

Abstracts of Presentations:

Dale Carpenter

Bad Arguments For and Against Gay Marriage

The policy debate over gay marriage is plagued by a series of poor arguments on both sides that serve to distract from important underlying issues. Yet these bad arguments have sometimes dominated the debate. In the hope of clearing away some of the intellectual underbrush, this paper will present and then rebut several common bad arguments on both sides of the controversy.

Teresa S. Collett

Private Ordering: An Adequate Alternative to Same-sex Marriage?

While the drive for recognition of same-sex unions continues unabated, the number of opposite-sex couples eschewing marriage has increased dramatically. Among these couples, a number seek to anticipate and resolve property and child-related disputes through private ordering. These efforts have met with mixed success. My paper will explore the question of whether private ordering is an adequate alternative to marriage for same-sex couples.

Dwight G. Duncan

Abstract: "The Massachusetts Marriage Amendment" is very much a work in progress. The pre-Goodridge proposals to amend the Massachusetts Constitution to protect marriage essentially got nowhere, ironically on the grounds that they weren't necessary. After Goodridge state legislators, intent on trying to please both sides, insisted on bundling the definition of marriage with an identical-in-all-but-name legal status of "civil unions" for same-sex couples. That is the current amendment, which still needs to be passed again by this legislature, perhaps in the fall, in order to be placed on the ballot in 2006. Meanwhile, attempts by both sides will be made to scrap it. Marriage defenders hope to replace it with a popularly-initiated amendment which could conceivably be on the ballot in 2008.

William C. Duncan (co-author with Monte Stewart)

Brief review of SMA's, and constitutional legal challenges to them; evaluate arguments pro and con, and suggest ways courts may handle those challenges.

L. Lynn Hogue

Tentative Title: "The Devil in the Details: Is Georgia's Marriage Amendment Constitutionally Defective?"

SYNOPSIS: A comparison of the language of the various state marriage amendments reveals that the phrasing of Georgia's language is unique in limiting marriage to "only the union of man and woman." While other amendments clearly have a broader focus, prohibiting bigamy and polygamy as well as same-sex unions, Georgia's language uniquely bars only homosexual unions. This paper explores the implications of that uniqueness and the extent to which that singular focus imperils the constitutionality of the amendment under the standards particularly of Romer v. Evans as well as Lawrence v. Texas.

Zachary A. Kramer

Tentative Title: Same-Sex Marriage at Work: Exporting Work Performance(s) Home

This symposium focuses on the recent state constitutional amendments barring same-sex marriage and their influence on the ongoing debate over same-sex marriage in the United States. At the core of this issue is the doctrinal question of whether gays and lesbians should have the right to marry. This question implicates a number of related issues. Most relevant to my paper is the question of how marriage or its absence affects same-sex families. In approaching this subject, my paper steps back from the doctrinal question to address two foundational issues. First, I show that a homosexual employee's non-marital status creates extra burdens for her at work, complicating her interactions with coworkers and creating for her a whole host of other difficulties. Second, I argue that the employee, upon leaving work, exports these complications and difficulties home, often with negative consequences for her family.

Recent scholarship in both law and the social sciences documents how gays and lesbians, as outsiders within the workplace, bear extra burdens at work to overcome their coworkers' negative stereotypes about the gay community. These burdens materialize as norms encouraging gays and lesbians to assimilate at work, usually in the form of passing as straight or covering, that is, downplaying their sexuality. My contention is that gay and lesbian employees export the stresses and problems of passing and covering to the private sphere, which in turn harms gay and lesbians families, especially the children in such households. Gays and lesbians who engage in this workplace-based identity work encounter difficulties when it comes time to shed their straight personae upon heading home at the end of the day.

Scholars take for granted the premise that work and family inhabit different, mutually-exclusive realms. Indeed, the doctrinal inquiry that this symposium engages presupposes that the legal question of same-sex marriage is an autonomous matter, somehow insulated from concerns of the market. But a person's marital status is directly related to how she interacts with others at work. The conceptual separation between work and family proves artificial; the spheres are, in fact, far more fluid than we normally assume. While the workplace may be physically separate from the family, what happens at work is not. Just as an employee's family problems affect her job performance, so too will her performances at work affect her family.

Val Ricks

Marriage and the Constitutional Right to Free Sex

Over the last 40 years, the Supreme Court and state supreme courts have sponsored a host of changes in constitutional law involving the legally separate issues of birth control, marriage, adultery, fornication, sodomy (including homosexual sexual activities), and pornography. Though facially (legally) dissimilar, each of these sets of judicial decisions, confirming as each does an individual right to engage in the activity at issue, has a common denominator: protecting individuals against adverse legal and social consequences of private sexual activity—not just sexual intercourse, but the kind of sexual activity of one's choosing. Taken together, these decisions declare a constitutional right to free sex—sexual activity free of legal and social consequences. The right is not absolute. It still yields to some interests, such as protecting children and others who cannot or do not consent and protecting against violence and commercialization (prostitution).

Goodridge and the other gay marriage cases are but the latest manifestation of this right to free sex, and the marriage amendments of the last year are its counter—an attempt to preserve one of the last social institutions in which sex is not free. Marriage is one of the last if not the last legal institution in which sex is said to have a public purpose such that it can be regulated. This purpose is the having and rearing of children by their biological parents, those most likely to have children and most likely to nurture them and understand them. Extending marriage to same-sex couples, as in Goodridge, erases that public purpose. Goodridge and cases like it are justifiable only as a constitutional protection of free sex. Goodridge formally rests on equality, but equality is dependent on some notion of liberty. Rhetorically, Goodridge espouses a view of marriage in which it consists solely of legal benefits and burdens and social privileges. But the adoption of this narrow view means that the kind of sexual activity one engages in within marriage is irrelevant to the right to marry. In concluding that the two kinds of sexual activity are treated unequally with respect to the marriage right, the court must assume that homosexual sexual activity is as protected a constitutional right as heterosexual sexual activity. The court must assume that married couples and homosexual couples are exercising the same liberty in order to conclude that the two are treated unequally by the marriage statute. And only great importance attached to this liberty would warrant the massive social engineering undertaken in Goodridge to protect it. This liberty, as much as equal protection, is a ground for Goodridge. What harm does a constitutional right to free sex do for us, one aimed at removing not only the legal but also the social burdens on sexual activity? At any rate, we can be sure there will be more sex and of greater variety, and citizens will feel more free of its consequences, including its procreative consequences. Will this be a good thing? I cannot see how it would. In one respect, the right to free sex appears to be a libertarian notion. We Americans do, after all, want everyone to be able to pursue happiness.

The missing perspective in the right to free sex jurisprudence is that, at root, it isn't the sex itself that makes us happy, not in any lasting way. Nor is it even a pre-condition of happiness. By implying that it is, the courts make that fact harder and harder to see. Parenthood, on the other hand, is a source of great joy. The state constitutional amendments remind us of that fact, and also that sex is, in fact even if not in law, not free.

Katherine S. Spaht

Making the One Object Argument: Banning Gay Marriage and Civil Unions

In some states there is a state constitutional requirement that every constitutional amendment submitted to the people must contain only one object. The jurisprudence in most states with the "one object" requirement gives the legislature (or initiative proposers) generous latitude in the content of constitutional amendments. As long as there is one identified purpose of the amendment most state courts defer to the legislature or initiative proposers in its framing of the amendment. In a few of the states with a "one-object" requirement litigation has been initiated arguing that a constitutional amendment prohibiting not only same-sex marriages, domestic and foreign, but also same-sex civil unions/domestic partnerships (a legal status "identical to or substantially similar to" marriage) violates the one object requirement. In Louisiana that litigation concluded with a decision by the Louisiana Supreme Court (7-0) that Louisiana's constitutional amendment addressing both subjects had only one object, the defense of traditional marriage from all perceived current threats. Use of social science data from the European experiments with other legal statuses helped convince the court that all four sentences in Louisiana's amendment were intended to protect traditional marriage.

Professor Spaht will discuss how Louisiana successfully defended its SMA against arguments that it violated the single object rule in the state Constitution, even though the amendment bans not only domestic and foreign same-sex marriages but also a legal status (domestic or foreign) substantially similar to or identical to marriage (i.e., civil unions).

Mark Strasser

State Constitutional Amendments Defining Marriage: On Protections, Restrictions, and Credibility

Recently, several states passed constitutional amendments defining marriage, allegedly to protect marriage. At best, however, these amendments restrict marriage and, at worst, they undermine the very goals that they are claimed to serve.

In many of the states passing these amendments, same-sex marriage is already precluded by law and would not have been recognized anyway. At least one difficulty posed, however, is that the language of the amendments is sometimes so open-ended that it is difficult to discern their reach. Ultimately, the effects of these amendments will have to be clarified by the courts and it will only be then that we will be able to see how much damage they have caused.

Monte Stewart

MARRIAGE AMENDMENTS AND THE READER IN BAD FAITH

Monte N. Stewart & William C. Duncan

President and Director, Marriage Law Foundation.

Since 1998, seventeen states have enacted marriage amendments to preserve their definition of marriage as the union of a man and a woman. Of these amendments, those in Nebraska, Louisiana, Georgia, Kentucky, Oklahoma and Oregon have been subject to court challenges on procedural and substantive grounds. A number of other states have reported threats of legal action (such as Utah, Michigan and Ohio). In other states (such as Oregon and Alaska), litigation has aimed to limit the scope of the amendments, such as by asking courts to mandate “civil unions” rather than marriage. Recent legislative action suggest that other states will enact marriage amendments which will also be subject to court challenge.

This article will briefly survey the current and pending marriage amendments. It will also identify constitutional objections to them raised during the public debate over ratification and in subsequent litigation. This will allow the authors to highlight the problem of the “reader in bad faith” who approaches the amendments with a presumption of unconstitutionality.

The article will conclude with an assessment of the relevant legal arguments for and against the amendments. This will lead to a suggestion about the way that constitutional challenges should be handled by courts in which anti-amendment litigation has been brought forward.

Jeffery Ventrella

Square Circles??!! Restoring Rationality to the Same-Sex "Marriage" Debate

Too many same-sex "marriage" discussions--both in the Academy and on the Sidewalk--generate heat, but little, if any light. One of the contributors to this situation is that the participants quarrel, rather than argue. Argument, that is, being rational, is critical to correctly analyzing any question of import, including the question of marriage. In fact, rationality is fundamental to being human. To be irrational is to undermine humanity in a fundamental way.

Mr. Ventrella's presentation will draw upon his having participated in over 30 formal same-sex marriage debates around the nation's universities and law school. And, he will set forth the thesis of his invited article, to be published by the Hastings Constitutional Law Quarterly, Square Circles??!! Restoring Rationality to the Same-Sex "Marriage" Debate. This article analyzes key logical missteps that recur in this debate. The article then proffers a tri-perspectival model for bringing balance to the question at hand: Good lawyers don't ignore Precedent, Providence, or People.

David Wagner

Why Goodridge Isn't Loving

The academy has heard much about the similarities between the issues of interracial marriage and non-intersex marriage. It is time to look at the differences, which I propose to do by looking

both at *Loving v. Virginia* itself and at a hypothetical case in which a plaintiff tries to use the teaching of *Loving* to obtain a right well beyond its boundaries.

SSM advocates argue that "marriage is a fundamental right," and cite *Loving v. Virginia*. My paper aims to show that *Loving* does not mean "marriage is a fundamental right" in the sense that same-sex marriage advocates mean.

There are two ways to approach this. One is to argue that "marriage," as used in *Loving*, has baggage that same-sex marriage advocates deny or overlook. I propose to show this by way of an analogy to the (presumably) less controversial field of banking. The other way is to deny that marriage is a fundamental right, and that *Loving* said it was. Briefly, "fundamental rights" are not as regulated as marriage has always been, and if they are, then we really have no "fundamental rights" at all.

Lynn D. Wardle

Constitutional Amendments – The Common American Response to Threats to Cherished Rights and Social Institutions

Seventeen states have now passed state marriage amendments (SMAs); thirteen were passed in 2004 alone. SMAs are currently in mid-process (involved in multi-year amendment proposal-and-ratification processes) in three additional states, and more than a dozen other state legislatures are considering possible state marriage amendments in 2005. Clearly, a socio-legal-political phenomenon of some significance is occurring in the United States of America.

While the language, structure, form, and effect of these amendments vary significantly, they are profoundly similar in purpose and in motivation. In every instance, the unique legal status of the social institution of conjugal marriage was perceived to be in jeopardy. The source of the threat was similar. The response was to propose and work to have ratified an amendment to the state constitution.

The adoption of amendments in response to perceived threats to cherished rights and institutions is a long-established practice of very honorable pedigree in the American legal system. I will review the history of that practice, and will consider the implications of its current emergence in the context of the movement to legalize same-sex marriage.

Camille S. Williams

Equal-Protection Analysis of State Marriage Amendments: the Quandary of Using Essentialist Arguments in the Era of Anti-Essentialist Theories of Human Sexuality

One of the arguments against state marriage amendments, is that they violate the equal protection guarantee of the Fourteenth Amendment by denying nonheterosexuals the

fundamental right to marry. Apart from the obvious argument, which is that the sexual orientation of the individuals is not the basis for denial, rather it is that two persons of the same biological sex cannot marry that is at issue, there is the problematical notion that persons could be classified on the basis of their sexual desires. That is, given queer theory and other social science theories, there are no stable sexual identities, so to categorize or group persons on the basis of sexual desire, orientation, identity or behavior is unlikely to yield anything but an individual predilection free-for-all--not the basis for a 14th amendment analysis.

Attempts to group persons on the basis of their sexual desires or practices can be distinguished from grouping persons on the basis of ethnicity, biological sex, or religion. Given the fact that it is impossible to classify persons on the basis of sexual desire, such phantom groupings cannot be used to sustain an equal protection challenge to state marriage amendments.