

Gay marriage dilemma: Get the state out of the marriage business

Posted by **Thomas Mitchell**

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On Aug. 5 [I wrote about](#) the federal judge's ruling overturning California's referendum banning gay marriage and how the judge harped repeatedly on the Equal Protection Clause of the [14th Amendment](#).

I concluded by asking why the states have any role in sanctioning marriage in the first place.

On Aug. 6 the Cato Institute's daily podcast guest, [Ilya Shapiro](#), right, came to a similar conclusion while noting the distinction between conservative views on the topic and the libertarian principles at stake.

During an interview by host Caleb Brown titled "Gay Marriage and Conservatives," Shapiro, a Cato senior fellow and editor of the Cato Supreme Court Review, singled out certain passages from the judge's ruling to show his strongest arguments and compare them to the high court decision in [Loving v. Virginia](#), which struck down state bans on interracial marriage.

Judge [Vaughn Walker wrote](#), "Race and gender restrictions shaped marriage during eras of race and gender inequality, but such restrictions were never part of the historical core of the institution of marriage. Today, gender is not relevant to the state in determining spouses' obligations to each other and to their dependents. Relative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law. Gender no longer forms an essential part of marriage; marriage under law is a union of equals."



Shapiro concluded that perhaps the state should get out of the marriage business altogether, saying couples could sign contracts concerning inheritance, hospital visits, etc.

If a state, say Nevada, were to eliminate laws and practices that distinguished between married couples and singles in terms of taxation, insurance coverage and the like, would it still be forced to recognize gay marriage because the federal government discriminates in income taxes, Social Security benefits, welfare and mandated health insurance coverage under ObamaCare? Catch-22?

Where, oh where, does the Equal Protection Clause end? Polygamy, children, barnyard animals, cedar fence posts?



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