REPORT

Introduction

As states across the country consider the question of what rights and protections should be accorded to same-sex couples,[1] efforts are underway to enact a federal constitutional amendment or other legislation that would prevent states from establishing, by court decision or legislation, a definition of marriage that would include marriages between two persons of the same sex.

This recommendation does not seek to place the ABA on record as either favoring or opposing laws that would allow same-sex couples to enter into civil marriage. Rather, its purpose is to preserve the authority conferred upon the states under our federal system to decide for themselves the terms under which two people may assume the rights and responsibilities of civil marriage.[2] As Justice Brandeis famously stated over 70 years ago, "It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social . . . experiments without risk to the rest of the country."[3]

In keeping with this philosophy, the ABA has adopted a series of policies urging state legislatures and state courts to provide legal protections for children in families headed by unmarried or same-sex partners. In August 1995, the ABA adopted a policy supporting the enactment of legislation and implementation of public policies that would ensure that child custody or visitation is not denied or restricted on the basis of a parent's sexual orientation. In February 1999, the ABA adopted a policy supporting "the enactment of laws and implementation of public policy [providing] that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interests of the child." Most recently, in August 2003, the ABA adopted a policy supporting state laws and court decisions permitting second parent adoptions by unmarried persons, including lesbian and gay partners.

The proposed resolution complements and seeks to preserve these existing policies by opposing federal legislation that would usurp traditional state powers to determine who may enter into civil marriage.

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[1] The 2000 Census revealed that gay and lesbian families reside in 99.3% of all counties across America. *See, e.g.,* http://www.hrc.org/familynet/printpage.asp?table=articles&ID=340.

[2] *See, e.g., Pennoyer v. Neff, 95 U.S. 714 (1877) (states decide eligibility to marry); In Re Burrus*, 136 U.S. 586 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States"). Of course, the general rule of states governing eligibility to marry gives way only when states' marriage laws fail to conform with constitutional guarantees. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (striking down anti-miscegenation law on state constitutional grounds); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking state law marriage restrictions based on race); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking state marriage restriction based on poverty); *Turner v. Safley*, 482 U.S. 78 (1987) (striking state marriage restriction based on incarceration).

[3] *Santosky v. Kramer*, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting) (quoting *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Proposed Constitutional Amendment

On May 21, 2003, Rep. Marilyn Musgrave (R-Colo.) introduced H.J.Res. 56, a joint resolution to amend the U.S. Constitution to restrict the definition of marriage to the union of a man and a woman, and to prohibit the states from allowing same-sex couples to enter into civil marriage or be granted the "legal incidents thereof." Specifically, the amendment provides:

> SECTION 1. Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

If ratified, the amendment would have sweeping consequences. It would bar courts and legislatures from taking steps to permit same-sex couples to enter into civil marriage or to extend to such unmarried couples legal protections comparable to those accorded to legal spouses, such as the right to sue for wrongful death, to inherit under intestate succession laws, hospital visitation, family medical leave, dependency presumptions for workers' compensation, or even the right to control the disposition of remains.[4] It is likely that the amendment would nullify Vermont's civil union system, California's new domestic partnership law, and scores of laws and ordinances granting various benefits to unmarried couples throughout the country.

As of Oct. 15, 2003, the proposed amendment had 97 co-sponsors in the House. Although a companion bill has not yet been introduced in the Senate, the Senate Judiciary's Subcommittee on the Constitution, Civil Rights, and Property Rights conducted a hearing on the issue on Sept. 4, 2003. Moreover, despite the lack of a pending bill in the Senate, a number of Senators, including Majority Leader Bill Frist (R-Tenn.) and Republican Conference Chairman Rick Santorum (R-PA), have stated their support for the concept.[5]

When asked about his position on the proposed constitutional amendment, President Bush stated that "a marriage is between a man and a woman, and I think we ought to codify that one way or another."[6] More recently, the President issued a Proclamation in

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[4] *See* Alliance for Marriage, *Legal Impact of the Federal Marriage Amendment,* available at http://www.allianceformarriage.org/reports/fma/colorchart.cfm.

[5] Amy Fagan and Bill Sammon, *Bush Weighs Marriage Amendment; Awaits Court Rulings on Gay Unions,* WASH. TIMES, Aug. 1, 2003, at A1. ("Sen. Rick Santorum, Pennsylvania Republican, and Senate Majority Leader Bill Frist, Tennessee Republican, have voiced support for a constitutional amendment. An aide to Mr. Frist said members of the House and Senate also are exploring ways to defend traditional marriage.").

[6] Jesse J. Holland, *Senate subcommittee to take gay marriages after August recess,* ASSOC. PRESS, Aug. 1, 2003.

support of "Marriage Protection Week, 2003,"[7] an effort by certain religious and conservative groups to consolidate their attacks on same-sex families.[8]

In contrast, a number of prominent conservative leaders have spoken out against the proposed constitutional amendment on federalism grounds. Former Representative Bob Barr (R-Ga.), one of the authors of the federal Defense of Marriage Act ("DOMA") (discussed below), has expressed his opposition to the proposed constitutional amendment, stating:

> Marriage is a quintessential state issue. The Defense of Marriage Act goes as far as is necessary in codifying the federal legal status and parameters of marriage. A constitutional amendment is both unnecessary and needlessly intrusive and punitive. . . . As any good federalist should recognize, [DOMA] leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.[9]

In a similar vein, with respect to the issue of protection for same-sex couples, Vice President Dick Cheney has stated: "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."[10]

The Defense of Marriage Act

In 1996, Congress enacted the Defense of Marriage Act (DOMA). At the time, no state recognized same-sex marriages, but it was believed that one or more states might soon do so, either through legislation or by court decision. The Act contains two substantive provisions. The first seeks to relieve states of their obligation to accord full faith and credit to same-sex marriages that are lawfully entered into in other jurisdictions.[11] The second provides that the federal government will not recognize such marriages.[12]

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[7] Marriage Protection Week, 2003, By the President of the United States of America: A Proclamation, Oct. 3, 2003. *See* http://www.whitehouse.gov/news/releases/2003/10/20031003-12.html

[8] *See* National Gay and Lesbian Task Force, *Marriage Protection Week' Sponsors: Are They Really Interested in 'Building Strong and Healthy Marriages?* available at http://www.ngltf.org/downloads/MarriageProtectionWeek.pdf.

[9] Bob Barr, *Leave Marriage to the States,* WASH. POST, Aug. 21, 2003. Similarly, conservative constitutional scholar Bruce Fein has argued that "conservatives should squelch a rash constitutional amendment pending in the House of Representatives to prohibit states from recognizing homosexual marriages and thus place the issue off-limits for democratic discourse. The amendment would enervate self-government, . . . and clutter the Constitution with a nonessential." Bruce Fein, *Constitutional Rashness,* WASH. TIMES, Sept. 2, 2003.

[10] Alan Simpson*, Missing the Point on Gays,* WASH. POST, Sept. 5, 2003, (quoting Dick Cheney).

[11] Section 2 of DOMA provides in the following terms that States need not respect the marriages of same-sex couples from other states:

> No State, territory or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe, respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

The DOMA does not bar any state from recognizing same-sex marriages entered into in accordance with its laws. The proposed constitutional amendment would do precisely that, stripping state courts and legislatures of their ability to prescribe the qualifications for civil marriage and to determine what rights and responsibilities should attach to that status.

The Robust Dialogue on This Issue in the States

States have been grappling with the issue of protections for same-sex couples since at least the 1970's. The first challenge to the exclusion of lesbian and gay couples from civil marriage was decided in 1971.[13] Since then, there have been a number of challenges across the country. All of these challenges were unsuccessful until 1993, when the Hawaii Supreme Court held that denying same-sex couples the right to marry may constitute unlawful sex discrimination.[14] While the case was working its way back up to the Hawaii Supreme Court, the voters of Hawaii passed a state constitutional amendment allowing the state legislature to limit marriage to different-sex couples. The litigation subsequently was dismissed as moot by the Hawaii Supreme Court.[15]

In 1998, an Alaska trial court held that denying same-sex couples the right to marry violated the state constitutional right to privacy and the right to be free from discrimination on the basis of sex.[16] Following that decision, the voters amended the Alaska Constitution to define marriage as the union of one man and one woman, effectively ending the lawsuit.

In 1999, the Vermont Supreme Court held that refusing to provide committed same-sex partners with the benefits and privileges granted to married couples violated the Vermont Constitution's Common Benefits Clause.[17] In response to the Court's instruction to remedy this constitutional infringement, the Vermont legislature enacted a law permitting same-sex couples to enter into civil unions. Couples in a civil union are granted all of the

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Defense of Marriage Act, Pub. L. No. 104-199, sec. 2(a), 1996 U.S.C.C.A.N. (110 Stat.) 2419, (codified at 28 U.S.C. Sec. 1738C).

[12] Section 3 of DOMA states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

Defense of Marriage Act, Pub. L. No. 104-199, sec. 3(a), 1996 U.S.C.C.A.N. (110 Stat.) 2419, 2419 (codified at 1 U.S.C. Sec. 7).

[13] *Baker v. Nelson*, 291 Minn. 310 (1971).

[14] *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993).

[15] *Baehr v. Miike*, 994 P.2d 566 (Hawaii 1999).

[16] *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998). The decision is also available at: http://www.qrd.org/qrd/usa/legal/alaska/brause-v-alaska.

[17] *Baker v. State*, 744 A.2d 864 (Vt. 1999).

state-conferred rights, benefits, and responsibilities of marriage, and private entities are required to treat marriages and civil unions equally. Persons in a civil union, however, are not granted any of the 1,049 federally-conferred rights, benefits, and responsibilities of marriage. Moreover, serious questions remain as to the extent to which civil unions are entitled to legal effect outside of Vermont.[18]

On Nov. 18, 2003, the highest court in Massachusetts held that it violates the Massachusetts Constitution to bar lesbian and gay couples from entering into civil marriage.[19] In its decision, the Massachusetts Supreme Judicial Court stayed the judgment for 180 days to permit the legislature to take whatever action it may deem appropriate in light of the decision. The timing of Massachusetts decision may make it more likely that Congress will act on the proposed constitutional amendment within the next year.

In addition, there are three other pending cases challenging the denial to same-sex couples of the right to marry. The cases are pending in New Jersey,[20] Indiana,[21] and Arizona.[22]

The state legislatures also are heavily involved in considering these issues. In the 2002-2003 session, bills were introduced in five states – Connecticut, Massachusetts, Montana, New York, and Rhode Island – to permit same-sex couples to enter into civil marriage. In seven states – California, Colorado, Connecticut, Hawaii, Massachusetts, Rhode Island, and Washington – bills were introduced to create civil unions or similarly comprehensive status. In California, legislation was signed into law conferring a broad range of rights, benefits, and responsibilities on registered domestic partners,[23] and domestic partnership legislation was introduced in 13 other states. On the other end of the spectrum, bills were introduced in 10 states to prohibit marriages between same-sex couples or to prohibit recognition of civil unions or domestic partnerships.[24]

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[18] *See Rosengarten v. Downes*, 71 Conn. App. 372 (2002) (denying respect in Connecticut to a Vermont civil union); *Burns v. Burns*, 253 Ga. App. 600 (2002) (same, in Georgia).

[19] *Goodridge v. Dept. of Public Health,* No. 08860, (Supreme Judicial Court, argued March 4, 2003).

[20] *Lewis v. Harris,* No. MER-L-15-03, Opinion on Motion to Dismiss (N.J. Super. Ct. Nov. 7, 2003).

[21] *Morrison v. Sadler*.

[22] *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003).

[23] AB 205 (Goldberg, 2003). The text of AB 205 can be accessed at http://www.leginfo.ca.gov/pub/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf. When AB 205 becomes operational on Jan. 1, 2005, registered domestic partners in California will be granted almost all of the state-conferred rights, benefits, and responsibilities that are currently conferred upon married couples. Like civil unions, however, being a registered domestic partner does not confer the over 1000 federally-conferred rights, benefits, and responsibilities based on marital status.

[24] In another measure of the vibrant dialogue on the issue of marriage for same-sex couples, a search of 52 major newspapers between Jan. 1, 2003 and Nov. 13, 2003 shows that the headline or lead paragraph contained the term "same-sex marriage" 862 times and "gay marriage" 925 times. A Google search reveals 120,000 entries for "same-sex marriage" and 162,000 for "gay marriage."

Conclusion

Should the House of Delegates adopt this recommendation, the Association will have taken no position on the merits of whether same-sex couples should be granted the right to enter into civil marriage. However, it will have affirmed the principle that the states should be permitted to debate and develop their own answers to this and other critical questions touching upon traditional state responsibilities in the area of family law.

Respectfully Submitted,

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