

Excerpts focusing on the issue of Marriage in America
From Cavalier, Ed. Approaching Deliberative Democracy
Chapter 7
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From Campus to Commonwealth: The Pennsylvania Marriage Amendment

After beta-testing survey instruments and background materials in a November 2007 Campus Conversation on the Issue of Marriage in America, the SPPDD hosted a deliberative poll on a proposed Pennsylvania Marriage Protection Amendment. The House Bill (first proposed in a longer version in 2006 and rewritten as HB 1250 in 2008) reads as follows:

“No union other than a marriage between one man and one woman shall be valid or recognized as marriage or the functional equivalent of marriage by the Commonwealth.”

Leading up to the first-ever state wide deliberative poll on a ‘social values’ issue, members of our project team worked with Chatham University’s PA Center for Women, Politics, and Public Policy to solicit strategically located sites for co-hosting the event. We invited organizers from those sites to attend the 2007 Campus Conversation and in the Spring of 2008 we visited each site in preparation for the September event. The four sites across the Commonwealth of Pennsylvania were Carnegie Mellon University, the Community College of Philadelphia, Shippensburg University, and Slippery Rock University.

With assistance from the University of Pittsburgh’s Survey Research Program, and drawn from the voter registration rolls of counties surrounding each of the sites, 256 randomly selected participants attended the day-long event. Following deliberative polling protocols, participants joined in small, moderated discussion groups and gathered in a plenary session to pose questions

to an expert panel. At the event's conclusion, the participants completed a post-poll survey assessing their views regarding a number of issues surrounding marriage in America. Several months later, in February and March 2009, a follow-up survey was sent to participants to assess their current opinions and to ascertain whether or not their views had changed since the September poll.¹

Background and Demographics

A number of background and demographic variables were collected to characterize our sample of participants, who were largely middle-aged (mean 54.1 years), with 49% college educated or above and 72% active members of a church. More women participated than men; registered Democrats were in greater attendance than registered Republicans as is representative of the state as a whole. There was substantial variability in background and demographic characteristics by geographic site. For example, the proportion of African American participants was substantially higher at the Community College of Philadelphia site (61.1%), while at the Slippery Rock University site, the percentage of participants who identified as white was 97 percent.

Given that much of the current discussion regarding marriage in America focuses largely on the complex set of issues surrounding the recognition of same-sex relationships, participants were asked to indicate their views and experiences related to the gay, lesbian, bisexual and transgender (GLBT) community. Our sample data showed that participants were moderately

¹ Of the 3358 potential participants contacted, a total of 402 indicated they would attend the deliberative event. This represents a 12% acceptance rate. Of the 402 people who indicated they would attend, 60% were present the day of the event. Thus, the 256 people in attendance represent a 7.6% overall participation rate. The sampling error associated with this number of participants is approximately 6.3%. A summary of the data and findings from the deliberative poll on the issue of marriage in America is located at caae.phil.cmu.edu/caae/dp/polls/fall08/

supportive of GLBT issues and reasonably familiar with someone in the GLBT community.² For instance, most participants (70%) reported having a GLBT acquaintance and many reported having a GLBT family member or close friend (38% and 39% respectively).³ In some instances, our participants foreshadowed their complicated pattern of beliefs about same-sex marriage with seemingly inconsistent views. For example, while close to half (45.9 %) of the participants reported thinking that homosexuality is morally wrong, 75% reported believing that homosexuals should be allowed to raise children.

Recognition of Same-Sex Relationships

While the broader topic for deliberation focused on the history, meaning and role of marriage in America, a central theme involved the current debate regarding the recognition of same-sex relationships. To better assess our participant's views of this issue, we asked them to provide – in pre- and post-poll surveys – the best representation of their position on the recognition of relationships among same-sex couples: whether or not same-sex couples should be allowed to legally marry, or that same-sex couples should be allowed civil unions but not legal marriage, or that same-sex couples should be given no legal recognition. These choices matched the legal and legislative options described in the background materials (i.e., the *Goodridge* decision in Massachusetts, Vermont's Civil Union law, and the proposed Pennsylvania Marriage Protection Amendment).

² A Harris Interactive report, commissioned by the Gay and Lesbian Alliance Against Defamation (GLAAD) and released in December 2008, found that approximately 19 percent of U.S. adults report that their views towards the GLBT community have become more favorable over the past five years. The biggest factor for this shift is that more people now know someone who is gay or lesbian. Roughly 73 percent of adults surveyed personally know or work with a gay, lesbian, or transgendered person.

³ Participants from the Philadelphia site reported the largest number of acquaintances (81%), while participants at the Slippery Rock site reported the lowest number of acquaintances (60%).

In our post-poll survey, approximately 70% of participants indicated that same-sex relationships should receive some form of recognition. In contrast, only 23% believed that same-sex relationships should be given no legal recognition.⁴ However, this general pattern did not reflect the perspective at all the host sites. Indeed, the pattern of support for same-sex relationships was somewhat reversed at one site, with nearly 41% of the those at the Slippery Rock site supporting no legal recognition for same-sex relationships. Additional analyses suggested that support for no legal recognition of same-sex relationships was more likely among those who believed that marriage represents a religious institution as opposed to a civil institution, those who believed that marriage should be governed by religious beliefs and historical tradition and those who supported more conservative positions on issues such as abortion.

While the majority of participants supported formal recognition of same-sex relationships, there was no clear consensus regarding the form that recognition should take. In fact, while half those who supported recognition *avored* legal marriage for same-sex couples, the other half supporting recognition that favored civil unions *opposed* legal marriage. While both groups indicated strong concerns for civil rights as well as the welfare of children and society, those who supported civil unions over legal marriage were more likely to espouse stronger religious beliefs. For this latter group, civil unions appeared to provide the most balanced solution with regard to the potentially conflicting domains of religious tradition and civil rights.

Participants were also asked to provide their opinion (e.g., strongly support, neutral, moderately oppose, etc) on the proposed amendment to the Pennsylvania constitution. The

⁴ Our data here also correlates to the Harris Interactive report (2008) on perspectives about the GLBT community. They found that approximately 75 percent of American adults believe either same-sex marriage or civil unions should be available for gay and lesbian couples. Additionally, only 22 percent reported that same-sex couples should receive no legal recognition. The Harris report also found that among those favoring legal recognition, there was a split on the type of recognition between those in favor of marriage and those in favor of civil unions. It is important to note that the mean age in this report was 45.6, significantly lower than that of our deliberative poll (54.1).

responses reflected a dilemma, noted above, that many participants seemed to experience between certain religious traditions and society's concerns for civil rights. Indeed, slightly over half of all participants (52%) indicated support for an amendment to the state constitution that would limit marriage to one man and one woman.⁵ Support for this amendment came from both those who opposed any recognition of same-sex relationships and those who favored civil unions but not legal marriages. In contrast, there was much less support for an amendment preventing recognition of civil unions (33.7% support).

In essence, participants seemed to be trying to balance a number of conflicting concerns in thinking about the recognition of same-sex relationships. Many expressed important commitments to historical tradition and strong concerns for religious perspectives. At the same time, they thoughtfully considered the broader issues such as freedom of choice, liberty, civil rights, support for all families and the welfare of children.

In the end, three general positions emerged. For most of the participants, the discussion resulted in an articulated support for same-sex relationships to receive the benefits and protection afforded by legal recognition. For some, marriage appeared to be the best option and those who supported this position tended to oppose any legislation to limit marriage. For others, broadening the constituency of legal marriage to include same-sex couples created a sense of anxiety and discomfort. An observer noted that in his groups these feelings, characterized as caution and concern, were not expressed as anti-gay, but as uncertainty in regard to the future. These participants viewed civil unions as the best option and tended to support legislation to limit marriage to one man and one woman. Finally, a third group of participants, many of whom held

⁵ While this number is similar to the results of the California referendum, the underlying tendency for legal recognition (70%) as well as the median age and demographics of our sample, show an undeniable movement toward some form of marriage equality, especially in light of the Harris Poll results regarding participants aged 18- 34 (who were 82% in favor of same-sex marriage).

strong religious beliefs about the permissibility or morality of homosexuality, opposed any form of recognition. Some felt frustration at the process, especially at one site that had some challenges during the plenary session. Participants in this group supported both state and federal legislation to limit marriage to one man and one woman.

Follow-up Survey

Beginning in February 2009, we sent a follow-up survey to the participants in the deliberative poll. We received 150 responses, a return rate of 54.3%. Our response rate at each site exceeded 50% as well. This rate of return and a comparison of the participant level data enable us to draw some general conclusions about changes in attitude as a result of the deliberative poll.

As in the post-poll survey, we again asked the participants to report their answers on what best represents their current, personal position on the recognition of same-sex relationships. It appears that there was slight movement towards a meta-level agreement in favor of civil unions, even after the deliberative poll. In the post-poll survey, the Community College of Philadelphia and Carnegie Mellon University sites had a majority of participants in support of legal marriage. The follow-up survey results for those sites indicate a movement towards support of civil unions. Most of the movement from the Community College of Philadelphia site was from participants initially supportive of same-sex marriage while the movement from the Carnegie Mellon University site was primarily from participants initially in favor of no legal recognition but also contained slight movement from participants initially in favor of same-sex marriage.

Additionally, slightly over 40% of the Slippery Rock University participants were in favor of no legal recognition and 6.8% were identified as unsure of their position in their post-poll surveys. However, in the follow-up survey results, a slight majority of Slippery Rock University

respondents favor civil unions. The post-poll survey results from Shippensburg University indicated that the participants were roughly broken into thirds among the three options. In the Shippensburg follow-up survey, 50% of respondents were not in favor of any legal recognition of same-sex couples. A closer look at who specifically was responding to the follow-up survey demonstrated that a majority of the Shippensburg follow-up respondents were not in favor of legal recognition in the post-poll survey, did not change their minds, and responded more readily than those holding positions that recognize same-sex relationships.

In the follow-up survey, we also asked participants if their position on marriage has changed since the deliberation. Of the respondents to the follow-up survey, 19% changed their position slightly while 3% significantly changed their position. As mentioned previously, an analysis of the data on the participant level revealed that a slight portion of respondents changed their position of “no legal recognition” towards “recognition of civil union.” Conversely, one respondent moved from an acceptable of legal recognition in some capacity to no recognition, while a few others seemed to be more in favor of same-sex marriage, a slight change from a post-poll position on civil unions. At bottom, the tendency in our sample toward broad recognition of legal rights for same-sex couples continued in the months following the deliberations.⁶

Evaluating the Experience

Participants indicated a strong sense of satisfaction with their participation in the deliberative process. In particular, participants reported that they gained a broader

⁶ Looking at a partial summary of the data, of the 28 participants who “slightly changed” their position: 15 participants shifted toward civil unions (from varying degrees of opposition), 3 participants shifted toward same-sex marriage, 1 participant supports civil unions but is slightly more supportive of same-sex marriage as a result of the poll, and 2 participants support same-sex marriage but have a deeper understanding of opposing viewpoints/became “less dogmatic.”

understanding of the history of marriage and the issues concerning the current debate concerning marriage and same-sex relationships. Additionally, participants indicated that the deliberative process presented them with perspectives that they hadn't previously considered.

And while a number of participants reported frustrations with perceived bias in the background information and site responses varied considerably regarding assessments of the resource panelists, the quantitative and qualitative data regarding the event itself paints a very positive overall picture. Indeed, responses across all sites showed that a super majority of our participants (85-95%) felt that the deliberative process was enjoyable, engaging and intellectually stimulating. As one participant wrote:

“I just want to thank you for putting this on, and I am very pleased and grateful to have been a part of it. My feelings are strong concerning the common man's involvement in issues like this concerning our country. It's great to be right in the middle of seeing democracy in action.”

Influence

In linking this process to outcomes, we contacted local media and local state representatives. Several newspapers, including a Spanish Language one in Philadelphia, published articles on the initial findings. An Op Ed piece appeared in the Pittsburgh Post-Gazette comparing the results of this process with the results and process of California's Proposition 8 referendum. State Representative Dan Frankel, a member of the House Appropriations Committee at a time when the bill in question was being debated, attended the Carnegie Mellon session. At first planning just to stop by, he stayed for several hours, talking to participants at lunch and listening to the Q&A during the plenary session. At the end of the panel discussion, Representative Frankel thanked the audience for their participation in what he described as an important example of

deliberative democracy. Certainly his interest in this process can only increase in light of the 2009 healthcare “Town Hall Meetings.”

In June of 2009 State Senator Daylin Leach introduced Senate Bill 935. Referred to the Judiciary Committee, the bill would have the effect of legalizing “same-sex marriage” in the State of Pennsylvania. It offered to repeal previous definitions that limited marriage to a man and a woman, added a section on same-sex marriage, and broadened to definition of “Marriage” to read: “A civil contract between two people who enter into matrimony.”

Based upon our analysis and in correspondence with him, the Senator saw how the notion of “civil marriage” frames this issue well for those seeking the legal recognition of same-sex couples. The phrase combines the informed opinions of our deliberations. It also draws an important distinction between State and Church by distinguishing the civil side of the marriage contract from that of a religion-based marriage ceremony.

To date, neither HB 1250 nor SB 935 have left committee. But the discussion will surely continue. In accord with the need to connect deliberation about policy to influence on policy, regardless of where one stands on the issue, our results have been presented to members of the state legislature. Here they will become part of the information available when this issue is raised again in the Commonwealth of Pennsylvania.

Afterward: Deliberative Democracy and the Courts

The concept of deliberative democracy may shed some light on the debate over the role of the courts to determine social value issues like abortion, same-sex marriage and end-of-life decisions. There are those who say that the Constitution is a living document and that the courts have a role in using its basic principles to address, judiciously, new circumstances. Others say that it is a bounded document whose statements are literally restricted and cannot be adjusted according to the times.

Supporting the former position, Supreme Court Justice William Brennan argued that “the precise rules by which we have protected fundamental human dignity have been transformed over time in response to both transformations of social conditions and evolution of our concepts of human dignity” (lecture at Georgetown University, 1985). While holding on to the “overarching principles” of the Constitution, it is possible to articulate principles implicit in the intent of the basic law that can serve us in our contemporary setting (like the Right to Privacy).

Chief Justice William Rehnquist disagreed. His disagreement, however, did not imply that social values issues were off bounds, only that they needed to be addressed by the legislative process, not the judicial one. “The brief writer's version of the living Constitution, in the last analysis, is a formula for an end run around popular government. To the extent that it makes possible an individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution, the brief writer's version of the living Constitution is genuinely corrosive of the fundamental values of our democratic society.” - *The Notion of a Living Constitution* (1976).

More than 30 years before this contemporary discussion, Justices Frankfurter and Jackson argued in a similar vein. However, their positions issued from the opposite side of the left-right

divide. For Frankfurter, the court's intervention in the rights of Jehovah Witnesses to decline reciting the pledge of allegiance in public schools was inappropriate. If the citizens and states want to pass foolish laws, then they deserve foolish laws. Our Founding Fathers believed in the positive freedom of the ancients and Frankfurter too believed that it is up to the citizens to live up to the ideals of democracy.

Of course, public opinion can be easily swayed and writers going back to Schumpeter spoke about the power of advertising, not just to market perfumes, but platforms as well. Yet the way that deliberative democrats value information and discussion could well serve as a tonic against media distortion of issues. *And the actual arguments of the courts themselves can become part of the background information that citizens need in order to arrive at more informed opinions.* Indeed, the background document used by our participants contained the "Voices" of the many legal arguments, each with arguments For and Against. An argument map at the end provided an overview of the salient features of the legal terrain.

So it is possible for deliberative democrats to appreciate both sides of the constitutional debate. In fact, it has been proposed that the 'original intent' of our Founding Fathers was complex, involving not only the document, but the republican ideals that surrounded it and gave birth to it.⁷

In situations like the 2008 California Referendum on same-sex marriage, where some argue that the courts may have gotten ahead of the people,⁸ the people in turn can listen to the courts as well as themselves in a larger, ongoing conversation.⁹ Courts here can play a role in educating the

⁷ See Ralph Ketcham's *Framed for Posterity: The Enduring Philosophy of the Constitution* (University Press of Kansas, 1993).

⁸ Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (The Annenberg Foundation Trust, 2006), pp. 106-113.

⁹ This larger, ongoing conversation is part of the thesis in Habermas's major work, translated into English by William Rehg, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1992).

public (in the public reasons they give, both in the decision and the dissent) and informed public opinion can provide a feedback loop regarding the current state of the nation.

In a strong democracy, the reasons of the courts and the opinions of the citizens can be part of the same democratic dialogue.