

## HOW GOVERNMENT UNINTENTIONALLY INFLUENCES CULTURE (THE CASE OF SAME- SEX MARRIAGE)

*William N. Eskridge, Jr.\**

I agree with many of the points made by the previous speakers. In such cases, one has two choices: sit down, or synthesize and expand upon the prior observations. Being a law professor disposes me not to relinquish my time entirely, and so I suggest a synthesis of what you just heard, particularly from the panelists on my far left—Mr. Romero,<sup>1</sup> Mrs. Schlafly,<sup>2</sup> and Dr. Murray.<sup>3</sup>

Closely following Mrs. Schlafly, I believe there is a strong tendency in our country for each side in a deep, values-based cultural conflict to see the government as a needed ally in advancing its normative agenda. We saw this in the debate between segregationists and civil rights advocates. We saw this in the battle between wets and drys a hundred years ago. We have seen this in the pro-life versus pro-choice abortion wars. And we are seeing this now in the culture clash between gay rights and traditional family values.

Possibly going beyond Mrs. Schlafly, I should add that it is inevitable that government will become involved in larger normative debates because the modern administrative state is teacher, police officer, and opinion leader. We are not only educated (less so than before) in the public schools, but the government is the locus of advertising campaigns that inundate us each day with information and norms. The government, moreover, is a police officer, having a monopoly on legitimate coercion. If one side gains the upper hand politically, the government is tempted to force conformity or provide incentives for conformity. Finally, the government sees itself often as an opinion leader. Symbolic politics is often about the value of govern-

---

\* Professor William N. Eskridge is the John Garver Professor of Jurisprudence at Yale Law School. Professor Eskridge originally delivered these remarks during Showcase Panel IV, entitled *The Role of Government in Defining Our Culture*, at the Federalist Society's 2006 National Lawyers Convention, on Saturday, November 18, 2006, in Washington, D.C.

<sup>1</sup> See Anthony D. Romero, "*Limited Government*" and the *Betrayal of American Values*, 102 NW. U. L. REV. 487 (2008).

<sup>2</sup> See Phyllis Schlafly, *How the Government Influences Our Culture*, 102 NW. U. L. REV. 491 (2008).

<sup>3</sup> See Charles Murray, *The (Im)proper Role of Government in Defining Our Culture*, 102 NW. U. L. REV. 483 (2008).

ment endorsement to carry normative weight, or at least be a signal of higher status for the victors. This seems to me the deep truth that you all have identified.

On the other hand, Dr. Murray is right to say that direct governmental intervention into these deep normative conflicts does not work. I should go further. Not only do governmental interventions not have the intended effects, but such interventions are often counterproductive. The government produces effects that are not sought after, even by the proponents. Take the anti-same sex marriage initiatives that we have seen in recent years. As I understand it, the stated goal of these initiatives is to strengthen “traditional” man-woman marriage in our country.

The anti-same sex marriage movement has run into three types of problems, and all three of them undermine rather than advance the stated goal.

The first is the *problem of the distorted normative agenda*. That is, political campaigns investing all sorts of resources to procure government intervention will often refocus attention away from the group’s deeper goals. For example, religious persons opposing same-sex marriage often find their most enthusiastic audience consists of bigots and homophobes, and their campaigns often fuel anti-Christian prejudices. Probe more deeply, and the effect is even more disturbing. Demonizing gay marriage as the great threat to traditional marriage not only scapegoats gay people, but deflects attention away from genuine threats to the institution, including high divorce rates, deadbeat dads, domestic violence, and so on. Consider the mixed message sent by the Defense of Marriage Act (1996), which disrespected the unions of committed lesbian and gay couples and boosted the political careers of President Clinton, Majority Leader Dole, and Speaker Gingrich, America’s highest ranking adulterers.

Second is a *problem of compromise*. That is, when you get involved in the government and there is deep normative conflict, then you are probably going to get compromises. These compromises can have unpredictable results. One effect of the anti-same sex marriage movement in the last thirty years has been the generation of compromises with moderates that create new governmental forms for recognition of horizontal relationships—such as domestic partnerships in California, Oregon, Washington, and dozens of American cities. You see civil unions, a new institution in Vermont, Connecticut, and New Jersey. You see reciprocal beneficiary institutions in Hawaii and Vermont. And sometimes, as in France and Vermont and many domestic partnership ordinances, straight couples want to enter these institutions as well, even though they were created primarily for gay couples. By stopping gay marriage, you end up creating institutions that are competitors to marriage, for straight as well as gay couples. There is no better way to undermine an institution than to create competitors.

Third, there is the *problem of hyperfocus*. That is, government attention to an issue creates hyperfocused discourse that can itself create and intensify unexpected phenomena. Thus, anti-same sex marriage campaigns

can create or mobilize homophobia, but they can also at the same time create homosexuality as a salient, coherent identity and even as a fabulous identity, a sexy identity. Recall the story of Romeo and Juliet, where both parents and the state declared war on their romance. As William Shakespeare recognized, forbidden love becomes love to die for. Neither state nor parental disapproval will dissuade Romeo from loving Juliet—or Mercutio, as the case may be—and indeed might even make Juliet, or Mercutio, even sexier. Likewise, the anti-same sex marriage initiatives might get young people thinking about homosexuality, and even romanticizing the love that once dared not speak its name. It is hard to predict the effect of hyperfocus, except to say that hysterical censorship in affairs of the heart never has anything like its intended effects.

Now, the problems that I have suggested for state intervention in culture conflicts—the misplaced agenda, compromise, and hyperfocus—are not unique to same-sex marriage. Justice Clarence Thomas, for example, makes these same arguments about the counterproductiveness of race-based affirmative action.<sup>4</sup> Affirmative action, he says, has distorted the civil rights agenda away from things it should be focusing on. It has created compromises that hold back African Americans, that do not advance their lives. And it creates a hyperfocus on race as a totalizing identity, certainly reinforcing race-based stereotypes and perhaps even contributing to and enhancing prejudice.

So my point about the counterproductiveness of direct state interventions in culture conflicts is not a liberal or a conservative claim. It is a truth claim.

Is the government therefore unimportant in transforming culture? Not at all. Again, I think Mrs. Schlafly is right. The government is very important. But the government is most important, most powerful in transforming culture, when it engages in big activities that are not trying to transform culture. I shall provide a couple of examples, and then Attorney General Meese will make me stop.

The best example is war. Governments fight wars, a lot of them actually; this was perhaps the American government's primary activity during the twentieth century. War has produced pervasive and intense cultural transformations in our society. World War II, for example, transformed mainstream American values toward people of color, toward the roles of women, and even ultimately toward homosexuality. Government innovations as to technology and infrastructure also can have deeper effects on culture than government does. Railroads in the nineteenth century contributed to a national economy and culture. It was not necessarily the intent, but that was the effect. And new economic tensions fueled unionization, farm co-ops, popular political consciousness, and so forth.

---

<sup>4</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 349–77 (2003) (Thomas, J., dissenting).

What about gays and lesbians? In my opinion, the anti-same sex marriage movements are not going to deeply affect the American family in a good way, nor gays and lesbians necessarily in a bad way. For all of the DOMAs<sup>5</sup> and the anti-same sex marriage initiatives, it seems to me that these will have less effect on same-sex marriage than two other government-sponsored innovations will have. One is the Internet, which the federal government was instrumental in developing. The Internet has made sexual information, as well as misinformation, widely available in ways that we never would have thought possible. It has made match-making easier for gays, lesbians, bisexuals, heterosexuals, etc. Second is government-sponsored research. This has in some way contributed to the wide availability of artificial insemination technologies. And these medical technologies, in which the government probably does not play the primary role, enabled something the law has maybe much less to do with, at least affirmatively: creation.

Mr. Romero speaks about same-sex unions and marriages.<sup>6</sup> According to the 2000 Census (another important governmental activity), there were 600,000 same-sex couples in the United States, probably an undercount; it has gone up by at least 100,000 since then.<sup>7</sup> The Census found that a third of those female couples were raising children within the relationship; a fifth of the males were raising children within their relationship, many of them through artificial insemination and other techniques.<sup>8</sup>

The flourishing of lesbian and gay families, including children, is transforming American culture, on the whole making it gay-friendlier. Presidents William Clinton and George W. Bush, usually presented as opposites, are well known for their antihomosexual policies, but the governments over which these men presided contributed to the public's better understanding of homosexuality in a variety of ways: by sponsoring antigay marriage legislation or constitutional amendments, these presidents publicized same-sex unions; by collecting and reporting data about these unions, these presidents raised their visibility; and by perpetuating unworkable antigay exclusions in military service and elsewhere, these presidents have created public sympathy for gay people and exposed the folly of antigay policies.

---

<sup>5</sup> Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000).

<sup>6</sup> See Romero, *supra* note 1, at 489.

<sup>7</sup> UNITED STATES CENSUS BUREAU, UNMARRIED PARTNER HOUSEHOLDS BY SEX OF PARTNERS: 2004, at tab 1 (Jan. 30, 2006), <http://www.census.gov/compendia/statab/tables/07s0061.xls>; *id.* at tab 2 (Mar. 20, 2002).

<sup>8</sup> UNITED STATES CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 10 (Feb. 2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>.