Option Four
A compromise on gay marriage
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The debate over marriage does not seem to be amenable to compromise. It is one of those debates in which the contending parties disagree not only about what answer we should reach, but also about what the question is in the first place. As in the debate over abortion, the very terminology of this debate is contested. Advocates of “gay marriage” use that phrase to suggest that what they want is an end to the exclusion of a class of people from an institution. Opponents of “same-sex marriage” use that phrase to suggest that what is at stake is a redefinition of the institution: The law they defend does not examine the sexual preferences of the parties to a marriage, but merely requires that they be of opposite sexes.

But perhaps a limited compromise can be reached, if we can separate the two fundamental issues in the debate: recognition and benefits. Whenever the debate has been at its most abstract and ideological, it has concerned the politics of recognition. Proponents of gay marriage want the government to recognize long-term homosexual relationships as morally equivalent, at least for public purpose, to marriage. Many proponents undoubtedly want more than this kind of formal legal equality: They hope that insisting on governmental evenhandedness between homosexual and heterosexual couples will change people’s attitudes so that society, and not just the government, will see them as equally worthy and morally indistinguishable. Opponents warn that if the demand for same-sex marriages is granted, it will be followed by demands for state penalties on people and churches that refuse to recognize them. But for now, what is being debated is the legal recognition of committed homosexual relationships as on a par with marriage.

When proponents of gay marriage say that existing law is “discriminatory,” and a violation of the Fourteenth Amendment, their underlying claim is that the state has no legitimate reason for distinguishing between long-term gay relationships and conventional marriages. If there is no reason to distinguish between them, the distinction observed by existing law can be attributed only to prejudice. Opponents of the same-sex marriage, on the other hand, have argued that there are legitimated distinctions to be drawn. If according legal standing to the marriage of a man and a woman can yield some public good that according legal standing to the same-sex couples cannot, then existing law does not involve any invidious discrimination. Whether any such public good exists has been a major point of contention in the debate. Almost all the high-flown commentary on the marriage debate has turned on this question of recognition, although the issue is sometimes disguised.

The energy brought to this part of the debate has sometimes obscured the extent to which the debate is also about various governmental benefits. Supporters of same-sex marriage have asked again and again why gays should be denied hospital-visitation rights when their partner falls ill or bereavement leave when their partner dies. Obviously, this concern is connected to the argument about equality: If committed same-sex couples are morally equivalent to married couples, then why should they not have the same legal protections? But the issue of benefits can, to a large extent, be separated from the issue of the legal recognition of relationships.
And the issues should be separated. There is no very good reason that many of the incidents of marriage that remain on the books should be tied strictly to marriage. To the extent possible, they should be extended more widely. Liberals and conservatives, supporters and opponents of same-sex marriage alike, should be willing to support this extension.

Take, for example, the question of the bereavement leave given to state employees. State governments could easily have their worker designate a person whose death would trigger the leave. Many workers would choose their spouses. Gay men and lesbians in long-term relationships would, presumably, choose their partners. People who are not in romantic relationships might choose blood relatives or friends. Family leave for state employees could be handled similarly.

So could hospital-visitation rights: Where the law has said that hospitals must grant them to spouses, it could be amended to require that they also be granted to whomever the patient has designated—and again, that “whomever” could be a man’s live-in girlfriend, his boyfriend, or a close friend. These benefits could, perhaps, be bundled together: People could be allowed to choose someone as their “designated partner” for a multitude of purposes. Legislators could call the resulting bundle of rights a “domestic partnership” or even a “civil union” if they wish. Bundling the benefits together would make things simpler for beneficiaries and government officials alike than extending each benefit separately.

Such policies would allow gay couples to get the tangible benefits they seek, but not governmental recognition of their relationships as such. And so long as the benefits were available not only to married people and to gay couples, but to any pair of people, then opponents of same-sex marriage would have nothing to complain about. No benefit would be contingent on any assumption by the government that the beneficiaries were involved in a sexual relationship outside traditional marriage. The precise nature of the relationship between the beneficiaries would not concern the state. The state would be blind to it.

NO “MARRIAGE LITE”

Would taking these steps “undermine marriage,” as opponents say same-sex marriage would? It’s hard to see how. The incidents of marriage that remain on the books may be important in some respects, but nobody gets married in order to enjoy them; allowing people to have them outside marriage is not going to drive down the marriage rate. Nor do most of the remaining incidents of marriage have much moral significance—the great exceptions being those incidents having to do with the raising of children, which will continue to divide social conservatives and social liberals. (Florida, for example, does not permit gay couples to adopt children.) The kinds of changes mentioned above are more akin to contractual arrangements. We allow people who are not married to each other to make all kinds of contractual arrangements without worrying that their ability to make them undermines marriage.

Social conservatives, and even some supporters of gay marriage such as the journalist Jonathan Rauch, have expressed concern that a proliferation of institutional substitutes for marriage would undermine marriage. They worry, that is, about “marriage lite.” The modern practice of cohabitation illustrates the fear. If a young man is being pressured by his girlfriend to commit but does not want to marry, he can move in with her instead. Would registering as a “designated partner” (or whatever term is employed) become
another way for him to avoid marriage? So, for example his girlfriend is pressuring him to make still more of a commitment than just living together. Will he be able to placate her by going to City hall and signing a form?
To the extent there is any reason to worry about this scenario, it’s an argument for making the above reforms piecemeal, even at the cost of reduced simplicity. But here is reason to doubt that even a wholesale extension of benefits would have baleful effects. The fact that the new institution would be open to everyone-roommates who are not involved in a sexual relationship as well as those who are, siblings, friends—would tend to undermine its attractiveness as a symbol of romantic commitment.
The idea of decoupling various benefits from marriage has hardly received an airing during the debate over gay unions. When the idea entered the debate, it did so at a peculiar angle. Around the time the high court of Massachusetts ruled in favor of same-sex marriage, when social-conservative organizations were hashing out what kind of constitutional amendment they should support, some social conservatives briefly proposed one with two major features. It would define marriage as the union of a man and a woman. It would also prohibit governments from granting any benefits to unmarried couples (or groups) that were predicated on a sexual relationship. The principle was very similar to what I am advocating here, except that it was framed negatively. The social conservatives were not proposing to extend any benefits that had traditionally been tied to marriage more widely. They were suggesting that they would allow such extensions under certain conditions. They would allow benefits to be given to the unmarried, that is, if it were done on a non-discriminatory basis: If unmarried couples, heterosexual or homosexual, could get the benefit, siblings who shared the rent had to be eligible for it too.
The proposal was somewhat convoluted, and thus easily misunderstood. Andrew Sullivan, a prominent pro-say-marriage pundit, thought that the social conservatives were saying that they wanted to extend benefits only to celibate couples. Any such proposal would be absurd and unworkable, as he suggested. But the present political moment seems auspicious for someone to go further than those social conservatives did, and actually propose an extension of marital benefits to unmarried couples of all kinds.
The reason compromise might work now is that the politics of marriage are in flux. Advocates of gay marriage are confident that the future is on their side. Although support for their cause in public-opinion polls has dropped since Massachusetts brought attention to is, the longer-run trend has been in their favor. Younger people, in particular, have shown steadily increasing support for gay marriage. If the advocates believe they will win in the long run, however, they are less sure how long that run will be. Their allies within liberalism, meanwhile, are afraid that they will suffer severe political damage in the interim—as they appear to have done in 2004.
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ANNUAL EDITIONS
Opponents of same-sex marriage, looking at the same situation from the opposite perspective, also have mixed prospects. They can see short-term political victories ahead, but actual success in their project of preventing same-sex marriage from becoming the prevailing law in America looks much less likely.
Each side had its own spin on the 2004 elections. Social liberals noted that in the exit
polls, a plurality of 35 percent of voters said they favored “civil unions” for gays. Social conservatives, however, noted that voters supported initiatives against same-sex marriage in every state where they were on the ballot—and some of those initiatives were against civil unions, too. Indeed, the opposition to many of those ballot initiatives centered on the notion that they were banning civil unions and domestic partnerships as well as same-sex marriage.

My hunch is that public opinion looks ambivalent because the median voter is tugged in two directions. He thinks marriage should remain an opposite-sex affair, but he has no wish to deny hospital-visititation rights to gay couples. If he is forced to choose between these impulses—if what’s on the ballot is a choice between same-sex marriage and the continued denial of various benefits for gay couples—he will vote against same-sex marriage. If a pollster offers him “civil unions” as a middle ground, however, he will say he supports it.

Civil unions, as generally conceived, seems not to be a viable compromise in the marriage controversy. Social conservatives seem to be implacably opposed to any governmental recognition of homosexual relationships, even if they do not travel under the name of “marriage”—partly because they fear once such unions are recognized, over time they will be treated as marriages.

THE FOURTH OPTION
But what if our pollster added a fourth option (in addition to same-sex marriage, civil unions, and nothing)? I imagine that if the public were granted an option that allowed gay couples to receive benefits without according legal standing to their relationships, the option would draw support from each of the other three camps. It might well become the plurality option.

That plurality would, I imagine, include President Bush, if a pollster called him. Right before the elections, Charles Gibson of ABC asked Bush, “[H]ow can we deny [homosexuals] rights in any way to a civil union that would allow, give them the same economic rights or health rights or other tings?” Bush responded, “I don’t think we should deny people rights to a civil union, a legal arrangement, if that’s what a state chooses to do…” Gibson interjected that the Republican-party platform “opposes it” (i.e., civil unions).

Bush came back with, “Well, I don’t. I view the definition of marriage different from legal arrangements that enable people to have rights. And I strongly believe that marriage ought to be defined as a union between a man and a woman. Now, having said that, states ought to be able to have the right to pass laws that enable people to be able to have rights like other.”

The remarks generated a lot of controversy, with some social conservatives convinced that Bush had betrayed them and pundits of all political persuasions convinced that Bush had made a last-minute campaign U-turn. The weekend after the election, Karl Rove offered his own gloss on Bush’s position for Fox News: “he believes that there are ways that states can deal with some of the issues that have been raised, for example, visitation rights in hospitals or the right to inherit or benefit rights, property rights but these can all be dealt with at the state level without overturning the definition of marriage as being between a man and a woman.”

Keep in mind, when reading Bush’s words, that the phrase “civil unions” has no determinate legal meaning. A state should offer various benefits to homosexual couples,
heterosexual couples, and roommates with no sexual relationship, all under the rubric of “civil unions.” With that understanding in mind, Bush’s and Rove’s remarks are entirely consistent with support for the kind of approach I am advocating. (They may also be consistent with the Republican platform.)

This approach would leave several important issues unsettled. Many people will continue to believe strongly that he law ought to recognize same-sex relationships the same way it recognizes traditional ones, and many people will continue to object strongly. No reconfiguration of benefits is going to end that debate. Liberals will be exasperated with conservatives: If they are willing to grant gay couples benefits, they will ask, why are they so stubborn about the merely symbolic question of legal recognition? Conservatives will have the mirror-image exasperation: If gays have almost every tangible benefit they want, why should they seek legal recognition too?

Nor can this approach neatly solve every question of benefits. The approach advocated here does not attempt to settle questions about rights and duties involving children, where the divisions make attempts at compromise unpromising. Finally, how to apply the approach raises some difficult questions. Tax and Social security law interact with marriage in various ways. The relevant provisions of the law could presumably extend the benefits to non-marital households that function as economic partnerships. If the provisions are seen, however, as a ways for the government to encourage moral behavior, social conservatives and social liberals are likely to disagree about whether they should apply to same-sex couples.

A compromise need not settle all the issues, however, to offer something to each side. A compromise need not settle all the issues to offer something to each side. Advocates of gay marriage would not get legal recognition for gay relationships. Their cause might lose some steam, since gays would get some benefits whose denial had previously generated sympathy. But gays would get those benefits sooner than they would if they wait for victory in the struggled for gay marriage-and those real-world benefits have to count for something. If advocates of gay marriage are right that their triumph is historically inevitable, they have little to lose.

Opponents of same-sex marriage also have little to lose, and something to gain. Many of them insist that they are not motivated by any hostility to gays as people. Supporting an extension of benefits would allow them to prove it, which would be worthwhile morally and would also improve their tactical position in the political debate. Their chances of passing the constitutional amendment they seek might improve. 9it’s important that there’s no certainty here. If this compromise were certain to make the social conservatives succeed, the other side would have no reason to support it.)

And it’s just barely possible that everyone would reap the benefit of a reduction in the strife that has attended the marriage debate.