



Gay rights in the USA: the states lead the way

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In Vermont, two lesbians can be joined in a civil union, receiving nearly all the benefits of marriage. These include the right of adoption, hospital visitation, insurance, and perhaps most important, public recognition of their relationship.

Thanks to America's federal system, if they drive just a few hours to any one of several states, not only will their union become immediately void, but they will be denied the right to engage in sex without fear of government punishment.

To some, American federalism seems to work against the equal rights of gays and lesbians, by creating a patchwork of laws that radically shift the status of homosexuals from state to state. However, advocates of gay equality should rather rejoice that America is not a unitary nation, because states are the battlegrounds where the legal status of gays and lesbians in America could change most dramatically in the next decade.

Why the states, and not the federal level? Couldn't a bold president give a speech similar to Lyndon B. Johnson's 1965 "We Shall Overcome" address that brought about voting rights for blacks in the American South? Or could not the Supreme Court rule as it did in *Loving v. Virginia* (1967), which struck down all state laws forbidding interracial marriage?

New political reality

The 2000 election ended any such hopes.

The best that can be expected from the Bush presidency is maintaining the status quo on gay progress. Even if Al Gore had won, enthusiastic leadership from the White House would have been unlikely. Gore, while he did endorse ending discrimination on the basis of sexual orientation, also supported the anti-gay Defense of Marriage Act in strong terms.

A full Democratic takeover in 2004 might end discrimination in the military and in the workplace, but it is difficult to foresee the centrists who currently dominate the party permitting such bold moves, particularly when the Republicans are unlikely to offer gays another political home.

The 2000 election also ended the possibility of rapid judicial progress to end discrimination against homosexuals.

In 1986, the Supreme Court came within one vote of ending all sodomy laws on

ruled racial segregation unconstitutional) is highly unlikely.

Marriage: a states' rights issue?

There simply is no clear national majority supporting equal rights for gays, at least not a solid enough majority to counter impassioned cultural conservatives.

Consider Clinton's highest profile rejection of gay equality, the Defense of Marriage Act signed in early 1997. Clinton, along with overwhelming majorities in Congress, defined marriage as a sacrament applying only to a man and a woman. Moreover, the law released states from their traditional obligation to respect the legal acts of other states.

Clinton's approval of federal intervention in marriage was particularly unusual. States consider marriage one of their last areas of supremacy in the federal system, and have crafted marriage laws that differ in the age of legal marriage, waiting periods, and blood test requirements.

States even differ in their definitions of incest. Nineteen states permit first cousins to marry. The other thirty one either forbid it outright or ban it when the couple is fertile. Yet under the "full faith and credit" constitutional principle, kissing cousins longing to be husband and wife can simply tie the knot in one of the "cousin-friendly" states and that matrimonial contract is legal everywhere in the USA. By contrast, the Defense of Marriage Act allowed states and the national government to avoid recognizing gay marriages contracted anywhere in America.

Changing attitudes and formidable obstacles

At the state level, only Vermont has moved to permit "civil unions" of gays

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due process grounds. That case, *Bowers v. Hardwick*, still sets the outer limits of sexual freedom under the constitution. The conservative majority on the Court has grown since then, and will likely increase over the next four years.

The one ray of hope is that Justice Kennedy, a Reagan appointee, has shown a consistently moderate tone on gay rights, emblemized by his opinion in *Romer v. Colorado*, which struck down a state referendum denying localities the right to protect gays. Still, a gay *Brown v. Board of Education* (the 1954 case that

and lesbians. Even there, cultural conservatives in 2000 managed to win a number of key state races as Republicans took control of the legislature, largely on the strength of the anti-gay backlash, and it is unclear whether civil union will survive the Republican counterattack.

Similarly, Hawaii almost legalized gay marriage when a state judge ruled that the denial of the right to marry same sex partners was a violation of the state's constitution. However, a popular revolt led to a rapid constitutional change that prevented legalization.

If gay marriage cannot win in two of the most liberal states of the union then it is highly unlikely that other states will move forward on this issue. Even if civil unions survive in Vermont, the obstacles in other states will remain formidable.

Yet states still offer the best hopes for progress on civil rights for gays. While following the passage of the Defense of Marriage Act more than half the states quickly adopted laws against recognizing gay marriage, state sodomy bans have been falling rapidly, and will continue to do so.

Thanks to recent state court actions, only eighteen states currently ban sodomy, variously defined as oral-genital, anal-genital, or oral-anal contact. Some laws apply equally to heterosexuals and homosexuals, while others single out same-sex contact.

Sodomy laws, like anti-birth control laws at the mid-century, are seldom enforced against consenting adults. Their primary functions are as a symbolic reinforcement of traditional sexual mores, an additional punishment on public gay sex, and a way to deny gays custodial rights of children. If a parent in a divorce, for example, can be shown to be regularly breaking the state's laws, then that parent can be easily defined as "unfit". (Sodomy laws are also occasionally used as lesser charges in difficult rape cases).

Given the increasingly widespread acceptance of heterosexual sodomy (evident in popular culture and indeed, in the public's nonchalant response to the sodomy-laden Starr Report), several more states will probably get rid of their sodomy laws in the next decade.

Workplace discrimination is another area where progress is more likely at the state

than the national level. Several states and a number of localities currently ban firing homosexuals simply because of their sexual orientation. In the rest of the country, it remains perfectly legal to dismiss an employee on the basis of anti-gay prejudice.

While it is unclear how widespread workplace discrimination against gays actually is, the extent of it will remain unknown so long as it is legal. Many gays, particularly in such sensitive areas as public school teaching, remain closeted out of fear of workplace reprisals.

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A question of "liberty"?

Across the panoply of the American federation, where might gays win protection in the workplace?

While the Northeast states continue to lead on this issue, the most interesting battleground may well be the West, where the underlying libertarianism, a form of "leave me alone" populism, may well contribute to key victories for gay rights.

The last years of Arizona Senator Barry Goldwater, an avatar of states' rights federalism, are illustrative. Goldwater, who campaigned hard against sexual immorality when he ran for President in 1964, ended his career advocating civil rights for gays. Look for the Mountain West region to be roiled by the conflict between its increasing Republican party affiliation and its historic commitment to personal liberty.

Across a whole host of issues, the deciding factor in the struggle may well be public beliefs about the origins of homosexuality.

According to public opinion expert Clyde Wilcox of Georgetown University, many of the most rabid homophobes become willing to tolerate homosexual rights if they are convinced that there are genetic roots to homosexuality. The diversity of the states in terms of religiosity, education levels, income, and ideology will result in radically different interpretations of scientific evidence, and very different legal responses.

For the foreseeable future, the legal status of gays and lesbians will advance only at the state level. This is not surprising. Every past movement for equality has followed a similar pattern.

States abolished slavery one by one long before the 13th Amendment freed slaves nationwide. Women were granted voting rights in several states before they won national suffrage. Even religious minorities were heavily discriminated against in certain states until the Supreme Court stepped in to protect them.

In each case, groups pressing for equality and civil rights had to succeed in at least a few states before they could win national acceptance of their demands. The states under American federalism remain, in the words of Justice Louis Brandeis, "the great laboratories of democracy."

So will it be for gays and lesbians.

Some states will range far ahead of the national consensus, and guarantee workplace protection, sexual freedom, and even marriage rights to homosexuals. When the rest of the nation travels to those states, and sees that widespread legal protection for homosexuality does not result in societal decay, mass pedophilia, and the wrath of a vengeful God, they will be more likely to advocate, or at least tolerate, national rights for gays and lesbians.

Ultimately, as with other social groups, the national government will have to take affirmative steps to fully realize gay equality. But the federal system demands victories in the states to create the national consensus that would make such action possible. (6)