

# DOMA AND MARRIAGE

*William C. Duncan\**

## I. INTRODUCTION

Past decades have witnessed a dizzying series of legal developments calling into question foundational social institutions such as the family. The family, valued as perhaps the archetypal mediating institution,<sup>1</sup> has been subjected to increasingly deep and profound challenges to its nature and purpose. Such challenges are not without precedent. A certain revolutionary temperament has always seen the family as a significant rival because of its claims to human loyalty independent of the State.<sup>2</sup> Totalitarian societies, for instance, have been long characterized by attempts to deconstruct (and reconstruct) the family.<sup>3</sup> Dystopian literature routinely portrays societies that have destroyed or dramatically reconceptualized the ties between mothers and fathers, parents and children, husbands and wives.<sup>4</sup>

Recent challenges to existing family norms have been directed at the institution's core concepts such as permanence, fidelity, and most recently, complementarity.<sup>5</sup> No-fault divorce enlists the state as an ally to a spouse seeking to end a marriage.<sup>6</sup> The increasing prevalence of non-marital cohabitation, with its significantly different norms of duration and exclusivity, has resulted in legal recognition of marriage substitutes.<sup>7</sup> Most recently, court decisions have attempted to remove any vestige of sex difference from marriage, with the inevitable

---

\* Director, Marriage Law Foundation.

<sup>1</sup> See generally RICHARD JOHN NEUHAUS & PETER BERGER, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977) (describing the family as one of four principle mediating institutions).

<sup>2</sup> See ROBERT NISBET, *TWILIGHT OF AUTHORITY* 217 (1975).

<sup>3</sup> ROBERT NISBET, *THE QUEST FOR COMMUNITY* 203 (1953).

<sup>4</sup> See generally ANTHONY BURGESS, *THE WANTING SEED* (1962); LOIS LOWRY, *THE GIVER* (1993); GEORGE ORWELL, *1984* (1948); YEVGENY ZAMYATIN, *WE* (1972).

<sup>5</sup> William C. Duncan, *Family as the Fundamental Unit in Marriage and Divorce, in FAVORING THE FAMILY* 77 (Carrie Burton ed., 2003) [hereinafter *Family*]; see also William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119 (2003).

<sup>6</sup> *Family*, supra note 5, at 79.

<sup>7</sup> See generally William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2004) (discussing the statistics of non-marital cohabitation and associated legal trends).

elimination of the natural link between marriage, procreation and child-rearing.<sup>8</sup>

While attempts to redefine or weaken marriage and family are not new, the pace of recent changes, accompanied by relatively few apparent misgivings (at least at the official level), is unprecedentedly unsettling. However, the ease with which other major changes in family law have been accepted may not extend to the current trend in favor of redefining marriage to include same-sex couples. This article will survey popular responses to this novel definition of marriage. It will then discuss prospects for the long-term success of the effort to reaffirm the legal definition of marriage as the union of one man and one woman.

## II. REAFFIRMING MARRIAGE

After the Hawaii Supreme Court held in 1993 that marriage was a form of sex discrimination,<sup>9</sup> it seemed eminently plausible that other states would soon be faced with claims by their citizens that same-sex marriages they contracted in Hawaii should be recognized. In response to this possibility, two states introduced legislation in 1995 to prevent their courts from granting recognition to same-sex marriages contracted in another state.<sup>10</sup> When Utah's proposal was enacted, it became the nation's first "Defense of Marriage Act."<sup>11</sup> This designation was actually created in 1996 for federal legislation that defined marriage as the union of a man and a woman for purposes of federal law and provided, pursuant to the United States Constitution's Full Faith and Credit Clause, that a state could not be *required* to recognize a same-sex marriage contracted in another state.<sup>12</sup> That same year, fourteen states

---

<sup>8</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (holding that the definition of marriage violates the state constitution's due process and equal protection provisions); *Li v. State*, No. 0403-03057, 2004 WL 1258167, at \*10 (Or. Cir. Ct. Apr. 20, 2004) (holding that the definition of marriage violates the state constitution's privileges and immunities clause); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004) (holding that the definition of marriage violates the state privileges and immunities provisions); *Andersen v. King County*, No. 04-2-04964-4 SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004) (holding that the definition of marriage violates the state constitution's due process and privileges and immunities provisions and relying almost exclusively on federal precedent).

<sup>9</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (Levinson, J., plurality) (holding that marriage statutes require strict scrutiny because they discriminate on the basis of sex and remanding the case for Hawaii to prove that the statutes furthered a compelling interest).

<sup>10</sup> David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the 'Same-Sex Marriage' Debate*, 32 CREIGHTON L. REV. 3, 6-7 (1998).

<sup>11</sup> UTAH CODE ANN. § 30-1-4 (Supp. 1998); Coolidge & Duncan, *supra* note 10, at 7.

<sup>12</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1997)); *see also* U.S. CONST. art. IV, § 1.

enacted legislation to prevent such recognition.<sup>13</sup> The momentum of these legislative developments came from the trial on remand of the Hawaii case and the subsequent decision that the state had failed to meet its burden of providing a compelling justification for the state's marriage law.<sup>14</sup>

While the Hawaii case was pending on appeal, six more states enacted marriage recognition laws in 1997 and 1998.<sup>15</sup> In 1998, the Hawaii decision,<sup>16</sup> and a similar one from an Alaska trial court,<sup>17</sup> precipitated the legislatures of both states to propose state constitutional amendments defining marriage. Both proposed amendments were approved in November 1998.<sup>18</sup>

While the momentum of the effort to enact marriage recognition laws seemed to slow for a time, some laws were still enacted. Perhaps most well known is California's experience. After repeated attempts had failed to secure legislation in the state Assembly, a petition drive put a marriage definition proposition on the March 2000 ballot.<sup>19</sup> The measure, Proposition 22, was approved by an overwhelming margin.<sup>20</sup> Unresponsive legislatures led to popularly proposed and enacted state amendments in Nevada and Nebraska as well.<sup>21</sup> By this time, legislative and popular efforts had begun to take notice of the creation of civil unions in Vermont, a marriage equivalent status for same-sex couples which had been required by court order.<sup>22</sup>

By the time the Massachusetts Supreme Judicial Court (SJC) ruled on a case challenging the Commonwealth's definition of marriage in 2003,<sup>23</sup> thirty-eight states had laws prohibiting the recognition of same-

---

<sup>13</sup> The Heritage Found., *Assessment of the Language used in State Statutes*, at <http://www.heritage.org/Research/Family/Dataforall50States.cfm> (last visited Jan. 31, 2005) [hereinafter *Assessment*].

<sup>14</sup> *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at \*16 (Haw. Cir. Ct. Dec. 3, 1996).

<sup>15</sup> *Assessment*, *supra* note 13.

<sup>16</sup> *Miike*, 1996 WL 694235, at \*16.

<sup>17</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

<sup>18</sup> David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 628 (2001).

<sup>19</sup> *Id.* at 631-32.

<sup>20</sup> Evelyn Nieves, *The 2000 Campaign: Those Opposed to 2 Initiatives Had Little Chance from Start*, N.Y. TIMES, Mar. 9, 2000, at A27.

<sup>21</sup> Coolidge & Duncan, *supra* note 18, at 632 n.39.

<sup>22</sup> *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that the state constitution required the benefits of marriage to be extended to same-sex couples); 1999 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15 §§ 1201-1207 (1999)); VT. STAT. ANN. tit. 18 §§ 5160-5169 (1999) (creating civil unions).

<sup>23</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

sex marriages.<sup>24</sup> In its decision, the SJC stated that the state constitution mandated a new definition of marriage: “the voluntary union of two persons, as spouses, to the exclusion of all others.”<sup>25</sup> The ruling in that case led to a renewed effort to clarify state laws. Within a short time, thirteen states proposed (by legislation or petition) state constitutional amendments related to marriage in order to prevent similar rulings in their own states and to bolster their expressed policy of refusing to recognize out of state same-sex marriages.<sup>26</sup> All thirteen were approved in the 2004 elections, eleven on November 2.<sup>27</sup> Although most were enacted in states that already had statutes to the same effect, Oregon was an important exception. There, a trial court decision had called the state’s marriage law into question<sup>28</sup> and other precedent suggested that it might not survive judicial review.<sup>29</sup> The approval of the Oregon amendment brought the total number of states with legal affirmations of marriage to forty (New Hampshire enacted a statute after the Massachusetts decision).<sup>30</sup> As of January 2005, forty-two states have legal affirmations of marriage, and others are likely to follow.<sup>31</sup>

### III. PROSPECTS FOR DOMA AND MARRIAGE

Proponents of redefining marriage are unlikely to cease their efforts, even in the face of overwhelming popular support for marriage as currently understood. Their efforts are bolstered by at least two major factors illustrated by the public debates over the most recent set of state amendments: elite hostility and legal supremacy.

#### A. *Elite Hostility*

The current iteration of elite opinion favors a view of marriage and family that is at odds with traditional understandings but extremely sympathetic to the claims of those who would redefine marriage. This

---

<sup>24</sup> ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Relationships*, 38 FAM. L. Q. 339, 397 (2004).

<sup>25</sup> *Goodridge*, 798 N.E.2d at 969.

<sup>26</sup> Jonathan Rauch, *Saying No to ‘I Do’*, WALL ST. J., Dec. 27, 2004, at A8.

<sup>27</sup> *Id.*

<sup>28</sup> *Li v. State*, No. 0403-03057, 2004 WL 1258167, at \*10 (Or. Cir. Ct. Apr. 20, 2004).

<sup>29</sup> See generally William C. Duncan & David Orgon Coolidge, *Marriage and Democracy in Oregon: The Meaning and Implications of Tanner v. Oregon Health Sciences University*, 36 WILLAMETTE L. REV. 503 (2000).

<sup>30</sup> N.H. REV. STAT. ANN. § 457.3 (2004).

<sup>31</sup> Nat’l Conference of State Legislatures, *Same Sex Marriage*, at <http://www.ncsl.org/programs/cyf/samesex.htm#DOMA> (last modified Jan. 25, 2005); Kavan Peterson, *50 State Rundown on Gay Marriage Laws*, at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=true> (Nov. 3, 2004).

view holds that what is key to defining family is not formalistic structure based on natural relationships, but rather the process of intimate interactions that occur among autonomous individuals.<sup>32</sup> Thus, family is defined by what it does (provide companionship or child care) rather than by what it is (a husband and wife with children). Since this view exalts chosen behavior over naturally occurring obligations, it is necessarily adult-centered and hostile to constraints.

While not likely embraced by a majority of the public, this view is firmly entrenched in certain elite circles such as academia, journalism, and the legal profession. Within these circles, and among those influenced by them, adherence to a more traditional understanding of marriage and family has been effectively stigmatized as mere nostalgia at best or mean-spirited animus at worst. Thus, even policymakers who nominally oppose redefining marriage are often tepid or outright hostile to enacting marriage definitions into law. For instance, Ohio's United States Senators, who claim to support the traditional marriage structure, initially opposed a proposed federal marriage amendment for timing reasons<sup>33</sup> and also opposed a proposed state marriage amendment for being too broad.<sup>34</sup> Opposition to Utah's proposed amendment was led by the state's Attorney General (a Republican).<sup>35</sup> Major newspapers were overwhelmingly hostile to the recent state amendments.<sup>36</sup> In Utah, where two-thirds of voters supported the amendment,<sup>37</sup> not one daily newspaper endorsed the amendment.<sup>38</sup>

This hostility allows for a broad dissemination of the arguments in favor of redefining marriage as these views are widely held and expressed by the elite in influential positions.

---

<sup>32</sup> See William C. Duncan, "Don't Ever Take a Fence Down": The "Functional" Definition of Family—Displacing Marriage in Family Law, 3 J.L. & FAM. STUD. 57 (2001).

<sup>33</sup> Jonathan Riskind, *Ohio's Senators Took No Comfort in Amendment Fight*, THE COLUMBUS DISPATCH, July 18, 2004, at 05C.

<sup>34</sup> Laura A. Bischoff, *Ohio Senators Oppose Issue 1*, DAYTON DAILY NEWS, Oct. 7, 2004, at B3.

<sup>35</sup> David Crary, *Voters in 11 States Will Consider Bans on Same-sex Marriage*, STAR LEDGER, Oct. 31, 2004, at 4.

<sup>36</sup> LifeSite, *Voters in Eleven States Ban Homosexual "Marriage" Despite Massive Media Bias*, at <http://www.lifesite.net/ldn/2004/nov/04110304.html> (last visited Jan. 25, 2005); see also Gay & Lesbian Alliance Against Defamation (GLAAD), *Pro/Anti-Amendment Endorsement Counts by State*, at [http://www.glaad.org/publications/resource\\_doc\\_detail.php?id=3747](http://www.glaad.org/publications/resource_doc_detail.php?id=3747) (last visited Jan. 25, 2005) [hereinafter GLAAD].

<sup>37</sup> *State Constitutional Amendments Defining Marriage*, at <http://www.washingtonpost.com/wp-srv/elections/2004/stateinitiatives/> (last visited Jan. 25, 2005).

<sup>38</sup> GLAAD, *supra* note 36 (listing state newspapers that have endorsed or opposed state marriage amendments).

### B. Legal Supremacy

The other crucial factor militating in favor of a redefinition of marriage has been the success of the proponents in the courts. A number of state courts have not hesitated to overturn statutes or common law to redefine marriage. Thus, even though the state of Washington enacted a marriage statute in 1998, two trial courts in the state have ruled the law unconstitutional.<sup>39</sup> When Nebraska enacted a marriage amendment, the amendment's opponents found a court sympathetic to their claim that the amendment violated the federal constitution.<sup>40</sup> In the recent campaign season, legal threats to proposed amendments played a major role in many of the state elections, with lawsuits in eleven states and threatened lawsuits in Georgia, Ohio, Oklahoma, and Utah.<sup>41</sup> As long as same-sex marriage advocates have recourse to sympathetic courts to annul legislation or popular enactments, they have the upper hand in the long-term.

Obviously, this could be alleviated by courts and advocates deciding to defer to majority wisdom on this question. There are reasons to doubt this will happen. Having framed their claims for redefinition in the language of civil rights, advocates can see their opponents as retrograde or bigoted. Many courts have accepted a relentless logic that looks skeptically at restrictions of individual choice, no matter how dramatic the ramifications of abandoning those restrictions. This has produced a revolutionary zeal that would do away with traditional institutions and their defenders. Supported by a powerful ideology of egalitarianism that cannot allow for compromise, the movement for same-sex marriage is not likely to be stopped by natural realities such as sex difference and male-female procreation.

## IV. VOICE OF THE PEOPLE

There is a countervailing reason for optimism in the face of these challenges—the optimism that marriage might enjoy a renaissance.

---

<sup>39</sup> Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at \*16 (Wash. Super. Ct. Sept. 7, 2004); Andersen v. King County, No. 04-2-04964-4 SEA, 2004 WL 1738447, at \*11 (Wash. Super. Ct. Aug. 4, 2004).

<sup>40</sup> See Citizens for Equal Prot., Inc. v. Bruning, 290 F. Supp. 2d 1004 (D. Neb. 2003) (rejecting the state's motion to dismiss challenge to Nebraska's marriage amendment and holding that plaintiffs had made cognizable equal protection and bill of attainder claims).

<sup>41</sup> Kavan Peterson, *50 State Rundown on Gay Marriage Laws*, Stateline.org, at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=true> (Nov. 3, 2004); Cara Weiser, *Same-Sex Marriage Ban Creates Bump in the Road for Utah Couple*, THE DAILY UTAH CHRON., at <http://www.dailyutahchronicle.com/main.cfm?include=subApplication&subApplicationName=quickRegister&fuse=registrationOrLoginRequired&thereferer=http%3A//www.dailyutahchronicle.com/news/2004/03/04/News/SameSex.Marriage.Ban.Creates.Bump.In.The.Road.For.U.Couple-626257.shtml> (last visited Jan. 31, 2005).

Although past changes in family structure have been accepted without heavy resistance, it is increasingly clear that those changes have not always equated with progress. This may lead to caution before accepting the next “Great Leap Forward.”<sup>42</sup> Indeed, the enactment of defense of marriage laws in forty-two states within a ten-year period<sup>43</sup> signals that majorities may now be willing to draw the line against further family deconstruction.

The fact that the “voice of the people” still supports marriage in overwhelming numbers suggests that the collective wisdom of humanity may be beginning to get its due. Although the future is still uncertain, there is reason for hope.

---

<sup>42</sup> See generally *Great Leap Forward*, THE COLUMBIA ELECTRONIC ENCYCLOPEDIA (6th ed. 2004), at <http://www.infoplease.com/ce6/history/A0821672.html> (last visited Jan. 31, 2005) (summarizing the failure of Communist China’s “Great Leap Forward”).

<sup>43</sup> Nat’l Conference of State Legislatures, *Same Sex Marriage*, at <http://www.ncsl.org/programs/cyf/samesex.htm#DOMA> (last modified Jan. 25, 2005).