Less Perfect Unions

The argument against same-sex marriage that hasn't been tried in the courts

By Margaret Liu McConnell

HERE'S AN ETIQUETTE question for the new age: You are introduced to a couple and their little girl. The men are clean cut, early middle-aged. Their child is well behaved and, by all appearances, well taken care of. Is it rude to ask the men how they came by their daughter?

Same-sex couples first challenged state marriage laws in the 1970s. Courts in California, Wisconsin, Kentucky, and Minnesota tersely ruled that they couldn't marry because same-sex marriage was a definitional impossibility.

A second wave of same-sex challenges to marriage laws began in Hawaii in the early 1990s. The state attempted the old defense that same-sex couples could not wed because of "their biologic inability ... to satisfy the definition of the status to which they aspire." The high court of Hawaii rejected the state's argument as an exercise in "tortured and conclusory sophistry."

What a leap from the courts' confident dismissal of such claims in the 1970s. The main reason for this sea change has been the presence of children in the lives of gays and lesbians. While same-sex advocates insist that marriage is not inextricably linked to procreation, every victory for same-sex couples in the courts that has accorded marriage or marriage-like rights statewide, has hinged on the fact that children were involved.

The essence of marriage in this country has always been that two people pledge publicly and to each other to bind their lives together, to take care of one another and any children their sexual union produces. Although same-sex advocates demand the freedom to marry—the recognition of what they view as a constitutionally guaranteed liberty interest—the essential promise of marriage is a loss of freedom. A married person is no longer solely concerned with his own life but has to worry about another's—and, if the couple is blessed with children, with that many more lives.

The state supports and honors this promise. While marriage does not require procreation, the status the state accords the couple is linked to the promise that they will not abandon, give away, or leave their child to the public charge.

The right to marry, then, is not just the right to the rather recent multitude of financial and social benefits but the right to support and recognition from the state of one's promise to fulfill what is at once the most simple and obvious of duties and the most profound, time-consuming, and liberty-killing.

This essential promise of marriage still holds, except in Massachusetts—which brings us back to the opening etiquette question. Is it rude to ask the two men how they came by their child? If they are married, what precisely is the state of Massachusetts honoring and supporting by sanctioning their marriage? Their devotion to one another, yes, but no longer the ideal that one should stick around and take care of one's child. It's clear that at least one of the little girl's biological parents has either given her up or died. Even if the child was deliberately conceived via reproductive technology, a woman somewhere is willfully without her biological child—perhaps in a spirit of helping the men but in a spirit nonetheless contradicting the ideal that no parent should relinquish his or her child. Perhaps the little girl is adopted. Agencies assisting adoptive parents advise them to do their utmost to make the biological parent formally relinquish all rights to his child. Marriage in Massachusetts, then, no longer upholds the ideal that society is served when parents keep their children but, in effect, encourages its contradiction.

If marriage no longer honors this ideal, our culture is left with no institution that does. That is what would be lost in expanding marriage to include same-sex couples.

Focusing on this loss may be the only viable legal argument left to defend traditional marriage, given changes in constitutional jurisprudence regarding the rights of homosexuals. Legal arguments insisting on the superiority of the traditional family have backfired from outset.

In 1991, three same-sex couples sued the state of Hawaii, claiming its marriage laws deprived them of a multiplicity of rights and benefits. Hawaii countered that marriage creates the best environment for children. At trial, however, even witnesses for the state agreed that single parents, adoptive parents, lesbian mothers, gay fathers, and same-sex couples can and do create stable families and make excellent parents. Finding Hawaii had failed to prove a compelling government interest, as required by Hawaii's Equal Rights Amendment when a law discriminates on the basis of sex, the court ruled that

the state could not deny the couples marriage licenses. The people took matters in hand, amending the state constitution to protect marriage. Although same-sex advocates did not succeed in changing Hawaii's marriage laws, they advanced their agenda in this important aspect: they demonstrated just how difficult it is to prove in court that a traditional family provides a better environment for children than other family configurations.

HOW COULD VERMONT **RECOGNIZE SAME-SEX PARTNERS AS PARENTS** YET DENY THEM AND THEIR CHILDREN **THE SECURITY IT GIVES MARRIED COUPLES**?

Alaska was next, with a similar outcome. A trial court ruled in 1998 that the fundamental right to marriage encompassed the right to marry the partner of one's choosing—including a partner of the same sex. Again, the people of the state mobilized to amend their constitution to protect marriage from court-imposed change.

Then, in 1999, Vermont's high court held that same-sex couples are entitled to the same benefits afforded by state law to opposite-sex couples, leading to the enactment of a civil-union law the following year. The court based its decision on its state constitution, contrasting it with the U.S. Constitution. Under the U.S. Constitution, a law is presumed valid if it bears a rational relation to some legitimate purpose as long as it does not restrict a fundamental right and as long as it does not unequally affect a "suspect" or "quasi-suspect" class (a group the court has reason to suspect the legislature singled out for disparate treatment because of animus). The Supreme Court recognizes race and national origin as suspect classes, but neither the Supreme Court nor the vast majority of other courts deems homosexuals a suspect class. Vermont's constitution is far less deferential to the legislature, and even where no fundamental right is at issue, and no suspect class affected, requires the court to scrutinize any disparate treatment. The court rejected all interests proffered by the state for excluding same-sex couples from marriage, chief among them promoting the "link between procreation and child rearing." These proffered interests made no sense, the court concluded, because Vermont's legislative policies supported same-sex families, even allowing same-sex couples to adopt. How could Vermont recognize same-sex partners as parents yet deny them and their children the security it gives married couples?

The Vermont and Hawaii courts based their decisions on provisions of their constitutions not present in the federal Constitution. So they set no binding precedent beyond their own borders. But two U.S. Supreme Court decisions bring to the fore the question of whether the U.S. Constitution, when the rights of homosexuals are at issue, requires the same kind of probing rational basis test—one that looks at the full scheme of laws related to the purported governmental interest—required by Vermont.

In 1996, in *Romer v. Evans*, the Supreme Court struck down an amendment to the Colorado constitution adopted in reaction to antidiscrimination ordinances in Aspen, Denver, and Boulder. The amendment repealed those ordinances to the extent they prohibited discrimination against homosexuals and prevented any further legislation from barring such discrimination. The court concluded that the amendment was "born of animosity toward the class of persons affected" and had no rational relation to any legitimate government purpose. This is a statement of the amendment's failure to pass the rational basis test. The court did not defer to the governmental interests Colorado claimed the law served—respect for other citizens' freedom of association—as rational basis review would ordinarily require. Justice Scalia pointed out in his dissent another interest furthered by the amendment—the moral disapproval of homosexual conduct. He cited the court's 1986 decision *Bowers v. Hardwick*, which upheld a Georgia statute making sodomy a crime, as requiring courts to defer to this governmental interest.

But in 2003, the Supreme Court overruled *Bowers*. In *Lawrence v. Texas*, a man caught in the act and convicted under a Texas statute prohibiting homosexual intercourse sued the state. The court struck down the statute as furthering no legitimate state interest, overruling its previous decision, *Bowers*, for upholding a law whose basis was the traditional condemnation of homosexuality. Together, *Romer* and *Lawrence* suggest that the Supreme Court may have set a new standard for deciding whether a law is "rational" where homosexual rights are at issue.

Citations from *Romer* and *Lawrence* permeate *Goodridge v. Department of Public Health*, the 2003 Massachusetts decision extending marriage to same-sex couples. Massachusetts had posited three governmental interests for its marriage laws: providing a favorable setting for procreation, ensuring the optimal environment for child rearing, and preserving financial resources. The court agreed loudly that protecting the welfare of children is a "paramount State policy," but, like the Vermont court, concluded that restricting marriage to opposite-sex couples "cannot plausibly fur-

ther this policy." The court declared that the plaintiffs' children, "like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit." The court dealt its final blow to marriage in Massachusetts from the high ground of racial civil rights:

> Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.

In *Goodridge*, the court ostensibly applies a rational basis test. But rather than deferring to the government, it delves into and dismisses the government's asserted interests. And for support, it uses *Romer* and *Lawrence*, U.S. Supreme Court decisions construing the U.S. Constitution. In Vermont and Hawaii, the precedential power of the decisions was limited to those states because they construed only their state constitutions. But *Romer* and *Lawrence*, if the U.S. Supreme Court were to confirm the interpretation given to them by the Massachusetts court and subsequently by numerous other state courts, would have a binding effect on all courts in the country, state and federal.

Such a decision would allow plaintiffs to reopen challenges to state marriage laws and to challenge state constitutional amendments and would require courts to apply the new, more searching rational basis test. In Vermont, Massachusetts, and numerous states to follow, the state's interest in "providing the optimal environment for raising children" consistently fails this test.

Post-*Lawrence*, state high courts have decided challenges to marriage laws in two ways. Either the court proceeds wearily under ordinary rational basis review, deferring to the legislature to uphold marriage laws (Arizona, New York, Maryland, Washington), or the court demands that the state provide justification for excluding same-sex couples, only to strike down or alter the laws on the grounds that there is no rational basis for causing the children of same-sex couples to suffer when the public policy of the state sanctions the formation of such families (New Jersey, joining Massachusetts). Decisions upholding state marriage laws, however, are not necessarily "wins" for traditional marriage. They are stepping stones toward a showdown over the meaning of *Romer* and *Lawrence*, where a split between states in their interpretation of the cases is a prerequisite for review by the Supreme Court. The *Lawrence* majority is still sitting.

Undoubtedly discouraged by the outcome of cases in Hawaii, Vermont, and Massachusetts, some states—New Jersey, Connecticut, California—abandoned their marriage-is-best-for-children argument. But when you take away the child-based reasons for reserving marriage to one man and one woman, it doesn't really leave much else. New Jersey rested its case on its interest in preserving "age-old traditions, beliefs, and laws"—and lost. The state high court reviewed New Jersey's system of child-related laws, including those that allow adoption by homosexuals and prohibit unequal treatment on account of sexual orientation. The court found "no rational basis" for visiting on plaintiffs' children "a flawed and unfair scheme directed at their parents." The New Jersey court, like the Massachusetts court, cited *Romer* and *Lawrence* together with its own law as protecting "gays and lesbians from sexual orientation discrimination in all its virulent forms." In 2006, the court ordered New Jersey to "provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples."

In the early cases, same-sex plaintiffs sued for the rights and benefits afforded by marriage, which states could provide through a parallel civil-union structure, as New Jersey did to comply with the court's order. Plaintiffs now demand nothing short of the right to marry. This leaves courts that are reluctant to redefine marriage to fall back into the sort of deferential rational basis defense of marriage laws that may be counter to the current Supreme Court view of the rights of homosexuals. *Romer* and *Lawrence* are unclear decisions. But it's not only activist judges who read them as requiring states to justify the exclusion of homosexuals from marriage and as rejecting tradition as a rational basis for upholding marriage laws. This was the point of Justice Scalia's white-hot dissent in *Lawrence*. Marriage won't be lost through dramatic high court decisions declaring same-sex marriage a fundamental right. That theory has won scarce times in the lower courts, including a recent Iowa trial court decision. But it has never survived the highest state tribunals. Marriage will be lost if its defenders fail to articulate a governmental interest that withstands post-*Lawrence* rational basis review.

Indiana's high court, upholding the state's marriage laws in 2005, latched on to an asserted state interest that did not

entail a "contest of the families." In short, the "accidental child" defense posits that heterosexuals are just rutting bumpkins who can't control their sexual impulses, don't understand biology, and end up making babies. They need marriage to channel their children into stable environments. But because same-sex parents must invest "significant time, effort and expense" in "assisted reproduction and adoption," the court brightly deduced, they are likely to be responsible persons who will provide a stable environment with or without marriage.

We await decisions from the high courts of California and Connecticut. California already provides same-sex couples with nearly all the rights and benefits of marriage through domestic partnership; Connecticut provides an identity of rights through its civil-union statute. Plaintiffs in both states reject these solutions as an insulting reprise of the heinous "separate but equal" scheme.

The California court seems to be seeking a way to preserve marriage as a status distinct from same-sex unions. It requested from plaintiffs a list of all ways California's domestic partnership scheme falls short of providing the same rights as marriage. Yet it bids fair to collapse under the onslaught of amicus briefs filed against the state by more than 200 organizations and individuals, ranging from the California NAACP, La Raza Centro Legal, the American Psychological Association, the National Association of Social Workers, and the Anti-Defamation League. These advocates for same-sex marriage attack on two fronts of moral righteousness: denying marriage to same-sex couples hurts children, and barring persons of the same sex from marrying is no different from barring persons of different races from marrying.

Now is not the time for defenders of marriage to give up on the courts. But we must recognize that insisting that traditional marriage is best for raising children is not effective. A better approach is to emphasize that traditional marriage promotes the ideal that no parent should abandon his child. Who would argue against that? It's consistent with other governmental policies in the area of child welfare. It's in accord with human nature. But making the argument requires the courage, honesty, and humility to say that some ways of procreating are not as good for the general welfare as others, whether the parents are of the same sex or are married heterosexuals.

Adoptive parents do God's work when they provide homes to children, and those homes can be as loving and stable as the home of any natural mother and father. But adoption is a humane response to what is already a tragedy in a child's life, the loss of a parent. Those adorable adoptees from China, for example, are the byproduct of a cruel policy of child restriction that has lead to the deaths of thousands of children.

Reproductive technology, like adoption, without doubt can produce children who are loved by their new parents in homes as stable as those of any biological parents. But the various techniques, when employed by same-sex couples, always require that at least one of the child's natural parents give up the child. This tempting world of sperm banks and egg brokers is the domain of the affluent and easily verges toward eugenics.

Adoption and reproductive technology as methods of forming our next generation are no foundation for a stable society. Social order doesn't depend on parents being forced to give up their children for adoption because of poverty, illness, supposed unfitness, or the brutal policies of a foreign country—nor on parents giving up their children in advance of birth in sterile, scientific transactions. Those historical Supreme Court cases declaring marriage a fundamental right lauded the stability-promoting aspects of marriage, emphasizing the good that radiates throughout the broader society from the promise the man and woman make on their wedding day: "Marriage … creat[es] the most important relation in life … having more to do with the morals and civilization of a people than any other institution." "Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties." The promise of the married couple to keep and care for one another and for their children engenders a respect for unconditional responsibility that serves us all.

Extending marriage to same-sex couples would leave no other institution to promote the ideal that every parent promises to care for his child. It's easier for fathers to walk away from their responsibilities when society no longer promotes the simple norm that a child belongs to both parents equally, and each has a duty to care for the child—the norm encompassed in traditional marriage. As the NAACP, La Raza Centro Legal, and the National Association of Social Workers know, the pain and deprivation caused by the erosion of this norm fall hardest on the poor.

This essential promise of marriage regarding children cannot, by its nature, be fulfilled by same-sex couples. To those who ask how reserving marriage for one man and one woman is any different from yesteryear's vile prohibition against interracial marriage, the answer is evident in the faces of the often exquisitely beautiful children of mixed-race couples, belonging to and beloved by both parents, relinquished by neither. ■

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Daniel Larison

Establishing Obama

In the wake of the controversy over his condescending remarks about small-town Americans at a San Francisco fundraiser in early April, Barack Obama lost the Pennsylvania primary by nine points, falling behind Hillary Clinton in the rural counties of the state by as many as 50. The results confirmed the limits of his voting coalition—predominantly young, urban, liberal, and black voters—just as his remarks in San Francisco seemed to crystallize the image of Obama as a professorial progressive who derogates culturally conservative whites while arrogating to himself the role of social scientist in chief. Hoping to span the gap between his donor base and the voting bloc that has continued to elude him throughout the primaries, Obama attempted to justify to an urban liberal audience the cultural attitudes and habits of rural and small-town voters and was rightly pilloried as an elitist for his efforts.

While the tag may still be political poison in the primaries in Indiana, Kentucky, and West Virginia, Obama can take some satisfaction from having been attacked as an elitist, since it is a mark of how far he has risen and how fully he has been accepted into the upper echelons. As he and his supporters never tire of mentioning, Obama was raised by his grandparents and his mother in fairly humble circumstances, and in the last decade he has almost ascended to the pinnacle of national politics. In a very short space of time, he has assimilated himself to the political class, whose attitudes he learned partly at Harvard and Columbia and partly in Springfield as a state legislator. Because Obama's rise has been so swift, he must keep speaking their language to signal his full belonging to that class.

Such is the essence of snobbery: it is most acute in those who have recently acquired their higher status, while those who have enjoyed the same status longer have more luxury to play at being tribune of the people. Ironically, it is his very newness to the national political scene, which many regard as one of Obama's refreshing traits, that compels him, far more than his opponents, to conform to conventional expectations in what he says and believes. This means that Obama will always be more constrained, and will inevitably appear more elitist, than his rivals because he cannot afford to compromise the high status he has achieved.

It is doubly ironic, even tragic, that Obama has also had to combat skepticism about his patriotism in recent months, since nothing could attest more fully to his complete assimilation to the political and cultural norms of American government and academia than his sociological distance from and pity for small-town America. If Obama can be cast in some way as "post-American" or a "globalized American," this is only because he has adapted to a class dominated by what David Brooks called the "progressive globalists," who fill the leadership of both parties. Obama's elitism and his perceived alienation from Middle America are both results of his successful integration into the political establishment.

What we have seen with the controversy over Obama's elitism is a well-entrenched section of the political class turning Obama's very imitation of their attitudes against him. If he had not fully embraced these attitudes, he would be ridiculed as an *arriviste* and a gatecrasher. Worse, he would be denounced by elite commentators with the only insult more politically damaging than "elitist"—"populist." The difference in the degree of hostility from most commentators is this: rivals and pundits mock you as an elitist to damage you, but it is still a sign of acceptance that you are a competitor who belongs in the arena with them, while the charge of "populist" is intended to stigmatize you as dangerous, crazy, or both.

Obama has been fortunate, therefore, to be described as an elitist and not as a populist. Elitists are at least allowed to reach the general election; populists must be stopped or politically crippled long before that. Of course, there is a relationship between what the candidate proposes to change and the use of the different names. Those who actually threaten the *status quo* in some meaningful way are deemed populist and driven to the margins, while those who represent an acceptable alternative are merely elitist. Politicians who are a little too visibly elitist are simply undesirable for other members of the elite because they remind everyone else of disparities in power and wealth. Populists, on the other hand, represent—in establishment minds at least—a real danger to their position. ■