

SPEAKING UP FOR MARRIAGE

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In a weekly radio address in 2004, President George W. Bush said: “If courts create their own arbitrary definition of marriage as a mere legal contract and cut marriage off from its cultural, religious, and natural roots, then the meaning of marriage is lost and the institution is weakened.”¹ Although fewer and fewer politicians are willing to speak up so forthrightly for the traditional understanding of marriage, President Bush was right to do so. Ultimately, his steadfast defense of marriage as the union of a man and a woman may be among the Administration’s most important contributions.

I. MARRIAGE IN 2000

The legal definition of marriage became an issue for President Bush even before his election.² On the ballot for the March 2000 election in California was Proposition 22, a citizen initiative to add to California’s Family Code a provision stating, “Only marriage between a man and a woman is valid or recognized in California.”³ As the issue gained national prominence,

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1. The President’s Radio Address, 40 WEEKLY COMP. PRES. DOC. 1253, 1253–54 (July 10, 2004).

2. This Essay will primarily address the question of whether marriage is to be redefined to include same-sex couples. For a broader review of family themes in the Bush Administration, see Allan Carlson, *Discounting Family Values*, AM. CONSERVATIVE, Nov. 17, 2008, at 12, available at <http://www.amconmag.com/article/2008/nov/17/00012/>. An important marriage-related development beyond the scope of this Essay is President Bush’s Healthy Marriage Initiative, which promoted marriage education services for couples who chose to marry, as a way of encouraging protection for children and spouses from poverty. See Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., *The Healthy Marriage Initiative*, <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Feb. 12, 2009).

3. CAL. FAM. CODE § 308.5 (2000).

the legal definition of marriage arose in debates and commentary during the 2000 presidential campaign.⁴

Although the first lawsuit challenging a state's definition of marriage as the union of a man and a woman had been raised decades before, resulting in a United States Supreme Court decision,⁵ the issue assumed truly national stature in 1993. That year, the Hawaii Supreme Court issued a plurality opinion narrowly deciding that the state's marriage law was presumptively unconstitutional as a form of sex discrimination.⁶ The court remanded the case to the circuit court for a hearing on whether the state had a compelling interest in maintaining its marriage law. The circuit court, predictably, found that it did not.⁷ The passage of a state constitutional amendment, however, rendered the decision moot and reserved to the legislature the ability to define marriage as the union of a man and a woman.⁸

But before the amendment passed, the Hawaii courts' decisions raised a major national issue: If Hawaii began to issue marriage licenses to same-sex couples, would other states be obligated to recognize these marriages? This question spawned

4. See David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 624–26 (2001).

5. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1972). A dismissal for want of a substantial federal question is a decision on the merits, and therefore binding on lower courts. See *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975). Interestingly, the United States Supreme Court decided to dismiss the appeal in *Baker* just five years after its landmark ruling in *Loving v. Virginia*, 388 U.S. 1 (1967), suggesting that the Court did not see a link between the constitutional mandate to remove racial restrictions on marriage and a fundamental redefinition of marriage as the union of any two persons.

6. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (plurality opinion).

7. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

8. See HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). While the lower court decision was pending review in Hawaii, a trial court in Alaska issued a decision to the same effect (and added, for good measure, that the marriage statute impinged upon a constitutional right to choose one's "life partner"). *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). The Alaska decision was also reversed by a state constitutional amendment. See ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). See generally 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) (describing the origins and history of the Alaska marriage amendment and analyzing its constitutionality).

a wave of law journal articles arguing in the affirmative,⁹ a series of state laws (thirty-seven in total) enacted to prevent such a result,¹⁰ and ultimately the federal Defense of Marriage Act (DOMA).¹¹ Overwhelming margins in both the House (342 to 67) and the Senate (84 to 14) approved the Act, and President Bill Clinton signed it into law on September 21, 1996.¹² DOMA defined marriage for federal purposes as the union of a man and a woman and asserted Congress's authority to give parameters to the Constitution's Full Faith and Credit Clause by allowing states to refuse to recognize same-sex marriages contracted in other states.¹³

In the wake of DOMA, activist groups in New England sued to invalidate Vermont's marriage law. The Vermont Supreme Court ultimately decided the case in 1999.¹⁴ Although the court rejected the plaintiffs' invitation to redefine marriage, it did interpret the Vermont Constitution as requiring the state to extend the benefits of marriage to same-sex couples.¹⁵ In response, the Vermont legislature created a legal status, "civil union," for same-sex couples. Now, wherever the state statutes referred to marriage or spouses, the statutes would include partners in a civil union.¹⁶

II. MARRIAGE 2001–2008

A few months after President Bush's inauguration, the group responsible for the Vermont litigation launched a carefully planned marriage lawsuit in Massachusetts, *Goodridge v. Depart-*

9. See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 256 (1998) (listing articles).

10. John King & Dana Bash, *Bush: States shouldn't change marriage*, CNN, Jan. 21, 2004, <http://www.cnn.com/2004/ALLPOLITICS/01/20/same.sex.marriage/index.html>; see also Memorandum from Johanna Mihok, Marriage Law Project, to Anne Collins, Marriage Law Project, State DOMA's (Nov. 20, 2004), available at <http://marriagelaw.cua.edu/DOMA.pdf> (collecting the relevant statute and constitutional provision for each state).

11. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

12. See Coolidge & Duncan, *supra* note 4, at 630 n.34.

13. See Defense of Marriage Act.

14. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

15. *Id.* at 886–88.

16. See VT. STAT. ANN. tit. 15, § 1204 (1999).

ment of Public Health.¹⁷ Although the plaintiffs failed at the trial court level, in 2003 the Massachusetts Supreme Judicial Court ruled 4-3 that the Massachusetts Constitution mandated a redefinition of marriage.¹⁸ Coming on the heels of, and generously citing, *Lawrence v. Texas*,¹⁹ the United States Supreme Court's ruling invalidating state sodomy laws, the *Goodridge* litigation dramatically returned same-sex marriage to the national stage.

Soon after *Goodridge*, activist groups launched similar lawsuits in several states. When deciding which states were most likely to hold in their favor, the activists considered such factors as the openness of the state's judiciary to creative interpretation of constitutional principles, the difficulty of amending the state constitution in response to a ruling adverse to traditional marriage, and the state's general social trends regarding marriage and the family.²⁰

But the record for such lawsuits was mixed. In fact, the Eighth Circuit and appellate courts in Indiana, Maryland, New York, and Washington all upheld statutes defining marriage as the union of a man and a woman.²¹ In 2008, however, the high courts of California and Connecticut ruled by one-vote margins that these states had to redefine marriage.²²

Concurrent with the continued litigation against the inherited understanding of marriage, a new effort arose to provide

17. 798 N.E.2d 941, 950 (Mass. 2003).

18. *Id.*

19. 539 U.S. 558 (2003).

20. See William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29, 38 (2006); Maggie Gallagher, *Europe's marriage crisis*, TOWNHALL.COM, Feb. 28, 2006, http://townhall.com/columnists/MaggieGallagher/2006/02/28/europes_marriage_crisis (noting that states in which couples were most likely to postpone marriage and having children were "among the first states [in which] gay marriage advocates chose to pursue court-created gay marriage").

21. See *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571, 673 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 338 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

22. See *In re Marriage Cases*, 183 P.3d 384, 452-53 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). The New Jersey Supreme Court, on the other hand, gave the legislature a choice: Within 180 days, it had either to create a new statutory scheme extending the benefits of marriage of same-sex couples or to allow them simply to marry. See *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006).

state constitutional protection to existing marriage laws. After their legislatures failed to enact marriage statutes, the citizens of Nebraska and Nevada amended their constitutions through initiative.²³ In 2004, the small group of states whose constitutions had been amended to preserve the traditional definition of marriage (by now including Alaska and Hawaii) grew much larger. Shortly after *Goodridge*, the mayor of San Francisco began to offer marriage licenses to same-sex couples, contravening California's Proposition 22.²⁴ Perhaps as a response to these developments, the legislatures or voters (acting through initiative) of thirteen states placed proposed marriage amendments on the ballot in 2004. The voters approved all of them.²⁵ Between 2005 and 2007, another ten states approved marriage amendments.²⁶ Most recently, voters in Arizona, California, and Florida enacted marriage amendments in November 2008.²⁷

As already noted, the California marriage saga began with Proposition 22 and continued with San Francisco's disregarding it. This latter event prompted a full-scale legal attack on Proposition 22's validity. A few months after the California Supreme Court ruled that the city lacked the authority to disregard state marriage law,²⁸ the superior court in San Francisco County held that the Family Code provisions limiting marriage to opposite-sex couples "violate[d] the equal protection clause of the California Constitution."²⁹ The court of appeals re-

23. See NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21.

24. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 464–65 (2004).

25. See ARK. CONST. amend. 83; GA. CONST. art. I, § 4, ¶ 1; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29.

26. See ALA. CONST. art. I, § 36.03; COLO. CONST. art. II, § 31; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

27. See ARIZ. CONST. art. XXX, § 1; CAL. CONST. art. I, § 7.5; FLA. CONST. art. I, § 27. The *Goodridge* decision and its reliance on *Lawrence v. Texas* and other federal authority also prompted efforts to amend the U.S. Constitution in 2004 and 2006. See *infra* Part III.

28. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 499 (2004).

29. *In re Marriage Cases*, No. 4365, 2005 WL 583129, at *12 (Cal. Super. Ct. Mar. 14, 2005), *rev'd*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008).

versed,³⁰ but in May 2008 the California Supreme Court finally issued a 4-3 ruling that California's definition of marriage was unconstitutional.³¹ The people of California responded by approving Proposition 8 in November 2008. The proposition amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."³²

The campaign for Proposition 8 highlighted a development that had emerged during the Bush Administration's tenure—the increasing conflict between laws giving legal status to same-sex couples and the rights of third parties, especially religious believers and organizations. For instance, in the wake of the *Goodridge* decision, Massachusetts Catholic Charities sought an exemption from a state law requiring adoption agencies to make no distinctions on the basis of sexual orientation, because it could not do so consistent with its religious mandate.³³ The legislature refused the exemption, and Catholic Charities withdrew from providing adoption services.³⁴ The *Goodridge* court's equation of parenting by same-sex couples and married couples seemed to preclude any judicial relief.³⁵

Redefining marriage in Massachusetts also required public schools to modify their curricula to reflect the change, invariably provoking concern from parents. In a recent case, parents of young elementary school students objected to books meant to

30. *In re Marriage Cases*, 49 Cal. Rptr. 3d at 726–27.

31. *In re Marriage Cases*, 183 P.3d at 452–53. In reaching this decision, the court first held that sexual orientation was a suspect classification and that limiting marriage to opposite-sex couples impinged upon a fundamental privacy interest, triggering strict scrutiny. *Id.* at 440–46. The court then concluded that the state's interest was not "sufficiently compelling" under this standard of review. *Id.* at 452.

32. CAL. CONST. art I, § 7.5.

33. See Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 CHILD. LEGAL RTS. J. 1 (2007).

34. See Maggie Gallagher, *Banned in Boston*, WKLY. STANDARD, May 15, 2006, at 20; John Garvey, *State putting Church out of adoption business*, BOSTON GLOBE, Mar. 14, 2006, at A15.

35. See Avila, *supra* note 33, at 11 ("While not directly concerning the question of same-sex adoption, the ruling in the *Goodridge* case will undoubtedly have a long term and far-reaching impact In effect the *Goodridge* majority declared . . . that the defense of traditional marriage is an invidious threat to the common good, and that its adherents espouse an intolerable public evil.").

teach children to respect marriages and families involving same-sex couples.³⁶ The parents argued that the school's refusal to give them advance notice and the ability to opt out of instruction regarding same-sex couples violated the Free Exercise Clause and their substantive parental and privacy due process rights.³⁷ The First Circuit, however, rejected their claims, holding that although the plaintiffs' "sincerely held religious beliefs were deeply offended, . . . they have not described a constitutional burden on their rights, or on those of their children."³⁸

Similarly, shortly after the California Supreme Court redefined marriage, the court heard a case involving a doctor who had referred a woman in a same-sex relationship to another doctor for in vitro fertilization because of his religious concerns about participating in the procedure.³⁹ The court stated that even if the civil rights law under which the plaintiffs sued were subject to strict scrutiny, the doctor still could claim no religious exemption because California's compelling interest in ending sexual orientation discrimination would outweigh even a "substantial[] burden" on religious belief.⁴⁰

In New Jersey, the Division on Civil Rights found probable cause to charge a Methodist camp association with violating New Jersey's antidiscrimination laws after the association declined to allow a same-sex couple to use a portion of its property for a civil union ceremony.⁴¹ In New Mexico, a member of a same-sex relationship successfully sued a wedding photographer for declining to photograph her commitment ceremony.⁴²

36. See *Parker v. Hurley*, 514 F.3d 87, 92–93 (1st Cir. 2008).

37. See *id.* at 90.

38. *Id.* at 99.

39. See *N. Coast Women's Care Med. Group v. San Diego County Superior Court*, 189 P.3d 959, 964 (Cal. 2008).

40. *Id.* at 968.

41. See Press Release, Div. on Civil Rights, Office of the Att'y Gen., N.J. Dep't of Law & Pub. Safety, Division on Civil Rights Finds Probable Cause in Ocean Grove Camp Meeting Association Case on Civil Union Ceremonies (Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a.html>. See generally *Ocean Grove Camp Meeting Ass'n v. Papaleo*, Civil Action No. 07-3802 (JAP), 2007 WL 3349787, slip op. at *1–2 (D.N.J. Nov. 7, 2007) (describing the history of the Ocean Grove Camp Meeting Association and the origins of the litigation).

42. Willock, HRD No. 06-12-20-0685, slip op. at 6, 19 (N.M. Human Rights Comm'n April 9, 2008), available at <http://www.law.georgetown.edu/moralvaluesproject/News/documents/ElainePhotographycase.pdf>.

These examples are not exhaustive, and further legal recognition of same-sex relationships as marriages (or an equivalent) will probably create additional conflicts for religious liberty.

These conflicts illustrate the logical extension of the idea that redefining marriage is a civil right—that those who oppose redefinition are bigots and discriminators who merit legal and social obloquy. Thus, it should not have been surprising that following the approval of Proposition 8, advocacy groups petitioned the California Supreme Court to invalidate the vote, arguing that “by effectively eliminating the courts’ ability to enforce the guarantee of equal protection for gay and lesbian persons with respect to the fundamental right to marry, Proposition 8 substantially alters our constitutional scheme and thus may not be enacted through the initiative process.”⁴³ California’s attorney general went further.⁴⁴ Proposition 8, he charged, impinged upon an unwritten right, inherent in Article I of the California Constitution, so fundamental that it cannot even be the subject of initiative amendment by California’s citizens;⁴⁵ instead, the court should ultimately decide whether the amendment, already approved by the voters, “sufficiently furthers the public health, safety, and welfare.”⁴⁶ Because the court

43. Amended Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities at 18, *Strauss v. Horton*, No. S168047 (Cal. Nov. 5, 2008).

44. *See* Answer Brief in Response to Petition for Extraordinary Relief at 77–78, *City & County of San Francisco v. Horton*, No. S168078 (Cal. Dec. 19, 2008) [hereinafter Answer Brief] (“Although petitioners have couched their complaint in terms of the amendment-revision dichotomy, this litigation, perhaps for the first time, poses a more fundamental question: Is the initiative-amendment power wholly unfettered by the California Constitution’s protection of the People’s fundamental right to life, liberty, and privacy?”).

45. *See id.* at 75–90.

46. *Id.* at 89. This argument strikes at the rule of law. As concisely described by John Adams in the Massachusetts Constitution, government should be “a government of laws and not of men.” MASS. CONST. pt. I, art. XXX; *see also* *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 463 n.1 (Cal. 2004). Such government consists of “uniform and predictable rules of conduct within a jurisdiction.” FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 291 (1985). California’s constitution provides a clear means for its own amendment, and the proponents of Proposition 8 availed themselves of these means to express their reasonable belief that the California Constitution should provide protection to the understanding of marriage as a union of a man and a woman. But the theories advanced in support of invalidating Proposition 8 would introduce subjectivity and confusion into the amendment process, under-

had already struck down Proposition 22 on these grounds, it should likewise strike down Proposition 8.⁴⁷ In effect, the premise of the California attorney general's challenge to Proposition 8 is simply that the understanding of marriage as the union of a man and a woman is now beyond the pale.

Nonetheless, at the end of the Bush Administration, a nationwide snapshot of marriage law would have revealed that although two states had redefined marriage to include same-sex couples by judicial decree, four state high courts had refused to do so, thirty states contain marriage amendments in their constitutions, and forty-one states had specific statutory provisions defining marriage as the union of a man and a woman.⁴⁸ Thus, despite the prominence of the topic in public debate, the laws of the United States overwhelmingly endorse our inherited understanding of marriage.

cutting the rule of law. They would thrust the court into the unnecessary position of determining whether any amendment not only complied with the mandate of the California Constitution (an appropriately objective inquiry that comports with the rule of law), but also whether it affected matters on which policymaking was forbidden to the public either because of super-constitutional principles (in the attorney general's proposed formulation) or because a law otherwise simple and narrow is transformed into a major structural change because it limits the courts' discretion (as the petitioners propose). Such an inquiry would be inherently subjective. Ironically, the California Supreme Court seemed to have understood this in its decision on the validity of the San Francisco marriage licenses. *Cf. Lockyer*, 95 P.3d at 463 ("[A]lthough the present proceeding may be viewed by some as presenting primarily a question of the substantive legal rights of same-sex couples, in actuality the legal issue before us implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders. In short, the legal question at issue—the scope of the authority entrusted to our public officials—involves the determination of a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being 'a government of laws, and not of men' (or women).").

47. See Answer Brief, *supra* note 44.

48. See *supra* notes 6–8, 10, 13–14. In addition to those statutes, the following define marriage without specifying the effect of out-of-state same-sex marriages: MD. CODE ANN., FAM. LAW § 2-201 (2006) and WYO. STAT. ANN. § 20-1-101 (2007). Since the Obama Administration began, however, the Iowa Supreme Court ruled unanimously that the Iowa Constitution mandated a redefinition of marriage in that state. *Varnum v. Brien*, No. 07-1499, 2009 WL 874044 (Iowa Apr. 3, 2009). Additionally, the Vermont Legislature approved a bill that would redefine marriage in that state. S. 115, 2009–2010 Leg. Sess. (Vt. 2009).

III. MARRIAGE AND THE ADMINISTRATION

Two factors necessarily limited the President's role in these developments. First, marriage policymaking typically occurs at the state level. DOMA largely settled areas of federal authority, such as defining marriage for federal law purposes, before President Bush took office. In the case of the federal marriage amendment, although the President could offer his opinion, he had no formal role because the amendment process is left to Congress and the States.

Second, advocacy organizations have further limited the Administration's role by purposely avoiding bringing lawsuits in federal courts because they believe the current U.S. Supreme Court would not be sympathetic to their claims. Of course, this is not to say that they do not believe that the courts should interpret the Constitution to support their ideology—they do.⁴⁹ Rather, they tactically have avoided federal litigation in the short term because it seems unlikely to succeed at this point. Unsuccessful federal litigation could create negative precedent that would hinder the ultimate goal of a national redefinition of marriage. Thus, these groups are content to wait.

Still, some attorneys and individuals, acting on their own and contrary to the wishes of larger advocacy groups, have challenged the traditional definition of marriage in the federal courts. In some cases, the larger advocacy groups have successfully opposed the litigation because it threatens to interfere with their avoidance-for-now strategy.⁵⁰ In the isolated cases that did reach the federal courts, however, President Bush's steadfast support for marriage may have been directly helpful. The Department of Justice worked diligently—and in the end successfully—to hold off these challenges to DOMA.⁵¹ The decisions in these cases may very well provide persuasive precedent when other federal courts inevitably are asked to weigh in on the constitutionality of marriage laws.

49. See Duncan, *supra* note 20, at 42.

50. See *id.* at 39–43.

51. See *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Less directly, but still importantly, President Bush was strong and consistent in his support for the most significant federal initiative related to the definition of marriage—the proposed federal marriage amendments. The first amendment effort came in response to the *Goodridge* decision and the actions of the San Francisco officials.⁵² Shortly after *Goodridge*, the President alluded to the decision in his January 2004 State of the Union address: “Activist judges, however, have begun redefining marriage by court order If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.”⁵³ He also discussed the San Francisco events in a February press conference.⁵⁴ That same month, the President called on Congress to pass a federal marriage amendment, noting the possibilities that a state might be forced to recognize another’s same-sex marriages or that a federal court might rule DOMA invalid.⁵⁵ He said that America’s freedom “does not require the redefinition of one of our most basic social institutions,”⁵⁶ and in a March address to the National Association of Evangelicals, the President explained further:

Ages of experience have taught humanity that the commitment of a husband and wife to love and to serve one another promotes the welfare of children and the stability of society. And Government, by recognizing and protecting marriage, serves the interest of all. It is for that reason I

52. The proposed amendment read:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

S.J. Res. 40, 108th Cong. (2004); accord H.R.J. Res. 106, 108th Cong. (2004). There had been other amendments introduced previously that did not result in a vote. See S.J. Res. 26, 108th Cong. (2003); H.R.J. Res. 56, 108th Cong. (2003).

53. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 88 (Jan. 20, 2004).

54. See Remarks Prior to Discussions With President Zine El Abidine Ben Ali of Tunisia and an Exchange With Reporters, 1 PUB. PAPERS 240, 241 (Feb. 18, 2004).

55. See Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 1 PUB. PAPERS 263, 263–64 (Feb. 24, 2004).

56. *Id.* at 264.

support a constitutional amendment to protect marriage as the union of a man and a woman.⁵⁷

Congress held hearings on a proposed amendment in May 2004.⁵⁸ The amendment was reintroduced in July.⁵⁹ Later that month, the President devoted his weekly radio address to making the case for the amendment:

When judges insist on imposing their arbitrary will on the people, the only alternative left to the people is an amendment to the Constitution—the only law a court cannot overturn. A constitutional amendment should never be undertaken lightly. Yet to defend marriage, our Nation has no other choice.

A great deal is at stake in this matter. The union of a man and woman in marriage is the most enduring and important human institution, and the law can teach respect or disrespect for that institution. If our laws teach that marriage is the sacred commitment of a man and a woman, the basis of an orderly society, and the defining promise of a life, that strengthens the institution of marriage.⁶⁰

The Senate filibustered the amendment, however, and a cloture vote that would have allowed a vote on the amendment failed 48-50.⁶¹ The House did vote on the measure, but it received only 227 votes, short of the two-thirds majority needed.⁶²

Despite the defeat of this specific proposal, the President continued to express support for a marriage amendment. In a speech to the Southern Baptist Convention in 2005, the President reiterated his support for an amendment, saying, “Because marriage is a sacred institution and the foundation of society, it should not be redefined by local officials and activist judges. For the good of families, children, and society, I support a constitutional amendment to protect the institution of marriage.”⁶³

57. Satellite Remarks to the National Association of Evangelicals Convention, 1 PUB. PAPERS 355, 356 (Mar. 11, 2004).

58. 150 CONG. REC. D502 (daily ed. May 13, 2004).

59. S.J. Res. 40, 108th Cong. (2004).

60. The President’s Radio Address, 40 WEEKLY COMP. PRES. DOC. 1253, 1253–54 (July 10, 2004).

61. 150 CONG. REC. S8090 (daily ed. July 14, 2004).

62. 150 CONG. REC. H7933–34 (daily ed. Sept. 30, 2004).

63. Satellite Remarks to the Southern Baptist Convention Annual Meeting, 41 WEEKLY COMP. PRES. DOC. 1041 (June 21, 2005).

The next major effort to enact a national amendment came in the summer of 2006.⁶⁴ Proponents introduced this proposed amendment against the backdrop of a series of lower court decisions, including a federal district court case in Nebraska, arguing that various state marriage laws were unconstitutional.⁶⁵ The Marriage Protection Amendment tracked the language of the previous proposed amendments almost exactly.⁶⁶

The President again made the argument for an amendment in his radio address.⁶⁷ He held a special meeting on the amendment on June 5 and addressed supporters of the amendment, saying he was “proud to stand with [them]” and calling on Congress to pass the amendment.⁶⁸ At the same meeting, he reviewed the recent court decisions on marriage and raised the possibility that federal courts might strike down DOMA.⁶⁹ The proposed amendment in the Senate, he said, “would fully protect marriage from being redefined”; rather than taking the issue from the States, as some had argued the amendment would do, “[i]t would take the issue away from the courts and put it directly before the American people.”⁷⁰ His speech included a strong statement about marriage:

64. The Marriage Protection Amendment was introduced in the Senate in January 2005, S.J. Res. 1, 109th Cong. (2005), and in the House in June 2006, H.R.J. Res. 88, 109th Cong. (2006).

65. See *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006); *In re Marriage Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), *rev'd*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Li v. State*, No. 0403-03057, 2004 WL 1258167, (Or. Cir. Ct. Apr. 20, 2004), *superseded by constitutional amendment*, OR. CONST. art. XV, § 5a; *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *rev'd sub nom. Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006).

66. Compare S.J. Res. 1, 109th Cong. (2005), and H.R.J. Res. 88, 109th Cong. (2006), with S.J. Res. 40, 108th Cong. (2004), and H.R.J. Res. 106, 108th Cong. (2004).

67. See The President's Radio Address, 42 WEEKLY COMP. PRES. DOC. 1073 (June 3, 2006).

68. Remarks on a Proposed Constitutional Amendment To Protect Marriage, 42 WEEKLY COMP. PRES. DOC. 1076, 1076 (June 5, 2006).

69. See *id.* at 1076–77.

70. *Id.* at 1077.

The union of a man and a woman in marriage is the most enduring and important human institution. For ages, in every culture, human beings have understood that marriage is critical to the well-being of families. And because families pass along values and shape character, marriage is also critical to the health of society. Our policies should aim to strengthen families, not undermine them. And changing the definition of marriage would undermine the family structure.

America is a free society which limits the role of government in the lives of our citizens. In this country, people are free to choose how they live their lives. In our free society, decisions about a fundamental social institution as marriage should be made by the people.⁷¹

Once again, the Senate filibustered the amendment, and the cloture motion received only forty-nine votes.⁷² The House vote also failed, garnering only 236 supporters.⁷³ But the President remained optimistic: "Today's Senate vote on the marriage protection amendment marks the start of a new chapter in this important national debate. . . . My position on this issue is clear: Marriage is the most fundamental institution of our society, and it should not be redefined by activist judges."⁷⁴ Although there were no subsequent attempts to pass a marriage amendment, the President continued to express his support for one.⁷⁵

It is difficult to assess whether and how President Bush's advocacy affected the nationwide support for state marriage

71. *Id.* at 1076.

72. See 152 CONG. REC. S5534 (daily ed. June 7, 2006). It is interesting that three of the state court decisions upholding marriage laws noted in the previous Part, see *supra* notes 18, 20, 22 and accompanying text, were issued in just more than a month after the unsuccessful Senate vote on the amendment. See *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004).

73. See 152 CONG. REC. H5320 (daily ed. July 18, 2006).

74. Statement on Senate Action on Marriage Protection Legislation, 42 WEEKLY COMP. PRES. DOC. 1099, 1099 (June 7, 2006).

75. See Press Release, Office of the Press Sec'y, Statement by Assistant to the President for Domestic Policy Karl Zinsmeister on Sanctity of Marriage (Oct. 10, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081010-6.html>; Press Release, Office of the Press Sec'y, Press Briefing by Tony Fratto (June 17, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/06/print/20080617-6.html>.

amendments. This support does not seem invariably to track partisan affiliation or voting; marriage is bigger than political parties or candidates. But it certainly could not have hurt to have President Bush's support for these measures.

Importantly, the President's support for marriage may have helped to counteract the idea that support for marriage is just irrational bigotry. For instance, he supported and signed the Support Our Scouts Act, included in the National Defense Authorization Act for Fiscal Year 2006, which prohibited federal agencies, states, and municipalities receiving funding under the Housing and Community Development Act of 1974 from discriminating against the Boy Scouts and other youth groups.⁷⁶ The Scouts have been the subjects of a campaign analogous to the effort to stigmatize marriage supporters because they do not allow openly homosexual individuals to serve as Scoutmasters.⁷⁷

In a time when powerful forces consider support for marriage as the union of a man and a woman a benighted bigotry that ought to be forced out of the public conversation, it may become rare for prominent political leaders to speak up for marriage. Voters in California had no such benefit from their political leaders as their Republican governor, along with most state political leaders, opposed Proposition 8.⁷⁸ Against this backdrop, perhaps President Bush's steadfast willingness to speak in favor of marriage will be one of his more important contributions. As he reiterated time and time again, "I believe a marriage is between a man and a woman."⁷⁹

CONCLUSION

The ideological position President George W. Bush resisted recasts marriage as a government creation—an administrative unit for dispensing benefits including both social welfare programs and less tangible goods such as "dignity." It is premised

76. See Support Our Scouts Act of 2005, Pub. L. No. 109-148, § 8126, 119 Stat. 2728 (repealed 2006).

77. See Al Knight, *The war on the Boy Scouts*, DENV. POST, Dec. 19, 2007, at B7.

78. See Kevin Yamamura, *Governor Won't Join Prop. 8 Fight: Schwarzenegger: Courts Will Decide*, MODESTO BEE, Nov. 17, 2008, at A10.

79. The President's News Conference, 39 WEEKLY COMP. PRES. DOC. 1003, 1008 (July 30, 2003).

on an egalitarian notion that all sexual relationships are essentially alike and deserving of the government's endorsement and approbation, and it seeks to appropriate the immense social capital of the marriage institution to advance this non-marriage purpose. It regards children as, at best, incidental to marriage. At worst, it regards children as instrumental to fulfilling adults' desires by giving adults the "right" to create or acquire children who will necessarily be either motherless or fatherless.

In contrast to this statist, adult-centered institution, the marriage ideal endorsed by President Bush understands marriage to be a pre-political institution, prior both in time and in prominence to the state. It is perhaps the primary example of a mediating institution providing meaning and purpose apart from state purposes, shielding individuals from the otherwise all-powerful state. The ideal promotes family autonomy by creating and nurturing family ties independent of state involvement.

And because marriage is made up of men and women, potential and actual mothers and fathers, it is child-centered. It has served in virtually all human societies to encourage men and women who may create a child to take responsibility for that child and for one another. As such, it is the most effective way for society to promote the child's opportunity to know and be raised by his or her own mother and father. Even those married couples who do not have children as a result of their marriage relationship can still provide a mother and father to those who are otherwise deprived of that opportunity. Married couples who are faithful to one another but who do not have children also promote children's best interests by not creating motherless and fatherless children. Finally, marriage promotes the integration of men and women; by treating both as essential to society's most basic and foundational unit, it rejects the idea that men and women, mothers and fathers, are fungible.

Given the unique social role of marriage as we have inherited it from millennia of human experience, President George W. Bush was undoubtedly right to speak and work in its defense. These days, it is not insignificant that the leader of the free world would do so.