

# REAFFIRMING MARRIAGE: A PRESIDENTIAL PRIORITY

DAVID ORGON COOLIDGE AND WILLIAM C. DUNCAN\*

I. THE CAMPAIGN TO REDEFINE MARRIAGE .....	627
A. <i>The Front Lines: Hawaii, Alaska, and Vermont</i> .....	627
B. <i>The Next Line of Defense:</i>	
<i>Congress and Other States</i> .....	630
C. <i>The Dutch Factor</i> .....	632
II. THE CONSEQUENCES OF REDEFINING MARRIAGE	633
A. <i>Consequences at the State and Federal Level</i> .....	634
1. <i>Consequences Within Vermont</i> .....	635
2. <i>Consequences Beyond Vermont</i> .....	637
B. <i>Consequences for Self-Government</i> .....	638
C. <i>Consequences for Marriage</i> .....	638
III. AN AGENDA FOR THE BUSH ADMINISTRATION ...	643
A. <i>The Choice: Avoid, Encourage, or Lead</i> .....	643
B. <i>Appointments to the Federal Judiciary</i> .....	644
C. <i>Defending the Definition of Marriage</i> .....	644
D. <i>Defending Organizations that Support Marriage</i> ...	645
E. <i>Marriage-Friendly Interpretations of Laws,</i>	
<i>Regulations, and Executive Orders</i> .....	648
F. <i>Reaffirming Marriage in the International Arena</i> ...	649
IV. CONCLUSION .....	651

Marriage is always in the news. Lately, however, it seems to be a hotter topic than usual. Debates rage about the “marriage penalty” in the tax code and whether to reform divorce law. Local school boards ponder how to teach students about marriage. Governors have created marriage commissions, and scholars are giving the subject respectful attention.<sup>1</sup> The full

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\* Director and Assistant Director, Marriage Law Project, Columbus School of Law, The Catholic University of America. The Project can be reached at <http://marriagelaw.cua.edu>.

1. A good summary of these developments can be found in *The Marriage*

title of a recent book by Linda Waite and Maggie Gallagher says it all: *The Case For Marriage: Why Married People are Happier, Healthier, and Better Off Financially*.<sup>2</sup>

Although marriage is primarily regulated by the states, it is hardly absent from federal law. Marriage has been the subject of a number of important decisions by the U.S. Supreme Court.<sup>3</sup> There are 1,049 federal statutes and many corresponding regulations relating to marriage, ranging from Social Security and taxes to education and immigration.<sup>4</sup> In 1996 Congress passed the Defense of Marriage Act, which addressed federal law and the Full Faith and Credit Clause.<sup>5</sup> By setting legislative, regulatory and funding priorities for his Administration, and taking advantage of the ever-present "bully pulpit," President Bush can certainly do much to promote marriage.<sup>6</sup>

Amid these positive developments and opportunities, however, there is a growing cloud on the horizon. Litigators and activist judges are attempting to *redefine* the meaning of marriage. Their effort is gathering steam, and led to skirmishes in the 2000 Presidential campaign. Both the vice-presidential debate<sup>7</sup> and the second presidential debate<sup>8</sup> included questions

*Movement: A Statement of Principles*, issued in August 2000 by a group of scholars and community leaders, sponsored by the Institute for American Values, the Coalition for Marriage, Family and Couples Education, and the Religion, Culture and Family Project of the University of Chicago Divinity School, available at <http://marriage-movement.org/html/report.html>; see also Joan Lowy, *Government's Hand in Marriage on the Rise*, MEMPHIS COM. APPEAL, Aug. 6, 2000, at A1.

2. LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

3. See Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L.J. 289 (1998).

4. See General Accounting Office Report GAO/OGC-97-16 (Jan. 31, 1997), available at <http://www.access.gpo.gov> (part of a follow-up report commissioned pursuant to the negotiations surrounding the Defense of Marriage Act).

5. Pub. L. 104-199, 110 Stat. 2419 (Sep. 21, 1996) (codified at 1 U.S.C. §7 and 28 U.S.C. §1738C (2000)).

6. A list of excellent ideas for action by federal, state and local governments can be found in *The Marriage Movement: A Statement of Principles*, at <http://marriage-movement.org/html/report.html>.

7. During the October 5, 2000 vice-presidential debate, moderator Bernard Shaw questioned vice-presidential candidates Joseph Lieberman and Dick Cheney on these issues. First turning to Senator Lieberman, Shaw asked, "Senator, sexual orientation. Should a male who loves a male and a female who loves a female have all—all—the constitutional rights enjoyed by every American citizen?" Lieberman's answer included this regarding marriage:

The question you pose is a difficult one, for this reason: It confronts or challenges the traditional notion of marriage as being limited to a

about "same-sex marriage" and "civil unions." Vice-President Gore also addressed the issue on MTV, strongly supporting equal treatment for what he called "civic unions."<sup>9</sup> In a follow-

heterosexual couple, which I support. But I must say, I'm thinking about this because I have friends who are in gay and lesbian partnerships who have said to me, 'Isn't it unfair that we don't have similar legal rights to inheritance, to visitation when one of the partners is ill, to health care benefits?' And that's why I'm thinking about it. And my mind is open to taking some action that will address those elements of unfairness while respecting the traditional religious and civil institution of marriage.

Moderator Shaw then addressed Secretary Cheney. With respect to "whether or not there ought to be some kind of official sanction, if you will, of the relationship or if these relationships should be treated the same way a conventional marriage is," Cheney stated,

That's a tougher problem. That's not a slam dunk. I think the fact of the matter, of course, is that matter is regulated by the states. I think different states are likely to come to different conclusions and that's appropriate. I don't think there should necessarily be a federal policy in this area. I try to be open-minded about it as much as I can and tolerant of those relationships. And like Joe, I also wrestle with the extent to which there ought to be legal sanction of those relationships. I think we ought to do everything we can to tolerate and accommodate whatever kind of relationships people want to enter into.

Transcript of the 2000 Vice Presidential Debate, October 5, 2000, <http://www.cnn.com/ELECTION/2000/debates/transcripts/u221005.html>.

8. On October 11, 2000, moderator Jim Lehrer asked then-Governor Bush, "Governor, both Senator Lieberman and Secretary Cheney said they were sympathetically rethinking their views on same-sex relationships. What's your position on that?" Bush replied:

I'm not for gay marriage. I think marriage is a sacred institution between a man and a woman. And I appreciated the way the administration signed the Defense of Marriage Act. I assume the Vice President supported it when the President signed that bill and supports it now. But I think—I think marriage is a sacred institution. I'm going to be respectful for people who may disagree with me. I've had a record of doing so in the state of Texas. I've been a person that's been called a uniter, not divider, because I accepted some—I accept other people's points of view. But I feel strongly that marriage should be between a man and a woman.

At that point Lehrer turned to Vice President Gore for a response. The Vice President replied, "I agree with that. And I did support that law. But I think that we should find a way to allow some kind of civic unions. And I basically agree with Dick Cheney and Joe Lieberman. And I think the three of us have one view and the governor has another one." Lehrer then asked Bush, "Is that right?" Bush replied:

I'm not sure what kind of view he's ascribing to me. I can just tell you, I'm a—I'm a person who respects other people. I respect them—I respect—on one night, he says he agrees with me and then he says he doesn't. I'm not sure where he's coming from. But I—I—I will be a tolerant person. I've been a tolerant person all my life. I just happen to believe strongly that marriage is between a man and a woman.

Transcript of the Second Presidential Debate, October 11, 2000, <http://www.cnn.com/ELECTION/2000/debates/transcripts/u221011.html>.

9. In a September 26 appearance on the MTV program, "Choose or Lose," Gore first announced his support for the Vermont civil union law, stating, "I favor legally recognized civic [sic] unions that have the legal protections of the kind that marriage confers. The most literate statement I've seen on this is by the Vermont

up to these exchanges, the Associated Press asked both candidates, "What federal legal rights, if any, should be extended to civic unions between gay partners?" In response, each issued an official statement.<sup>10</sup>

President Bush's Administration will be faced not only with opportunities to promote marriage, but also the need to reaffirm what marriage really is. The issue cannot be dodged. The only question is whether the next President will provide the leadership the American people need on this issue before it is decided by somebody else.

While many other issues related to marriage are extremely important, this Article will focus on the question of definition. In Part I we describe the campaign to redefine marriage through the courts using both the "front door" of same-sex "marriage" and the "back door" of "civil unions."<sup>11</sup> We also

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Supreme Court, that said it is unfair to discriminate against gays and lesbians in this whole area of the law, and it ordered the legislature to come out with some approach to equalize the legal protections, and that's my position." *Choose or Lose* (MTV television broadcast, September 26, 2000), quoted in *Gore on Gay Marriage*, WASH. TIMES, October 10, 2000, at A14. In the second presidential debate, Gore reaffirmed his support for civil unions, while at the same time declaring that he supported the Defense of Marriage Act in 1996. Transcript of the Second Presidential Debate, October 11, 2000, <http://www.cnn.com/ELECTION/2000/debates/transcripts/u221011.html>. This conflicted, however, with his earlier statements in the campaign. While campaigning in California, Gore indicated that he did not support the Defense of Marriage Act, telling reporters, "I don't think I would have voted for it." Zachary Coile, *Gore Shows Stamina in L.A. Meeting*, S.F. EXAMINER, February 3, 2000, at A14.

10. Then-Governor Bush offered the following statement:

All individuals deserve to be treated with dignity and respect. I believe that marriage is a covenant between a man and a woman and I believe that a married father and mother provide the best environment to raise children. I do not support federal legislation mandating that all the legal benefits, protections, and responsibilities of marriage be extended to domestic partners, whether the couples are homosexual or heterosexual, though private companies are free to do so.

For his part, Vice-President Gore stated:

While I support continuation of existing laws, which define marriage as between a man and woman, I oppose punitive efforts to use this issue to divide Americans or to discriminate against gay and lesbian Americans. Hundreds of our leading companies, cities and counties have implemented systems to recognize domestic partners and provide benefits, such as the right to visit a sick or injured partner in the hospital. I support legal protections for domestic partnerships, and as president I would work to identify what protections are appropriate."

*Candidates on the Issues: Gay Unions*, ASSOCIATED PRESS NEWSWIRES, October 12, 2000.

11. We put the term same-sex "marriage" in quotation marks to reflect our belief that same-sex unions are not marriages, a belief which we realize some readers will not share.

describe responses to that campaign on the state and federal level. In Part II we look at the consequences of redefining marriage for states, self-government, and marriage. In Part III we offer an agenda that the Bush Administration might undertake in order to reaffirm marriage. This multi-faceted agenda includes federal, federal-state, and international dimensions.

## I. THE CAMPAIGN TO REDEFINE MARRIAGE

Groups of litigators and activists are attempting to redefine marriage through the courts.<sup>12</sup> In this way they hope to mandate the legalization of same-sex "marriage" or its equivalent without having to put the question squarely before the American people.<sup>13</sup> Difficult as it may be to believe, America is on the verge of legalizing same-sex "marriage" by way of a court-ordered redefinition of marriage analogous to *Roe v. Wade*.<sup>14</sup>

So far, there have been a number of attempts to remove this vital issue from the people and have it decided in the courts. In past decades these attempts were unsuccessful.<sup>15</sup> In the past decade the real "action" has been in Hawaii, Alaska, and Vermont.

### A. *The Front Lines: Hawaii, Alaska, and Vermont*

The same-sex "marriage" debate will always be associated with Hawaii, because it was there that the effort to redefine marriage through the courts almost succeeded. In 1991, three same-sex couples filed a lawsuit challenging the

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12. See Evan Wolfson, *Supreme Moments in the Battle to Win the Freedom to Marry*, at <http://www.lambdalegal.org> (July 2, 1998). Wolfson was co-counsel for the plaintiffs seeking to overturn Hawaii's marriage law. See *Baehr v. Miike*, 1996 Civ. No. 91-1394 (Haw. Cir. Ct. 1996); see also Lambda Legal Defense and Education Fund, *Marriage Project: In Depth*, at <http://lambda.legal.org> (Sept. 28, 1997); Gay & Lesbian Advocates and Defenders, *Marriage Fact Sheet*, at <http://www.glad.org> (Sept. 2000). These two websites also offer information on various legal and activist groups such as the Freedom to Marry Coalition.

13. See David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).

14. 410 U.S. 113 (1973).

15. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1980), cert. denied, 458 U.S. 1111 (1982); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974), reh'g denied, 84 Wash. 2d 1008 (1974); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

constitutionality of Hawaii's marriage law, which recognized only marriage between a man and a woman. In 1993, the Hawaii Supreme Court held that under the Hawaii Constitution the state's marriage law "discriminated on the basis of sex" and was therefore subject to strict scrutiny, requiring the state to provide a compelling state interest in order to justify the law.<sup>16</sup> Applying this standard, a Hawaii trial court found the law unconstitutional in 1996. However, the trial court suspended its decision while the state appealed back to the Hawaii Supreme Court.<sup>17</sup> Meanwhile, the legislature passed an amendment to the state constitution protecting their power to restrict marriage to the union of a man and a woman.<sup>18</sup> In one of the biggest ballot battles of 1998, the citizens of Hawaii ratified the amendment by a margin of 69 to 31 percent.<sup>19</sup> In 1999, after delaying for a year, the Hawaii Supreme Court finally accepted the inevitable and dismissed the original case in light of the passage of the Marriage Amendment.<sup>20</sup>

In early 1998, while the Hawaii appeal was pending before the Hawaii Supreme Court, a trial judge in Alaska held that the Alaska Constitution created a fundamental right to "choose a life partner."<sup>21</sup> In response, the Alaska Legislature approved a state constitutional amendment defining marriage as the union of a man and a woman.<sup>22</sup> After various attempts to take the amendment off the ballot failed, the citizens of Alaska ratified it by a 68-32 margin on November 4, 1998, the same day as the Hawaii Marriage Amendment.<sup>23</sup> Ignoring the vote for almost a

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16. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

17. Baehr v. Miiike, 1996 Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996).

18. H.B. 117, S.D. 1, C.D. 1, Conf. Comm. Rept. No. 1 (Haw. Apr. 18, 1997) ("The Legislature shall have the power to reserve marriage to opposite-sex couples.").

19. See Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR-BULL., Nov. 4, 1998, at A1; *State Constitution*, HONOLULU ADVERTISER, Nov. 5, 1998, at B3.

20. Baehr v. Miiike, Civ. No. 91-1394-05 (Haw. Dec. 9, 1999) (unpublished opinion). For a full narrative of the drama in Hawaii, see David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. (forthcoming 2001).

21. *Brause v. Bureau of Vital Statistics*, 1998 No. 3AN-95-6562 Cl., 1998 WL 88743 (Alaska Super. Ct. 1998).

22. ALASKA CONST. art. I, § 25 ("To be valid of recognized in this State, a marriage may exist only between one man and one woman.").

23. See Liz Ruskin, *Limit on Marriage Passes in Landslide*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at 1A.

year, the trial judge finally dismissed the original case.<sup>24</sup>

Shortly after the Hawaii Legislature voted to put the Marriage Amendment on the general election ballot, groups seeking to redefine marriage filed a similar lawsuit in Vermont.<sup>25</sup> After the trial court dismissed the lawsuit, the plaintiffs appealed to the Vermont Supreme Court.<sup>26</sup> On December 21, 1999, the court decided that the Vermont Constitution's "Common Benefits Clause" required the state to offer all the *benefits* of marriage to same-sex couples, even though the actual *status* of marriage could still be reserved for opposite-sex couples.<sup>27</sup> The court did not, as the plaintiffs urged, strike down the marriage law, but instead *ordered the Vermont Legislature* to provide a way for same-sex couples to enjoy the benefits of marriage.<sup>28</sup>

In rapid succession, the Vermont House Judiciary Committee put forward a bill creating a new status of "civil unions" that conferred on same-sex couples all the benefits of marriage.<sup>29</sup> After two months of fractious debate, the legislation was passed by the Legislature.<sup>30</sup> Governor Howard Dean signed the

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24. Press Release, Senator Loren Leman, Superior Court Rules on Same-Sex Marriage Lawsuit (Sept. 22, 1999). For an extended description of events in Alaska, see Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999).

25. The announcement was made in a joint communiqué from Boston-based Gay & Lesbian Advocates and Defenders (GLAD) and New York-based Lambda Legal Defense & Education Fund (co-counsel in the Hawaii case). Press Release: Freedom to Marry Case Filed in Burlington, Vermont (July 22, 1997).

26. *Baker v. Vermont*, No. S1009-97CnC, (Chittenden (Vt.) Super. Ct., Dec. 19, 1997).

27. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). For a more detailed analysis of *Baker* and the response of the Legislature, see David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000).

28. *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999).

29. VT. ACT 91 (2000) (originally introduced by the House Judiciary Committee as H. 847).

30. The bill was approved by the House in a vote of 76 to 69. *Journal of the House*, March 16, 2000, available at <http://www.leg.state.vt.us/>. The bill was subsequently approved with slight revisions by the Vermont Senate on a 19-11 vote. *Journal of the Senate*, April 18, 2000, available at <http://www.leg.state.vt.us/>. The House concurred shortly thereafter by a 79-68 vote. Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions* N.Y. TIMES, Apr. 26, 2000, at A14. For an overview of the session, see David Orgon Coolidge, *The Civil Truth About "Civil Unions"*, WKLY STANDARD, June 26, 2000, at 26. A special symposium issue of the Vermont Law Review was recently published which contains extensive discussion of "civil unions", See 25 VT. L. REV. 1, *et seq.* (2000).

bill the next day in a private ceremony.<sup>31</sup>

The law, which has no residency requirement, took effect on July 1, 2000. According to the Vermont Secretary of State's office, 1527 civil unions were registered between July 1 and December 31. Of these, 338 were from Vermont. The rest involved 1189 couples representing 46 other states.<sup>32</sup> Vermont is going national.

### *B. The Next Line of Defense: Congress and Other States*

It became clear by 1995 that events in Hawaii could affect the entire nation. Congress and other States began to respond to the possibility that Hawaii would legalize same-sex "marriage."

In 1996, after a series of brief but fierce debates, the U.S. Congress enacted the Defense of Marriage Act (DOMA)<sup>33</sup> by an overwhelming vote, and President Clinton signed it into law.<sup>34</sup> This Act defines marriage, for purposes of federal law, as the union of a man and a woman and clarifies that no State is required under the Full Faith and Credit Clause<sup>35</sup> to recognize a same-sex "marriage" contracted elsewhere. The Act has already been the subject of numerous law review articles, and both its critics and defenders expect it to eventually arrive before the

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31. See Cheryl Wetzstein, *Vermont Governor Signs Bill Legalizing Same-Sex Unions: Foes Say Measure "Railroaded," Vow To Continue Fight*, WASH. TIMES, Apr. 27, 2000, at A3.

32. Email from Vermont Department of Health to Wendy Herdlein, Marriage Law Project (Feb. 14, 2001) (on file with authors).

33. Pub. L. 104-199, 100 Stat. 2419 (Sep. 21, 1996) (codified at 1 U.S.C. §7 and 28 U.S.C. § 1738C (2000)).

34. The Defense of Marriage Act was introduced in the U.S. House of Representatives by Representative Bob Barr and in the Senate by Senator Don Nickles, and was co-sponsored by then-Majority Leader Bob Dole, among others. It passed the House of Representatives on July 12 by a vote of 342 to 67. See *House Passes Defense of Marriage Act*, CONGRESS DAILY, July 12, 1996, available at 1996 WL 10091180; *House Votes To Ban Gay Marriages* SEATTLE TIMES, July 12, 1996 at A1; Cheryl Wetzstein, *Senate Takes Up Gay 'Marriage' as Hawaii Court Case Resumes*, WASH. TIMES, Sep. 24, 1996 at A3. Senate Democrats proposed an amendment to the Defense of Marriage Act banning discrimination based on "sexual orientation" in employment. After negotiations with Senate leadership, the measure was put up separately and voted down 50-49 on the same day that the Defense of Marriage Act was approved by a vote of 85-14. See David Jackson, *Senate Rejects Gay Marriages, Anti-Bias Bill, Both Sides Say Status of Same-Sex Unions May Be Up to High Court*, DALLAS MORNING NEWS, Sep. 11, 1996, at 1A; Bob Hohler, *Senate OK's Bar on Gay Marriages*, BOSTON GLOBE, Sep. 11, 1996, at A1. President Clinton signed the bill into law on September 21, 1996. See *Clinton Draws Criticism from Gay Activists*, CHI. TRIB., Sept. 23, 1996, at 6.

35. U.S. CONST. art. IV, § 1.

Supreme Court.<sup>36</sup>

In addition, many States have reaffirmed as a matter of public policy that marriage is the union of a man and a woman. One of the biggest battles took place in California, where Proposition 22 was approved on March 7, 2000, by a margin of 61 to 39 percent. Proposition 22 provides that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>37</sup> As of October 2000, similar laws have been enacted in thirty-three States.<sup>38</sup> On the day of the 2000

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36. For articles defending DOMA, see *infra* note 78. For articles attacking DOMA, see Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997); Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063 (1999); James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christianity*, 4 MICH. J. GENDER & L. 335 (1997); Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203 (1997); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997); Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227 (1998); Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99 (1997); Alec Walen, *The "Defense of Marriage Act" and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619 (1997); Evan Wolfson & Michael F. Melcher, *The Supreme Court's Decision in Romer v. Evans*, 16 QUINNIPIAC L. REV. 216 (1996); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221 (1996); Evan Wolfson & Michael F. Melcher, *DOMA's House Divided: An Argument Against the Defense of Marriage Act*, FED. LAW., Sept. 1997, at 30.

37. CAL. FAM. CODE §308.5 (approved March 7, 2000).

38. For a discussion of these statutes through 1998, see David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the 'Same-Sex Marriage' Debate*, 32 CREIGHTON L. REV. 3 (1998). The current statutes are: 1998 ALA. CODE § 30-1-19 (2000) (approved May 1, 1998); ALASKA CONST. art. I, § 25; ARIZ. REV. STAT. ANN. §25-101 (West 2000); ARK. CODE ANN. §9-11-107 (1987); ARK. CODE ANN. §9-11-109 (1987); ARK. CODE ANN. §9-11-208 (1987); CAL. PROP. 22 (2000); 2000 Colorado H.B. 1249, 62d Gen. Assem., Reg. Sess. (Colo. 2000); 13 DEL. CODE ANN. §101 (1975); FLA STAT. ANN. §741.212 (West 2000); GA. CODE 19-3-3.1 (1982); HAW. REV. STAT. §572-3 (1999); HAW. CONST. art. I, §23; IDAHO CODE §32-209; 750 ILL. COMP. STAT. ANN. § 5/212 (West 2000); IND. CODE §31-11-1-1; IA. ST. 595.2 (1998); KAN. STAT. ANN. § 23-101 (1999); H.B. 13, 1998 Gen. Assem., Reg. Sess. (Ky. 1998); LA. CIV. C. art. 89 (West 2000), amended by 1999 La. Act of July 2, 1999, No. 890 § 1; 19-A ME. REV. STAT. ANN. § 701 (West 2000); MICH. COMP. LAWS ANN. §551.1 (West 2000); MICH. COMP. LAWS ANN. §551.271 (West 2000); MINN. STAT. ANN. §517.01; MISS. CODE ANN. §93-1-1; MO. CODE ANN. § 40-1-401; N.C. GEN. STAT. §51-1.2 (West 2000); N.D. CENT. CODE § 14-03-01 (1960); 43 OKLA. ST. ANN. § 3.1 (West 2000); PA. CONSOL. STAT. ANN. § 1704 (West 2000); S.C. CODE ANN. § 20-1-15 (West 2000); S.D. COD. LAWS §25-1-1

presidential election, two more states approved similar constitutional amendments.<sup>39</sup> Serious efforts are also underway in 2001 legislative sessions to pass similar legislation.<sup>40</sup>

### C. The Dutch Factor

As if all of the above is not enough, another factor is about to enter the mix: Dutch same-sex "marriage." The Netherlands has been the center of alternative sexual movements for many years.<sup>41</sup> Not surprisingly, on April 1, 2001, the Netherlands will become the first country to "open up" marriage to same-sex couples.

The effort to legalize same-sex "marriage" in the Netherlands gathered momentum over the last decade. It included a non-discrimination act with a human rights commission, the acceptance of private cohabitation contracts, and then the passage of a full-pledged Registered Partnerships law in 1998, which gave both same-sex and opposite-sex couples the ability to register with the government and have all of the available to married couples except the right to adopt children.<sup>42</sup> The Lower Chamber of the Dutch Parliament recommended the full "opening up" of marriage to same-sex couples.<sup>43</sup> Legislation to

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(1968); TENN. CODE ANN. § 36-3-113 (1955); UTAH CODE ANN. § 30-1-4 (1953); VA. CODE § 20-45.2 (West 2000); S.H.B. 1130 of February 6, 1998 (1998 Wash. Ch. 1) (amending WASH. REV. CODE ANN. 26.04.010-26.04.020 (West 2000)).

39. See *Breaking Down the Electorate* TIME MAGAZINE, November 20, 2000, at 74. The states are Nebraska (Initiative 416) and Nevada (Question 2). Nebraska's Initiative Measure 416 states: "Only marriage between a man and a woman shall be valid or recognized in Nebraska, and to provide further that the uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska" 1999 BAL. MEAS. 10 of Sept. 22, 2000, 96th Leg., 2d Reg. Sess. (Neb. 2000) (Initiative Measure 416). Nevada's Question 2 provides: "Only a marriage between a male and female person shall be recognized and given effect in this state" 2000 NV. BAL. MEAS. 2 of Aug. 31, 2000, 2000 Leg., Reg. Sess. (Nov. 2000) (Question No. 2). It must be voted on in both 2000 and (if it passes) in 2002.

40. See 2001 Maryland House Bill 531; 2001 Missouri Senate Bill 180; 2000 New Jersey Assembly Bill 803; 2000 New Jersey Senate Bill 57; 2001 New York Assembly Bill 892; 2001 Texas House Bill 496; 2001 Texas Senate Bill 496; 2001 Wyoming House Bill 223.

41. For background information, see Federatie van Nederlandse Verenigen tot Integratie van Homoseksualiteit, *Brief Summary of COC's History*, at <http://www.coc.nl/index.html?file=history> (last visited Mar. 21, 2001).

42. See Kees Waaldijk, *Dutch Law Reform in Progress*, at [http://www.coc.nl/index.html?file=marriage\\_01](http://www.coc.nl/index.html?file=marriage_01) (last visited Mar. 21, 2001).

43. See Kees Waaldijk, *Dutch Parliament Demands Legislation to Open Up Marriage and Adoption for Same-Sex Couples*, at [http://www.coc.nl/index.html?file=marriage\\_08](http://www.coc.nl/index.html?file=marriage_08) (last visited Mar. 21, 2001).

accomplish this was introduced by the Government in 1998.<sup>44</sup>

On September 12, 2000, after several days of extended debate, the Second (or Lower) Chamber of the Dutch Parliament approved the "opening-up" bill, as well as a bill to allow for adoption by same-sex couples. The vote was a lopsided 133-109.<sup>45</sup> The First (or Upper) Chamber approved the bills on December 19, 2000 by a 49-26 vote.<sup>46</sup>

Under the new law, only one of the two "spouses" is required to be a permanent resident or citizen of the Netherlands.<sup>47</sup> Therefore an American citizen could go to the Netherlands and marry a Dutch citizen anytime on or after April 1, 2001, and then return to seek recognition. There are already reports of plans for mass same-sex weddings on April 1st. Sooner or later a couple will force the issue.

## II. THE CONSEQUENCES OF REDEFINING MARRIAGE

There will be serious consequences if America legalizes same-sex "marriage" or civil unions. In the short run, we are likely to see enormous legal and political turmoil nationwide. As same-sex couples contract civil unions in Vermont (or perhaps eventually "marry" in another state), they will return home, demand recognition in their state, and sue if refused. Every major public official in the United States will have to take a position on this question.<sup>48</sup> In some states, there will be

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44. See Kees Waaldijk, *Dutch Cabinet Introduces Bills Allowing Same-Sex Marriage and Same-Sex Adoption*, at <http://www.coc.nl/index.html?file=marriage> (last visited Mar. 21, 2001).

45. The approved laws were "The Opening-Up of Marriage" (Bill 22672) and the "Adoption of Children by Same-Sex Couples" (Bill 22673). For an English summary of the bills, see Netherlands Department of Justice, *Same-Sex Couples to Be Able to Marry*, at [http://www.minjust.nl:8080/a\\_beleid/fact/samesexm.htm](http://www.minjust.nl:8080/a_beleid/fact/samesexm.htm) (last visited on Mar. 21, 2000) and Netherlands Department of Justice, *Adoption by Same-Sex Couples*, at [http://www.minjust.nl:8080/a\\_beleid/fact/adoptsam.htm](http://www.minjust.nl:8080/a_beleid/fact/adoptsam.htm) (last visited Mar. 21, 2000). Additional information and materials concerning the Dutch debate can be found at the website of Professor Kees Waaldijk, a leading proponent of same-sex "marriage," <http://ruljis.leidenuniv.nl/user/cwaaldij/www/index.html> (last changed on Feb. 8, 2001) and on the Marriage Law Project website, <http://marriagelaw.cua.edu> (last modified Dec. 15, 2000). At the time of the Lower Chamber vote, it was widely misreported that the vote was final even though it still had to be approved by the Upper Chamber.

46. Legislation Bills 26672 and 26673. For more information, see the website of the Dutch Parliament, <http://www.parlement.nl>. English translations of the bills are available on the Marriage Law Project website at <http://marriagelaw.cua.edu/Internat.htm>.

47. See *id.*

48. Mary Bonauto, *Civil Unions Update: The September Primaries: Analysis and*

political turmoil, as in Vermont.<sup>49</sup> Other states may flatly resist. Others may debate without resolution. Still others may pay lip service but eventually surrender.

In the long run, both sides think these developments could lead to major changes in the institution of marriage. After all, if supporters of same-sex "marriage" or its equivalent don't expect any results from redefining marriage, why are they fighting so hard for it? The only difference is that one side thinks the results would be positive, while the other side does not.<sup>50</sup> Those who seek to reaffirm marriage note that previous radical social policy experiments have often had unprecedented, disastrous effects, especially on children.<sup>51</sup> We fear the same will happen here. But by the time this becomes clear, what have begun as mere policies may have hardened into invulnerable constitutional rights.

What sorts of consequences are we referring to? There are at least three: consequences at the state and federal levels, consequences for self-government, and consequences for the institution of marriage itself.

#### *A. Consequences at the State and Federal Level*

The new Vermont civil unions statute has become the testing ground for how the question of same-sex "marriage" will be

*Action* (Sep. 27, 2000), at <http://www.glad.org>. ("Regardless of the outcome of the elections, we believe lawmakers should file marriage legislation, and, in some cases, also file comprehensive civil union legislation. It may not pass right away, but the only way to get what you want is to ask for it. And of course, advocates should continue to explore well-planned and well-placed litigation."); see also *Vermont and the Nation*, NAT'L REV., October 9, 2000, at 14.

49. See Michael Powell, *For Granite Staters, A Bedrock Chasm*, WASH. POST, Oct. 17, 2000, at C1; Hanna Rosin, *Same-Sex Union Divides Small Vermont Community*, WASH. POST, Oct. 11, 2000 at A1; David Orgon Coolidge, *Vermont: The Rest of the Story, We've Only Just Begun*, NAT'L REV. ONLINE, Jan. 9, 2001, at <http://www.nationalreview.com/comment/comment010901c.shtml>.

50. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 8-13 (1996); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-95); William Bennett, *Leave Marriage Alone*, NEWSWEEK, June 3, 1996, at 27; Stanley N. Kurtz, *What Is Wrong with Gay Marriage*, COMMENTARY, Sept. 2000, at 35; cf. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833.

51. See Barbara Dafoe Whitehead, *The Decline of Marriage as the Social Basis of Childrearing*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 4-8 (David Popenoe, Jean Behtke Elshtain & David Blankenhorn eds., 1996) (describing consequences of rise in divorce rates).

addressed by the States and, ultimately, the federal government. No one yet knows all the implications of this new law, either for Vermont or for any other jurisdiction. But there are already a number of areas, easily identifiable, that give reason for deep concern. First we will examine consequences within Vermont, since it could serve as a model for other states. Second, we will consider the possible consequences of the civil unions statute outside Vermont.

### *I. Consequences Within Vermont*

The first area of concern within Vermont is the general social message sent by civil unions legislation. Schools are likely to be forced to teach students that there is no difference between marriage and a same-sex relationship, because to think or say otherwise would be considered bigotry and thus forbidden by the non-discrimination provisions of the civil unions law.<sup>52</sup> No agency of state government will be allowed to convey a countervailing message, because to do so would be "discrimination" under the law. What this means is that the State must endorse the message that marriage is no longer the general ideal for society.<sup>53</sup>

Second, the civil unions bill will likely affect private organizations, including businesses, non-profit organizations, private schools, churches and synagogues. With its grudging and vague religious exemption, the bill creates a number of potential conflicts between the rights of religious people and organizations and the State in three specific areas:

*Employment benefits.* This legislation allows an employer to be sued under the non-discrimination portion of the civil union legislation even if, based on religious beliefs, the employer refuses to hire, or discharges, an individual based on his or her registration in a civil union.<sup>54</sup> The same holds true where an

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52. See VT. ACT 91, § 3 (1999) (codified at 15 VT. STAT. ANN. § 1201, *et seq.* (2000)).

53. See Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEXAS L. REV. 735, 756-757 (1998).

54. See, e.g., VT. ACT 91, § 3 (1999) (codified at 15 VT. STAT. ANN. § 1201, *et seq.* (2000)). Contrast that with the following cases: *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000) (reversing unanimous decision of the New Jersey Supreme Court that state "sexual orientation" discrimination law required Boy Scouts to accept homosexual leaders); *Hurley v. Irish American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (holding state public accommodations law requiring

employer, motivated by a religious belief that homosexual conduct is sinful, refuses to offer spousal benefits to an employee's same-sex civil union partner. In both scenarios, the "civil union" law could subject religious organizations or believers to litigation and impose a significant burden on the free exercise right. The ironic result is that although Vermont "sexual orientation" non-discrimination law in employment already contains an exemption for religious organizations,<sup>55</sup> it would be effectively removed if the employee has entered into a "civil union."

*Housing.* In other states, a number of cases have arisen out of the unwillingness of individuals to rent to unmarried couples based on religious beliefs related to sexual morality.<sup>56</sup> The "civil unions" law creates a situation in which a couple who establishes a "civil union" may easily sue a landlord unwilling to rent to *unmarried* couples based on moral objections to *extramarital* sexuality. Although the *unmarried* couple could arguably already press a discrimination claim,<sup>57</sup> once registered in a civil union their case against the religious landlord would be even stronger. This would force individuals with sincere religious or moral beliefs to choose between violating their consciences or withdrawing from the rental market.

*Government contracts.* The final area of potential conflict involves the provision of government services by religious organizations (such as adoption placement or foster home placement for children). For instance, if an organization, believing that the best moral environment for children is a home with a married mother and father, refuses to place a child for adoption with a couple in a registered "civil union," it could well be sued by the couple. The "civil union" legislation could prevent religious organizations who provide government services from acting on their sincere religious objections to

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private organizers of a parade to include a homosexual group carrying a banner unconstitutional as applied); *Lewis v. Buchanan*, 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979) (rejecting discrimination claim brought against pastor for refusal to hire homosexual as teacher at a parochial school).

55. 21 VT. STAT. ANN. § 495(e) (1999).

56. See *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc), cert. denied, 121 S. Ct. 1078 (2001); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *State v. French*, 460 N.W.2d 2 (Minn. 1990).

57. See cases cited *supra* note 56.

same-sex partnerships.<sup>58</sup>

## 2. *Consequences Beyond Vermont*

All the impacts described above could also begin to appear in other States if they, like Vermont, move to recognize "civil unions" as the legal equivalent of marriages.

But will civil unions be recognized by other States or by the Federal government? The question of the legal effect of a civil union can arise in at least three contexts: (1) a couple from another state travel to Vermont, enter into a civil union, and return to their home state, where they seek some or all of the benefits associated with the civil union status; (2) a couple who have established a civil union in Vermont move to another state, and seek to have that status recognized in the new state; or (3) a couple in a civil union obtain a court judgment based on that civil union (such as an award of support from the former partner upon dissolution of the civil union), and seek to have it enforced in another state.

Currently, only Hawaii and California have general statutes that recognize non-marital couples. Both are limited compared to the provisions of Vermont's civil union law.<sup>59</sup> In those states, a couple could argue that state policy already supports the extension of benefits to unmarried partners, so that either their civil union should be recognized in its entirety, or that they should at least be entitled to benefits already offered by the state.<sup>60</sup>

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58. For instance, Kentucky Baptist Homes for Children, which provides placement for children who are wards of the state, was told earlier this year that the state might refuse to place children with them because of their policy not to hire homosexuals. See Tom Loftus, *Baptist Homes, Kentucky Near Deal*, LOUISVILLE COURIER-J., July 6, 2000, at 1A. In San Francisco, the Salvation Army had to pull out of city contracts because it would not provide domestic partnership benefits to employees. See Don Lattin, *Charities Balk at Domestic Partner, Open Meetings Laws*, S.F. CHRON., July 10, 1998, at A1.

59. See 1997 HAW. REV. STAT. § 572C (1999) (allowing agreements for "reciprocal beneficiary" between persons who are 18 years old, not eligible to marry the other beneficiary, and unmarried; these include relationships not involving sex or the same residence; rights include funeral leave for state employees, hospital visitation rights, health insurance coverage for partners of state employees, and ability to claim an elective share of a partner's estate); 1999 Cal. Legis. Serv. Ch. 588 (AB 26) (creating a "domestic partner" registry whereby same-sex couples and opposite-sex couples over 62 can register for the right to hospital visitation and to appoint their partner as a beneficiary on their insurance).

60. In fact, legislation was proposed in California during the 2000 legislative

Whatever happens, two outcomes seem likely: there will eventually be litigation in other states based on Vermont's civil union law, and if another state recognizes a Vermont civil union, all of the Vermont law's effects may potentially carry over to the other state.<sup>61</sup>

### B. Consequences for Self-Government

Court-ordered same-sex "marriage" or the forced recognition of civil unions will also have a devastating effect on self-government. Already, many key questions are being removed from the people. If courts step in to redefine marriage and prevent citizens from responding, even more voters will become alienated from the political process. If Americans believe that children thrive best with both a mother and father, and that marriage is the central social institution that brings men, women and children together, they should have the right to recognize that institution in law and support it in public policy.<sup>62</sup>

### C. Consequences for Marriage

Advocates of same-sex "marriage" claim that same-sex couples need marriage to resolve a series of legal problems that threaten their relationships.<sup>63</sup> More generally, these advocates argue that until this takes place, the law does not recognize

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session to make that state's domestic partnership benefits available to couples who had established a domestic partnership status in another state. Assemb. 2211, 1999-00 Leg., Reg. Sess. (Ca. 2000). The bill did not pass.

61. See Bonauto, *supra* note 48; Mary L. Bonauto, Gay & Lesbian Advocates and Defenders, *A Historic Victory: Civil Unions for Same-Sex Couples, What's Next!*, June 2000, at <http://www.glad.org/Publications/CivilRightProject/HistoricVictory.PDF> ("We regard [laws providing that only marriages between a man and a woman will be recognized] as unconstitutional and are carefully considering how best to secure their limitation over time. . . . We must proceed collectively and carefully, moving forward the best cases in the best places at the best times."); see also Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflicts of Laws Questions and Concerns*, at <http://www.law2.byu.edu/alisymp/whitten0119.htm> (last visited Mar. 21, 2001).

62. On the importance of self-government, see Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999); David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000); David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. (forthcoming 2001).

63. See Lambda Legal Defense and Education Fund, *Why Civil Marriage Laws Should Not Discriminate Against Lesbians and Gay Men*, at <http://www.lambdalegal.org> (Sept. 26, 1997).

their full humanity.<sup>64</sup> These practical and symbolic arguments appeal to the pragmatic and tolerant instincts of the American people. Even so, most Americans still reject the idea of same-sex "marriage."

Both sides appear to agree that the legalization of same-sex "marriage" or its equivalent will have profound and enduring consequences for the institution of marriage itself. What will those be?

We have described above how under such a new legal regime, any principled opposition to same-sex "marriage" or its equivalent will be labeled "discrimination" and treated as "bigotry". This has already begun in Vermont, and we can expect it to intensify. A policy sold as giving rights to some will limit the rights of others.

But more importantly, the core concept of marriage will be altered. By definition—not only legally, but also culturally—the idea of marriage has always included a man and a woman. Marriage is the joining of the two sexes into a community that connects the generations.

If one removes this core concept, the definition of marriage changes. Instead of a unique community, marriage becomes one more *relationship*. And why should this relationship be so special? If it has no necessary connection to children, or even to sex, what makes it different from an ordinary friendship? Friendships are multiple; why limit marriage to two persons? Sexual relationships can be multiple; why promote exclusivity? Relationships come and go, and reasonably so; why promote permanence? If marriage is a freely chosen relationship unconnected to sex, children, exclusivity or permanence, why have legal marriage at all? Why not simply abolish it and let people create their own contracts? In short, if one removes the reason for the concept, its other elements come apart. No element, taken alone, adequately explains the concept of legal marriage.<sup>65</sup>

Initially, many gay and lesbian activists were opposed to the idea of same-sex "marriage." They rejected any kind of

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64. See Andrew Sullivan, *The Marriage Moment*, ADVOCATE, JAN. 20, 1998, at 59.

65. This is why Stanley Kurtz argues that same-sex "marriage" opens the door to "polyamory." Stanley N. Kurtz, *What Is Wrong with Gay Marriage*, COMMENTARY, Sept. 2000, at 35.

affiliation with such a "heterosexual" institution, based on the kinds of reasons we have just lived above.<sup>66</sup> Now, however, they have concluded that they can have their cake and eat it too. They can support same-sex "marriage" precisely because it will destabilize the traditional idea of marriage, thereby opening the door for more radical developments down the road.<sup>67</sup> Consider this statement by Professor David Chambers of the University of Michigan:

If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying—rather than as imposing a view of proper relationships—the law ought to be able to achieve the same for units of more than two. . . . [I]t seems at least as likely that the effect of permitting same-sex marriage will be to make society more receptive to the further evolution of the law. By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive of units of three or more (all of which, of course, include at least two persons of the same sex) and to units composed of two people of the same sex but who are bound by friendship alone. All desirable changes in family law need not be made at once.<sup>68</sup>

Or consider the words of Judith Stacey, a prominent scholar in family studies. After confessing to previous doubts about the wisdom of same-sex "marriage," she says her mind has changed: "I have, for one, converted to the long-term cause."<sup>69</sup> What is this "cause"? She does not hesitate to articulate it:

If we begin to value the meaning and quality of intimate bonds over their customary forms, there are few limits to the kinds of marriage and kinship patterns people might wish to devise. . . . [P]erhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small-group marriages arranged to share resources, nurturance and labor.<sup>70</sup>

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66. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 51 (1996).

67. See Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9 (1991).

68. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *MICH. L. REV.* 447, 490-491 (1996).

69. JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 126 (1996).

70. *Id.* at 127.

This is not the "alarmist" rhetoric of critics. These are prominent *advocates* of same-sex "marriage" who see it as a logical "wedge" by which the legal concept of marriage can be deconstructed.

Certainly, this transformation will take time. Even if same-sex "marriage" is legalized, it may seem at first that nothing much has changed. But gradually, in small but important ways, it will become obvious that something dramatic has happened. Here and there across the country, those who still object will be called "bigots," or those who take action will be penalized for "discrimination." People seeking to succeed will either avoid the issue, or become crusaders for "equality" to stay in official favor.

While the campaign to redefine marriage concentrates on the big prize of same-sex "marriage," efforts also continue to break down the basic legal distinction between "married" and "unmarried." Proponents advocate a smorgasbord of options between "single" and "married," such as domestic partnerships.

Yet advocates of same-sex "marriage," such as Professor William Eskridge of Yale Law School, concede that if marriage becomes only one more option, like a flavor of ice cream, its social position will eventually be undermined. According to Eskridge, "experimental laws like Vermont's will undermine the institution of marriage. . . . In the long run, they threaten to make marriage obsolete."<sup>71</sup> What these laws actually accomplish is to raise the social status of cohabitation, which has a long-run destabilizing social effect.<sup>72</sup>

Once there is a menu with many options, the usual American tendency (magnified by activist lawyers) is to question and exploit any legal differences. Now the burden of proof shifts: why should married people get all these benefits? Instead of

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71. William N. Eskridge, Jr., *The Emerging Menus of Quasi-Marriage Options*, WRIT: FINDLAW'S LEGAL COMMENTARY, at [http://writ.findlaw.com/commentary/20000707\\_eskridge.html](http://writ.findlaw.com/commentary/20000707_eskridge.html) (last visited Mar. 21, 2001).

72. See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 200-201 (2000) (objecting to domestic partnership laws that include opposite-sex couples, because those couples have no real incentives to then marry). Eskridge cleverly suggests that the way to achieve "stability" in relationships, therefore, is to legalize same-sex "marriage." Eskridge, *supra* note 71. But this assumes that marriage is a mere policy tool to be redefined to achieve social goals.

worrying about "marriage penalties," why should one get marriage subsidies? This push toward what Harvard Law School professor Mary Ann Glendon has called the "dejuridification" of marriage and the individualization of benefits, plays into the hands of activists whose goal is to end any privileged legal status for marriage.<sup>73</sup>

If the meaning of marriage changes, its favored status will begin to wane. To take an example from social custom, people who marry for the third or fourth time are not likely to receive as many gifts or as much attention as when they first wed. If they make public vows of permanence, people will take them less seriously. If marriage becomes just one more way to obtain rights and benefits, the moral rationale for these rights and benefits will start to wither.

Consider what is happening in France, which in 1998 passed its PACS law. PACS creates a status where two opposite- or same-sex couples can register together. Already, there are allegations that people "PACS" for entirely instrumental purposes.<sup>74</sup> The more this happens, the more cynical people will become about the arrangement, and the less likely they will be to support it. Such a downward spiral may well lead to the collapse of legal marriage.

In sum, if same-sex "marriage" is introduced, we believe it will only add to social confusion and instability, and further alienate citizens from their own laws. Once torn, the fabric of a vital social institution is difficult to mend. It took thirty years for social scientists to recognize the negative consequences of

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73. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 63-64 (1987); see also Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'*, 79 VA. L. REV. 1535 (1993).

74. French secondary school teachers and members of the military are using France's cohabitation certificate (PACS) as a means to be placed in favorable teaching positions or to avoid military service. Of the 14,000 PACS signed since last November, 2000 involve secondary school teachers and it is expected that most of those were contracted for and entered for fraudulent purposes of avoiding placement in bad weather areas or with violent pupils. See Adam Sage, *Teachers Fake Gay Love to Move Jobs*, TIMES (London), May 25, 2000, at 18. One teacher "said he knew of four male colleagues who had signed cohabitation (PACS) contracts with other men to be able to move to an area where they wanted to work," and, highlighting the anti-commitment potential of recognizing same-sex relationships, said, "I would only do it with someone I knew. You need to be sure you can de-Pacs when you want to." Jon Henley, *Points Taken by French Teachers*, GUARDIAN (Manchester), May 26, 2000, at 19.

no-fault divorce.<sup>75</sup> Those who advocate the risky social experiment of redefining marriage should bear the burden of proof to support it.

### III. AN AGENDA FOR THE BUSH ADMINISTRATION

The Bush Administration will likely be forced to confront this issue sooner rather than later. This will offer President Bush an opportunity to reaffirm marriage at a time when he might be tempted to look the other way. Without engaging in a crusade against homosexuals, the President can speak up for marriage, because it is essential to the common good. Justice must be done to marriage for *everyone's* sake.

How can it send a positive message about what marriage really is?

#### *A. The Choice: Avoid, Encourage, or Lead*

One option for President Bush is to look the other way and *avoid* the subject of marriage. The media often caricature the issue as a battle between "the Christian Right" and "gays and lesbians."<sup>76</sup> If President Bush has no firm convictions about marriage, this is the path of least resistance.

But the President has made a clear public statement that he believes that marriage is truly the union of one man and one woman. This gives him a better option: to *encourage* marriage. The President could endorse efforts to enact marriage recognition laws in various states and lend informal support to the repeal of Vermont's "civil unions" law. Such a move would not only be strategically wise, but also politically popular. Recent polling that shows that a vast majority of Americans support the definition of marriage as the union of a man and a woman.<sup>77</sup>

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75. See DAVID POPENOE & BARBARA DEFOE WHITEHEAD, *THE STATE OF OUR UNIONS 2000: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* (2000), available at <http://marriage.rutgers.edu/publicat.htm>.

76. See, e.g., Robert Dreyfuss, *The Double-Edge Wedge*, AMERICAN PROSPECT, August 28, 2000, at 24; Jacob Glazeski, *Let's Hear It for the Religious Right*, DAILY NEBRASKAN, July 21, 2000, available at 2000 WL 24488384; David Goodman, *A More Civil Union*, MOTHER JONES, July/Aug. 2000, at 48; Richard Schneider, Jr., *Summer 2000: "The Enemies of Equality"*, GAY & LESBIAN REV., Summer 2000, at 4.

77. A poll commissioned for the World Congress of Families II and performed by Wirthlin Worldwide indicated that eighty-three percent of Americans agree with the statement: "The definition of marriage is one man and one woman." THE HOWARD CENTER FOR FAMILY, RELIGION & SOCIETY, SPECIAL REPORT: RESULTS OF

But something more is needed. President Bush should provide *leadership* in the task of reaffirming marriage in American law. He should vow never to accept the legalization of same-sex "marriage" in American life, and do everything within his power to stop it. He could provide leadership by the following actions.

### *B. Appointments to the Federal Judiciary*

It is widely expected that President Bush will have the opportunity to appoint several new Justices to the U.S. Supreme Court, not to mention hundreds of other federal judges. The question is, will these jurists do justice to marriage? Judges who believe that marriage requires a man and a woman would be welcome. However, they should at least respect the judgment of the *people*, who have enacted this view of marriage. It is the people, after all, who give courts their constitutional authority. The willingness of a judge to respect the meaning of marriage as understood by the people, whether he or she personally agrees with it or not, is an important sign of his or her respect for the democratic process. President Bush should not nominate anyone to the federal judiciary who believes that he or she has the authority to redefine marriage as other than between a man and a woman.

### *C. Defending the Definition of Marriage*

If lawsuits are filed over civil unions, or States begin to recognize or legalize same-sex "marriage," the Defense of Marriage Act is sure to be challenged. President Bush should instruct the Justice Department to vigorously defend the Defense of Marriage Act.<sup>78</sup> If a case reaches the U.S. Supreme

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A GLOBAL SURVEY ON MARRIAGE AND THE FAMILY (Nov. 2000), available at [http://www.worldcongress.org/WCF2/wcf2\\_survey.html](http://www.worldcongress.org/WCF2/wcf2_survey.html).

78. A number of recent articles provide strong support for the constitutionality of the Defense of Marriage Act. See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998); Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998); Maurice J. Holland, *The Modest Usefulness of DOMA Section 2*, 32 CREIGHTON L. REV. 395 (1998); Timothy Joseph Keefer, Note, *DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635 (1997); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 57 (1998); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998);

Court, the President should direct the Solicitor General to argue firmly that liberty and equality are still fully compatible with a law establishing that marriage requires a man and a woman.<sup>79</sup>

If the Defense of Marriage Act is overturned and same-sex "marriage" or its equivalent is forced upon the States, the U.S. Supreme Court will have nationalized the issue. Doing justice to marriage will require a federal constitutional amendment defining marriage as the union of one man and one woman.<sup>80</sup> This would be a last resort, and it would require bold leadership from the President.<sup>81</sup>

#### *D. Defending Organizations that Support Marriage*

Ironically, the same groups that seek to redefine marriage

Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, FED. LAW., Feb. 1998, at 30; Lynn D. Wardle, Williams v. North Carolina, *Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

79. Resources for this task include Gerard V. Bradley, *Same Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 729 (2000); Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH U. L. REV. 1245 (1998); David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239 (1998); Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147 (1997); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM J. JURIS. 97 (1997); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L. J. 301 (1995); Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships Be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51 (1996); Lynn Marie Kohm, *Liberty and Marriage — Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253 (1998); Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage* 47 CATH. U. L. REV. 1271 (1998); Jay Alan Sekulow & John Tuskay, *Sex and Sodomy and Apples and Oranges — Does the Constitution Require States to Grant a Right to Do the Impossible*, 12 BYU J. PUB. L. 309 (1998); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 87 (1996); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L. J. 289, 333 (1998).

80. Abraham Lincoln's response to *Dred Scott v. Sandford*, 60 U.S. 393 (1856), is a good model. He argued that although the Court's specific judgment should be respected, its interpretation of the Constitution should be rejected. See HADLEY ARKES, *FIRST THINGS* 419-20 (1986).

81. This would not be unprecedented. Forty-three countries have statements about marriage or family in their national constitutions, although these vary widely in their content and legal implications. For a list of texts (with no endorsements), see Marriage Law Project, *Marriage and Family in National Constitutions*, at <http://marriagelaw.cua.edu/Marriage.htm> (last visited Nov. 9, 2000).

have also sought to deny the Boy Scouts their constitutional rights to freedom of speech and association.<sup>82</sup> In its 1999-2000 Term, the Supreme Court narrowly upheld the right of the Boy Scouts of America to maintain its historic support for a traditional understanding of sexuality, marriage and family, alongside those with other views more favored by the government of New Jersey.<sup>83</sup>

The good news is that the Scouts got five votes, but the bad news is that they *only* got five votes. This reinforces the

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82. Evan Wolfson, Director of the Marriage Project for the Lambda Legal Defense & Education Fund and co-counsel in the Hawaii same-sex "marriage" case, was also the lead attorney for James Dale, who attempted to use New Jersey's "sexual orientation" anti-discrimination law to compel the Boy Scouts of America to accept homosexual leaders. In a dramatic and unprecedented decision, the New Jersey Supreme Court held that New Jersey's interest in preventing discrimination trumped any possible claim by the Boy Scouts. *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999). Although the Scouts' free association claims were eventually vindicated by the U.S. Supreme Court, the New Jersey Court's interpretation of the New Jersey Law Against Discrimination remains in force, to be used against the Boy Scouts in the public square.

83. *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000). Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas. The Court based its opinion on the Scouts' First Amendment freedom of association. Rehnquist concluded that the BSA's clear mission was to instill values, and accepted the Scouts' assertion that homosexuality is incompatible with the principles of Scouting. *Id.* at 2453. The Chief Justice then asked whether applying New Jersey's anti-discrimination law to the Scouts would significantly affect the Scouts' ability to advocate its views. He disagreed with the New Jersey Supreme Court's finding that the BSA's ability to disseminate its message was not significantly affected by Dale's inclusion. Instead, he reasoned that because Dale was a prominent "gay rights activist," his presence in the Scouts would "force the organization to send a message" that "homosexual conduct [is] a legitimate form of behavior." *Id.* at 2453. In an important passage, illustrating the principle of tolerance, Rehnquist stated that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.* at 2452.

Justice Stevens wrote a lengthy dissent joined by Justices Souter, Ginsburg and Breyer. *Id.* at 2459 (Stevens, J., dissenting). Justice Stevens argued that it was "plain as the light of day" that the Scout principles regarding being "morally straight" and "clean" say nothing about homosexuality. *Id.* at 2461. He argued that the Court has never held that a group's exclusionary policy trumps an anti-discrimination law and analogized this case to the *Jaycees* and *Rotary* cases, which provided no constitutional protection to these groups' exclusion of women. *Id.* at 2466-67. Justice Stevens also made the remarkable charge that the Court's justification for allowing the Scouts to exclude Dale "is tantamount to a constitutionally prescribed symbol of inferiority." *Id.* at 2476. Justice Souter also wrote a separate dissent (joined by Justices Ginsburg and Breyer), in which he stated that he did not believe that the decision should be based on changed views about homosexuality, but rather on whether the Scouts were sufficiently explicit about their views to warrant First Amendment protection in this case. While agreeing with the majority that the popularity of beliefs is not the test for a right of freedom of association, he agreed with the dissent that the Scouts did not make their case. *Id.* at 2479 (Souter, J., dissenting).

importance of future judicial appointments. A new Justice need not even *agree* with the Scouts—just respect their right to freedom of association, and the rights of other organizations holding this traditional view of marriage.

In the meantime, however, opponents of the Boy Scouts have launched an aggressive campaign declaring that the Boy Scouts “discriminate against homosexuals,” and that all public and private groups should stop sponsoring such a “bigoted” organization. The primary weapon in this campaign is the attempt to leverage anti-discrimination laws and policies. If a public or private organization has a policy “barring discrimination on the basis of sexual orientation,” activists argue that the Scouts should be rejected by that organization.<sup>84</sup>

At the federal level, there have already been two initial skirmishes. The Department of the Interior began to probe the use of federal lands by the Scouts.<sup>85</sup> After an outcry, Attorney General Janet Reno issued an opinion that the Scouts could use federal lands without violating an executive order that prohibits discrimination on the basis of “sexual orientation.”<sup>86</sup> It appears that this executive order may remain in place;<sup>87</sup> if so, President Bush should reaffirm the Attorney General’s opinion. By the same token, any branch of the federal government or any federal contractor should be free to sponsor Scout troops.

The Scouts also have a Federal Charter. After *Boy Scouts*, Rep. Lynn Woolsey (D-CA) introduced H.R. 4892 to revoke their charter. However, this effort proved premature. When brought up on the House floor, the bill to revoke the charter was defeated 362-12.<sup>88</sup> President Bush should continue to accept the honorary role of “leader” of the Scouts and should resist all attempts to symbolically shame the Scouts, such as by revoking their Federal Charter.

At the state and local level, where federal influence is less

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84. See Lambda legal Defense and Education Fund, *Discriminatory Policy Raises Questions About Special Treatment for Boy Scouts*, July 19, 2000, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=664>.

85. Joyce Howard Price, *Federal Agency Probes Scouts over Gay Ban*, WASH. TIMES, Aug. 31, 2000, at A1.

86. Lou Chibbaro, *Reno: Scouts Can Hold Events on Federal Land*, WASH. BLADE, Sept. 8, 2000, at 1.

87. See Lou Chibbaro, *Ashcroft Host Log Cabin*, WASH. BLADE, Feb. 23, 2000, at 1.

88. See Lee Davidson, *House Kills Bill to Revoke Scouts’ Charter*, DESERET NEWS, Sept. 13, 2000, at A1.

direct, the Bush Administration should nonetheless support the Scouts in whatever ways it can. The Administration might, for instance, promote (1) the right of public entities, such as school systems, to sponsor Scout troops; (2) the right of the Scouts to use public lands and facilities on preferential or equal terms; (3) the right of the Scouts, like other private groups, to recruit members in public places; and (4) the right of private organizations to sponsor Scout troops without retaliation, such as losing contracts, from units of government that consider the Boy Scouts "bigoted." Many of these issues will arise initially in settings unrelated to the federal government. But as they work their way up the governmental ladder, especially through the court system, it will be crucial that the Justice Department be clearly in support of the Boy Scouts.

There is a great irony here, and it should not be lost upon the Bush Administration. In the name of "anti-discrimination," campaigners against the Scouts are engaging in intolerance. For this reason, the next Administration has an excellent opportunity to support and defend the Boy Scouts of America, in the name of promoting genuine diversity. President Bush should stand up for the right of Americans to associate for the well-being of youth in an organization that promotes traditional sexual morality. He should insist that this is nothing to be ashamed of, and he should support the rights of all such private organizations.

*E. Marriage-Friendly Interpretations of Laws,  
Regulations, and Executive Orders*

There are a number of other ways in which President Bush can proactively provide leadership on the issue of marriage. For example, how the next Administration interprets and applies the term "sexual orientation" in existing or future federal statutes, regulations or Executive Orders will be crucial.<sup>89</sup> President Bush should see that these laws are

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89. This would include the interpretation and application of two proposed laws: "hate crimes," H.R. 1082, 106th Cong. (1999) and S. 622, 106th Cong. (1999), and the "employment non-discrimination act" (ENDA), H.R. 2355, 106th Cong (1999) and S. 1276, 106th Cong. (1999). If the Justice Department crafts guidelines on a hate crime law, for example, they should state clearly that a belief in traditional sexual morality, including marriage as the union of a man and a woman, does not indicate bias. Similarly, the exemption for religious organizations under ENDA should be interpreted as broadly as possible.

implemented in a way that preserves the distinction between married couples and unmarried persons, and upholds the right of private organizations to support this view of marriage in their programs.<sup>90</sup>

The new White House Office of Faith-Based and Community Initiatives and its inter-agency working group should take the lead in ensuring that social service providers with traditional views of marriage are not discriminated against in the the contract award process. This intersection of federal and state law offers a key opportunity to ensure equal treatment for secular and religious service providers alike.

The President also should instruct the Internal Revenue Service not to accept tax returns that attempt to use Vermont "civil unions" as a basis for claiming marital status or its equivalent. If challenged, IRS counsel should defend these cases vigorously. The President should also instruct the Departments of Education and Health & Human Services to ensure that their publications and guidelines relating to marriage and family express a clear understanding that marriage is the union of a man and a woman. Groups that receive federal funding should be encouraged, by all available means, to do likewise. Organizations receiving federal support from Charitable Choice should be free to maintain their moral and religious identity even if the law of the recipient state differs.

The President could follow the lead of several Governors by creating a commission or office to consider how federal law can help strengthen marriage. In the process of answering this question, the commission could address the issue of definition.

#### *F. Reaffirming Marriage in the International Arena*

The next President could also take significant steps to

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90. This involves resisting legal interpretations that treat marriage as a form of "sex discrimination" or "sexual orientation discrimination." See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997). But see Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231 (1998); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 87 (1996).

reaffirm marriage in the "global village." The campaign to redefine marriage is not limited to the United States. It involves litigators, judges, professors and activists from many countries working together to redefine marriage not only in their own countries, but also in the international arena.<sup>91</sup> Their cooperative efforts have already borne fruit in Canada,<sup>92</sup> the European Union,<sup>93</sup> the United Kingdom,<sup>94</sup> and South Africa. As we have already seen, the Netherlands has voted to legalize

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91. This cooperation became fully evident on July 1-3, 1999, when prominent jurists, professors, litigators and activists assembled in London for a conference entitled "The Legal Recognition of Same-Sex Partnerships." The 150 participants attended sessions on gay and lesbian legal theory, the legal status of same-sex couples, and efforts to influence the European courts. A special conference session, "The Judicial Role in Protecting Human Rights: A Panel Discussion," featured jurists from the United Kingdom, U.S., South Africa, Denmark, Australia, Canada, and the Netherlands. Chairing the session was Lord Slynn of Hadley. At the table with him were Justice Claire L'Heureux-Dubé (Supreme Court of Canada), Justice Michael Kirby (High Court of Australia), Justice Edwin Cameron (High Court of the Transvaal, South Africa), Judge Michael Elmer (former Advocate General at the European Court of Justice and an original drafter of the Danish Registered Partnerships Law), Dr. Pieter van Dijk (Member of the Council of State of the Netherlands and former Judge of the European Court of Human Rights), and Judge Deborah Batts (Southern District of New York). See Conference, *Legal Recognition of Same-Sex Partnerships*, Kings College, London (July 1-3, 1999) (conference materials on file with authors).

92. In Canada, Parliament has since passed omnibus Bill C-23 in response to a decision of the Supreme Court of Canada, which found the failure of Canadian law to include same-sex couples in its definition of common-law "spouses" in violation of the Canadian Charter of Rights and Freedoms. *M. v. H.*, [1999] S.C.R. 3. One of the Canadian Justices voting for the majority in that opinion was Madame Justice L'Heureux-Dubé, who spoke at the London Conference. She was widely hailed by participants at the conference for the decision, which was held up as a model for other nations. Justice L'Heureux-Dubé also chaired a panel at the London Conference that discussed changing Canadian law to make it more favorable for same-sex couples. Currently, a number of lawsuits are seeking to challenge Canada's marriage law. See Janet Epp Buckingham, *When Tolerance Turns into Intolerance*, LONDON FREE PRESS, Feb. 17, 2001, at H5.

93. A panel was held at the conference to discuss ways in which European Union and European Community law might be used to push unwilling member states to "reform" their laws in favor of legal recognition of same-sex couples. The registered partnership systems in these nations were a major topic of the conference. Within the year, the European Parliament adopted a report to urge member states to do just that. The report also held up the examples of other European countries who had established systems of registration for same-sex couples as models for the other countries to follow. Annual Report on Respect for Human Rights in the European Union, EUR. PARL. DOC. (COM A5-0050 final) (March 16, 2000).

94. In October 1999, Lord Slynn, a member of the United Kingdom's House of Lords and one of the justices who spoke at the London Conference, wrote the lead opinion in a case involving a suit by a partner in a same-sex couple who sought to continue tenancy after the death of his partner, to whom their residence was rented. *Fitzpatrick (A.P.) v. Sterling Hous. Ass'n Ltd.*, 3 W.L.R. 1113 (H.L. 1999). The judges involved in the case offered an expansive definition of "family" and found in favor of the plaintiff.

same-sex "marriage," and its new law will take effect April 1, 2001.<sup>95</sup>

The President should make it clear to all countries and international bodies that the official position of the United States is that marriage is the union of a man and a woman. Therefore, federal law will not give marital status or its equivalent to same-sex couples, regardless of the law of another country. In international bodies that deal with private and public international law, the U.S. representative should advocate this position without apology.

Similarly, U.S. delegations to United Nations conferences and other international forums should be instructed to reject any proposed statements or policies redefining marriage. Such an opportunity may arise in 2001 when the UN will hold conferences on children, and racism and intolerance.<sup>96</sup> In addition, the United States should reaffirm this posture in further negotiations regarding the creation and implementation of an International Criminal Court.<sup>97</sup>

#### IV. CONCLUSION

Every crisis provides an opportunity, and the debate about marriage is no exception. We have surveyed the landscape and laid out some of the potential consequences of redefining marriage. The campaign to redefine marriage is going strong, yet the Bush Administration can still act boldly to reaffirm marriage. "Compassionate conservatism" does not counsel timidity in the face of this challenge, though cries of "heartless" are sure to follow. To reaffirm marriage is a truly compassionate agenda. To do justice to marriage in American law benefits all Americans. As the issue becomes inescapable, we hope the Bush Administration will provide the leadership needed to make a positive difference.

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95. See *supra* Part I.C.

96. See *Conferences and Events*, at <http://www.un.org/events> (last visited on Nov. 10, 2000).

97. For an analysis of the ICC, see Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. INT'L. L. & PRAC. 151 (1999).

