

## **Abstracts**

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## **DECONSTRUCTION OF MARRIAGE: THE SWEDISH CASE**

**by  
Allan Carlson**

This paper will answer the arguments made in a widely circulated essay by Stanley Kurtz, “The End of Marriage in Scandinavia” (THE WEEKLY STANDARD, 02/02/2004). In essence, Kurtz argues that the introduction of registered partnerships or de facto same-sex marriage has demonstrably weakened the institution of marriage. Using Scandinavian examples, he offers statistics showing that out-of-wedlock birthrates rose during the 1990s, which he sees as a consequence of the introduction of registered partnerships. This result undermines the “conservative case” for same-sex marriage, Kurtz says, which has held that this change would not harm, and might even strengthen conventional marriage.

Focusing primarily on Sweden, this paper will demonstrate that Kurtz’s emphasis on same-sex marriage oversimplifies the history of marriage in Sweden over the last 75 years. It will show how the deconstruction of marriage in Sweden actually began in the 1930’s, as an intentional project. It rested on a novel combination of feminist and social democratic theories, and used concern over falling birthrates to argue for socializing the whole of private life, including marriage.

The early architects of this strategy were Alva and Gunnar Myrdal. Their 1934 book, KRIS I BEFOLKNINGSFRAGAN, laid out the pro-natalist case for socializing most family functions. While claiming to support marriage, they actually advanced policies that would diminish marriage as an institution. Their ideas dominated the work of the influential 1935-38 Royal Commission on Population. During the 1940’s, however, a conservative backlash pushed their program into the background. The 1945-65 period is now known as “the era of the Swedish housewife.”

During the 1960’s, however, the Myrdal project gained new momentum, through Alva Myrdal’s report, ON EQUALITY. Under Prime Minister Olaf Palme, radical reform of Swedish family law began; what feminist historian Yvonne Hirdman calls the “Red Years,” 1967-1976. A series of measures stripped marriage of most economic, social, and child-rearing functions and strongly discouraged traditional gender roles. In short, by 1987, Sweden had already deinstitutionalized marriage; only the label remained. Registered partnerships for same-sex couples were only an afterthought, not the cause of family change.

The paper will end by considering current marital and family statistics in Sweden, and the status of debate there over same-sex marriage and adoption.

**Rights, Religion, Values, and the Perception of "Other:" The Political Economy of Legal Recognition for Same Sex Marriage and its Impact on American Public Education**

by  
**Scott Ellis Ferrin, J.D., Ed.D.**

The author believes that public education is the cornerstone of American democracy, and serves a vital democratizing and socializing purpose that brings Americans together from more diverse backgrounds than do most other American institutions currently. This provides a shared experience that has the potential to define an American ethos of cooperation and respect for others. As a people we are divided by race, de facto real estate segregation, socio-economic background, ethnicity, gender, sexual preference and religion perhaps more than ever in our past. Our public schools are also segregated and divided in many ways also, mirroring in part the larger societal situation they inherit, and the real estate and economic stratification of current American society; but the public school is still one of the few institutions that has the potential to provide a forum or "town hall" where individuals from diverse backgrounds can learn from each other. Americans will serve on juries together; will vote together; and will make policy decisions together-especially as referenda and other more direct (and parenthetically more dangerous) forms of democracy develop in political importance. Where will their information come from about each other's aspirations, needs, dreams, and deeply held beliefs? The ability to learn from and, discuss respectfully with, all Americans is one of the precious outcomes that may be possible in public education, if most Americans are involved.

However, will most Americans remain involved in the coming years? Support for public education has been waning in most polling data, including Phi Delta Kappa's annual public opinion polls. Under the rubric of "choice" more voucher plans, and to some effect charter schools, have the potential to resegregate America into private, home, "community," or "neighborhood," schools that do not look like the traditional public school. At the same time, the political influence of some religious groups has been rising. It is reported that some religious groups see public schools as secular bastions, hostile to religion. Some religious groups and parents are showing their perception of this hostility to religion in continuing calls for "choice" systems that tend to allow a more sharply differentiated and perhaps segregated education system.

If same sex unions are given legal cognizance as marriages, what will be the impact on public schools? The question is at the center of a nexus of constitutional rights, including the 1st and 14th Amendments, civil rights statutes, provisions from No Child Left Behind, and a host of political forces and reactions. Will we be able to learn to communicate across our deepest differences as a people; or will same sex marriages, if given legal sanction, and a secure place legally, and in the curriculum, increase the potential for loss of support for public schools from biblical conservatives, Muslims and other religious groups? Religion is a highly motivating factor for many Americans' educational and life choices. Will the public schools and the public discourse become bereft of some traditional religious groups if their needs are not noted and accommodated?

As expressed in public schools through their curricula, and their practice, what rights, civil rights and protections are traditional religious groups willing to support for gay, lesbian, and transgendered individuals? How, or will gay, lesbian, and transgendered individuals and

couples, and others in an increasingly secular society, communicate respect and protection for deeply religious groups in ways that open dialogue and reach common ground of protection of liberties and rights of individuals?

The potential on both sides of an increasingly polarized political landscape to demonize and silence those on both sides of the issue is great. Religious groups often decry the apparent loss of respect for the cultural diversity that may be expressed in some traditional belief structures. What will the Supreme Court's role be in the determining the outcome of legal challenges by religious groups over curricula and practices in school that allegedly offend their 1st amendment rights, whether under free exercise, or establishment grounds? The nuances of language used in the greater policy and constitutional debate will be explored briefly, by reference to some opinion data collected by the author.

At the same time the above forces and threats are rising, the Supreme Court is blurring the separation between church and state, and is seemingly vague regarding defining the difference between teaching "values" and free exercise of religion. Will a continuing trend toward allowing tax support through voucher and other plans to private religious groups further exacerbate the potential of a rift that will divide some religious groups from the traditional public schools, as it becomes possible for religious groups to experience a religiously grounded education, funded by public monies? The paper is an attempt to discuss and predict the outcomes and the forces that may shape the future of America's public schools, and thus America itself, if same sex marriage is given legal recognition in most, or all states.

**III: The California Marriage Case**  
**Scope of Proposition 22**  
**Andrew P. Pugno, Chief Counsel**  
Proposition 22 Legal Defense & Education Fund

While the fourteen simple words of Proposition 22 (“Only marriage between a man and a woman is valid or recognized in California”) were selected for their simplicity and popular appeal to the voters of California, their legal meaning has been the subject of much debate both in the courts (including the Coordinated Marriage Cases currently on appeal) and in California’s legislative arena. Debates concerning the scope of Proposition 22 seem to boil down to two issues: (1) whether Proposition 22 limits the recognition of both domestic- and foreign-performed marriages, or just those performed outside of California; and, (2) more importantly, whether Proposition 22 allows the Legislature to incorporate by reference and extend substantially the entire body of California marriage law to same-sex couples who register as domestic partners.

Although the California Supreme Court dodged the first issue in *Lockyer v. City and County of San Francisco* when it invalidated thousands of illegally issued same-sex “marriage” licenses, the Courts of Appeal and other legal authorities have generally concluded that the unqualified text of Proposition 22 applies to marriages performed both in-state and out-of-state.

On the second issue, current case law indicates that Proposition 22 limits only the use of the word marriage, but not the legal incidents of marriage. Thus, the argument goes, the Legislature’s act of substantially duplicating the rights of marriage for same-sex domestic partners does not “impact” Proposition 22’s limit on marriage itself, which would otherwise violate of the California constitutional protection against amending voter-passed statutes. This conclusion, however, is on a legal collision course with the conflicting analysis of the trial judge in the Coordinated Marriage Cases, now on appeal, where the comprehensive marriage rights conferred upon domestic partners were found to duplicate marriage so much that there remains “no rational basis” for withholding the formal status of marriage as well. The two conflicting views must be reconciled as the Courts of Appeal continue to struggle with the meaning of Proposition 22.

**Redefining the Best Interests of the Child:  
Science and Common Sense on Lesbian and Gay Parenting  
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Drexel University  
Director of the J.D./Ph.D. Program in Law and Psychology at  
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DO NOT CITE**

A growing body of cross-sectional and longitudinal research indicates that the mental health and psychosocial adjustment of children raised by gay and lesbian parents is as positive as that of children raised by heterosexual parents. Although earlier studies suffered from substantial methodological limitations, several recent studies rest on a sounder methodological foundation. However, children raised by gay or lesbian parents frequently report having concerns about peer rejection if they disclose that their parents are gay. More importantly, some studies suggest that children raised in lesbigay households are somewhat more likely to express an interest in homosexuality and homosexual relationships. Yet not only are such findings tentative, but whether such outcomes are negative is highly debatable. Clearly, research on adolescent development shows that boys raised in father-absent homes are more likely to exhibit negative outcomes, such as involvement in delinquency, than boys raised with strong paternal role models who provide supervision and are actively involved in the child's life.

Thus, it may be particularly important that lesbian parents provide male influences and role models for their boys, and judges should consider (as just one of many factors) the possible impact of father absence when deciding whether to award custody of male children to two-parent lesbian versus heterosexual couples.

## **Dr. Walter Schumm**

The work of Dr. Gary Gates is commended as an extremely important contribution to our understanding of the demography of gay households in the United States. His data greatly enhance our ability to develop appropriate social policies and legal reform with respect to issues such as gay marriage and gays in the military. Here, Dr. Schumm provides insights from his social science and his military background to highlight a few things that have been overlooked in the literature and some of the macrosociological implications of changing definitions of equality among different family forms.

## **Does Same-Sex Marriage Threaten Religious Liberty?**

**Roger Severino, Esq.**

Because of the historically intimate relationship between religion and marriage, the Massachusetts Supreme Judicial Court decision in *Goodridge v. Dep't of Public Health* carried with it profound implications for religious liberty-implications that are only now being appreciated. Although religious institutions have substantial constitutional protections, this paper argues that the risks to religious freedom from legalized gay marriage are many and are potentially destructive.

The legal definition of marriage does not exist in isolation; changing it changes many areas of law. For example, marriage plays important roles in the law of adoption, education, employee benefits, employment discrimination, government contracts and subsidies, taxation, tort law, trusts and estates, and many others. In turn, these same legal regimes directly govern the ongoing, daily operations of religious organizations of all stripes. Because of the centrality of marriage to religious and civic life, many conflicts will inevitably arise where the legal definition marriage differs dramatically from the religious definition-to the detriment of religious liberty.

Specifically, the advent of same-sex marriage will impinge on religious liberty by inducing and allowing government to (1) compel religious institutions to provide financial or other support for same-sex married couples, and (2) punish religious institutions for opposing same-sex marriage. As for the first point, wherever religious institutions provide special benefits to traditional married couples, state laws will likely require those institutions to extend equivalent benefits to same-sex married couples. Religious institutions that do not comply will be civilly liable. Correspondingly, as more courts elevate same-sex marriage to the status of a fundamental constitutional right, more courts will treat opposition to same-sex marriage as "discrimination," "irrational," or "motivated by animus," meriting the severest form of government disapproval. Thus, religious institutions that retain their "discriminatory" beliefs will be targeted for a wide range of legal punishments, precisely because their policies reflect those beliefs. Government will sanction uncooperative religious institutions by excluding them from an array of government benefits and government functions that they currently enjoy.

The question of marriage is one of national importance. As such, there is a strong push to harmonize the definition of this foundational civic and cultural institution across the nation, in the near-term or long-term, one arrangement or the other. That decision will have deep implications for the liberty of religious institutions that choose to reflect their deepest beliefs about marriage in their organization, in their speech, and in their deeds.

**The Courts' Treatment of Social Institutional Theory**  
**Monte N. Stewart**

While there have been a number of court decisions from various states grappling with the question of whether to mandate genderless marriage over the past three decades, only recently have courts begun to address a critical point of the debate—the nature of social institutions and social institutional theory. This presentation will assess the judicial performance in responding to social institutional arguments for man/woman marriage, noting particularly judicial elisions of these arguments.

## **What Is Marriage?**

by

**Lynn D. Wardle**

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Abstract of Paper to be Presented at the

*Symposium on Marriage, Adoption and Gay and Lesbian Families in the Law*

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This paper considers the question – what is *marriage*? The paper first will show that this question underlies the family policy controversies and social debates over legalization of same-sex marriage and about the creation of marriage-equivalent same-sex civil unions and domestic partnerships throughout the United States (and around the world) today. It is the most burning domestic policy issues in America today. It also is a profound issue for international relations, is an integral part of the growing gap between western and Islamic nations; indeed, it is not an exaggeration to observe that the strong, hostile reaction to how this question seems to be answered in the West is a significant part of what is driving the Islamic fundamentalist revolution.

Next, this paper will discuss how this the question may (and usually should) be considered contextually. That is, marriage means different things in different contexts. In religion it has one meaning (or, more accurately, one set of meanings which differ according to religious or faith tradition). In sociology, marriage has another meaning. In law, marriage has another meaning. In families, marriage may have another meaning. In history, marriage has meanings that have differed over time and culture. In psychology, marriage may have another meaning. Likewise, the different meanings of “marriage” in other contexts will be noted. For individuals, marriage has a set of meanings, that change as they change; it means one thing when a couple are young, unmarried, and planning their future together; it means another thing when they are newly married without children; it means another thing when they have young children.

The institutional meaning(s) of marriage are next considered. When marriage is described as “pre-political” this is what is usually connoted. The significance of marriage as the basic, foundational social institution is reviewed.

The political meaning of marriage is also examined. At the micro-politics of marriage are examined. Marriage has symbolic meaning that may help define people, and throughout the history of our nation, marriage has been used positively to unite and strengthen or national identity and national character. There is a potential dark side to the political use of marriage; marriage also may be used manipulatively as a symbol to help define, strengthen, and galvanize political movements, and it has been so used several times in the history of the United States.

The public policy meaning of marriage will be considered. Proposals to “abolish” legal marriage will be analyzed. The purposes for legal recognition of marriage will be reconsidered. The meaning of marriage for the law and for “who decides” will be examined.

The meaning of marriage for individuals – for married adults, unmarried adults, for children, for other relatives – will also be considered. Finally, the significance of these meanings of marriage for the movement to legalize same-sex marriage will be discussed. In some ways, that is an intrusion, the putting of private interests above public needs.

**Biology, Narrative, and Materiality: Same-Sex Marriage and the Subjectivity of the Child**  
by

**Camille S. Williams**

The Marriage & Family Law Research Grant  
J. Reuben Clark Law School

Many advocates for same-sex marriage assert the view that the family is socially constructed, and so can be reconstructed to fit the desires of individual adults. A second influential argument for same-sex marriage arises from sympathy for children, whose needs and vulnerabilities, it is argued, call for familial reconstruction. A third less influential argument is based on the view that sexual behavior is linked to genetic makeup.

I will argue that whether one relies on evolutionary psychology, neuropsychology, or social constructionism, reconstructions of the family via same-sex marriage are likely to result in alienation from the body, and from other generations of the family. Rather than denaturalize the conjugal family, we should strive to provide that children be raised by their biological parents where possible, and encourage a reconciliation of individuals with their bodies and with their intergenerational families.