6-27-2011

Same-Sex Marriage Is Legal In New York: The In-State and National Ramifications

Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation
Joanna L. Grossman, Same-Sex Marriage Is Legal In New York: The In-State and National Ramifications VERDICT (2011) Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/920

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
June 27, 2011
Joanna L. Grossman

Same-Sex Marriage is Legal in New York: The In-State and National Ramifications

Last Friday, June 24 — after a week filled with rumors, delays, protests, chanting, singing, hand-wringing, and closed-door meetings — the New York senate passed a law (http://open.nysenate.gov/legislation/bill/A8520-2011), by a vote of 33-29, to legalize same-sex marriage in the state.

In this column, I’ll consider the impact of the new law – both for New York and also, potentially, for other states and for the nation.

The New York Legislature’s Turnaround on Same-Sex Marriage

The vote on the New York law took place after 10 p.m., before a packed gallery of supporters and opponents. Earlier in the week, the bill had easily passed the Assembly. Governor Andrew Cuomo, who had introduced the bill and intensely lobbied potential swing votes for its passage, appeared in the senate gallery a few minutes after the vote was taken, and has already signed the bill into law. The first gay marriages will take place on July 24, 2011.

This was a surprising turnaround for the New York legislature. A similar bill was passed by the New York Assembly in 2009, but it lost by 14 votes in a Democratic-controlled state senate. This time, although the New York senate is currently controlled by Republicans, the bill passed by a three-vote margin. All but one of the Democrats voted for the bill, along with four Republicans.

The legalization of same-sex marriage in New York makes sense since the state is both socially liberal and generally supportive of gay rights. (A recent and widely-cited poll reported that 58 percent of New Yorkers favor marriage rights for same-sex couples.) If the law had not been passed now, this change would surely have occurred sometime in the near future.

The obvious impact of this change is for New Yorkers, who will, in thirty days’ time, be able to celebrate same-sex marriages without leaving the state. Also, those New Yorkers who married elsewhere will be guaranteed recognition of their same-sex unions — without the need to litigate against employers, executors, hospital
personnel, or anyone else who might not understand that, until now, New York had been a state that gave effect to other states’ same-sex marriages even while it did not allow them to be celebrated in New York in the first instance.

Notably, however, New York’s law will have effects beyond New York, too, as New York is a significant player in the national legal and policy landscape.

**How New York’s Decision May Affect the National Legal Landscape**

Before New York’s decision, five states and the District of Columbia already offered marriage equality to same-sex couples. Now, the fact that New York, the nation’s third most populous state, has joined them more than doubles the number of people who live in a state that allows same-sex marriage.

Also, same-sex couples from anywhere — whether an American state or territory, or the District of Columbia, or a foreign country — will be able to marry in New York, as there is no residency requirement for marriage in the new New York law. (In contrast, for a short time, Massachusetts restricted its same-sex marriages to residents and only those non-residents whose own states would also have allowed them to marry — under an arcane and now-repealed “reverse marriage evasion” law.)

Moreover, for better or worse, New York is a state that can garner national and international attention. Its new law could thus effect change elsewhere, whether by jumpstarting a second wave of marriage-equality enactments or by triggering further religious, legal, or political backlash.

**Same-Sex Marriage in the U.S.: The Short Version**

To understand the New York law’s full effect, it’s necessary first to consider the national landscape regarding same-sex marriage.

Currently, the U.S. has a patchwork of diametrically-opposed laws that either support or forbid gay marriage. Famously, Massachusetts was the first American state to legalize same-sex marriage. The state’s highest court ruled in 2003, in *Goodridge v. Department of Public Health* (http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html), that the legislature’s failure to allow same-sex couples to marry on the same terms as opposite-sex couples was a violation of the equal protection and due process guarantees in the Massachusetts constitution.

Six months later, on the fiftieth anniversary of the U.S. Supreme Court’s school desegregation ruling in *Brown v. Board of Education*, the first same-sex marriages were legally celebrated in the United States.

Although *Goodridge* launched same-sex marriage in the U.S., it was not the first entry on the gay marriage controversy timeline. An early flirtation with the possibility of same-sex marriage in Hawaii in the early 1990s set off a backlash at the federal and state level. By the time of *Goodridge*, Congress had enacted the Defense of Marriage Act (DOMA), which provides that only heterosexual marriages are recognized for any federal-law purpose, such as determining Social Security benefits, enforcing immigration laws, or calculating federal tax liability; and that states are free to refuse recognition to same-sex marriages from sister states. (DOMA is still in force, but the Obama Administration has ceased defending the constitutionality of the federal law provision in litigation, at least in those jurisdictions with no binding precedent on the appropriate level of scrutiny.)

Dozens of states followed suit after Congress passed DOMA, by adopting their own mini-DOMAs and constitutional amendments to make clear that they allow neither the celebration nor the recognition of same-sex marriages. Eventually, every state but eight acted to prevent itself from being affected by same-sex marriage.

After *Goodridge*, there was a lull of several years for the pro-same-sex-marriage movement. Then, in 2008, a somewhat surprising cascade of states found their way to the recognition of same-sex marriage or civil unions. In Connecticut and in Iowa, each state’s respective high court ruled, as Massachusetts’ highest court had ruled in *Goodridge*, that the ban on same-sex marriage was inconsistent with state constitutional protections for liberty and equality.
In Vermont, New Hampshire, and the District of Columbia, the legislative branch adopted marriage equality without any push from the courts.

A number of foreign jurisdictions, including Canada, Spain, and South Africa, also legalized same-sex marriage.

Meanwhile, a growing number of states began to recognize civil unions, a marriage-equivalent status that was first invented in Vermont (which later recognized full marriage equality) and that is now available, or soon to be available, in New Jersey, Illinois, Delaware, and Hawaii.

The Same-Sex Marriage Controversy in New York

Once same-sex marriage became a reality in the U.S., New York seemed like a logical state to adopt it. Unlike the vast majority of states, New York never adopted a mini-DOMA, nor did it amend its state constitution to ban same-sex marriage. Indeed, until this bill passed, the state’s domestic relations code was silent on the issue of same-sex marriage and contained no express restriction regarding the gender of the parties seeking a marriage license.

As happened in many other states, a case was filed in New York to push for the right of same-sex couples to marry. But, in Hernandez v. Robles (http://law.justia.com/cases/new-york/court-of-appeals/2006/2006-05239.html) (2006), the New York Court of Appeals (the state’s highest court) ruled that the state code, though silent on gender, implicitly restricted marriage to opposite-sex couples. It also ruled that such a ban did not violate the New York constitution’s guarantees of liberty or equality.

Over a vigorous dissent by then-Chief Judge Judith Kaye, the court wrote that there is neither a fundamental right to marry a person of the same sex, nor any robust constitutional protection against sexual-orientation discrimination. It thus reached a different conclusion from the court in Goodridge, which was interpreting a similar state constitution, and aligned itself, instead, with high courts in states like New Jersey and Maryland, which ruled against a right of same-sex marriage.

Hernandez, however, only answered the constitutional question of whether the state must allow same-sex marriage. It left open, of course, the possibility that the democratically-elected legislature might choose to allow it one day. Indeed, the New York Court of Appeals’ majority implored the Legislature to take up the issue, to “listen and decide as wisely as it can,” in the hope that “those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made.”

Previously, New York Had At Least Recognized Same-Sex Marriages Celebrated Elsewhere

Even before the legislature took the plunge last week, however, New York had staked out a decidedly middle ground in the same-sex marriage controversy. In a series of cases, New York state courts at all levels ruled that same-sex marriages celebrated in other states or foreign jurisdictions were to be given full legal effect in New York.

Historically, the question of whether a marriage can be legally celebrated in a jurisdiction has been entirely distinct from the question whether that same marriage should be given legal effect. States have always disagreed about the rules of marriage – who can marry whom, and under what circumstances – but states were able to reconcile most of these conflicts through a set of “marriage recognition” principles that made marriage, in general, a portable status.

Most states follow a “place of celebration” rule that says marriages are valid everywhere if valid where celebrated. The rule is subject to only narrow exceptions. This rule arises from the principle of “comity” – respect for sister states. In this context, comity means that states should try to give effect to out-of-state marriages even if they themselves would not have allowed the marriage to be celebrated within their own borders.

New York courts have drawn on these traditional marriage-recognition principles to hold that same-sex marriages validly celebrated elsewhere will be given effect. Through these rulings, same-sex spouses have been able to
gain recognition of their out-of-state unions for purposes of obtaining spousal health benefits, getting a divorce, and other marriage-related rights. Thus, while New York didn’t allow same-sex marriages to be celebrated, it evidenced a tolerance for same-sex marriages that few of its sister states shared.

What makes New York an outlier in this regard is that most states, through their anti-same-sex marriage statutes and constitutional amendments, have taken the question of marriage recognition away from the courts altogether. Instead, most states now apply a blanket rule of non-recognition to same-sex marriages, while relying on the traditional principles of marriage recognition only for other types of prohibited marriages.

**The Marriage Equality Act: Civil Rights, with Religious Accommodation**

With the passage of this bill, New York abandons its unique middle ground and joins the six other jurisdictions that grant full marriage rights to same-sex couples. Because marriage is a fully-defined institution, a law to extend it to same-sex couples requires few words. The bulk of the bill – like the bulk of the time spent discussing it, in the week prior to its passage – is devoted to provisions designed to accommodate religious objections to gay marriage.

By way of legislative intent, section 2 of the Act states:

Marriage is a fundamental human right. Same-sex couples should have the same access as others to the protections responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. For the welfare of the community and in fairness to all New Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex. It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law.

The act then goes on to add two new provisions to the state’s domestic relations code, which provide, respectively, that (1) “[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex;” and (2) “No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex.”

The act, like those in most other states that authorize gay marriage, provides for a variety of religious exemptions. Two of them deal with involvement in gay weddings.

First, the act provides that a religious entity or a non-profit organization owned or run by a religious entity “shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage, any such refusal . . . shall not create any civil claim or cause of action or result in any state or local government action to penalize, withhold benefits, or discriminate against such [entity].”

Second, the act provides that a clergyman, minister, or leader in the Society for Ethical Culture – all authorized to solemnize marriages in New York — cannot be sued for refusing to officiate at gay weddings.

These exemptions do very little, if anything, to change current law. Churches and their ministers already have wide discretion to pick and choose among weddings to cater, host, or solemnize. These provisions are narrower than a version that was apparently debated, but rejected, that would have deferred to religious objection of any person. The provisions actually enacted rely on standard definitions of religious entities and of clergypersons to circumscribe the exemption.

There is an additional religious exemption that is more ambiguous in scope and meaning. It provides that the act does not “limit or diminish the right” of religious entities or organizations that such entities operate “to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”
This last exemption, like the others, may do no more than restate the freedom already enjoyed by religious entities under the law, but it may also be read more broadly to curtail the civil rights of lesbians and gays who avail themselves of legal marriage. But challenges could be dangerous because the law also contains a non-severability clause, which provides that if any part of the law is invalidated, the entire law must be thrown out.

**Why the Religious Exemptions’ Significance Is Largely More Political Than Legal**

The political significance of these exemptions is greater than their legal significance. Religious entities already have broad freedom to act in ways that would be forbidden by other institutions or individuals. Even if these exemptions push the boundaries of that freedom, they do so only at an already-generous margin.

The exemptions were important, though, because the fight over the nature, scope, and wording of the exemptions shifted some of the focus — and the heat — away from the underlying question of whether same-sex marriage should be allowed.

These exemptions also mattered in the final vote — either because, for some lawmakers, they really define the border of acceptable gay marriage rights, or because they allowed those who voted in favor to find some cover, in the face of ardent opposition by religious groups.

In the end, the New York senate extended its session by a full week – a few hours or a day at a time – to debate, discuss, and, ultimately, insist on the addition of religious accommodation provisions to Cuomo’s original bill.

**What the New York Law May Signify, and the Effect It May Have**

There may be no immediate copycatting of New York, as most states that do not currently allow same-sex marriage have committed themselves pretty strongly already to an anti-same-sex marriage position. But the adoption of same-sex marriage by a Republican-controlled state senate is, nevertheless, a sign of the changing times.

Young people overwhelmingly support same-sex marriage, and there is growing support in older age groups as well. Without question, the gay rights movement has come into its own in New York – from its start at the Stonewall riots in 1969, to the legislative adoption of marriage rights that have become synonymous with equality.
Have a Happy Day!