Marriage, Pluralism, and Change: A Response to Professor Wax

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How would, and should, secular conservatives think about same-sex marriage? A conservative or quasi-conservative case can be made for gay marriage rights, but most conservatives are surely opposed or at least deeply skeptical. Amy Wax gives a sophisticated and thoughtful account of why. She captures the spirit as well as the substance of why conservatives, especially those whose thinking is broadly in line with Edmund Burke or Michael Oakeshott, might be very reluctant to change the marriage laws to institute gay marriage.

But Professor Wax's essay raises a key question: How should people of conservative temperament think about change? Liberals, radicals, technocrats, and rationalists—all these might tend to put the onus on any existing institution to justify itself. From these (nonconservative) points of view, if a traditional way of doing things cannot be shown to be fully consistent with desirable principles, then the way should change: at least, it should unless there is a convincing, rational case against reform. This is to take liberalism, radicalism, and so on as abstract ideals, of course. Few actual human beings, perhaps, would adopt this stance toward all existing institutions: certainly not toward institutions in which they have a personal stake. For example, liberal or leftist academics who have an interest in existing practices such as academic tenure could safely be expected to put the burden of proof on anyone proposing to abolish or radically reform them. And most conservatives, likewise, are not conservative all the time, especially when there are interested reasons

not to be. But conservatives, on the whole, do believe that the burden of persuasion should be on the advocates of change; their presumption is in favor of existing institutions and ways of doing things. This is essentially the definition of being conservative.

Yet, as Professor Wax notes, conservatives are not simply, categorically, and always against change. It would be untenable—in fact, it would be ludicrous—to suggest that people or their ways could or should never change or evolve. Burke and Oakeshott, like other conservative thinkers, and indeed like any sane person, acknowledge that some change is good, and some is inevitable. How, then, should a conservative think about gay marriage? It is surely not enough to say "the burden of persuasion should be on the proponents." Such a "burden" is, at best, a kind of metaphor drawn from the law courts. Even in court, the meaning of the various "burdens of proof" tends to be elusive.[1] For proponents of gay marriage, specifically, what should they have to prove? How, and how convincingly, should they have to prove it?

Professor Wax quotes Edmund Burke:

> [T]he ground for a legislative alteration of a legal Establishment is this, and this only; that you find the inclinations of the majority of the people, concurring with your own sense of the intolerable nature of the abuse, are in favour of a change.[2]

In other words, as a politician, you should "acquiesce in change only if both the public and [you] concur that some modification is necessary."[3] And "[m]inor changes should be resisted; it is only when the abuse is 'intolerable' that change is warranted."[4]

This may not be very helpful, however, either for the gay marriage debate or more generally. First, if you resist all change until abuses are intolerable, then you preclude gradual, evolutionary change, and you implicitly await and invite eventual revolutionary, seismic change—which is surely the opposite of a conservative attitude. Oakeshott, too, seems to resist "tinkering." "He comes out against what he terms the 'politics of felt need', which he characterizes as the relentless tendency to identify problems or dissatisfactions with existing arrangements, however small,

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1. *See* United States v. Fatico, 458 F. Supp. 388, 409–11 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979) (exploring the wide variations in how the various burdens of proof are interpreted). *See generally* Rita J. Simon & Linda Mahan, *Quantifying Burdens of Proof*, 5 L. & SOC'Y REV. 319 (1971) (divergent understandings by judges and jurors of the various burdens of proof).
2. Amy L. Wax, *The Conservative's Dilemma: Social Change, Traditional Institutions, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1075 (quoting MICHAEL FREEMAN, EDMUND BURKE AND THE CRITIQUE OF POLITICAL RADICALISM 160 (1980)).
3. *Id.* at 1071.
4. *Id.*

and then to pursue immediate action to correct the perceived flaws."[5] The more passionate advocates of gay marriage, of course, contend that existing institutions and laws are a grave abuse, not a trivial or even a tolerable one. In various practical as well as symbolic ways, they claim, the denial of gay marriage denies homosexuals the chance of a "normal" family life, and demeans and diminishes them as human beings. The question, of course, is how to assess these claims. But any conservatism that admits change only when abuses are intolerable invites the advocates of any change to persuade themselves, as the first step toward persuading others, that a given object of reform is not merely an object of reform but a grave and intolerable abuse. It opens the door to the politics of passion, of uncompromising grievance—which again might seem to be the opposite of what conservatives ought to be promoting.

As for Burke's suggestion that you should oppose any change unless "you find the inclinations of the majority of the people" already favor it, Burke himself conspicuously failed to comply. Burke, famously, was a friend of American independence, and vehemently opposed British warfare against the rebellious colonies after July 1776.[6] Yet the American Revolution, until after the conclusion of the War of Independence, probably never had majority support even in America, much less in Britain.[7]

If these passages, at least, from Burke and Oakeshott do not offer a convincing conservative theory of change, might the gap be filled by Friedrich Hayek, a third thinker to whom Professor Wax alludes? Hayek is skeptical of social engineering, and of ambitious command-and-control

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5. *Id.* at 1072.

6. *See* Edmund Burke, *Speech on Conciliation with America (1775)*, *in* ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 62 (David Bromwich ed., 2000); *see also* Edmund Burke, *A Letter to the Sheriffs of Bristol on the Affairs of America (1777)*, *in* ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 138 (David Bromwich ed., 2000).

7. Robert M. Calhoon, *Loyalism and Neutrality*, *in* THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 247 (Jack P. Greene & J. R. Pole eds., 1991) ("Historians' best estimates put the proportion of adult white male loyalists somewhere between 15 and 20 per cent. Approximately half the colonists of European ancestry tried to avoid involvement in the struggle . . . . The patriots received active support from perhaps 40 to 45 per cent of the white populace . . . ."). Other historians put the numbers of loyalists even higher, and of patriots lower. John Adams is frequently quoted as guessing that a third of Americans were for independence, a third were loyalists, and a third were indifferent. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492—PRESENT 76 (20th anniv. ed., 1999). The numbers surely fluctuated before and during the War of Independence, and are scarcely ascertainable with much confidence today.

schemes for reform, primarily because of the problem of knowledge costs. A reformer or regulator has to know a lot—often, perhaps, more than any one person or institution can possibly know—in order to change existing institutions wisely. Which reforms would benefit a diverse multitude of people? What will be the real consequences of a particular reform? Free markets, says Hayek, are decentralized: they spread decisions among many people, each of whom has reason to know what he, she, or—in the case of collective bodies—it wants. Of course, people can make mistakes about this, but at least decentralized decision-making spreads the risk of error among a larger number of people. Hayek was preeminently a critic of central planning. Social engineering is apt to be inefficient, he says, because it presumes a level of knowledge that is difficult or impossible to acquire, especially "from the top down" in a large and complex society.[8]

But Hayek's views have equivocal implications for the gay marriage debate. Introducing gay marriage, or instituting any radical reform of marriage, can surely be characterized as social engineering of the kind that Hayek warns against. But from another point of view, it is marriage itself—insofar as it is a state-sponsored and state-supported institution—that amounts to social engineering. In other words, it might be just as valid an inference from Hayek's ideas, instead of opposing gay marriage, that marriage and family law as a whole ought to be privatized: that people should make their own arrangements, by contract or otherwise, based on their greater knowledge about themselves, without state favoritism for or against any particular form of family, or for or against families altogether.

Friedrich Hayek, to be sure, sits rather uneasily with Edmund Burke and Michael Oakeshott. There is at least a difference in emphasis, and perhaps in fundamental outlook, between Hayek's skepticism of central authority and his enthusiasm for free markets, and the more tradition-minded conservatism of Burke and Oakeshott. Hayek, after all, is more identified with the "libertarian" than with the "traditionalist" strain of conservatism.

As Professor Wax rightly implies, however, secular conservatives—Burke, Oakeshott, and Hayek as well—all tend to share a belief in value pluralism: in the idea that there are many competing ideals and goods in life, but no single utopian principle that can systematically and consistently give the right answer to every public (or private) question.[9]

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8. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).
9. *See* JOHN KEKES, A CASE FOR CONSERVATISM 34–36, 191–99 (1998) (arguing that value pluralism is an important element of secular conservatism). Value pluralism is most closely identified with the writings of the English twentieth-century philosopher and historian of ideas Isaiah Berlin. *See* SIR ISAIAH BERLIN, THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS (Henry Hardy & Roger Hausheer eds., 1997).

Value pluralism is by no means confined to conservatives, of course. But value pluralism has particular resonance for secular conservatives who are suspicious of utopianism and of a "rationalist" approach to public policy—the kind of approach that puts a premium on consistency, on legalistic thinking, on abstract adherence to principle, and on institutional reforms guided by experts and central planners. Value pluralism suggests, on the contrary, that public life (and private life too) require rough compromises among conflicting goods, which no social engineer can hope to reduce to ideological consistency.

Does value pluralism point the way to an answer in the gay marriage debate? Value pluralism emphasizes that there are various competing and conflicting visions of life, and that there is good in many of them. Hence it implies that there should be the greatest feasible tolerance for various ideas and ways of life. This might in turn suggest—unless there are strong reasons against it—that there ought to be some "social space" for gay marriage, if only as an experiment, without necessarily mandating that gay marriage should be lawful everywhere.

In a federal system, it is often possible to have laws that reflect diverse, even conflicting, values within a single nation. As such, federalism is an attractive political vehicle for value pluralism.[10] Federalism enhances human possibilities in this practical sense: whereas emigrating to a foreign country is unrealistic for most people, federal pluralism within one country can mean considerable freedom of choice for citizens about where to live, under which laws to live, and hence which values to live by.

Value pluralism seems to imply, then, that the best solution would be for gay marriage to be lawful in some states or provinces, but not in others: at least unless there are very strong reasons, outweighing value pluralism, for it to be lawful in all, or in none.

Things are more complicated, alas, on closer consideration. There are many areas of law that lend themselves to different, even contradictory, treatment in different jurisdictions. Tax rates can be higher in one state or province, lower in another; social welfare provisions can be more generous in one than in another; business regulation can be more or less onerous; one state can have the death penalty, another can abolish it.[11]

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10.   *See* Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 Nw. U. L. Rev. 961, 974 (2001) (arguing that federalism is usually favorable for value pluralism).
    11.   Thirty-eight states now have the death penalty in some form; twelve states have no death penalty. *See* Roper v. Simmons, 125 S.Ct. 1183, 1200–02 (2005).

There will often be spillover effects even on these matters, to be sure: tax rates and business regulations can attract, or repel, people to or from a given state. But within reasonable limits, states have latitude to legislate on such subjects in ways that reflect value pluralism: different laws, reflecting diverse values, in different states.

State laws instituting gay marriage, however, may fit awkwardly, or not at all, into this framework. The problem, of course, is that people (and couples) are mobile. If I contract a gay marriage in one state, to what extent must it be recognized in other states? There is a doctrinal question under the Constitution of whether my marriage is entitled to "full faith and credit" in other states.[12] Even if the answer to that question were "no," it would be difficult or impossible for other states to ignore the marriage entirely. If I lawfully contract a gay marriage in one state, can I later contract a heterosexual marriage to someone else in a state that does not recognize gay marriage? What about child custody disputes, to the extent that state law takes marriage into account—which it sometimes does—in adjudicating such disputes?[13] What if the surviving partner to a gay marriage claims property in a no-gay-marriage state from the estate of the deceased spouse, on the basis of being the surviving spouse? Confining the legal effects of gay marriage to states that actually institute it would be difficult, and the prospects for conflict among the states, including conflicting court judgments, might be considerable.[14] And beyond the strictly legal repercussions, gay marriage in one or more states might have profound cultural consequences in other states, well beyond the ripple effects of tax or welfare laws, or even death penalty laws, that now differ from state to state.

More broadly, it may be uncertain whether value pluralism conduces for gay marriage or against it. There is an obvious argument that pluralism supports gay marriage. Gay marriage would add to human choice. Heterosexual marriage is lawful everywhere, after all: no one proposes to forbid it. But if there is good in heterosexual marriage and in the ethos it bespeaks, there might be good in gay marriage as well, and in the different ethos and body of values that it might represent. Instituting gay marriage would expand the range of human possibilities; it would in no way contract it. And federalism would add a further element of

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12. U.S. CONST. art IV, § 1. Congress has now enacted the Defense of Marriage Act which purports to permit states to refuse to recognize same-sex marriages from other states, if they so choose. The relevant portion of DoMA is at 28 U.S.C. § 1738C (Supp. 2005).

13. *See, e.g.*, Burns v. Burns, 560 S.E.2d 48–49 (Ga. App. 2002) (refusing to treat a civil union as a marriage for purposes of interpreting a child visitation clause in a consent decree).

14. *See* Brian Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 105–07 (2003).

pluralism if gay marriage, and whatever changes in social climate that might go along with it, were adopted in some states but not in others.

But the case against gay marriage can be put in value pluralist terms as well. Especially if the effects of instituting it cannot be confined to particular states, gay marriage might not expand human choice so much as it would substitute, nationally, a new ethos for the old one: an ethos in which marriage no longer means what it used to mean. Up to now, marriage has remained substantially a traditional institution. Marriages are no longer indissoluble, if they ever were, but they are not purely private agreements whose terms are up to the parties. Legally as well as culturally, there are important elements in marriage that derive from religious ideas: "to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part, according to God's holy ordinance."[15] As such, marriage is a remnant, or an oasis, of premodernism—of what Henry Maine called "status" and Ferdinand Tönnies called Gemeinschaft—in a modern or postmodern world that is overwhelmingly driven by the values of "contract" or Gesellschaft.[16] To preserve marriage in something like its traditional form, from a value pluralist point of view, is to preserve an institution whose values are at odds with the main currents of modern life: currents dominated by free choice and free contract, by mobility, by innovation, by reason or by what Max Weber called "rationalization."[17] Gay marriage, to be sure, might not erode the values now implicit in marriage, but strengthen them, by extending them to gay couples. But skeptics view gay marriage as a big step towards "rationalizing" marriage, towards adapting it to the range of choices that modern or postmodern people are accustomed to in the marketplace. Skeptics also believe that the mores of unmarried gay people are as likely to influence gay marriages—and through gay marriages, ultimately to influence all marriages—as for the influences to run the other way. To update marriage in this way, a value pluralist might argue, would be to erode an institution, and an area of life, embodying

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15. BOOK OF COMMON PRAYER 304 (London: Cambridge Univ. Press n.d.).
16*. See* HENRY S. MAINE, ANCIENT LAW 304 (14th ed. 1891) (the progress of societies is from status to contract); FERDINAND TÖNNIES, COMMUNITY & SOCIETY (GEMEINSCHAFT UND GESELLSCHAFT) (Charles P. Loomis trans. & ed., Mich. State Univ. Press 1957) (1887). For an overview of the sociological classics on this topic, see ROBERT A. NISBET, THE SOCIOLOGICAL TRADITION (1966).
17. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., 1978).

values that challenge and provide an alternative to the values now prevalent in most other areas of life. Hence, gay marriage would be a step towards greater uniformity of values, not towards greater pluralism.

There is no formula for resolving which of these value pluralist arguments, for and against gay marriage, is the stronger. That plausible arguments for and against can both be put in value pluralist terms suggests that as to this, and perhaps as to other important public questions as well, value pluralism is more a temperament than a conclusive formula. There are surely things that value pluralism would preclude: totalitarian enforcement of any single-minded way of life comes obviously to mind. But there are many issues which value pluralism might not resolve, and about which value pluralists could take various and conflicting views.

As with value pluralism, so likewise for conservatism. There is no formula for resolving how traditionalist conservatives should think about gay marriage, or about social change in general. It is unlikely that many conservatives would be sympathetic to judicial decisions holding that gay marriage is a federal constitutional right. As Richard Posner has written,

> It is possible to make good lawyers' arguments that there should be a federal constitutional right to homosexual marriage. . . . The only thing wrong with these arguments is the tacit assumption that the methods of legal casuistry are an adequate basis for forcing every state in the United States to adopt a social policy that is deeply offensive to the vast majority of its citizens and to do so . . . [on the basis of arguments whose] moorings in text, precedent, public policy, and public opinion would be too tenuous to rally even minimum public support.[18]

But Posner, a pragmatic if not a traditionalist conservative, does not absolutely reject gay marriage. "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."[19] Traditionalists, of course, might be skeptical that such an experiment could be contained within the bounds of the single-state laboratory.

An abstract theory of social change will not be forthcoming from traditionalist conservatives. As Amy Wax says, suspicion of abstract social theories is fairly central to traditionalist conservatism. The conservative view, or temperament, is well expressed by Isaiah Berlin, the twentieth-century author most closely identified with value pluralism. There are no scientific laws for assessing or managing social change, says Berlin.

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18. RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 249 (1999).
19. *Id.* at 250.

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What is needed, instead, is a "sense of reality", "being able to size up the situation, knowing when to leap and when to remain still":[20]

> What is called wisdom in statesmen, political skill, is understanding rather than knowledge—some kind of acquaintance with relevant facts of such a kind that it enables those who have it to tell what fits with what: what can be done in given circumstances and what cannot, what means will work in what situations and how far, without necessarily being able to explain how they know this or even what they know.[21]

It is in some such terms that conservatives think about and debate gay marriage: a few supporting it, more no doubt opposing it. On the whole, to make a successful case for gay marriage to conservative-minded people, it will surely be necessary to persuade them that gay marriage will not fundamentally erode or transform marriage, or the values that have long been implicit in family life. Doing this may be especially difficult given that some supporters of gay marriage plainly have little love for traditional ways. For practical political purposes, it is not just a question of persuading conservatives, of course. But as to gay marriage at least, it is probably true to say that whatever might be required to persuade the conservative-minded, persuading any substantial body of the American people is apt to require much the same.

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20. ISAIAH BERLIN, THE SENSE OF REALITY: STUDIES IN IDEAS AND THEIR HISTORY 33 (Henry Hardy ed., 1996).
21. *Id*. at 32.