Position Paper for Hastings Constitutional Law Quarterly Symposium on Gay Marriage

by THERESE M. STEWART[1]

Preface

1. The topic of *interjurisdictional recognition of gay and lesbian marriages* that are legal in the place where entered into is of great interest and has begun to surface in a number of cases around the country. It is not at issue in the cases pending in the San Francisco Superior Court, although one of the coordinated cases may eventually raise it. It is in issue in another case in California, pending in the U.S. District Court for the Central District called *Smelt v. Orange County and United States of America*, No. SACV04-1042 GLT (C.D. Cal. filed Sept. 24, 2004). *Smelt* involves, among other things, a challenge to the federal Defense of Marriage Act ("DOMA"), which establishes federal policy of non-recognition of the marriages of same-sex couples, regardless of where entered into and whether valid where entered. The City has submitted an amicus brief in *Smelt* arguing that the federal court should abstain from deciding the federal constitutional challenges to California's marriage statutes since the state court may, if it strikes down those laws under the state constitution, avoid the need for a decision under the federal constitution. The City has not weighed in on interjurisdictional recognition issues to date. An excellent article on the subject is Professor Herma Hill Kay's Same-Sex Divorce in the Conflict of Laws, 15 Kings College L. J. 63 (2004).

2. The topic of whether same-sex marriage is a civil rights issue is one the City has weighed in on. My position paper, which follows,

---

[1] Therese Stewart is the Chief Deputy City Attorney with the Office of the City Attorney, City and County of San Francisco. She currently serves on the Boards of Directors of the Legal Aid Society/Employment Law Center, Boalt Hall Alumni Association, San Francisco Bar Association, and the Northern District of California Historical Society. Ms. Stewart received her J.D. from the University of California at Berkeley, Boalt Hall School of Law in 1981 and was a member of the Order of the Coif.

will focus on this and the next topic.

3. The topic of whether a constitutional amendment banning same-sex marriage violates principles of federalism is one on which the City Attorney has weighed in, albeit not in the context of the pending litigation, and I will address it in the position paper attached.

4. The issue of separation of powers and local governments' ability to make decisions on matters of the constitutionality of state statutes they are charged with implementing is the subject of the California Supreme Court's ruling in *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055 (2004). The City Attorney's Office briefed that issue extensively and argued it in the California Supreme Court, and we have strong views about it, but since it is a settled issue now for purposes of California law, I will not focus the position paper on it. Our California Supreme Court briefs can be obtained from the California courts' website, www.courtinfo.ca.gov (Supreme Court Case No. 122923).

Position Paper

I. Marriage is a Fundamental Civil Right, and Depriving a Class of People That Right Based on Their Gender or Sexual Orientation Plainly is a Civil Rights Issue.

Both the United States Supreme Court and the California Supreme Court have, on numerous occasions, held that marriage is a fundamental civil right. Both courts have also held that the decisions of whether and whom to marry are a critical aspect of that right. While the purposes of marriage are many and varied, and are different for different people, decisions about the issues that have been viewed as important to the marital relationship have likewise been recognized as constitutionally protected civil rights, for example, the decisions whether and with whom to have an intimate sexual relationship, whether to cohabitate with another person, whether to have or raise children, whether to use (or not use) contraception, whether to conceive and/or bear a child, whether to terminate a pregnancy, and to how to raise and educate one's children.

If the right to marry and all of the rights incident to marriage are fundamental civil rights, it cannot plausibly be argued that the denial of these rights to a particular group of people based on gender and/or sexual orientation is not a civil rights issue. Indeed, denial of any rights on either of those bases is by itself a civil rights issue—one of unequal treatment based on criteria that have nothing to do with a

person's ability to contribute to society. Denial of important rights that have been held to constitute fundamental civil rights for due process purposes to a class of persons based on criteria the use of which raises serious equal protection issues is unquestionably a civil rights issue. Stated otherwise, the denial of marriage to lesbians and gay men is a civil rights issue for two reasons: it involves both a denial of fundamental rights that are protected by the due process clause and classifications that are or should be suspect. They single out a group of people based on their sexual orientation and on the gender of their loved ones for unequal treatment, thus raising equal protection issues as well.

II. Creating a Federal Constitutional Provision Denying the Fundamental Right of Marriage to Same-Sex Couples Would Intrude into an Area of Law and Policy Long Left to the States and Would Contravene Longstanding Principles of Federalism.

During and since the Reagan years, conservative politicians, lawyers and judges have been using principles of federalism, i.e., the notion that states should be free from unwarranted incursions by the federal government into issues that have traditionally been reserved to the states, as a means of limiting federal legislation on a variety of subjects. Of all of the issues for this same group to argue should be the subject of federal legislation and (currently) a constitutional amendment, the regulation of marriage is by far the most hypocritical. That is because marriage has *always* been regulated at the state level, and has never, until DOMA (the federal Defense of Marriage Act) was enacted in 1996), been the subject of federal legislation. The federal government has, again until DOMA, given the states the right *even for federal law purposes* to regulate who could marry. If a marriage is legal under state law, the federal government historically has recognized it, whether for purposes of social security, federal pension benefits, taxation or other federal law purposes.

The federal government has never required uniformity among the states with respect to marriage law. State marriage laws vary in minimum age requirements, consent requirements, the requirements for licensing and solemnization, recognition of common law marriage and putative spouses, consanguinity limitations, the requirements and process for divorce, child custody and support laws, and the number and scope of rights, benefits and obligations that are afforded and imposed by marriage. The legal history of marriage is one of unfettered state regulation with only one exception.

Federal intervention in marriage laws has come when only when

states have *restricted* the right to marry, and in such circumstances the Supreme Court has in most instances held that the right is fundamental and can be denied only in compelling circumstances. Thus, the Supreme Court has held that states cannot prohibit marriage between persons of different races, marriage by prisoners or marriage by persons who have failed to support their children.

Apart from imposing constitutional limitations on denial of the right to marry, until DOMA the federal government stayed out of the business of regulating who could marry and what the terms of the marital relationship would be. That history has reason behind it. Generally, marriage affects local and state communities much more than it affects us as a nation. Stable marriages contribute to social stability, including families whose members provide each other support. Marriage increases the number of persons who are supported by employers and even businesses in the form of employee benefits and family discounts. Marriage reduces homelessness, joblessness, mental illness, juvenile delinquency and violence. Marriage reduces the number of people reliant on government support for health care, mental health care, homeless programs, welfare and other government benefits and programs, and reduces the need for law enforcement. The same is true to some extent as well on a federal level, but the federal government does not bear the brunt of these costs. Nor does the federal government have the kind of day to day contact with everyday people that put it in the position of state and local officials to make sound marriage policies.

For all of these reasons, a federal constitutional amendment banning marriage between same-sex couples is contrary to core principles of federalism and should be rejected.