Defining Marriage in California: An Analysis of Public & Technical Argument

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The Legal Argument over Gay Marriage

• Legal arguments are “technical” in the sense that who is authorized to argue, what sorts of claims, inferences, and evidence are considered appropriate, and how legal arguments are presented are all circumscribed by a set of social practices.
In re Marriage Cases (May 15, 2008)

California Supreme Court was ruling about the definition of “marriage.” The state’s Domestic Partnership Act in 2005 already had created the option for gay partnerships that differed from marriage mostly by name: “Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.” (California Family Code, section 297.5)
What did the Court rule?

• Because marriage is a fundamental substantive right, the legal difference between civil unions and marriage required “strict scrutiny.”

• No “compelling state interest” has been shown for denying marriage to gays/lesbians.

• Different labels for couples “similarly situated” violates California’s Equal Protection Clause and therefore is unconstitutional.
The Performance of Legal “reasonableness”: Context

- The U.S. Supreme Court’s ruling in *Romer v. Evans* (1996) struck down Colorado’s effort to deny equal protection to homosexual citizens.
- The U.S. Supreme Court reversed *Bowers v. Hardwick* (1986) in *Texas v. Lawrence* (2003), ruling that laws criminalizing consensual homosexual conduct were unconstitutional.
Reasonableness of “State Interest”

• Defendants and supporting amici briefs most often identified two interests: Society’s interest in encouraging procreation and the traditional value of heterosexual marriage.

• Court noted that the right to marry is not dependent on procreation, and that “tradition” is not a “compelling state interest” since it sometimes masks inequality.
What was excluded from legal argument?

• With the DPA and the Romer and Lawrence Supreme Court decisions, the argument that “homosexuality is wrong, unnatural, and/or immoral” was wholly preempted.

• Religious arguments were completely absent; the Supreme Court’s “Lemon” test requires that laws must have a primarily secular purpose.

• In short, once explicitly “anti-gay” claims are taken out of the argument ecology, the legal case for gay marriage is much easier to make.
Again: This was a debate over the definition of the word “marriage.”

- The most interesting definitional argument against gay marriage was by the National Legal Foundation: “Just as the term ‘salt’ is given to the specific molecular union NaCl, the term ‘marriage’ is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that Na\textsubscript{2} or Cl\textsubscript{2} is not salt.”
The Public Argument over Prop 8

• The case for banning gay marriage boiled down to four main arguments:

• First, marriage is traditionally (and correctly) defined as between a man and a woman. Unlike the legal arguments, religious texts were frequently invoked to support this argument.
• Second, advocates argued the power to define “marriage” ought to reside with voters rather than the Court. *Many* advocates frame Prop 8 as restoring democratic rule and contrast the 61% majority who voted for Prop 22 (in 2000) with an act by four judges, usually identified as “activist” or as “San Francisco” judges.

• Third, advocates argue that redefining marriage is unnecessary because the Domestic Partnership Act provided equal rights for same-sex couples.
• Fourth, advocates offered a variety of arguments from consequence; that is, a redefinition of marriage to include same-sex couples is harmful to traditional marriage, families, and especially children.

• These arguments were made in print, radio, Internet, and televisual media. This last argument, however, was especially prevalent in TV and Internet ads. Why?
The Power of “Visual Argument”

• Ads are most effective not when they try to convey “content” but when, in the words of Tony Schwartz, provide *evocative stimuli* that strike a “responsive chord” (1973).

• The point of Schwartz’s “resonance principle”—originally articulated over 35 years ago—is that to achieve a particular behavioral effect, one provides stimuli that will “resonate” with the viewers’ beliefs, values, and emotions.
For samples, go to:
http://z.umn.edu/zumnedunca

• Negative advertising that resonate with citizens’ fears and anxieties about homosexuality combined with positive stimuli that link Prop 8 with strongly held beliefs about one’s children and family are powerful persuaders.
Opponents to Prop 8

- There were four main arguments offered by those who opposed Prop 8: The consequences of gay marriage cited by Prop 8 supporters are false, civil rights should not be subject to popular vote, eliminating the right to marry is discrimination, and marriage is about love.
A Weaker Visual Argument?

• The opponents to Prop 8 relied (mostly) on two arguments in TV/Internet ads:
  • A) Proponents of Prop 8 are lying.
  • B) Prop 8 is discrimination (and by inference, proponents of Prop 8 are prejudiced).
• These were not particularly effective arguments.
“Prop 8 advocates are lying.”

• A defensive position rather than a constructive one of how gay marriage could aid the state.

• Not enough to overcome fear of unknown consequences, especially for redefining a word most had learned from birth as between a man and a woman.
“Prop 8 advocates are bigots”

• Argument appears to have backfired with some undecided voters. If anyone with beliefs that question gay marriage is considered a “bigot,” then by definition a significant majority of U.S. citizens are bigots.

• Many Black voters—a majority of whom voted for Obama and for Prop 8—rejected the analogy between interracial marriage and gay marriage.
The only surprise was the closeness of the vote on Prop 8.

- Between 1977 and 1997, voters approved 80% of measures that restricted gay rights.
- Thirty-one ballot initiatives preventing gay marriage have been proposed, thirty-one have passed. The average percentage voting in favor of such measures is 68%.
- One study found in 2004, “Americans rated groups such as ‘rich people,’ ‘feminists,’ fundamentalists,’ ‘people on welfare,’ and ‘Muslims’ more warmly than gays and lesbians.”
What do we do as Critics?

• First, critique false or misleading arguments, especially visual arguments; seek to improve critical media literacy.

• Second, help “translate” legal arguments for a public often painfully unfamiliar with constitutional argument. It is arguably a civic duty to serve as commentators on the differences between legal and political argument.
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