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Friends With Benefits?

State marriage amendments will not ban private contracts.

By William C. Duncan

This November, eight more states will vote on marriage amendments. The new amendments (like most of those already passed in 20 states) typically say two things: (1) marriage is the union of one man and one woman; and (2) something else about civil unions.

That “something else” has become the subject of increasing political and legal controversy. Gay-marriage advocates realize from hard experience that trying to stop these marriage amendments by rallying support for gay marriage is a losing proposition.

So they’ve employed a new tactic: increasingly focusing their opposition on the civil-union ban instead. In Virginia, Wisconsin, Arizona, and elsewhere, marriage-amendment opponents are telling increasingly lurid legal stories (*see*) about the harsh consequences that will follow if these amendments pass — and not just for gay people, but for single people and cohabiting couples.

A group of attorneys and legal scholars from around Virginia recently signed a statement expressing concern about the “significant and largely unpredictable legal consequences” of the state marriage amendment.” A legal memo prepared by for the group concluded the ballot measure “could be interpreted” by Virginia courts to “invalidate rights and protections currently provided to unmarried couples under Virginia’s domestic-violence laws,” prohibit “public medical facilities” from recognizing private domestic-partnership benefits, and prevent courts from enforcing “private agreements between unmarried couples”, “child custody and visitation rights,” as well as “wills, trusts, and advance medical directives, executed by unmarried couples.”

These are highly implausible charges. Since 1998, 20 states have passed marriage amendments, and in none of those states have private employers lost their ability to offer health benefits to domestic partners; single people still get custody rights, and many will their estates to their domestic partners or anyone else they wish. Indeed, the Virginia Attorney General recently issued a legal opinion that concluded flatly “I can find no legal basis for the proposition that passage of the marriage amendment will limit or infringe upon the ordinary civil and legal rights of unmarried Virginians.”

But if these second sentences are becoming controversial talking points for the opposition, why do those drafting state marriage amendments continue to use such language?

One reason is that an increasingly creative judiciary has made it a challenge to confine marital benefits to married people.

Consider Alaska’s experience, for example.

In February 1998, a trial-court judge in Alaska found a constitutional right to same-sex marriage. Alaskans immediately passed a state marriage amendment saying otherwise.

The Alaska supreme court next decided the government must offer marriage benefits to its public employees with same-sex partners, and ordered the state to come up with a plan. The trial-court judge now in charge of overseeing the new plan is reportedly dissatisfied, with news accounts saying he may order more expansive (and expensive) benefits.

Judges have not hesitated to use creative legal arguments, unless specifically prevented by the plain language of state constitutions. So citizens' groups worry that if marriage amendments leave any wiggle room at all, courts will still demand that marital benefits must be extended to unmarried cohabiting couples. (For a powerful critique of other recent legal efforts to treat cohabiting couples as married, see "Marriage and the Law: A Statement of Principles" released this month and signed by more than 100 legal and family scholars, available at marriagedebate.com)

If an amendment were to ban "civil unions or domestic partnerships", the courts could simply switch their terminology to refer to "reciprocal beneficiaries" or some such. This is why amendment drafters have typically felt it necessary to use broad language: to prevent the creation of any legal status "substantially equivalent" to marriage, since they no longer can know exactly what language the courts might use to try to extend marital benefits. For this, the amendment-drafters are accused of using "overly broad" and "untested" language that "goes too far."

Of course, all of this lawyer-created confusion would be more amusing if the stakes weren't so high.

What state marriage amendments typically say is something like this: Marriage is the union of husband and wife. Governments can give marriage benefits only to married couples. Private groups can offer any benefits they choose.

What is so scary about that?

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