other married couples.¹³⁹

Despite the beneficial effects of private ceremonies, state recognition remains an important issue. First, it may strengthen the positive effects the marriage ceremony is likely to have on the stability of the relationship.¹⁴⁰ It

136. At one point, he lists characteristics of "marriage" that help strengthen the relationship between the couple: a high level of commitment, a link to the historical community, collective participation of friends and family, and the symbolism and gravity of the ceremony. *See id.* at 79. Interestingly, all of these characteristics can flow from a wedding ritual even if the state does not recognize it.

137. *See id.* at 79 ("The pomp, gravity, and religiosity of marriage . . . lend the institution an air of sanctification that is meaningful to its participants."); Deb Price, *What God Has Joined Together Let No One Put Asunder*, STAR TRIB. (Minneapolis-St. Paul), Nov. 29, 1995, at 13A (quoting lesbian participant in marriage ceremony as stating: "I feel like, yes, she said this in front of everybody so it must really be true.").

138. The couples themselves perceive an added permanence. *See, e.g.*, LESBIAN AND GAY MARRIAGE, *supra* note 25, at 165 (quoting lesbian who participated in a marriage ceremony as stating that "[t]he wedding made it more concrete for me that problems get worked out, problems don't get pushed away"); *id.* at 169, 170 (quoting gay man who participated in marriage ceremony saying his wedding made him feel "like we weren't just living together anymore;" his spouse added "when it's done in front of people, it makes you think about not just walking out."); *id.* at 217 (quoting lesbian who participated in marriage ceremony claiming that having had wedding and "having said 'for better and for worse'" helped couple go through difficult events in their lives). The couples' families also believe the relationship to be more permanent. *See, e.g.*, Isherwood, *supra* note 132, at 61 (noting that authors of book on same-sex weddings were "impressed by the number of couples who attested to the new respect their wedding brought from previously skeptical family members"); LESBIAN AND GAY MARRIAGE, *supra* note 25, at 178 (stating that lesbian who participated in marriage ceremony believes her parents have "a lot more confidence" in her relationship since wedding).

139. *See* ESKRIDGE, *supra* note 2, at 48; LESBIAN AND GAY MARRIAGE, *supra* note 25, at 68; *see also* OSBORN, *supra* note 25, at 96 (marriage ceremonies "teach about the true texture of our relationships"); LESBIAN AND GAY MARRIAGE, *supra* note 25, at 161 (lesbian who participated in marriage ceremony suggests that using word "marriage" gives her relationship "more validation"); *id.* at 178 (nephew of lesbian who participated in marriage ceremony says that she is "just as married as anyone else").

140. *See* ESKRIDGE, *supra* note 2, at 71 (suggesting that legal relationship signals "higher level of commitment" than unrecognized marriage); Alan Ryan, *No Easy Way Out*, NEW YORKER, Sept. 11, 1995, at 87, 90 ("the public and official nature of marriage" is helpful in "sustaining" stable relationships).

Same-Sex Marriage

may encourage friends and family to support the relationship and take it more seriously.¹⁴¹ In addition, the financial and emotional costs of divorce proceedings may encourage couples to try harder to work out their problems and stay together.¹⁴² More importantly, state recognition provides access to the marriage benefits package.¹⁴³ Even some same-sex couples who would not participate in any form of public marriage ceremony, often because of discomfort about some of the symbolism of marriage, say they would enter a state recognized marriage to obtain the attendant legal protections and economic benefits.¹⁴⁴ Finally, state recognition is seen by many same-sex couples as providing an endorsement of their relationships.¹⁴⁵

Given the additional benefits that arise from state recognition, advocates may feel that discussing private ceremonies constitutes an unnecessary distraction. Focusing on rituals may minimize or mask the importance of the state's refusal to recognize the marriage. Non-gay people might incorrectly assume that state benefits flow from the wedding or might decide that state recognition is unimportant because the members of the couple see themselves as married even without a license.¹⁴⁶

In the alternative, advocates might choose to downplay marriage rituals as part of a tactical decision to characterize the government's refusal to recognize same-sex marriage as unwarranted interference with the "right to marry." Invoking the language used in constitutional marriage cases like *Loving v. Virginia*¹⁴⁷ and *Zablocki v. Redhail*¹⁴⁸ obviously will facilitate the application of substantive due process jurisprudence. Focusing on private ceremonies may confuse the legal issue by provoking the question of why married couples need a "right to marry."

However, claiming that the state denies same-sex couples the "right to marry" may be literally accurate, but incomplete. Although the U.S. armed forces and other government agencies may fire people who participate in same-

141. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 64 (noting belief of member of gay male couple that legalization would "lend some social support for same-sex relationships to stay together"); *id.* at 235 (citing lesbian participant in marriage ceremony as suggesting that legalization would make it easier for people to condone same-sex marriage openly); SULLIVAN, *supra* note 25, at 183-84 (suggesting that legal gay marriages could help bring gay people closer to their biological families).

142. See ESKRIDGE, *supra* note 2, at 71-72; see also KRAUSE, *supra* note 35, at 71 (noting that divorce procedures make ending marital relationships more costly than ending non-marital cohabitation).

143. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 143, 146, 235 (stating that gay men and lesbians who have participated in private marriage ceremonies say they would get a state marriage license, if it were available, in order to garner legal and financial benefits); OSBORN, *supra* note 25, at 97 (stating that many same-sex couples desire to marry in part for economic benefits).

144. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 7, 41, 76.

145. See *infra* text accompanying notes 159-160. The question of whether the state is in fact providing this endorsement is explored in Section II.C.

146. See Schachter, *supra* note 25, at 725-30 (expressing concern that same-sex marriage ceremonies portrayed in television sitcoms will create these perceptions among viewers).

147. 388 U.S. 1, 12 (1967).

148. 434 U.S. 374, 383 (1978).

sex marriage rituals,¹⁴⁹ to my knowledge, no state has actually tried to ban the ceremonies themselves.¹⁵⁰ Thus, describing the existence of private marriage ceremonies, while stressing their limitations, may more accurately portray the situation of same-sex couples. More importantly, downplaying private marriage ceremonies may marginalize the many same-sex couples who participate in them. In particular, claiming that state recognition is necessary to achieve the civilizing effects of marriage trivializes the long-term commitments many gay and lesbian couples have achieved without any help from the state.¹⁵¹ This is especially true because, as noted above, these couples view their private ceremonies as conveying many of the benefits of recognized marriages. To ensure respectful representation, advocates for same-sex marriage should take into consideration the importance that couples place on private rituals.

In addition to describing the actual experiences of same-sex couples accurately and respectfully, emphasizing the significance of private marriage rituals may have some tactical benefits. Suggesting that same-sex couples need the civilizing effects of state-recognized marriage may simply reinforce the stereotype that les/bi/gay people are incapable of love and commitment on their own.¹⁵² By contrast, arguing that the state should recognize *existing* same-sex marriages helps make several useful points. First, it emphasizes that many gay and lesbian couples already are in long-term intimate relationships.¹⁵³ Professor Dalton has noted that this "is an important message to put before the

149. See *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995) (ruling on withdrawal of employment offer by state Attorney General after he learned of prospective employee's plan to participate in same-sex marriage ceremony); *McConnell v. Anderson*, 451 F.2d 193, 194 (8th Cir. 1971) (ruling on withdrawal of employment offer by state university library after prospective employee "publicly applied for a marriage license" with another male); 32 C.F.R. Pt.41, App. A., Pt.1.H.(c)(3) (making entering or attempting to enter same-sex marriage presumptive grounds for separation from armed forces).

150. Presumably, direct state interference with a same-sex marriage ritual would raise serious issues regarding freedom of speech, freedom of association, and the free exercise of religion. See *Shahar*, 70 F.3d at 1221-25 (finding state's withdrawal of job offer because of participation in religious same-sex ceremony subject to strict scrutiny due to interference with both "intimate association" and "expressive association").

151. For example, Eskridge claims that a lesbian couple's marriage proposal and acceptance signals "a higher level of commitment as a matter of words but not as a matter of action, because the two cannot yet be legally bound in matrimony." ESKRIDGE, *supra* note 2, at 71. The implication that the couple's private marriage ceremony would be merely "a matter of words" is disrespectful. Similarly, as another reviewer of the book noted, "such a statement as 'gay men realize that they tend to lose their balance and succumb to private sirens if they are not socially and even legally constrained' amazes me in its sweep and arrogance, especially when I think of friends who have been in long-term relationships for the better part of a decade." Chuck Small, *The Divided Union: Why Gay Marriage Is Not a Religious Matter, but a Constitutional One*, NEWS & OBSERVER, (Raleigh, N.C.), June 2, 1996, at G4 (quoting ESKRIDGE, *supra* note 2, at 83).

152. See *supra* note 61.

153. See Duclos, *supra* note 22, at 42; see also Gallagher, *supra* note 16, at 26 (reporting statement of Evan Wolfson that "[t]he battle over the freedom to marry offers unprecedented opportunity to talk about lesbian and gay families"); cf. LESBIAN AND GAY MARRIAGE, *supra* note 25, at 4 (noting that clergy who perform both same-sex and different-sex marriage ceremonies report that "same-sex couples tend to have been together for a much longer time [before the ceremony] than the straight couples").

Same-Sex Marriage

American public, because to most of straight society, lesbian and gay relationships are invisible.”¹⁵⁴ This message, in turn, helps counter the stereotype of the sex-obsessed, promiscuous homosexual.¹⁵⁵ Moreover, this focus may help deflect the commonly expressed concern that same-sex marriage is unprecedented and therefore inappropriate.¹⁵⁶ Asking for the “unprecedented” may scare people because it conjures up images of radical change. Merely asking for recognition of an existing relationship should trouble them less because it suggests that no major changes to the status quo are necessary.¹⁵⁷ Finally, at a time when faith in the government is very low, the words of late activist Tom Stoddard may strike a chord with many people: “I am party to a gay union; regardless of what the State of New York or the federal government chooses to call our relationship, my spouse and I call it a ‘marriage.’”¹⁵⁸ The suggestion that, once again, the government is stupidly refusing to recognize reality could have great rhetorical power today.

In sum, same-sex marriage advocates may wish to reassess Eskridge’s decision not to emphasize the difference between ritual and recognition. People may differ in their perception of whether the tactical advantages of emphasizing private marriage ceremonies outweigh the risks. The literature on the same-sex marriage debate has not focused on this issue, so further conversation is needed. This failure to discuss the significance of private wedding ceremonies ignores an important reality about same-sex marriages and prevents further exploration of its possible tactical uses.

C. *The Denial of Endorsement*

A final concern for advocates relying on the book involves the argument that the state does not endorse homosexual relationships if it recognizes same-sex marriage.¹⁵⁹ Because fear of the appearance of state endorsement is such an important part of the rhetoric of same-sex marriage opponents,¹⁶⁰ attacking

154. Dalton, *supra* note 21, at 4.

155. See Fajer, *supra* note 22, at 568-70 (arguing that presenting information about long-term same-sex relationships helps break down this stereotype).

156. See *supra* text accompanying note 74.

157. See SULLIVAN, *supra* note 25, at 183.

158. Stoddard, *supra* note 20, at 2. Other participants in same-sex marriage rituals express similar sentiments. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 143, 161 (reporting statements of lesbians who participated in marriage ceremony that, “I don’t see how third-party recognition would make us any more married than we already are” and “I consider myself married”); *id.* at 188 (reporting that gay man who participated in marriage ceremony says that despite the absence of license, “I consider that we had a wedding. We took the same vows and the same commitments as heterosexuals take”); *id.* at 235 (reporting that lesbian who participated in marriage ceremony states, “whether the United States recognizes it or not, this is a marriage”); Witt, *supra* note 132, at 1G (reporting that pastor who performs same-sex weddings states, “no matter what society or the government might say, we’re going to do weddings”).

159. See *supra* text accompanying notes 34-36.

160. See ESKRIDGE, *supra* note 2, at 104-05; see also SULLIVAN, *supra* note 25, at 97-102 (describing conservative belief that it is important that state express public disapproval of homosexuali-

their factual premise is a tempting tactic. However, advocates may wish to resist the temptation for two reasons. First, the argument is inconsistent with the beliefs of many les/bi/gay people. Second, the argument is likely to be ineffective because, particularly in the context of a discourse of equality, it simply will not be believed.

Many les/bi/gay people express the sentiment that they want their relationships viewed as equivalent to those of heterosexual couples.¹⁶¹ They want state-recognized marriage precisely because they believe that the resulting equal treatment provides endorsement or legitimation of their relationships.¹⁶² Respectful representation suggests forgoing the argument that the state's endorsement is not at issue where in fact it is precisely what many same-sex couples are seeking.

Moreover, the book's logic—there is no endorsement because the state effectively does not care who receives a marriage license—is tenuous.¹⁶³ That the state asks few questions before recognizing a marriage does not mean that the ones it does ask are unimportant. These questions generally address the participants' age, sex, present marital status, and familial relationship to each

ty); William Bennett, *Leave Marriage Alone*, NEWSWEEK, June 3, 1996, at 27 ("the legal union of same-sex couples would . . . endorse practices which are completely antithetical to the tenets of all of the world's major religions"); Gallagher, *supra* note 16, at 26 (noting statement of CNN analyst William Schneider that "most Americans" reject same-sex marriage because "[i]t's giving a legal endorsement to homosexuality"); Jerry Gray, *House Passes Bar to U.S. Sanction of Gay Marriage*, N.Y. TIMES, July 13, 1996, at 1, 8 (quoting Republican Congressman after passage of DOMA in House, saying that America would not say "that homosexual marriages are as important as, and rise to the level of the legal and moral equivalency of, heterosexual marriage"); Elizabeth Hall, *Young Leader Gives Talk, Rowland Speaks at Boys State*, HARTFORD COURANT, June 26, 1996, at B1 (quoting Connecticut Governor John Rowland objecting to signing of gay pride proclamation referring to same-sex marriage, saying "I don't think the state has to endorse that"); Ryan, *supra* note 140, at 90 ("a substantial part of the American people would go to great lengths to deny" gay people "legitimization" of same-sex marriage); Carl Weiser, *Hawaii Ruling Will Drag Gay Marriages into National Fight*, ITHACA J., Jan. 11, 1996, at 1A, 5A (quoting representative of Family Research Council as saying that same-sex marriage is "an ideological invention designed . . . toward the goal of government-enforced acceptance of homosexuality").

161. See, e.g., LESBIAN AND GAY MARRIAGE, *supra* note 25, at 68; Bull, *supra* note 94, at 40, 42; see also SULLIVAN, *supra* note 25, at 181 ("The issue [in the debate over state-recognition] is whether these identical relationships should be denied equal legal standing."); Duclos, *supra* note 22, at 48 (noting existence of this argument); Polikoff, *supra* note 25, at 1549 (same).

162. See LESBIAN AND GAY MARRIAGE, *supra* note 25, at 83-84, 200; SULLIVAN, *supra* note 25, at 179, 186; see also OSBORN, *supra* note 25, at 98 (stating that lesbians and gay men "hunger . . . for acknowledgement of our relationships"); Dalton, *supra* note 21, at 7 (stating that many people desire marriage because it "constitutes an affirmation by the state, a larger-than-life acknowledgement of one's relationship, a seal of approval"); Ettelbrick, *supra* note 25, at 24 (characterizing state-recognized marriage for some same-sex couples as "the final acceptance, the ultimate affirmation of identity"). Because of the belief that equality validates the relationships, some gay people reject the movement to obtain domestic partner benefits. "Domestic-partners legislation makes us an officially sanctioned class of oddities and freaks." Berresford, *supra* note 25, at 107; see also ESKRIDGE, *supra* note 2, at 79, 122 (suggesting domestic partnership arrangements are insufficient because they are not equal to marriage).

163. See *supra* text accompanying notes 34-36.

Same-Sex Marriage

other,¹⁶⁴ neatly circumscribing pedophilia, homosexuality, polygamy, and incest.¹⁶⁵ Excluding just these few relationships from the privileges of marriage demonstrates that the culture views them as particularly significant.¹⁶⁶ Removal of homosexuality from this list might not constitute endorsement of any particular same-sex marriage, but surely it is fair for opponents to view the state's decision to eliminate a previously important taboo as implicitly acknowledging that same-sex relationships are substantially similar to traditional marriages.¹⁶⁷ If a state changed the law to allow incestuous or polygamous marriages, it would be widely viewed as legitimating these relationships.

The nature of the discourse about same-sex marriage also will undermine the claim that recognition does not constitute endorsement. The equality arguments that the book heavily emphasizes¹⁶⁸ necessarily assume that same-sex couples are similarly situated to people in licensed marriages.¹⁶⁹ The state's adoption of these arguments almost certainly constitutes a statement that it views gay marriages as sufficiently like non-gay marriages that they must be treated alike. Calling a new arrangement "equal" to a traditional institution that is highly valued in the culture does not seem very different from endorsing it. Although advocates could try to quibble about the meaning of "endorsement" in this context, even many gay-friendly commentators concede that recognizing same-sex marriage would constitute some form of legitimation of lesbian and

164. See KRAUSE, *supra* note 35, at 43-51. Generally, the only other limit on marriage is that the participants be of sound mind. See *id.* at 52.

165. Eskridge's claim that, "gay people constitute virtually the only group in America whose members are not permitted the partner they love," ESKRIDGE, *supra* note 2, at 12, needs to be seen in the context of the other groups about whom the statement is true: people who "love" young children, their close relatives, or other people's spouses. Eskridge claims that pedophiles can marry the objects of their affection if they are "willing to go to some trouble." *Id.* at 64. Most of the laws he relies on, however, require court or parental approval for a marriage between an adult and someone under 18 and entirely bar marriages involving children under 14. See *id.* at 64, 146. The very rare case in which an adult manages to convince a parent or judge to allow marriage with a 15-year old hardly constitutes generalized permission for pedophiles to marry the people they "love."

166. Cf. Robson & Valentine, *supra* note 100, at 511, 528-29 (noting "state's scrupulous patrolling of the boundaries of the institution" of marriage).

167. See, e.g., Bettina Boxall, *And Now the Bride May Kiss the . . . Bride*, MIAMI HERALD, April 4, 1995, at E1 ("[I]f gay men and lesbians gain the right to marry . . . they will win a hugely symbolic stamp of mainstream legitimacy."); *A Hollow Defense*, MIAMI HERALD, Sept. 16, 1996, at 8A ("Those who have pushed for recognition of gay marriages clearly want the symbolism of equal footing for their relationships."); Andrew Koppelman, *No Fantasy Island*, NEW REPUBLIC, Aug. 7, 1995, at 22, 24 ("[W]hen states celebrate marriages, they are seen as sanctifying certain sexual relationships.").

168. See, e.g., ESKRIDGE, *supra* note 2, at 10-11, 62-66, 188-91; see also *id.* at 123-82 (elaborating constitutional arguments that rely primarily on Equal Protection Clause). Eskridge also argues that "America's denial of marriage to same-sex couples . . . formally announces . . . that gay couples are so 'inferior and degraded' that they cannot participate in an institution that welcomes heterosexual felons and fiends." *Id.* at 189. This argument could fairly be used to support the proposition that recognition of same-sex marriage "formally announces" that the state no longer believes same-sex couples are "inferior and degraded."

169. If same-sex couples were not similarly situated, the state would have no duty to treat them equally.

gay relationships.¹⁷⁰ Advocates for same-sex marriage are likely to rely heavily on equality arguments. If they try simultaneously to argue that state recognition does not constitute endorsement, they are simply unlikely to be believed.¹⁷¹

Thus, if advocates deny the endorsement element of state-recognized same-sex marriage, they disavow the real views of some members of the gay community and risk seeming so disingenuous that their credibility will be undermined generally. Advocates may prefer to respond to opponents' endorsement concerns by simply arguing that the state *should* endorse same-sex marriage. They then can utilize Eskridge's well-constructed arguments that many same-sex relationships are similar to traditional marriages and that the benefits that accrue to the couple and to society from different-sex marriage will flow from same-sex marriage as well.¹⁷² Arguing that equality does not imply "endorsement" seems likely, at best, to yield extended wrangling about the meaning of that term. Focusing instead on providing information about the lives and needs of same-sex couples seems a more effective use of time.

III. CONCLUSION

Advocates for same-sex marriage are currently struggling to craft arguments that will be persuasive to the non-gay majority. However, perceived persuasiveness outside the community cannot be the only criteria for selecting and framing arguments. The way members of the community treat each other in the process also is important.¹⁷³ The non-gay public will view les/bi/gay advocates for same-sex marriage as speaking on behalf of the gay community. This representative role does not mean that advocates must limit themselves to arguments with which all members of the community are comfortable. Unless people continue to speak out even when there is intra-community disagreement, there can be no political action.¹⁷⁴ However, their role should make advocates sensitive when they speak to the wide array of viewpoints held by their implicit constituency to engage in "respectful representation." Advocates concerned with respectful representation will try to craft their arguments in

170. See, e.g., Chambers, *supra* note 24, at 450; Duclos, *supra* note 22, at 45; Kovacs, *supra* note 55, at 539. A variation on this argument is the claim that the failure to recognize same-sex marriage sends the message that intimate lesbian and gay relationships are unimportant or even non-existent. See Dalton, *supra* note 21, at 7-8; Stoddard, *supra* note 55, at 18.

171. See Lewis, *supra* note 20, at 14 (rejecting "no endorsement" argument).

172. See ESKRIDGE, *supra* note 2, at 109-11.

173. See OSBORN, *supra* note 25, at 188 ("In all our dealings with each other, we must lead from a place of respect at all times."); Dunlap, *supra* note 21, at 91 (suggesting that regardless of outcome of struggle over recognition of same-sex marriage, "[h]ow we conduct ourselves in the process, how we treat one another, and what we manage to learn may be what we win").

174. See Dalton, *supra* note 21, at 6.

Same-Sex Marriage

ways that do not unduly marginalize or disavow positions held by many in their imputed constituency.

Respectful representation has costs. Arguments that carefully avoid overstatement and marginalization may well be less persuasive in some circumstances. Moreover, respect may simply not significantly lessen the divide between those who wish to join society as it is and those who wish to remake it into something different.¹⁷⁵ However, respectful representation may also have long-term benefits for the gay community. Respectful relations regarding contested issues make possible future cooperation on other issues on which more people agree. Respect makes possible future discussions which reformulate contested issues or develop new strategies in ways that bring more of the gay community together. Activists frustrated by deep disagreements about strategy may find it all too easy to suggest that muzzling a significant part of the community is a necessary strategy for achieving gay rights.¹⁷⁶ Instead, advocates must find ways to communicate with one another and to hear the rich chorus of voices in which their community speaks.

Much advocacy—legal, political and grass roots—lies ahead before state-sanctioned same-sex marriage is a reality throughout the United States.¹⁷⁷ In *The Case for Same-Sex Marriage*, Professor William Eskridge provides a good and thorough addition to the public conversation about the issue and an immensely useful resource for the many lesbians, bisexuals, and gay men who will advocate for state-recognized marriage during the next few years. Most of its major points constitute intelligent advocacy that generally treats the varied views of the gay community fairly. The analysis here has suggested ways that advocates may wish to modify some of the book's arguments in order better to meet the goals of effective advocacy and respectful representation. Although many in the gay community are likely to disagree with some of Professor Eskridge's tactical choices, his thorough work, clear writing, and respectful tone should be models that advocates can agree to emulate. And although many advocates also will disagree with the tactical suggestions made here, this Review primarily is intended to encourage further conversation on how best to undertake the difficult tasks of representing a highly diverse community of lesbians, bisexuals, and gay men in general, and of selling same-sex marriage to a resistant public in particular.

175. See *supra* note 25.

176. See, e.g., Berresford, *supra* note 25, at 105-06 (wishing images of gay people "demanding government favors or living a hedonistic 'gay lifestyle' . . . would evaporate").

177. See Wolfson, *supra* note 16, at 612-13.