

2011

## Burke Triumphs Over Jefferson in New York Same-Sex Marriage Decision

Nathan B. Oman

*William & Mary Law School*, nboman@wm.edu

---

### Repository Citation

Oman, Nathan B., "Burke Triumphs Over Jefferson in New York Same-Sex Marriage Decision" (2011). *Popular Media*. 242.  
[https://scholarship.law.wm.edu/popular\\_media/242](https://scholarship.law.wm.edu/popular_media/242)

# Deseret News

---

## Burke triumphs over Jefferson in New York same-sex marriage decision

By Nathan B. Oman

Published: Friday, July 1 2011 8:45 p.m. MDT

---

On June 24th, the New York State Legislature adopted same-sex marriage in a law containing generous exemptions for those with religious scruples to gay unions. This is good news for those who care about American democracy, including, ironically, those who oppose same-sex marriage.

The nineteenth-century French philosopher Alexis De Tocqueville observed that in the United States virtually every pressing political issue is eventually turned into a judicial question and resolved by the courts. Until recently this was certainly the case with same-sex marriage, which has overwhelmingly come by judicial decree rather than legislation.

Until recently, America was virtually unique in giving so much power to its courts. We are liable to celebrate this fact. Judicial review protects individual rights against the tyranny of the majority. There is some truth to this story, but national pride tends to overstate its importance. Canada, New Zealand, and the United Kingdom, for example, long lacked judicial review and they have not degenerated into mindless majority tyranny or vicious police states.

The Declaration of Independence midwived the United States by declaring our commitment to inalienable natural rights. It is an alluring vision of politics controlled by unassailable and consistent fundamental principles. Given such origins, the dream of American constitutional law that judges can resolve disputed social question through abstract reasoning from first principles is natural.

The problem is that it is just a dream. The reality is that society is far messier than Jefferson's vision of inalienable rights allows. As Edmund Burke observed "human nature is intricate" and we should not expect an appeal to first principles to resolve difficult questions. Rather, we should expect a series of ad hoc, historically accidental compromises. The stability and peace created by such compromises, insisted Burke, was the surest way of protecting liberty in the long run.

What does this have to do with New York's new marriage law? Some gay rights activists have decried the religious exemptions as either an unnecessary concession to religious paranoia or, alternatively, as a missed opportunity to further marginalized religious hostility to same-sex marriage.

Advocates for traditional marriage, on the other hand, understandably see the law as a defeat. Their opposition to same sex marriage has rested on two concerns. The first is that same-sex marriage is the harbinger of legal hostility toward conservative religious believers. The second is that gay unions will place further centrifugal pressure on the already fragile social institution of marriage. The New York law accommodated their first concern but not their second.

In Massachusetts, California, and Iowa, judges declared that traditional marriage was so irrational and abhorrent to the first principles of the Republic that same sex marriage was constitutionally mandated. The decisions promised to gay rights activists a total civic victory, but as the reversal of the California Supreme court's decision by Proposition 8 demonstrated, those opposed to same-sex marriage were not going to declare unconditional surrender in the face of judicial decrees.

Whatever the claims of gay rights activists, opposition to same-sex marriage is not primarily

motivated by hate. Roughly half of all Americans have expressed concerns about same-sex marriage, but many of these same people support anti-discrimination laws protecting gays, gay civil unions, and deplore violence and bullying of their gay neighbors. This is not hate. It is an understandable uneasiness about the radical transformation of a major social institution.

The reality, however, is that attitudes towards homosexuality and same-sex marriage are shifting. Many of those who previously expressed uneasiness about same-sex marriage are changing their minds, and the young seem much more comfortable with gay unions than the old. Given demographics and massive changes in public attitudes, it is fruitless for traditional marriage advocates to imagine that they can stop same-sex marriage laws everywhere and forever.

Nobody can claim total victory in New York's legislation. It provides for same-sex marriage while acknowledging – rather than marginalizing – the concerns of its opponents. It is a messy and perhaps inconsistent compromise that prioritizes peaceful co-existence over a ringing defense of principle. In short, it is Burkean rather than Jeffersonian and for that we can all be grateful.

*Nathan B. Oman is an associate professor of law at The College of William & Mary in Virginia.*

Copyright 2013, Deseret News Publishing Company