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Eighteen Years On: A Re-Review

*The Case for Same-Sex Marriage: From Sexual Liberty to
Civilized Commitment*

BY WILLIAM N. ESKRIDGE, JR.

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In 1992 I published a book called *Sex and Reason*, a primarily law-and-economics study of human sexual behavior and its regulation. I discussed homosexuality at some length (see the index references to “Homosexuality” and to “Homosexuals”), touching briefly on homosexual marriage.¹ Two years later, Yale Law School Professor William Eskridge published a book advocating a right to such marriage: *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*. In the following year I reviewed his book.² Seventeen years later I wrote the opinion for my court invalidating Indiana’s and Wisconsin’s prohibitions of same-sex marriage.³ And on June 26 of this year the Supreme Court invalidated such prohibitions in all states.⁴ The editors of this *Journal* asked me to “re-review” Professor Eskridge’s book in light of the change in the law and in my views relating to homosexual marriage since my 1997 review.

I am going to start well before 1997. I am going to trace the evolution of my thinking about homosexuality back to 1952, when I was thirteen years old. It was about then that I first heard about homosexuality, though I don’t remember how I heard about it; I’m sure it was never mentioned by my parents. I considered it incredibly weird. In part for that reason I didn’t think I’d ever actually meet a homosexual. Not that I felt hostility toward them, any more than I did toward Eskimos; they seemed alien, but not threatening, though I recall reading Jean-Paul Sartre’s short story *The Childhood of a Leader*—a harrowing tale of homosexual seduction. Eventually I learned about homosexuals such as Marcel Proust, Oscar Wilde, Aaron Copland, Benjamin Britten, and Alan Turing who had made important contributions in a variety of fields. But I still thought I’d never meet one, and I went through college without thinking that any student or teacher I met was homosexual, though in retrospect I realize that one of my finest teachers, and several students I knew, were. As a law professor from 1968 to 1981, I met the occasional openly homosexual professor or student, but homosexuality as a subject of study did not interest me.

My 1992 book *Sex and Reason*, my first academic foray into sex, originated in a case my court had heard en banc that involved nude dancing in a strip joint—the Kitty Kat Lounge—in South Bend, Indiana. The State wanted to forbid such dancing, primarily on the ground that it was likely to promote illegal activity, mainly prostitution. My court held that the dancing was protected

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1. RICHARD A. POSNER, *SEX AND REASON* (1992).
 2. Richard A. Posner, *Should There Be Homosexual Marriage? If So, Who Should Decide?* 95 MICH. L. REV. 1578 (1997) (reviewing WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)).
 3. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).
 4. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

by the First Amendment's Free Speech Clause, but the Supreme Court reversed.⁵ I was struck by the ignorance of the lawyers and judges (myself included) about erotic dancing, which has a long and interesting history going back to Salome's (probably mythical) "Dance of the Seven Veils," a striptease, and indeed earlier, to the ancient Greeks' satyr plays. I thought it odd that judges should be opining on matters of sex without having any systematic knowledge of the subject. During the gestation of our court's decision I did a good deal of research into the history of nude dancing, and of nudity in art more broadly, and ended up writing a very long (for me) concurring opinion, though ultimately to no avail.⁶ And the book followed.

There was little interest in homosexual marriage in 1992. No state recognized such marriage; the first to do so was Massachusetts in 2004.⁷ The first foreign country to do so was the Netherlands in 2001, though Sweden and Denmark already recognized "civil unions," which gave homosexual couples most of the rights of married couples.⁸ In 1992, public opinion polls revealed that only twenty-seven percent of Americans favored allowing homosexual marriage;⁹ today a majority do,¹⁰ and the percentage is likely to grow as a result of the Supreme Court's decision, the decline of religious orthodoxy, and the "normalization" of homosexuality through marriage. By the last point I mean that marriage is regarded as a badge of normalcy; "normal" people marry and married homosexuals acquire that badge.

My book was "pro-homosexual" by the standards of the time. I rejected the notion still current then (but no longer) that heterosexuals could be "recruited" to be homosexual rather than that homosexual preference is an innate characteristic. I argued in like vein that homosexuals could not be converted to heterosexuality. I argued that they should be allowed to serve in the armed forces (they weren't then, at least officially; oddly there had been no bar to their serving in the armed forces before World War II).

I was agnostic about whether homosexual marriage should be permitted. I listed some objections (of which one, now obsolete and probably silly even

5. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

6. *Miller*, 904 F.2d at 1089-1104 (Posner, J., concurring).

7. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

8. *Gay Marriage Around the World*, BBC NEWS (Apr. 23, 2013), <http://www.bbc.com/news/world-21321731> [<http://perma.cc/CQC2-QFMB>].

9. PAUL RYAN BREWER, *VALUE WAR: PUBLIC OPINION AND THE POLITICS OF GAY RIGHTS* 24 (2007).

10. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (July 29, 2015), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage> [<http://perma.cc/ML6R-HJGS>].

when I made it, was: “Should we worry that a homosexual might marry a succession of dying AIDS patients in order to entitle them to spouse’s medical benefits?”¹¹). I concluded that “[n]one of these points is decisive against permitting homosexual marriage. All together may not be. The benefits of such marriage may outweigh the costs.”¹² But since, at the time I was writing, authorizing homosexual marriage was simply out of the question, I added that “maybe the focus should be shifted to an intermediate solution that would give homosexuals most of what they want” – and I pointed to Denmark’s “registered partnership” and Sweden’s “homosexual cohabitation”¹³ as examples of such a solution.

Professor Eskridge’s book, published as I said four years after mine, took issue with a statement in my book that a number of “incidents of marriage”¹⁴ – such as inheritance, social security, income tax, medical benefits, and life insurance – “were designed with heterosexual marriage in mind, more specifically heterosexual marriages resulting in children. They may or may not fit the case of homosexual marriage; they are unlikely to fit it perfectly. Do we want homosexual couples to have the same rights of adoption and custody as heterosexual couples?”¹⁵ Eskridge’s rebuttal was persuasive: “[T]he law of marriage focuses on the interpersonal commitment and not the heterosexuality of the partners. To the extent the law of marriage focuses on children (by and large it does not), it is agnostic as to where the children come from.”¹⁶ As for my concern with a homosexual marrying “a succession of dying AIDS patients,”¹⁷ Eskridge brushed that off as a “lavender herring.”¹⁸

He granted that Denmark’s “registered partnership” law would give homosexual couples most of the rights of married couples (except adoption), but said he “would oppose a halfway house to marriage,”¹⁹ which was his characteriza-

11. POSNER, *supra* note 1, at 313. More substantial reasons that I noted for not permitting homosexual marriage, though I no longer think them valid, are that homosexual marriages would not be as stable or rewarding as heterosexual ones and that allowing homosexuals to adopt children would be problematic. *See id.* at 312-13.

12. *Id.* at 313.

13. *Id.*

14. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 116 (1996) (quoting POSNER, *supra* note 1, at 313).

15. POSNER, *supra* note 1, at 313.

16. ESKRIDGE, *supra* note 14, at 118.

17. POSNER, *supra* note 1, at 313.

18. ESKRIDGE, *supra* note 14, at 119. I don’t know what a “lavender herring” is, but it doesn’t sound good.

19. *Id.* at 121. Oddly, Professor Eskridge’s book gives little weight to adoption rights as an important element of marriage for homosexuals. There is no index reference to “adoption.”

tion of the Danish law,²⁰ and he went on to argue for a constitutional right to same-sex marriage, making almost all the arguments that have been advanced in the recent wave of litigation culminating in the Supreme Court's decision in *Obergefell v. Hodges*.²¹

In my review I called his book “a work of deep and scrupulous (though not flawless) scholarship—unstrident, unpolemical, and written with extreme lucidity and simplicity so that it is fully accessible to the nonlawyer. Except for the treacly vignette of lesbian love with which the book opens, it is a model of advocacy scholarship.”²² I noted that he argued both “for legislative reform: state marriage statutes (or their interpretation) should be changed to permit people of the same sex to marry . . . [and] that the courts in the name of the Constitution should force acceptance of same-sex marriage on all the states at once.”²³ I said that he'd made a powerful argument for legislative reform and that I would not be troubled if a state were to be persuaded by it, but that I found his constitutional case unconvincing. Distinct from either point, I noted his questionable historical claims, such as that “we can infer that ‘same-sex intimacy was common in [ancient] Egypt’ from the denunciation of the Egyptian practice of same-sex marriage in Leviticus.”²⁴

I said,

I do think (Eskridge is vague about this) that homosexual couples ought not be granted the identical rights of adoption as heterosexual couples without further study of the effects of such adoption—not on the sexual orientation of the child, which I believe to be invariant to the adoptive parents' orientation as to other environmental factors, but on the child's welfare in the broadest sense. Apart from this reservation, I find Eskridge's argument for recognizing homosexual marriage quite persuasive—but only as an argument addressed to a state legislature.²⁵

20. *Id.* at 122.

21. 135 S. Ct. 2584 (2015).

22. Posner, *supra* note 2, at 1578 (footnote omitted).

23. *Id.* at 1578-79.

24. *Id.* at 1580 (alteration in original) (quoting ESKRIDGE, *supra* note 14, at 19). This is an example of a weakness inherent in advocacy scholarship, a type of scholarship signaled by the first words of his book's title, “*The Case for*.” He acknowledges in his book that he is himself homosexual, which means that he has a personal stake in the legal position that he advocates, regardless of whether he has any interest in being married; allowing homosexual marriage is bound to boost the social status of homosexuals.

25. *Id.* at 1584. I don't know why I was worried about homosexuals adopting children. In the opinion for my court invalidating Indiana's and Wisconsin's prohibitions on same-sex marriage, I emphasized the importance of adoption by homosexual couples of children who

As a constitutional argument, I said, it was not convincing, for though Eskridge had made “good lawyers’ arguments,” he had made

the tacit assumption that the methods of legal casuistry are an adequate basis for compelling every state in the United States to adopt a radical social policy that is deeply offensive to the vast majority of its citizens and that exists in no other country of the world, and to do so at the behest of an educated, articulate, and increasingly politically effective minority that is seeking to bypass the normal political process for no better reason than impatience, albeit an understandable impatience. (Americans are an impatient people.) A decision by the Supreme Court holding that the Constitution entitles people to marry others of the same sex would be far more radical than any of the decisions cited by Eskridge. Its moorings in text, precedent, public policy, and public opinion would be too tenuous to rally even minimum public support. It would be an unprecedented example of judicial immodesty. That well-worn epithet “usurpative” would finally fit No nation in the world, no state of the United States with the uncertain and incipient exception of Hawaii (by no means a typical state, in any event), recognizes homosexual marriage and equates it to heterosexual marriage. An overwhelming majority of the American people are strongly opposed to it; even the homosexual community is divided over it (hence chapter 3 of Eskridge’s book). A complex and by no means airtight line of argument would be necessary plausibly to derive a right to homosexual marriage from the text of the Constitution and the cases interpreting that text—a tightrope act that without a net constituted by some support in public opinion is too perilous for the courts to attempt. Public opinion may change—Eskridge’s book may help it change—but at present it is too firmly against same-sex marriage for the courts to act.

. . . [P]ublic opinion is not irrelevant to the task of deciding whether a constitutional right exists. When judges are asked to recognize a new constitutional right, they have to do a lot more than simply consult the text of the Constitution and the cases dealing with analogous constitutional issues. If it is truly a new right, as a right to same-sex marriage would be, text and precedent are not going to dictate the judges’ conclusion. They will have to go beyond the technical legal materials of decision and consider moral, political, empirical, prudential, and institu-

would otherwise be confined to foster care. *Baskin v. Bogan*, 766 F.3d 648, 654, 662-64 (7th Cir. 2014).

tional issues, including the public acceptability of a decision recognizing the new right.

Reasonable considerations also include the feasibility and desirability of allowing the matter to simmer for a while before the heavy artillery of constitutional rightsmaking is trundled out. Let a state legislature or activist (but elected, and hence democratically responsive) state court adopt homosexual marriage as a policy in one state, and let the rest of the country learn from the results of its experiment. That is the democratic way, and there is no compelling reason to supersede it merely because intellectually sophisticated people of secular inclination will find Eskridge's argument for same-sex marriage convincing

. . . Similarly, if no other country in the world authorizes such a thing, this is a datum that should give pause to a court inclined to legislate in the name of the Constitution

. . . The country is not ready for Eskridge's proposal, and this must give pause to any impulse within an unelected judiciary to impose it on the country in the name of the Constitution.²⁶

In retrospect I don't like the first quoted paragraph of the preceding passage, especially the reference to "impatience." But I think the rest of that passage was okay for its time, and that a decision by the Supreme Court in 1997 establishing a right to homosexual marriage in all states would have been a mistake. A change in public opinion was required to make the judicial creation of such a right acceptable. The change occurred. By 2011 a majority of Americans supported authorizing same-sex marriage. On the eve of the *Obergefell* decision, thirty-five states and the District of Columbia recognized same-sex marriage, though mainly as a result of lower-court decisions based on implications of the *United States v. Windsor* decision discussed below.²⁷ By 2015 the time was ripe for the Supreme Court to lay the issue to rest.

Between 1997, when I reviewed Eskridge's book on same-sex marriage, and 2013, when I reviewed two books (neither by him) on same-sex marriage,²⁸ my

26. Posner, *supra* note 2, at 1584-87 (footnote omitted).

27. *The State of Marriage Equality in America*, MD. OFF. ATT'Y GEN. (April 2015), <http://www.oag.state.md.us/reports/the%20state%20of%20marriage%20equality%20in%20america%202015.pdf> [<http://perma.cc/5VJF-TH8P>].

28. Richard A. Posner, *How Gay Marriage Became Legitimate: A Revisionist History of a Social Revolution*, NEW REPUBLIC (July 24, 2013), <http://www.newrepublic.com/article/113816/how-gay-marriage-became-legitimate> [<http://perma.cc/2ZS7-GCWZ>] (reviewing MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR*

interest in the subject flagged. Yet in a book review published in 2003 (which I had completely forgotten until September 2015), I discover with some surprise that I opposed, not homosexual marriage as such, but the creation by the Supreme Court of a constitutional right to such marriage, on grounds not dissimilar to those advanced by the dissenters in *Obergefell*. In a typical passage I said,

I am dubious about interpreting the Constitution to authorize the Supreme Court to make discretionary moral judgments that offend dominant public opinion. Nothing in the Constitution or its history suggests a constitutional right to homosexual marriage. If there is such a right, it will have to be manufactured by the justices out of whole cloth. The exercise of so freewheeling a judicial discretion in the face of adamantly opposed public opinion would be seriously undemocratic. It would be a matter of us judges, us enlightened ones, forcing our sophisticated views on a deeply unwilling population. It would be moral vanguardism.²⁹

At the time I wrote that review, there was still overwhelming public opposition to same-sex marriage, in light of which it might indeed have been imprudent for the Court to have declared a constitutional right to it. By 2013, when I wrote the other review that I've mentioned,³⁰ public support had swung strongly in favor of allowing such marriages. But, as I said, my interest in the subject had flagged, and the books I reviewed focused on the inconclusive question of whether a Supreme Court decision creating a constitutional right to same-sex marriage would cause a backlash that might undermine the Court's authority and have other untoward consequences.

My same-sex marriage case, *Baskin v. Bogan*,³¹ invalidating as I said earlier the Indiana and Wisconsin prohibitions of same-sex marriage, was argued in August 2014 and decided in September, just months before *Obergefell*. By the summer of 2014, the tide was running strongly in favor of invalidating such prohibitions, although it was not certain that the Supreme Court would go with the tide. I do think the change in public opinion was decisive for all the courts that ruled in favor of creating a constitutional right to same-sex mar-

SAME-SEX MARRIAGE (2012) and JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT (2013)).

29. Richard A. Posner, *Wedding Bell Blues: Same-Sex Marriage and the Constitution*, NEW REPUBLIC (Dec. 22, 2003), <http://www.newrepublic.com/article/wedding-bell-blues> [<http://perma.cc/AP8F-UZEA>] (reviewing EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION (2004)).

30. See *supra* note 28 and accompanying text.

31. 766 F.3d 648 (7th Cir. 2014); see also *supra* text accompanying note 3.

riage. Law is not a science, and judges are not calculating machines. Federal constitutional law is the most amorphous body of American law because most of the Constitution is very old, cryptic, or vague. The notion that the twenty-first century can be ruled by documents authored in the eighteenth and mid-nineteenth centuries is nonsense.

The arguments against same-sex marriage were never strong. They didn't need to be when there was overwhelming passionate objection to such marriage. When the objection faded (not completely, but to a great extent, and with remarkable speed), the absence of strong arguments against same-sex marriage, and the presence of strong arguments in favor of it, became the decisive factors guiding judicial action.

But I want to say a little more about the change in public opinion that set the stage for *Obergefell*, and this will allow me to return to where I started in this Review, with my youthful discovery that there was this strange phenomenon called homosexuality. In those days a great many homosexuals concealed their homosexuality from heterosexuals in order to avoid the discrimination against homosexuals that was then rampant. The result was that those who flaunted their homosexuality—whose mannerisms or dress or occupations signaled homosexuality—were taken by heterosexuals to be typical of homosexuals, and were derided, especially since, in a prissier era than today, homosexual sex was criminalized by many states. (I am speaking primarily of male homosexuals, who have always received more critical attention than lesbians.) But beginning in the 1960s with the Alfred Kinsey reports revealing a greater amount of promiscuity than conventional people realized existed, there was a loosening of sexual mores in general and among its effects was an increasing tolerance of homosexuals. Gradually, as that tolerance grew, fewer homosexuals bothered concealing the fact of their being homosexual. As homosexuals not readily recognizable as such by reason of mannerism, dress, or occupation began to acknowledge, or at least cease denying or trying to conceal, their homosexuality, heterosexuals discovered that most homosexuals are indistinguishable in any respect except sexual preference from heterosexuals; and so it became difficult to understand why they should be discriminated against. The Supreme Court, first in *Romer v. Evans*, which held that a state could not enact a law forbidding municipalities to provide protection against discrimination against homosexuals,³² then in *Lawrence v. Texas*, which invalidated laws criminalizing homosexual sex between consenting adults,³³ and then in *United States v. Windsor*,³⁴ invalidating the federal Defense of Marriage Act, which had de-

32. 517 U.S. 620 (1996).

33. 539 U.S. 558 (2003). *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986).

34. 133 S. Ct. 2675 (2013).

nied federal marriage benefits to homosexual couples married in states that authorized same-sex marriage, set the stage for the *Obergefell* decision, a decision anticipated by a number of lower federal courts, and also state courts, after *Windsor*. Indeed Justice Scalia, in his characteristically scathing dissenting opinion in *Windsor*, said that the majority opinion signaled that the Court would invalidate all state laws forbidding same-sex marriage.³⁵ And sure enough, two years later, in *Obergefell* the five-Justice majority in *Windsor* confirmed Justice Scalia's fears. By this time, the majority could be confident that a combination of public opinion increasingly favorable to allowing same-sex marriage with the flood of lower-court cases invalidating state laws forbidding such marriage would deflect the indignation that such a decision would have aroused in 1996, or perhaps in any year before 2015. And so it has proved.

Justice Kennedy, Catholic and conservative, the critical swing vote and majority-opinion author in the cases involving homosexual rights, deserves great credit for his political and intellectual independence in regard to homosexuals. Big business also deserves credit. The biggest U.S. corporation (net worth seven hundred billion dollars) is Apple. Its CEO, Timothy Cook, is an "out of the closet" homosexual. It is hard to disrespect such a star; and, as far as I know, no one does. Many other prominent people are openly homosexual as well. Big business (and small business as well), regardless of the sexual preferences of its CEOs, dislikes discrimination against homosexuals (including denial of marriage rights) because homosexuals tend to have above average income and education, making them attractive to business as customers and employees. Business is also concerned that hostility to homosexuals will turn off prospective customers and employees who, though heterosexual themselves, consider, as increasingly they do, such hostility to be a form of bigotry.

So Eskridge's position has triumphed. It's a shame that Justice Kennedy's opinion did not cite his book. Nor did any of the four dissents cite his book; nor for that matter had I cited it in my opinion in *Baskin*. I had forgotten his book, forgotten my review of it, and forgotten what I had said about same-sex marriage in *Sex and Reason* and the subsequent book reviews that I mentioned here. A prophet before his time, William Eskridge has the satisfaction of having finally been vindicated.

35. *Id.* at 2709-11 (Scalia, J., dissenting).