

EVOLVING ARGUMENT STRATEGIES IN THE DEBATE OVER SAME-SEX MARRIAGE IN THE U.S.

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1. Introduction

The debate over same-sex marriage in the U.S. is taking place in the legal sphere in the court system as well as in the public sphere leading up to various state ballot initiatives. In an earlier project, I analyzed the differences in argumentation in the technical and public spheres in 2008 concerning Proposition 8 in California (Schiappa 2012). My colleagues and I found that the norms and practices of constitutional argument in the technical sphere filter out specific arguments—particularly fear appeals and claims based on religious beliefs and values—that were prominent in the public sphere.

This paper continues my analysis of the same-sex marriage debate in two ways. First, I describe the four state Supreme Court decisions that have ruled a prohibition of same-sex marriage is unconstitutional to argue that the majority opinions should be thought of as engaging in argument evaluation. Second, I focus on two states that vote in 2012 on constitutional amendments that define marriage as strictly between a man and a woman. In North Carolina, voters went to the polls on May 8, 2012 following a public debate that illustrated a somewhat different argumentative exchange than has been seen in most states that have voted on the issue of same-sex marriage. In Minnesota, the state legislature voted in the spring of 2011 to put a constitutional amendment on the November 2012 ballot. The 18-month period between the legislature's action and the vote in November allows for a very different sort of campaign strategy than is typical—one that I believe is best understood through the lens of the Elaboration Likelihood Model of argumentative persuasion.

2. The Constitutional Debate

The constitutional argument for same-sex marriage is, on its face, quite simple. In each of the four state Supreme Court decisions that struck down legal barriers to same-sex marriage, the rationale

was a two-step process. Each court ruled that marriage is an important and fundamental right. Once that premise is established, the argumentative burden shifts to the state to provide adequate justification for infringing on that right. Though the court opinions relied on different levels of scrutiny of that justification, all four concluded that the state's arguments were inadequate, making the relevant state restrictions on same-sex marriage unconstitutional.

In 2003, the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) ruled that precluding same-sex marriage violated the Massachusetts constitution. Describing marriage as a “vital social institution,” the court noted that the institution provides many protections and benefits on citizens who marry, just as it demands various legal, financial, and social obligations. A number of U.S. Supreme Court decisions are cited that establish marriage as a fundamental civil right, including, most notably, *Loving v. Virginia* (388 U.S. 1, 12 [1967]), which struck down state laws precluding interracial marriage.

There are three different levels of “scrutiny” that have become recognized in the adjudication of constitutional law in the U.S. The lowest level of scrutiny is known as the “rational basis” test. This standard requires only that there be some sort of rationale for a law, hence it is considered the most deferential standard the courts can use in assessing the constitutionality of an action. The second level is appropriately called “intermediate” scrutiny, which requires that the law or policy being challenged further an important government interest in a manner that is substantially related to that interest. Such a mid-level scrutiny is the standard most often applied in cases involving statutory or administrative classifications that are based on biological sex. The highest level of scrutiny is known as the “strict scrutiny” test and is often employed in cases involving racial discrimination. Strict scrutiny requires that the law or regulation at stake must serve a compelling government interest and be crafted in a manner

that is “least restrictive”; that is, the law or regulation is the only way in which the government interest can be met.

In the Massachusetts case, the court utilized the most deferential standard available—the “rational basis” test. Such a test was understood as meaning that to meet constitutional requirements for due process, a law must merely have a “real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.” For equal protection challenges, the rational basis test requires that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.” Despite lowering the proverbial bar to the most deferential standard, the Massachusetts Supreme Court ruled that, “the marriage ban does not meet the rational basis test for either due process or equal protection.”

The Court reviewed three legislative rationales for prohibiting same-sex marriages: (1) providing a favorable setting for procreation, (2) ensuring the optimal setting for child rearing, and (3) preserving scarce State and private financial resources. The Court concluded that none of these rationales withstood even modest scrutiny: (1) Citing numerous precedents, the Court noted that there is no necessary connection between the right to marry and procreative sex. The Court noted that the state already facilitates bringing children into families regardless of whether a parent is married or not, or how the child was conceived, and regardless of the sexual orientation of the parent. (2) The Court noted that there was no evidence that same-sex parents provide any less of an “optimal setting” for child rearing, and that there was no reason to believe that forbidding same-sex marriage would somehow advance or encourage additional child rearing in families headed by heterosexual couples. (3) The Court noted that the state assumed that same-sex couples are more financially independent than married couples and thus less needy of public or private support. Such a generalization, the Court concluded, is simply false given the number of same-sex couples with children. Furthermore, since Massachusetts laws concerning the receipt of public and private financial benefits for married couples does not require demonstration of financial dependence, it is not rational to apply such a requirement on same sex couples.

In addition to the three rationales identified above, the Court also reviewed additional arguments for prohibiting same-sex couples from marrying that will not be discussed here. But it is noteworthy that the Court was quite bold in its

stance from an argumentative standpoint: Even using the most lax standard of scrutiny, the Court found no rational basis for prohibiting same-sex couples from marrying.

On May 15, 2008, the Supreme Court of California ruled (*In re Marriage Cases* 183 P.3d 384, 439 [Cal. 2008]) that marriage could not be limited to male/female couples, thereby redefining marriage to include same-sex couples. Like Massachusetts, the court noted that there are clear legal precedents that have declared marriage to be a fundamental right. Unlike Massachusetts, which utilized the less stringent “rational basis” test, the California Supreme Court ruled that laws that restrict marriage rights are subject to “strict scrutiny”; that is, a compelling public interest must be served by such a restriction and that compelling interest must be shown as *only* achievable by the restriction. The Court ruled that no such compelling state interest was demonstrated. Defendants and supporting *amici* briefs most often identified two interests: Society’s interest in encouraging procreation, and the traditional value of heterosexual marriage. The Chief Justice, who authored the majority opinion, noted that not all marriages result in procreation and that the heterosexual right to marry does not depend on procreation; furthermore, the State’s interest in supporting stable families could be advanced by providing families headed by same-sex couples the same dignity and protection families headed by male/female couples. The Chief Justice also noted that tradition is not a compelling state interest. The Court noted that entrenched social practices and traditions often masked inequality; examples include bans on interracial marriage, routine exclusions of women from many occupations, and the relegation of blacks to separate but supposedly equal public facilities. Lacking a compelling state interest, prohibition of same-sex marriage violates the equal protection of rights and hence was declared unconstitutional.

On October 10, 2008, the Connecticut Supreme Court ruled in *Kerrigan and Mock v. Connecticut Department of Public Health* (957 A2d 407 [Conn. 2008]) that prohibiting same-sex marriage violated the equality and liberty requirements of the Connecticut constitution. In this case, the court ruled that restrictions based on the category of sexual orientation are subject to “heightened or intermediate judicial scrutiny” and that the state “failed to provide sufficient justification for excluding same sex couples from the institution of marriage.” The bulk of the decision is devoted to justifying the use of a heightened level of scrutiny. Once the second stage is reached of evaluating the state’s rationale

for prohibiting same-sex marriage, that rationale is handled rather summarily. Only two reasons were proffered: To promote uniformity and consistency with the laws of other jurisdictions, and to preserve the traditional definition of marriage as between a man and a woman. The first reason is acknowledged as “rationally related” to the prohibition of gay marriage, but “cannot withstand heightened scrutiny.” There is no precedent cited and nothing is offered other than “mere assertion” that such consistency is a “truly important governmental interest.” The second reason is rejected for the same reason it was by other courts: Tradition alone is not a sufficient justification for discrimination, and thus cannot survive scrutiny.

In 2009, the Iowa Supreme Court ruled unanimously in *Varnum v. Brien* (763 N.W.2d 862 [Iowa 2009]) that state restrictions on same-sex marriage are unconstitutional. Citing the *Kerrigan* decision from Connecticut extensively, the Iowa court similarly imposed an intermediate level of scrutiny and concluded that none of the various arguments for prohibiting same-sex marriage could meet the standard of being “exceedingly persuasive” (897). The primary rationales examined were support for the traditional institution of marriage, the optimal procreation and rearing of children, and financial considerations. The argument of “tradition,” not surprisingly, was quickly dismissed as vacuous absent a compelling rationale underlying that tradition. The Court concluded that there was an abundance of evidence and research, “confirmed by our independent research” that the interests of children are “served equally by same-sex parents and opposite-sex parents” (899). Because laws and regulations advancing the state’s interests in childrearing are not coterminous with the laws governing civil marriage, the Court concluded that the law preventing same-sex marriage is not “truly” about the best interest of children or procreation. Finally, with respect to conserving state resources, the Court noted that while it was true that the objective of reducing tax losses due to marriage exemptions would be enhanced by prohibiting gay marriage, there is no rational justification for advancing such an objective through an obvious violation of equal protection. One might as easily exclude any group, “even red-haired individuals,” and it would be equally “rational” (903). To summarize: “Having examined each proffered governmental objective through the appropriate lens of intermediate scrutiny, we conclude the sexual-orientation-based classification under the marriage statute does not substantially further any of the objectives” advanced by the state (904). The Court concluded

that, “Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban” (904).

What is remarkable about these decisions from the standpoint of argumentation studies is that each court made what is basically an *argument evaluation* (Schiappa 1995). That is, in each case the court identified and assessed the strength and persuasiveness of the arguments for precluding same-sex marriage and found them inadequate. It is noteworthy that the arguments tend to be similar, though not identical, in each case. It is also remarkable that all three levels of scrutiny recognized in constitutional law are deployed in the different cases. These levels of scrutiny can be characterized as epistemological argument evaluation standards. The rational basis test requires only that a governmental action is a “reasonable” means to an end that may be legitimately pursued by the government, the intermediate scrutiny level requires an “exceedingly persuasive” argument, and the strict scrutiny standard requires that a “pressing public necessity” be demonstrated (*Korematsu v. U.S.* 323 U.S. 214 [1944]). Regardless of which level of scrutiny each court invoked, the arguments concerning tradition, procreation, childrearing, and financial resources were found inadequate. Which standard of scrutiny should be used is a procedural decision that is worth revisiting at another time. However, the *substantive* evaluation performed by the four courts yielded an identical result—the collective judgment that no compelling case can be sustained for denying access to same-sex marriage.

3. The Public Debate in North Carolina

Constitutional argument takes place in what Goodnight calls the technical sphere (1982), where institutional practices exclude argument forms that are common in public sphere debates over same-sex marriage, including religious arguments, fear appeals, and, since the Supreme Court’s decision in *Texas v. Lawrence* (539 U.S. 558 [2003]), moral condemnation of homosexuality. Such arguments continue to pervade the public debate over same-sex marriage in 2012. In this portion of the paper, I examine the argumentative strategies found in North Carolina and Minnesota.

At issue in North Carolina on May 8th was a ballot initiative known as Amendment One, which states that, “Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.” In the arguments in favor of Prop 8 in California, four arguments were prominent (Schiappa 2012) in

print media where advocates made their case: First, advocates promote an essentialist definition of marriage solely as between a man and a woman. Second, advocates argued that the power to define marriage ought to reside with voters rather than the Court. 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. With the exception of the third argument, the arguments in favor of Amendment One were similar to those expressed in California, though the extent to which religious beliefs played a role is especially apparent and explicit.

In defending the traditional definition of marriage, it is possible to classify most instances of this argument in North Carolina as argument by authority: Marriage should be defined as between one man and one woman because God says so. Typical of this sentiment is a letter by Dave and Joanna Davis (2012), which claims it is the “will of our Father” that they “stand up for what we believe in” and vote for Amendment One. The argument that the people should decide the definition of marriage instead of “activist judges” is common, such as Flora Ann Scarce’s (2012) vehement insistence that “We’ve witnessed the overturning of laws by liberal judges in other states. We do not want that to happen in our great state of North Carolina! Marriage must be reinforced, NOT redefined!” The argument from consequence was expressed as well, including the classic slippery slope claim that legalizing same-sex marriage would lead to bestiality. Paul Plagge (2012) wrote that if “gay marriages become ‘the norm’ throughout North Carolina and eventually the U.S., then it wouldn’t surprise me if the ACLU, PETA, and other liberals will try to authorize marriages between humans and animals.”

An additional theme that emerges in the letters to the editor in the papers examined was that Christians must unite in the face of an assault on their values. Brendan Madigan (2012), an undergraduate at the University of North Carolina, repeatedly claims to having been attacked (verbally) for expressing his beliefs, and insists “Despite all these attacks (and in some cases threats), I refuse to stand down, and neither should other marriage supporters across North Carolina.” Another supporter notes that their yard sign supporting Amendment One had been stolen and notes, “we don’t know if this is part of an

organized campaign to suppress our voices” (Davis 2012).

In print media, opponents of Amendment One presented somewhat different arguments than what was found in California in 2008. Two lines of argument were similar, as opponents of Prop 8 and Amendment One both argued that civil rights should not be subject to popular vote (a somewhat superfluous point given the issue was already on the ballot) and that eliminating the right to marry is discrimination that should not be enshrined in the state constitution. Where North Carolina opponents differed from California was in the degree of emphasis on arguments from consequence. One particularly thorough letter by Barbara Harrison (2012) summarizes nicely the list of harmful consequences opponents raised:

Amendment One would:

- * Harm Our Children by restricting access to health insurance for both gay and straight unmarried couples and their children.
- * Harm All Families by interfering with protections for both gay and straight unmarried couples to visit one another in the hospital or make emergency medical and financial decisions if one partner is incapacitated and would invalidate trusts, wills and end-of-life directives by one partner in favor of another.
- * Harm Unmarried Women by taking away domestic violence protections.
- * Harm Senior Citizens who choose not to marry in order to preserve the legal protections and the pensions they need to survive.
- * Harm N.C. Economy when businesses refuse to locate here because of the restrictions on workers.
- * Harm All Unmarried Couples by negating Article 1 of the State Constitution declaring all persons are created equal and would forever ban civil unions. (Harrison 2012)

Some opponents tried to respond to religious arguments against same-sex marriage by arguing the “true” Christian position would favor same-sex marriage. Phil Seymour’s (2012) letter to the editor states: “I submit that one can neither be a true Christian, nor a true American, while at the same seeking to deny that fundamental right to marry the adult male or female of one’s choice, regardless of one’s gender. Are we not all made in God’s image — Black, white, male, female, gay, straight? And if God saw fit to make us in this way, who are any of the rest of us to question His judgment?”

An interesting combination strategy is to make secular arguments against Amendment One but present them by a member of the clergy. Thus a letter from Rev. Carl Johnson (2012) of Garner, North Carolina, is almost identical to that by Harrison (2012), but functions enthymematically to suggest that Christians should be concerned about the harmful effects of Amendment One.

As explained in a previous paper (Schiappa 2012), televised and web-based ads should be seen as providing what Tony Schwartz (1973) calls *evocative stimuli*, designed to prompt viewers to associate a specific emotional response with the issue at hand. In 2008, the most effective ad in California's Prop 8 debate was a fear-based appeal that claimed the California Supreme Court's decision had led to mandatory teaching of young school children about gay marriage. The person credited for creating the ad, Frank Schubert, explained to American Association of Political Consultants that extensive audience research had shown that the only way to sway straight voters who were not already committed to one side or the other was to "attach consequences" to gay marriage for those voters (Hawkins 2012). As a result, advocates of banning same-sex marriage often advance claims that are based on argument from consequence, ranging from teaching about same-sex marriage in grade schools to claims that religious freedom will be diminished or even criminalized if same-sex marriage is legal.

The video ads proffered by advocates of the constitutional amendment to preclude same-sex marriage (Vote4MarriageNC 2012) vary from the standard arguments from consequence in three ways. First, the ads consistently invoke religious arguments that would be precluded in constitutional arguments. Ads that feature well-known religious figures such as Billy Graham's son, Franklin Graham, explicitly invoke Christian faith as a reason to oppose same-sex marriage, and the premiere ad by the organization "Vote for Marriage NC" features a visual of the Holy Bible and claims that marriage between a man and a woman was created by God. A series of ads called "Man on the Street" feature clips with citizens who attended a pro-Amendment One rally and explain their support as related to their Christian faith.

Second, a number of the ads feature African American spokespeople, from "Man on the Street" interviews to prominent preachers, or they visually feature an African American family or couple getting married. No doubt this particular tactic stems from well-established data that African Americans, as a group, tend to oppose same-sex marriage and their opposition played a significant role in the passage of California's Prop 8. Internal

documents from the National Organization from Marriage recently disclosed that it is part of NOM's strategy to "drive a wedge between gays and blacks" by provoking "the gay marriage base into responding by denouncing these spokesmen and women as bigots" (Confessore 2012). Thus, for proponents of Amendment One, ads featuring African Americans do double duty.

Third, in an interesting reversal of positions, advocates had to construct an ad claiming that "fear" ads run by opponents are false. In 2008 in California, opponents of Prop 8 ran an ad that features TV screens with ads running on them that the voice-over claims are lies; the ad denounces the claims are false and says those who ran them are trying to scare voters. In 2012, to respond to claims of unintended consequences of Amendment One's broad wording, advocates ran a similar claiming that such consequences are false and that opponents are trying to scare voters. To understand these claims, I turn now to the video ads run by opponents of Amendment One.

Perhaps recognizing that most North Carolina voters normally would not vote in favor of same-sex marriage, opponents of Amendment One have focused most of their efforts in television ads to call attention to the broad wording of Amendment One, which appears to invalidate *all* unions or domestic partnerships other than those solemnized by civil marriage. The possible consequences of such a legal limitation is argued to be a loss of certain legal rights now held by cohabitating but unmarried couples, including diminished protection from domestic violence laws and loss of access to domestic partner insurance policies. One such ad is titled "Melissa" and begins with a mother saying, "My fear with Amendment One is that my daughter would lose her health insurance, and that she would lose it immediately" (Ballotpedia 2012). Another ad is titled "Consequences" and features a woman describing the physical abuse she suffered from a former boyfriend. She claims that Amendment One, if passed, would "take away my protection order" just because they were not married. Such an action would "put my life at danger" as well as the life of her daughter. Another ad, titled Amily, portrays a District Attorney with stacks of files on her desk concerned with domestic violence who says Amendment One "could take away protections for domestic violence victims" who were unmarried at the time of their attacks. All of these ads have somber music and in general create an ominous mood.

The outcome of the North Carolina vote was not a surprise, as almost all polls suggested that Amendment One would pass easily (Silver 2012).

The concerns over unknown consequences of the amendment's broad wording apparently was not enough to overcome the strong opposition in the state to same-sex marriage. It may be the case that the counter-attack ad claiming that opponents of Amendment One were making false claims was sufficient to reassure those who wanted to vote for it but may have wavered. That ad featured a claim that "independent experts" had issued a report debunking the claims that Amendment One would cause problems for unmarried opposite-sex couples, even though follow-up news coverage revealed that the "independent" experts had a long history of public work in opposition to same-sex marriage (Maza 2012).

Though Amendment One passed easily, 61%-39% (about 1.3 million to 840,000) it is worth noting that voter turnout was only 34% of nearly 6.3 million registered voters. Thus, a vote of 20.7% of the registered voters in the state of North Carolina was able to change the state constitution (North Carolina State Board of Elections 2012). It is difficult in such a context not to recall James Madison's concern that a direct democracy, "where a multitude of people exercise in person the legislative functions," was undesirable because the public demonstrates an "incapacity for regular deliberation" compared to a representative republic (*Federalist Papers #48*). In a 21st century echo of Madison's concerns, the empirical research suggests that states with direct-democracy structures are significantly more likely to adopt bans on same-sex marriage than states without, leading Daniel C. Lewis (2011) to conclude, "Without the checks and balances of a representative, separated powers system that encourages deliberation and minority representation, minority rights are at increased risk under direct-democracy institutions" (p. 364).

4. The Public Debate in Minnesota

The Minnesota vote will be the conclusion to an unusually long campaign for a constitutional amendment to ban same-sex marriage, spanning 18 months from spring 2011 until November 2012. Advocates and opponents of the proposed amendments have used this time for grassroots organizing and fundraising, but they have also used it in a way that I think is best understood by reference to the Elaboration Likelihood Model of argumentative persuasion, or ELM. Space does not permit a thorough account of the Minnesota campaign at this point, but I do want to point to what could be an interesting difference in this campaign from others.

ELM was developed by Richard Petty, John Cacioppo, and their associates (Petty & Cacioppo 1986). The theory suggests that people are typically persuaded through one of two cognitive routes. The "central route" refers to what argumentation scholars would think of as rational deliberation and systematic thought, while the "peripheral route" relies on activating habits or "cognitive shortcuts" that argumentation scholars generally would critique as fallacious or unreliable (such as the number of arguments made or liking a known source). Which route a person will use to make a decision depends on two factors, motivation and ability. Decisions made as a result of careful deliberation are more likely to resist change and become strongly held. Decisions made via the peripheral route can still result in a vote, which is why political campaigns rely on them so heavily in the period of time close to the election. Such short-term efforts are aimed at the "undecided" voter who is the most likely to be influenced by last minute media blitzes (Hillygus & Shields 2008).

While both campaigns will fund a flurry of TV ads in the fall run-up to the election that will rely heavily on peripheral processing, the 18-month campaign period provides an opportunity for advocates to try to engage voters' central cognitive processes through longer, carefully reasoned, and repetitive messages. The more citizens learn about the issues involved, the less likely they will be influenced by peripheral cues (Petty & Cacioppo 1986). Accordingly, both sides have engaged in extensive efforts to reach citizens through use of social media sites, direct mail, letters to the editor, and advocacy websites to present their case.

An interesting example of this effort is part of a website sponsored by Minnesota for Marriage (2012), an advocacy group supporting the constitutional amendment. In a series of videos titled "Minnesota Marriage Minute," spokesperson Kalley Yanta (a former news anchor) articulates arguments in favor of the amendment *or* responds to arguments allegedly being made against the amendment. These videos, which typically are several minutes long, can be credited as appealing to central cognitive processes rather than peripheral processes. Likewise, a page labeled "Myths and Facts" attempt to respond to arguments made against the amendment. By contrast, the website of the umbrella organization opposing the amendment, Minnesotans United for All Families (2012), contains no comparable argumentative content. Instead, the site is primarily focused on soliciting funds and organizing events. The one exception is a page titled "This is what a family looks like" that

features stories by Minnesota families. The page states: “These are real, Minnesotan stories. Some of the writers are LGBT, and others are straight... but their orientation doesn’t matter. What they all have in common is a strong belief in the power of marriage. They believe family is about love and commitment, working together, bettering their communities, raising children, and growing old together.”

Though one must be cautious not to infer too much from these two websites, the available evidence suggests very different approaches to the campaign. Contrary to expectations, in the early stages of the campaign it appears that advocates of the amendment are taking a more rationalistic approach than opponents. Whether the campaigns will continue in such a matter, and which approach proves more effective, remains to be seen.

5. Conclusion

The debate over same-sex marriage in the U.S. is likely to continue for years and is salient to argumentation scholars in at least three ways. First, as argumentation *theorists*, the debate challenges us to explore the intersections and limitations of public and technical argument, and to consider the role of public deliberation over matters of civil rights in a republic. As argumentation *critics*, the heavy reliance on religious and fear arguments, especially in television advertising, calls upon us to assist the public to understand better why there is such a marked difference between constitutional and political/religious argument as well as how to analyze critically televisual appeals. Finally, as argumentation *teachers*, the debate provides fertile grounds for teaching our students a great deal about virtually every aspect of argumentation. It is important for us to seize the moment and make what contributions we can.

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