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Walking down a fine aisle

Gay marriage in New York is almost legal - couples just have to go someplace else for the ceremony

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Same-sex couples who reside in New York still have to travel out of state or out of the country to exchange wedding vows. But after the toasts are done and the cake is cut, the newlyweds can return home with a perfectly legal marriage license.

New Yorkers woke up to this news the other week, as it seemed Gov. David Paterson had waved a magic wand and spontaneously made gay marriage legal in the state. The development delighted some, outraged others and confused almost everyone.

What the governor did was to authorize a directive to all state agencies, asking them to review about 1,300 regulations to ensure that any references to "spouse," "husband" or "wife" would be interpreted to apply to same-sex marriages. He said his action was required because of a ruling by an intermediate court in Rochester, which found that just as New York has historically recognized legal heterosexual marriages from other jurisdictions, it should also honor legal homosexual marriages.

Paterson's directive, however, came before the state's top court had a chance to review the Rochester case, *Martinez v. County of Monroe*, and before the governor had consulted with other top elected officials. The haste resulted in an amateurish communications effort about what the state was doing. Paterson still seems to be acting reflexively as a legislator, and not deliberately as an executive, who has the obligation of leading all the people.

This failure to explain the complex interplay of court decisions and public policy led to cries that Paterson did an end-run around the legislature or the wishes of the people.

Despite the directive's unfortunate unfolding, that interpretation is wrong. The legislature still has every right either to ban same-sex marriages or to embrace them. It has done neither, resulting in a political stalemate that makes New York unique among the states. Same-sex couples legally married elsewhere could have the same rights and obligations of straight couples married here - from the right to inherit a liquor license to the obligation to pay alimony. But while the state will recognize homosexual marriages, it will also refuse to allow them to be performed anywhere between Montauk and Buffalo.

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Consider it a domestic-relations version of the compromise reflected in the military's "Don't Ask, Don't Tell" policy toward gays.

The people's choice

This editorial page has supported civil unions, arguing that committed gay couples are entitled to the same benefits as heterosexual ones. It has long held, however, that the formal recognition of marriage is so fervently intertwined with deeply held moral beliefs, that any decision about changing the definition of the cornerstone of the traditional status quo is best left to the political process. Marriage has historically been seen as having a value to the couple as well as a benefit to all of society. Only when that degree of acceptance is possible can poisonous culture wars be avoided.

What happened

Referring the matter to the legislature is just what the New York Court of Appeals, the state's highest tribunal, did in its 2006 decision in *Hernandez v. Robles*, which said there was no constitutional requirement that New York marry same-sex couples.

By contrast, California's top court ruled last month that a right to same-sex marriage is recognized under its laws. The judicial declaration prompted an immediate challenge from opponents, who successfully placed a referendum to overturn it on the state's ballot this November.

Back in New York, a different and more mundane case involving same-sex marriage had worked its way through the state court system on a totally separate but much more established legal theory. New York has a long tradition of recognizing valid marriages elsewhere, which is known as comity.

In 2004, well before California permitted gay marriage, Patricia Martinez and her partner, Lisa Ann Golden, were married in Canada. Afterward, Martinez asked her employer, Monroe Community College, to extend health benefits to Golden. The college refused. Martinez sued, but she lost when the lower court ruled that the state didn't have to recognize the Canadian nuptials. In February, the appellate court in Rochester overturned that decision, finding that under the state's comity principle, as long as the marriage was legal in the other jurisdiction, it made no difference whether the union was between homosexuals or heterosexuals.

If the Martinez ruling stands, New York would be required to recognize same-sex marriages from Canada, the Netherlands, Spain, Belgium, Massachusetts (which will only perform same-sex marriages for its residents) and California - unless Proposition 22 passes.

Joanna Grossman, a Hofstra University law professor and expert on family law, said the ruling by the Rochester court is consistent with the state's history of recognizing marriages, even if they would not be allowed to take place in New York. Such impermissible but still valid marriages include those by common law, those of 15- and 16-year-olds, and even those of some family relatives, such as a recent case involving a half-uncle and half-niece who were wed in Rhode Island.

Grossman said the reasoning behind the comity principle is simple, and it's critical to the very foundation of marriage laws in this nation. Unless states recognized one another's marriages, people who wanted to dissolve their union wouldn't need a divorce - they would just have to move to another state to unilaterally end it. "Marriage needs to be portable for it to be meaningful and for children to be legitimate," she said.

Such a dual way of looking at marriage is not unprecedented. North Carolina once had a law barring marriage between whites and blacks on its books, but in 1877 it did recognize an interracial marriage, because of the strong tradition of honoring marriages legal in other states.

That doesn't mean that New York must recognize all marriages. It can reject those considered "abhorrent" to the public policy, and it has done so in the past when the marriages were polygamous or incestuous. Right now, the betting is that the Court of Appeals would not reject homosexual marriages on public-policy grounds.

That's why many legal experts and certainly Paterson's legal counsel think Martinez will be upheld. The top court initially rejected an appeal by the community college for the technical reason that the appellate court ruling was not final. But another appeal is expected.

What should've happened

Paterson should have waited for a final determination from the top court before he acted, and then he should have explained clearly to the public how he planned to respond. Given his reputation for honest and fair dealings with the State Senate and the Assembly, it was surprising that he did not consult with them.

While a ban is highly improbable, given the Assembly's support for same-sex marriage, the legislature does have another avenue. It could claim that the governor does not have the right to unilaterally modify laws about inheritance or public housing, for example, because these provisions were enacted without contemplation of same-sex marriages.

Instead, Paterson whacked an election-year bee hive. His counsel sent a directive to all agency lawyers on May 14, a day before the California ruling but just a week after the Court of Appeals rejected the Martinez appeal on a technicality. The directive asking them to conform state regulations to recognize same-sex marriages also suggested they read a report by the New York City Bar Association and the Empire State Pride Agenda Foundation, which had found there were 1,300 provisions that might need revision.

Yet, the governor's office was surprised that the directive was leaked and made front-page news. Now there is a legal challenge to the governor's order. And the issue has already become a factor in this year's elections for State Senate, where Republicans are clinging to a majority.

Fear of decisions like Martinez motivated more than 40 states to pass the Defense of Marriage Act, which specifically rejects same-sex marriages as against public policy.

That's unlikely to happen in New York, given that the Assembly supports such marriages and so does the governor. The GOP-controlled State Senate, however, has not allowed a same-sex marriage bill to come to the floor for a vote.

So New York stands alone in this unique and contradictory position. And that may reflect the actual political divide in a state where polls show New Yorkers opposed to making same-sex marriages legal, but not ready to ban them.

Paterson's actions, in the end, may have been inevitable. "If I had been opposed to same-sex marriage, on the law, I would have come to the same conclusion," he said.

But probably not so quickly.

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