

Marriage, Domestic Partnership, and the Future of “Separate But Equal”

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Several of the ideas discussed here are developed at greater length in Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 *Colum. L. Rev.* 1955 (2006). Additional information regarding the status of the marriage and domestic partnership developments discussed here can be found in Suzanne B. Goldberg, *And Justice For All? Litigation, Politics, and the State of Marriage Equality Today*, 1 *Advance* 33 (Spring 2007).



Whether “separate but equal” rules violate American equality guarantees depends less on fixed jurisprudential rules and more on prevailing social views than the popular invocations of *Brown v. Board of Education* would suggest. When it decided *Brown* in 1954, the Supreme Court pointed to “modern” psychological research to justify its conclusion that racial segregation caused constitutional harm. It did not, contrary to the received wisdom, declare that the Equal Protection Clause, in and of itself, forbid states from separating their constituents by race. Instead, years would pass before the Court recognized explicitly that new *norms* regarding equality, as well as new social and psychological *facts*, underpinned its invalidation of officially sanctioned race-based distinctions.

Since *Brown*, constitutional challenges to “separate but equal” rules have arisen in a variety of additional contexts, and courts have continued to look to “facts” and “modern research” about the separately treated group or issue to reach their decisions. As in *Brown*, the courts undertaking this fact-centered adjudication regularly leave unmentioned (at least in early decisions that forge new constitutional doctrine) the equality norms that inevitably shape

their view of the facts. In *Reed v. Reed*, for example, the Supreme Court in 1971 treated women's experience in administering estates as *the* reason for invalidating an estate law prioritizing husbands over wives. The Court neither responded directly to the Idaho high court's observation that "nature itself" justified the sex-based rule nor acknowledged the sex-equality norm that undergirded its first-ever rejection of state-sanctioned sex discrimination.

Today, one cutting-edge location for studying how social change may reshape "natural" differences into legally intolerable classifications is in the roiling conflict over whether same-sex couples should be recognized via marriage or civil unions (or domestic partnerships, as the status is known in some states). As in the early race and sex discrimination cases, many courts (and elected officials) have studiously avoided addressing the implications of the "separate but equal" relationship-recognition rules they are being asked to evaluate.

To be sure, most states provide no formal legal recognition at all for same-sex couples, and some have gone so far as to amend their constitutions to underscore the point. At the same time, however, a number of states have changed their relationship rules quickly and substantially. Although the current debate about the relative merits of marriage and civil union was all but unimaginable until 1993, when the Hawaii Supreme Court rejected the government's motion to dismiss a marriage equality suit brought by gay and lesbian couples, all signs suggest that the rapid change will continue.

For those states that have created civil union as a marriage-like status that provides the state-controlled benefits and obligations of marriage, the "separate but equal" question is front and center. And while constitutional equality doctrine has some role, changing societal views regarding both gay people and marriage are unquestionably an equally if not more influential factor shaping the analysis of whether the distinction in relationship-recognition rules should be tolerated.

At a time when the prevailing public view was that same- and different-sex couples were fundamentally different, whether along functional, legal, moral, or other dimensions, the marriage/civil union question would not have been a difficult one. The different treatment could have been explained by pointing to differences between the couples, so long as those perceptions of difference were widely held.

Today, by contrast, many states and local governments forbid sexual-orientation discrimination. In family law, in particular, jurisprudence in the

overwhelming majority of states holds that sexual orientation is, in itself, irrelevant to parenting ability, and that gay and non-gay parents are similarly situated in adjudications of parental rights. The nation's leading social science experts are in accord, with the American Psychological Association and the American Academy of Pediatrics regularly weighing in to support equal treatment of gay and non-gay parents and adult couples.

Despite these changes in perception and the move toward equal treatment of gay and non-gay people generally, many courts have not “tipped” to the point of rejecting “separate but equal” relationship rules. Instead, several arguments have had significant traction, both in court and in the public debate, to justify the different treatment.

For one, some courts have found that tradition authorizes states to exclude same-sex couples from marriage. After all, the argument goes, marriage has always been between a man and a woman. True enough, as a historical matter, but state marriage rules also, for many years, incorporated race-based distinctions and treated women as the property of their husbands. A second favored argument is that the legislature, not courts, should decide contested public questions, including those regarding the rights of same-sex couples. Apart from questions about whether an “avoidance of public debates” doctrine forms an actual part of equal protection law, we can note simply, for purposes here, that courts regularly decide difficult, politicized questions.

A final argument popular in some quarters is that states have committed no equality violation in reserving marriage for different-sex couples because society, not the state, has endowed marriage with its special social status. This, too, might carry weight if the state did not exercise monopolistic control over civil marriage. As is, though, the state wholly governs access to civil marriage and cannot, under ordinary rules, invoke either social biases or preferences as a legitimate justification for unequal rules.

While none of these leading rationales for “separate but equal” relationship rules presents particularly strong legal arguments in light of contemporary constitutional doctrine, they have, as just noted, continued to hold sway in many jurisdictions. This phenomenon suggests the force of the observation at the outset of this essay—that judicial determinations about the permissibility of separate rules are more culturally contingent than we might ordinarily think.

Although equal protection doctrine surely plays some role, the more powerful influence, it seems, is in societal perceptions of the groups and issue

at hand. As a descriptive matter, this tells us that shifts in equal protection analysis will typically occur first with judicial pronouncements that “facts” have changed and only later with open declarations of new equality norms. As a predictive matter, this dynamic suggests that to determine the future of “separate but equal” rules, we cannot limit our analysis to rote invocations of *Brown* and must instead also, and always, look to the surrounding social context. ¹⁰