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***THE SUMMER HITS OF  
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IN MARRIAGE LAW***

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# THE SUMMER HITS OF 2006: RECENT TRENDS IN MARRIAGE LAW

The month of July 2006 was possibly the most consequential in the ongoing debate over the legal meaning of marriage in decades. In that month, eight court decisions on various issues related to the definition of marriage were issued and all were, in varying degrees, welcomed by defenders of the legal definition of marriage as the union of a man and a woman. The trends discernible in these opinions provide some optimism for the future of marriage as a normative social institution but also signal reasons for caution.

## Cases

On July 6, the New York Court of Appeals (the state's highest court) issued a decision in four consolidated cases, each challenging the definition of marriage on state constitutional grounds. The court ruled 4-2 (one judge had removed himself from the case), that defining marriage as the union of a man and a woman did not violate any constitutional guarantees. Specifically, the court held that the definition of marriage could be justified by: (1) the biological reality that men and women make children and thus "an important function of marriage is to create more stability and permanence in the relationships that cause children to be born" and (2) the "intuitive" proposition "that it is better, other things being equal, for children to grow up with both a mother and a father."

That same day, the Georgia Supreme Court turned back a challenge to that state's marriage amendment. The ACLU had argued that the amendment addressed two subjects in contravention of a constitutional rule that the people are allowed to vote only on one matter at a time. The court summarily rejected this contention.

The next week, the Massachusetts Supreme Judicial Court unanimously allowed a ballot measure to define marriage as the union of a man and a woman to go forward for legislative consideration. Ominously, however, two of the court's judges suggested that they were open to another challenge to the amendment based on the radical notion that the court's earlier redefinition of marriage might be "irreversible" because that "holding has become part of the fabric of the equality and liberty guarantees of our Constitution."

Also that week, a trial court in Connecticut ruled that that state's marriage law was constitutional. The court based its decision on the fact that the state legislature had already provided the benefits of marriage to same-sex couples, so these couples suffered no harm as a result of the marriage definition.

Two days later, the Tennessee Supreme Court rejected an ACLU challenge to a proposed marriage amendment in that state. The challengers had argued that the legislature failed to meet a technical publication requirement in approving the amendment, but the court held that since the plaintiffs had known about the amendment since its inception, they were not harmed by any delay in publication.

A most significant federal court decision was issued that same day. This case involved a challenge to the Nebraska marriage amendment approved overwhelmingly by voters in 1999. Advocacy groups had argued that the amendment prevented them from petitioning the legislature to get marriage benefits in

violation of the federal constitution. They succeeded at convincing a trial court judge of their argument, but the Eighth Circuit Court of Appeals rejected it out of hand. The court specifically held that any law that defines marriage as the union of a man and a woman is justified against constitutional attack because of the government's interest in "steering procreation into marriage."

After nearly a year and a half, the Washington Supreme Court finally issued, on July 26, its decision in two cases challenging the state marriage law enacted in 1997. The court voted 5-4 in favor of the marriage law. The majority found legitimate the state's concern with "encourag[ing] procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive." Two justices concurred and went further, characterizing the state's interest as "compelling."

Getting in just under the wire, a British High Court judge issued a July 31 decision holding that a same-sex couple married in Canada would not be recognized as married in England. The judge noted that although same-sex couples can access the benefits of marriage by registering as "civil partners," the belief that marriage is the relationship that "best encourages stability in a well regulated society is not a disreputable or outmoded notion based on ideas of exclusivity, marginalisation, disapproval or discrimination" against homosexuals.

## **Trends**

Leaving aside the technical decisions, some trends emerge in the reasoning of the pro-marriage majorities in the July decisions.

First, these decisions seem, for the most part, to go beyond simply saying that the definition of marriage should be a matter for the legislature to decide. The decisions appropriately defer to the people's right of self-government but they do so advisedly after examining the meaning of marriage and the role of legal recognition of that institution. Indeed, more than punting a difficult question to the legislature, the opinions evince an important recognition of the limitation of the judiciary's role.

This is crucial for preserving marriage since our historic understanding of the role of the state vis a vis marriage has always been that there are appropriate jurisdictional limits on what the state can do relative to the family. These include recognition that the state does not create marriage, it merely recognizes it. It also includes the principle that the state will not interfere with an intact family absent significant misconduct on the part of a member. Thus, any indication that these jurisdictional notions will be respected is indeed encouraging.

Second, the courts have shown a willingness to defer to social and biological realities. They see that marriage is more than outmoded bigotry. Rather, the decisions note that our inherited understanding of marriage has long served to channel men and women into relationships that make more likely the ideal of a child being raised by the mother and father responsible for that child's existence. The courts have implicitly rejected the radical notion that men and women are simply interchangeable. The New York court, in particular, recognized that men and women make unique contributions to child rearing and neither should be intentionally excluded in the service of adult desires for intentionally motherless or fatherless homes.

They have also recognized that the fact that same-sex couples create families only as a result of intention, with third party assistance, makes these relationships fundamentally different from relationships that can (and do) result in procreation without intention. Even childless opposite-sex couples promote society's

interests in marriage by refraining from creating children with other people who will then be raised by only one parent. Redefining marriage, conversely, exalts adult choice as the sine qua non of family-a development that compounds marriage's other current challenges (like rampant divorce) rooted in radical individualism.

## Warnings

The trends in the dissenting opinions are also important to note because they raise a warning for those who defend marriage as a social institution with an intrinsic meaning related to child well being and other goods. This is true particularly, because in two of the most significant decisions, the voting was close. Only one vote stood in the way of a redefinition of marriage in Washington, for instance.

The first trend is the sense of historical triumphalism in the dissenting opinions. Some of the judges who support a redefinition of marriage specifically charged that the majority opinions would be a source of "shame" or "regret" to future generations. This has also been a characteristic of the same-sex marriage advocates' criticism of the decisions-the argument that they are on the right side of history as it unrelentingly marches on to an enlightened future of general acceptance, away from the benighted prejudices of our ancestors. One danger of this way of thinking is the tendency of its proponents to believe that history may need a little push, thus justifying incursions on the liberties of those on the "wrong" side of history.

This "progressive" theory of history is typical of an ideology manifest in other trends evident in the pro-redefinition opinions. This ideology is a version of the leveling spirit that has consistently threatened inherited institutions. In the marriage context, the leveling requires a removal of all the elements of our historical understanding of marriage other than the "lowest common denominator" of adult choice. In the service of treating all adult choices of relationships as equally valid, the notion that marriage has anything to do children should be, they argue, jettisoned.

Another manifestation of ideology in the redefinition arguments is the characterization of those who disagree as motivated by ill motives. The trajectory following such a characterization leads to stigmatization of dissenters and sometimes attempted "conversions" of hold-outs to the "enlightened" notions of the ideologue. The Washington majority was correct when it noted that this attempt to characterize opponents as filled with animus goes beyond the judicial function. It is, however, part and parcel of an ideological movement.

The fact that the current attacks on marriage are motivated by ideology should be sobering. Ideologies are notoriously hard to engage in reasoned conversation. Those who believe that marriage is nothing more than a way to harm the human dignity of same-sex couples, are not likely to stop pressing their suit just because they have failed to convince their fellow citizens of their position. Thus, the effort to secure a redefinition of marriage will surely go forward with tenacity and heedless of good faith disagreement.

Summarizing, recent judicial developments provide hope that courts and other decision makers can indeed grasp the unique contribution that the legal definition of marriage as the union a man and a woman provides to society. This hope, however, must be tempered by a realistic awareness (stemming at least partially from the narrowness of some of the court majorities) that the ideology-driven opposition to our inherited understanding of marriage is still on the march.

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## Endnotes

The major proponents of redefining marriage have generally been careful to avoid making federal claims about the constitutionality of marriage for fear that the current makeup of the U.S. Supreme Court makes that court unlikely to accept their claims. They, no doubt correctly, believe that to lose a major federal case would stall their long-term goal of a nationwide redefinition of marriage. Thus, they have opted to take their claims to state courts they perceive to be sympathetic until the prospect of a national victory is more likely.