

## *Featured Review Essay*

### **Establishment Politics? The Fight for Same-Sex Marriage in Courts, Politics, and Society**

*Same-Sex Marriage in the United States: The Road to the Supreme Court.* By Jason Pierceson. Plymouth, UK: Rowman & Littlefield, 2013. 266 pp. \$41.74 Cloth

*An Argument for Same-Sex Marriage: Religious Freedom, Sexual Freedom, and Public Expressions of Civic Equality.* By Emily R. Gill. Washington, DC: Georgetown University Press, 2012. 288 pp. \$26.96 Paper

*The Nuptial Deal: Same-Sex Marriage and Neo-Liberal Governance.* By Jaye Cee Whitehead. Chicago, IL: University of Chicago Press, 2011. 208 pp. \$25.20 Paper, \$63.00 Cloth

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Since the late 1990s, same-sex marriage has been presented as the next great frontier of civil rights and, last June, the United States Supreme Court announced two remarkable decisions regarding marriage equality. In *United States v. Windsor*, the Court ruled that the Defense Against Marriage Act (DOMA) violated due process, equal protection, and the rights of states to acknowledge and protect same sex marriages by denying federal benefits to legally wed same sex couples. This decision was widely hailed as a landmark civil rights victory. In *Hollingsworth v. Perry*, the Court refused — on technical grounds — to decide whether Proposition 8 (a California referendum that made marriage available only to heterosexual couples) violated the United States Constitution. The Court's refusal to hear the case allows same-sex marriage in California and, for now, leaves the states to individually define and delimit civil

marriage. Three thought-provoking and accessible books — in public law, political science, and sociology — clarify and complicate the context and theoretical assumptions behind marriage equality, leaving the reader to decide whether marriage equality as a litigation strategy should be celebrated or treated as a cautionary tale.

Jason Pierceson's *The Road to the Supreme Court: Same-Sex Marriage in the United States* provides a helpful preface to these two important decisions. Pierceson insists that changes in marriage law can only be understood by probing the interaction between law, politics, and culture. Providing a state-by-state analysis, he demonstrates the tension among courts, legislatures, and majorities voting in referenda as he discusses public opinion, electoral politics, judicial activism, backlash, religion, and minority rights. In tracing the evolution of the issue from the earliest cases in Hawaii and Vermont to the more recent cases in New York and California, he concludes that there has been a policy innovation: trial court judges have, uncharacteristically, been willing to favor same-sex marriage. Thus, many of these cases are decided by one person without witnesses or cross-examinations. A second key to understanding same-sex marriage laws and court decisions is the extent to which the decentralized structure of the American federal system incentivizes *both* creative policy innovation that extends marriage to same-sex couples *and* discrimination that includes only heterosexual partners. Pierceson believes the United States Supreme Court will eventually break this deadlock (and he dedicates a late chapter to national precedents).

The federalism narrative is complemented by a chapter on the politics of marriage equality in Europe, Commonwealth countries (Canada, Australia, and New Zealand), South Africa, and South America. Pierceson suggests that marriage equality is related to the need for couples to share benefits when they are not provided by the state. Although largely unconnected to the rest of the narrative, Pierceson's data provides perspective on the role of both material and symbolic benefits in the American case.

How did the United States move from the 1950s — when the Senate openly described gays as perverts and transgressors — to the 2013 Supreme Court overturning the DOMA for discriminating against same sex couples? Pierceson identifies 1950–1990 as a period of legal change in employment, public accommodation, and LGBT youth rights. These early attempts to understand lesbian and gay rights in terms of sexual minorities contextualize the emergence of a legal identity necessary for mobilizing in the courts. This legal consciousness — legal awareness and activity by average citizens — can both “restrict and encourage

[citizens'] legal ideas and actions, either by fear of the law or by a sense of justice motivating the law" (38). Gay and lesbian Americans needed a legal consciousness to recognize and mobilize against discrimination.

The litigation strategy pursued by the marriage equality movement is liberal constitutionalism: the political and legal status of sexual minorities should be informed by individual freedom and equal treatment. If sexuality is part of identity, then non-heterosexual forms of sexuality should be recognized and protected by the law. Pierceson accurately (and presciently) places Justice Kennedy's jurisprudence in this camp as Kennedy's majority decision in *Windsor* relies upon due process, equal protection, and the concern that the national government is disparaging and injuring those whom the states were trying to protect in their "personhood and dignity" by legalizing same-sex marriage. Pierceson emphasizes tangible harm — mirroring Kennedy's majority opinion in *Windsor* as well as earlier decisions rejecting criminalized sodomy and discrimination against sexual minorities. Kennedy frames his opinions in terms of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" and Kennedy sees the 14<sup>th</sup> amendment as crucial to their protection (9–10). But this does not square with Pierceson's claim that the fundamental rights approach is not popular with today's courts and is flawed because it looks backward for rights deeply embedded in tradition. The evidence Pierceson marshals demonstrates that *both* fundamental rights and equal protection are used by state courts (17, 90, 101, 126, 128, 159, 164, 188) and both are central to the Kennedy jurisprudence.

Pierceson's claims regarding legal consciousness, backlash, precedent, forum shopping, the role of elites, and the interplay between city, state, and national governments, would be stronger if they were compared with previous legal mobilization movements (e.g., civil rights or pay equity for women) or scholarly works regarding legal mobilization. For example, Michael McCann's *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* would have provided a nuanced theoretical framework to explain the effects of legal consciousness on actors and institutions and it is curious that this work (or other similar works) are not substantively discussed.

In attempting to bridge the tension between deep case study and comprehensive coverage, Pierceson provides short summaries of key state cases. This approach allows him to show the interactions between the political and legal institutions to good effect: and to show how these issues don't always cut in ways you might imagine. In religiously conservative

Alaska, for example, the trial court judge found denial of property tax benefits to violate equal protection and Governor Sarah Palin vetoed a bill that would have forbidden benefits to same sex partners.

Yet scholars of American politics will miss any serious discussion of the effect of the media or clear evidence for his claims that courts and politicians affect public opinion. Political party, religion, race, and regions are also under-analyzed. Pierceson accurately lays out the objections to same-sex marriage from religious groups and tries to show how this often overlaps with neoconservative secular arguments (marriage as a first institution necessary to fight social pathologies). He notes the importance of religion as one of the sources for the Republican Party's strong opposition and suggests that Republican opposition combined with strong public support of same-sex marriage might lead to third party politics but he under-analyzes the Tea Party and how it affects Republican party dynamics. There is no rigorous analysis of race as part of individual state political cultures. In the strangely brief description of the South as a region, there is no discussion of the intersection of party, race, religion, or public opinion. The South is merely stereotyped as "religious" without serious analysis.

Pierceson shows how and why the litigation strategy varied so greatly but cataloging this much information leads him to sacrifice depth for breadth. As an introductory work for undergraduates, this is a superb book (and I will assign it next semester) but it will be less satisfying to scholars in the fields of public law or political theory.

While Pierceson's book provides context and description, Emily R. Gill's *An Argument for Same-Sex Marriage: Religious Freedom, Sexual Freedom, and Public Expressions of Civic Equality* focuses on prescription. In the same way that non-recognition of interracial marriage supported white supremacy, heteronormative marriage laws preserve heterosexual privilege and Gill insists that civic equality requires the state to stop favoring heterosexual citizens. Drawing parallels between free exercise of religion and sexual identity, Gill rejects the American "establishment" of heteronormativity and the inequality that it encourages.

Writing well before *Windsor*, Gill perceptively anticipates Kennedy's majority opinion. Even if individual states legalize same-sex marriage, the *national* government (through DOMA) deprives same-sex couples (legally wed in the states) of the federal benefits that typically accompany marriage. DOMA creates differentiated citizenries that subordinate and marginalize in terms of both material benefits (e.g., the estate tax that motivated the *Windsor* case) and civil recognition that communicates public respect.

But Gill adds another layer: the lack of neutrality regarding sexual orientation and practice is very much like constitutional guards against state sponsored religions or abridgement of free exercise of religion. Justice Sandra Day O'Connor's endorsement test insists that government cannot make a policy that appears to endorse some religious belief over others because state endorsement creates citizens who are insiders and outsiders. Because marriage is the "gold standard" for both material benefits and public recognition, Gill labels heterosexual marriage requirements as a *state* endorsement of relationship insiders. Full membership in the community means equal public standing — and equal access to a public institution, civil marriage, which is defined by the state. Alternative arrangements (e.g., civil unions) support this notion of marriage insiders. Gill believes O'Connor's endorsement test reveals how "civic equality requires the inclusion of same-sex couples in the civil institution of marriage" (124).

For Gill, sexual orientation is — like religion — a central fact of one's identity. Sense of self and purpose in the world cannot be uncoupled from sexual orientation and practice. Whether the search for fundamental truth is rooted in conventional religion or secular sources, Gill wants the Constitution to protect the search, including the right to marry the partner of one's choice. Because choices regarding sexual identity speak to authenticity and conscience very much like religion, denying marriage to same-sex couples is akin to denying their free exercise of religion.

Gill provides a superb discussion of how same-sex marriage rules affect basic human rights — fundamental liberties in constitutional terms — showing how, first, a group is deprived of a right and, second, the deprivation is justified on the grounds of longstanding dehumanizing stereotypes. In liberalism, privacy can be protective but it can also endorse a position. "Don't Ask, Don't Tell" sidesteps toleration and recognition as it asks individuals to keep behavior private while reinforcing traditional relationships: a form of endorsement of heteronormative relations and relationships.

For those interested in the intersection between politics and religion, Gill demonstrates hidden sectarian preferences embedded in the law: a shadow establishment of religion that favors a particular vision of intimate relationships and grants privileges accordingly. She also helps identify important differences in recent religious objections to legalization. Religious conservatives contend that same-sex marriage destroys *their* free exercise of religion (e.g., they will be forced to rent a room to a same-sex couple even though that practice violates their religious

beliefs). This argument is often extended to a demand for the government to promote policies that *enable* a religious practice by penalizing those who do not share their beliefs. For Gill, many who oppose same-sex marriage are not content with rejecting those relationships — they want additional control over the “formative social and political environment” in which they live their lives. She uses works in meta-ethics to show that social conservatives and the religious right see legalizing same-sex marriage as elevating and validating. One of her crucial insights is that no system is *neutral* to citizen preferences in terms of religious belief or sexuality — all have ranges of acceptable preferences (e.g., the United States rules out polygamy). To make her claims, Gill effortlessly combines the insights of legal and political theory. Here, for example, she applies Nancy Rosenblum’s understanding of foundationalist integralists — clarified by returning to John Stuart Mill’s definition of contingent or constructive injury — to Kennedy’s opinion in *Romer v. Evans* to show how Colorado sought to create an environment that was comfortable for religious believers.

The free exercise of religious people who object to same-sex marriage will be *affected* by legalization but Gill sees no constitutional violation. A religious bed-and-breakfast owner — who will not rent rooms to a same-sex couple — can, Gill maintains, choose another occupation. Here, Gill is a bit quick to dismiss the effect of marriage equality on the religious. She writes that “civil authority necessarily defines the limits of religious practice, and some manifestations of belief may be forbidden because they are deemed harmful to one’s fellow citizens or the larger community. We tend to conclude that curtailing religious *practice* (my emphasis) though regrettable, does minimal damage because, after all, we are not pressuring people to change their beliefs” (45). Gill seems to understate the extent to which belief and practice are linked in foundational liberal theory (Locke) and the American constitutional structure (free exercise). Yet her example encourages the reader to think about bigger fish. Organized religions have chosen to create hospitals and universities and most take money from local, state, or the national government. What decisions must be made regarding free exercise, establishment, and equal citizenship?

This thoroughly researched and deeply challenging book rewards the careful reader as Gill covers not only the legal arguments but their basis in foundational works of liberal democratic theory and decades of secondary theory both directly and indirectly connected to same-sex marriage. By integrating foundational and secondary works, she makes Roger Williams, John Locke, and Thomas Aquinas speak to issues surrounding marriage

equality in extremely productive ways. This is a work that should be read by political theorists as well as scholars of public law.

Gill's analogy — sexual v. religious establishment — is productive and thought provoking as political theory but her argument is more limited as a roadmap for any United States court. While Gill is fundamentally correct that sexual and religious expression *both* carry deep meaning for many individuals, only one is *explicitly* protected in the United States Constitution and it isn't clear that issues of race, gender, and sexual orientation are purely matters of conscience as opposed to identity. If a legislature argued for heterosexual marriage based on religion, shadow establishment would be a productive approach but endorsement would not work if arguments were strictly secular. Like it or not, the Constitution privileges religious choice unlike any other belief system by enumerating protections. Given Gill's emphasis on choice and autonomy, fundamental liberty — substantive due process jurisprudence — would better capture the arguments Gill makes using liberal theory.

Whereas Pierceson and Gill frame marriage equality as civil rights advancement, Jaye Cee Whitehead's *The Nuptial Deal: Same-Sex Marriage & Neo-Liberal Governance* urges caution. The "nuptial deal" is not a liberal democratic bargain but a neo-liberal swindle. Individuals may believe that they are autonomously choosing to create families outside the social norms in order to fulfill themselves by experiencing love and pleasure freely but Whitehead directs us to understand these choices in the context of a wider force: neo-liberal governance.

Like Pierceson, Whitehead identifies the early 1990s as the moment when gay rights organizations began to prioritize legalizing same-sex marriage as a goal of civil rights. As she surveys gay social movements, she highlights a shift from the radicalism of the 1960s that treated marriage with suspicion (as linked to patriarchy and privilege) to the embrace of legal and legislative strategies to extend marriage. Rather than radically reform government and social structures, activists settled on a strategy based on fitting into existing institutions.

Events of the 1980s set the stage for that shift as the AIDS epidemic brought issues of care structures — hospital visitation, health care benefits, death benefits — to forefront. The informal care structures that gay men had depended upon were found lacking, revealing the vulnerability of those individuals who had caring partners — but not ones that were legally recognized by hospitals or insurance companies. Whitehead also details how the lesbian baby boom of the early 1980s helped expose marriage as the sole site for parental rights, leaving lesbian and gay parents

and children inadequately protected. Although theorists like Nancy Polikoff pushed to disentangle marriage and parental rights, by the 1990s, activists saw including same-sex couples in marriage as a way to address issues of health care and parental rights.

Whitehead's analysis of the social movement helps clarify *why* same-sex marriage might be on the agenda and what the long-term social and political implications might be. She argues that the diminishing care structure in the United States is responsible for the urgency of marriage equality. Without state benefits granted to individuals, marriage becomes a private alternative that enables benefit sharing and supplies a ready care model in which individuals are valorized for taking "responsibility" and making good choices for themselves and their family members. Neo-liberal governance cultivates subjects who are invested in managing themselves — in marriage — rather than "burdening" the state. Given this incentive structure, same-sex couples are directed to legal marriage to manage illness, poverty, and disability. The nuptial deal preserves a model of care that reduces state expenditures by locating care and the regulation of life risks in the legal family.

Whitehead skillfully uses Foucault and Bourdieu to demonstrate how neo-liberal governance — a process that exists beyond formalized systems of political authority — encourages individuals to *consent* and even ask for a system that they ideologically oppose. Same-sex couples are being managed even though they are not directly controlled by institutions of the state. In a nuptial deal, individuals set aside their progressive agendas for change (e.g., state benefits based on individual citizenship, economic redistribution, radical challenging of gender roles) in exchange for access to the marriage license.

In order to understand how proponents of same-sex marriage fight for — and justify — marriage equality, Whitehead, a sociologist, provides an ethnographic account of the marriage equality movement as well as an interrogation of this neo-liberal theoretical framework that pushes couples to seek marriage for benefits. In this well-written, jargon free, and fascinating case study, she follows members of a national gay rights organization that she calls Marriage Rights Now to protect the identity of her subjects. She combines a qualitative content analysis of legislative hearings, court affidavits, activist manuals, opinion pieces, and policy briefs with participant observation and in-depth interviews. Her rich methodology convincingly reveals how the motivations and goals of agents intersect with the forces of governing structures. Her study is attentive to nuances of race and class (though less focused on religious difference).



Whitehead is clear that governance is not the *only* force in play — but she believes it is one that goes unnoticed as we celebrate same-sex marriage as a civil rights achievement or the result of autonomy and personal choice.

Reading Whitehead back-to-back with Gill has enormous intellectual rewards. Whereas Gill explores the theoretical arguments that are critical of marriage as liberating, Whitehead supplies the everyday understanding of individuals fighting for same-sex marriage in fruitful and productive ways. Her interviews reveal fascinating differences in the texts and documents of the movement — focused on extending civil rights, short on calls for progressive changes to benefits or income redistribution — with the beliefs of individuals working for Marriage Rights Now. First, activists have not necessarily abandoned their commitment to a wider and thicker social safety net. Many see marriage equality as a strategy to alleviate short-term problems for same-sex couples even as wider changes would be necessary for equality. Second, many activists are keenly aware that discrimination might not be enough to convince the state to open up marriage to same-sex couples. Thus, they use economic arguments — extending marriage saves money, helps rear children without state assistance — for strategic purposes. Whitehead also demonstrates the extent to which symbolic — rather than material — rewards motivate activists because legal marriage signals acceptance.

Whitehead offers helpful insights regarding a paradox. If marriages help neo-liberal governance, why have state governments resisted legalizing same-sex marriage? Whitehead posits that the neo-liberal state patrols the status of marriage as special (rather than simply mechanism of the state for privatizing care). Thus, same-sex marriage *might* threaten neo-liberal governance if it exposes marriage as a site for privatizing care rather than expressing intimacy.

Whitehead uses a local case study to make more general claims about neo-liberal governance. Yet her conclusions cry out for some global comparisons. If the weak social safety net pushes American activists to advocate for marriage equality, one would expect that nations with thicker social services grounded in citizenship should *not* experience the same pressures for same-sex marriage. But the data on international trends (see Pierceson's brief overview) don't support the correlation. Countries with national health care (like Canada) still experience calls for marriage equality. As the wider case is made for the effect of neo-liberal governance, it would be interesting to untangle the effect of material benefits and the symbolic power of recognition by comparing trends in different countries.

Whitehead's reminders — specifically that marriage creates the legal scaffolding for private property and capital accumulation — are particularly timely. The *Windsor* case — with all its language of choice and equality — focused on material benefit: the \$363,000 tax that would not have been paid if the couple's marriage had been recognized by the national government.