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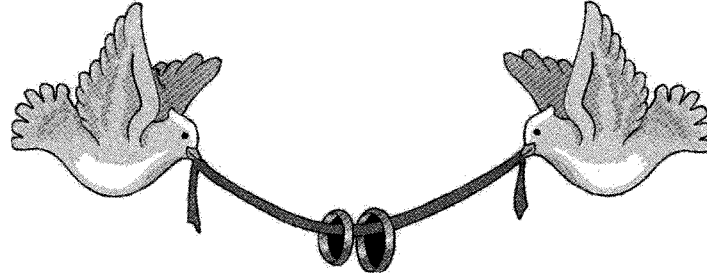
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Defining Marriage: What Ballot Question Two Doesn't Do



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"Let me not to the marriage of true minds admit impediments."
- William Shakespeare, poet/playwright.

"Gay and lesbian couples who want to wed aren't trying to assail the grounds for marriage. They're trying to share them."
- Ellen Goodman, syndicated Boston Globe columnist.

"Defense of Marriage? It's like the old V-8 commercial. As though if this act didn't pass, heterosexual men all over the country would say, [smacking head] 'I could have married a guy!'" - Barney Frank, U.S. Representative.

"I think men who have a pierced ear are better prepared for marriage. They've experienced pain and bought jewelry."
- Rita Rudner, comedienne and Las Vegas resident.

"Only a marriage between a male and female person shall be recognized and given effect in this state." -- Ballot Question 2, Amendment to the Nevada Constitution, State of Nevada, November 2000 & 2002 elections.

The joys of a good marriage have long been celebrated in our culture. The challenge and sacrifice of maintaining such a committed partnership have been celebrated as well, often through rueful humor. Few would disagree that a successful committed partnership is a major achievement, the pursuit of which is worthy of every ounce of time and energy we put into it. Couples who achieve such success, regardless of their age, race, or religion, rightly enjoy the respect of their fellow citizens. Such partnerships benefit the entire community, because committed partners can be counted on to care for one another, through sickness or hardship, thus sparing the community's resources to be devoted to others who are in need of such assistance.

The oddly-worded initiative, which constitutes Question 2 on Nevada's 2002 ballot, is therefore a bit of a puzzle, even two years after it was first sprung upon the electorate. Touted during its previous appearance in the 2000 election as a "definition of marriage,"¹ it is all too clear that the initiative is anything but that. Neither the initiative, nor any existing provision of Nevada law, makes the slightest attempt to define marriage. Ask yourself a simple question: If your son or daughter asked you today what marriage means, as a matter of law, would Question 2 provide an answer? What does it mean to be married, as a legal matter?

The fact is that marriage as a *legal* matter is simply a collection of legal rights and responsibilities, spelled out in numerous statutes and common law rules. Marriage as a legal matter is simply a shorthand for this collection of specific rights and obligations. These rights and obligations are not even uniform throughout the United States. Within the bounds of the United States Constitution, each state is free to decide for itself what legal effects a marriage should have on its citizens and residents. The law simply does not concern itself with any other aspects of marriage - emotional, religious, cultural, or otherwise. Nor should it. Individuals should be free to choose their own emotional, religious, or cultural affiliations, free of government dictates.

This is what makes Question 2 so puzzling. If it is simply about the word "marriage," then it means nothing as a matter of law because Nevada law does not define marriage, and assigning a particular meaning to that term has no impact on the legal authority of the state to allocate particular rights and responsibilities to persons. Any rights accorded to married persons under Nevada law can easily be granted to non-married persons if the legislature so decides.

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Prior to the November 2000 election, the so-called "Coalition for the Protection of Marriage" argued that Question 2 was not about whether the state should grant same-sex couples the same legal rights as opposite-sex couples. Rather, they argued, it would simply prevent Nevada from being compelled (under the Full Faith and Credit Clause of the U.S. Constitution) to recognize marriages performed in other states between persons of the same sex.²

That seemed to change a few months after the election. When the 2001 Nevada legislature was considering a bill that would have created a domestic partner registry for such modest purposes as allowing hospital visitation rights (which are routinely afforded to married partners),³ the Coalition showed up in force at the hearing, arguing that the 69% of voters who approved Question 2 also would oppose such a registry. Not a single legislator expressed doubt about the source of this uncanny insight into the minds of the voters, and the bill died in committee. Were the committee members really persuaded despite the lack of evidence, or were they simply intimidated? Does this foreshadow an attempt to use this constitutional amendment to prevent the legislature from performing its essential role of assessing public needs and enacting laws that meet those needs?

As most Americans know, the state of Vermont has, for more than two years now, granted full legal recognition to same-sex couples through its civil union law, which provides such couples with all of the legal rights of marriage. By all accounts, the people of Vermont have not suffered any moral or economic detriment from their decision to end this form of sex discrimination. Indeed, Vermont is not the only jurisdiction that has eliminated gender barriers to civil marriage. Legally recognized marriages and civil unions are now routinely celebrated in most of Europe, regardless of the celebrants' genders. The Canadian courts have ruled that Canada must do the same. Polls indicate that a majority of Swiss and Canadians, and two-thirds of Americans, believe that same-sex couples will achieve the right to marry.⁴

In the United States, at least five states have already created domestic partner registries - California, Connecticut, Massachusetts, New York, and Hawaii. In addition, at least eight state governments now extend domestic partner benefits to the same-sex partners of their employees. Those states include California, Connecticut, Hawaii, New York, Oregon, Vermont, Washington, Massachusetts, and Delaware.⁵ More than 41 municipal governments have created domestic partnership registries, including such major cities as Atlanta, Los Angeles, Minneapolis, New York, Philadelphia, San Francisco, and Seattle,⁶ and more than 83 municipal governments now offer some form of domestic partnership employee benefits (in many cases, offering complete parity with spousal benefits),⁷ including such major cities as Atlanta, Baltimore, Chicago, Denver, Detroit, Los Angeles, New York, Palo Alto, Philadelphia, Pittsburgh, Sacramento, San Diego, San Francisco, Seattle, St.

Paul, as well as several cities in our neighboring states, including Tucson, Tempe, and Santa Fe.⁸

The number of same-sex couples in the United States was recently estimated at 1.5 million. Any effort to intimidate legislators out of enacting laws to create parity among committed couples reflects intent to treat some couples as second-class citizens, regardless of their level of commitment and their contributions to the community:

Since the 1980's, in response to a changing workforce and changing family structures, thousands of private corporations, non-profit organizations, universities, colleges, states, cities and counties have extended family benefits to the unmarried partners of their employees. Rooted in the workplace principle of equal pay for equal work, domestic partnership policies extend the same family benefits to unmarried employees with domestic partners that are routinely extended to married employees. This work equity principle continues to lead employers to reform their benefits policies to ensure that all employees with families have the same access to health benefits, family and medical leave, bereavement leave, and other family workplace benefits that assist employees in handling the demands of both job and family responsibilities.

Domestic partnership policies also respond to changing family structures. While family benefits were once extended primarily to the "head of household" as an acknowledgment of the extra responsibility they have to care for a spouse and children, that structure no longer fully accounts for the diversity of American families. Most notably, same-sex couples who are banned from formal family recognition, and different-sex couples who for any number of reasons have not married or remarried are left to struggle with the financial and emotional stress of a family illness or death in a system in which millions of Americans rely on health care through employer-provided plans.¹⁰

Whether legal equality is achieved through individual laws recognizing specific legal rights and responsibilities, or through enactment of a pervasive marriage or civil union privilege for same-sex couples, any gender-based legal distinctions between committed couples will become increasingly difficult to justify in any state that takes individual liberty seriously:

The traditionally defined nuclear family, consisting of a married, heterosexual couple with children under the age of 18, is no longer the norm for United States families.... The movement for domestic partnership benefits is rooted in the democratic notion of equal pay for equal work. With benefits comprising approximately 40% of a worker's compensation, employees who can obtain benefits for their spouses are, in effect, paid higher than employees in relationships, which are not legally recognized.... Domestic

partnership benefits, then, are a means of working towards greater economic justice in the workplace.¹¹

The importance of equality among committed couples is not limited to economic rights. It also affects such important rights as adoption. As noted in numerous academic journals, scientific studies have uniformly debunked the myth that children experience any negative effects whatsoever because of being raised in gay or lesbian households.¹²

The Vermont civil union law is the first legal recognition in the United States that committed couples are entitled to equal respect regardless of gender.¹³ In enacting the civil union legislation, the Vermont General Assembly made Legislative Findings that should ring equally true in Nevada:

Vermont's history as an independent republic and as a state is one of equal treatment and respect for all Vermonters . . .

The state's interest in civil marriage is to encourage close and caring families, and to protect all family members from the economic and social consequences of abandonment and divorce, focusing on those who have been especially at risk.

Legal recognition of civil marriage by the state is the primary and, in a number of instances, the exclusive source of numerous benefits, responsibilities, and protections under the laws of the state for married persons and their children.

. . .

The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.

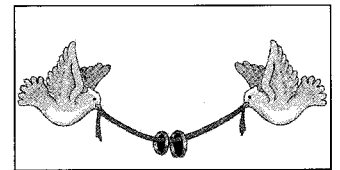
Without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships.

Despite long-standing social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring, and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married under Vermont law.¹⁴

Addressing the important subject of religious freedom, the Vermont Assembly noted that granting legal recognition to same sex couples in no way limited the freedom of different religious groups to decide for themselves which couples would be recognized as married for church purposes:

The constitutional principle of equality [embedded in Vermont's state constitution] is compatible with the freedom of religious belief and worship guaranteed in Chapter I, Article 3rd of the state constitution. Extending the benefits and protections of marriage to same-sex couples through a system of civil unions preserves the fundamental constitutional right of each of the multitude of religious faiths in Vermont to choose freely and without state interference to whom to grant the religious status,

sacrament or blessing of marriage under the rules, practices or traditions of such faith."¹⁵



Constitutional amendments wreak major change in the balance of power in state government, significantly reducing the power of the citizens' elected representatives to consider and resolve important questions of public policy. Recognizing this, in July of 2002 a joint session of the Massachusetts Senate and House decisively rejected (by a vote of 137-53) a proposal to amend their state constitution to ban same-sex marriages. The Executive Director of the National Gay and Lesbian Task Force, Lorri L. Jean, responded to the news with a nod to Lincoln's Gettysburg Address, noting: "A government 'of the people, by the people, and for the people,' ought to serve everyone, and that means respecting and valuing our families equally."¹⁶

Couples who travel from their home states to Vermont in order to enter a civil union are, in a legal sense, more bound to one another than couples who are married. Under Vermont law, while nonresidents may enter civil unions, they cannot dissolve those unions unless they become state residents for a least one year.¹⁷ Thus, most civil union couples do not know whether their legal commitment will provide them with any protection in their home states or elsewhere, and in return for this uncertainty they take on the weighty responsibility of a legal commitment that may be extremely difficult to dissolve. If we contrast with this the ready availability of divorces for married couples, and the assurance they enjoy that their marriage will be respected across state lines, the overwhelming seriousness of a civil union commitment is hard to miss. Yet the thousands of couples who have entered into Vermont civil unions have done so in spite of the risks and the uncertain rewards of doing so. Why? Because they care about marriage.

With the resounding defeat of the proposed constitutional amendment in Massachusetts, Alaska and Nebraska remain the *only* states that have ever amended their constitutions to ban recognition of same-sex marriage.¹⁸ If the supporters of Question 2 have their way, Nevada will be in cold company.

ENDNOTES

- ¹ Dean Heller, Nevada Secretary of State, *Ballot Question # 2; Amendment to the Nevada Constitution: An Initiative relating to the definition of marriage; see also id., Arguments for Passage & Arguments Against Passage* (2000); Press Release, Coalition for the Protection of Marriage (Mar. 8, 2000).
- ² See, e.g., Ed Vogel, *Survey Shows Nevadans Oppose Same-Sex Unions*, Las Vegas Review-Journal (June 17, 2000).
- ³ A.B. 496, *The Nevada Family Fairness Act*, introduced by Assemblyman David Parks.
- ⁴ News Release, Lambda Legal Defense and Education Fund, *Netherlands Ends Discrimination in Civil Marriage: Gays to Wed* (Mar. 30, 2001), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=814>; *International Recognition of Same-Sex Partnerships: Marriage Project Fact Sheet*, (Mar. 30, 2001), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=432>.
- ⁵ Paula Ettelbrick, *Domestic Partner Benefits for State Employees* (NGLTF Policy Institute, 2001), <http://www.nglrf.org/pi/dpstate.htm>; Wayne van der Meide, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States*, at 85 (Policy Institute of the National Gay and Lesbian Task Force: New York, 2000).
- ⁶ Van der Meide, at 7; ACLU, *Domestic Partnerships: List of Cities, States, and Counties*, <http://www.aclu.org/issues/gay/dpstate.html>.
- ⁷ *Id.*
- ⁸ Van der Meide, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States*, at 85 (Policy Institute of the National Gay and Lesbian Task Force: New York, 2000).
- ⁹ Van der Meide, at 7.

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¹⁰ Paula Ettelbrick, *Domestic Partner Benefits for State Employees* (NGLTF Policy Institute, 2001)

¹¹ Urvashi Vaid, "Introduction," in *The Domestic Partnership Organizing Manual* (For Employee Benefits), NGLTF Policy Institute: New York, 1999 (footnotes omitted), quoted in Van der Meide, at 6. Could this mean that failure to provide equal benefits (or the equivalent in cash compensation) to employees who have partners of the same sex could violate state ENDA laws? 2N.R.S. § 613.330 (barring discrimination in "compensation, terms, conditions or privileges of employment" on the basis, *inter alia*, of sexual orientation).

¹² See Charlette J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 1 DUKE J. GENDER L. & POL'Y 191, 197-200 (1995) (reviewing numerous social science studies and related scholarly literature); Craig A. Bowman & Blake M. Cornish, Note: *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1211 & n. 83 (1991); Julie S. Gottman, *Children of Gay and Lesbian Parents*, 14 MARRIAGE & FAM. REV. No. 3/4, at 177 (1989); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978); Mike Allen & Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32 J. HOMOSEXUALITY 19 (1996); M. Neil Browne & Andrea Giampetro, *The Contribution of Social Science Data to the Adjudication of Child Custody Dispute*, 15 CAP. U. L. REV. 43, 47-49 (1985); Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POLICY 207, 210-17 (1995).

¹³ Vermont law provides that when two eligible persons enter a civil union, they "may receive the benefits and protections and be subject to the responsibilities of spouses." 15 V.S.A. § 1201 (2002).

¹⁴ Legislative Findings, 1999, No. 91 (Adj. Sess.), §1, eff. April 26, 2000 (subsection numbers omitted).

¹⁵ *Id.*

¹⁶ *Right-Wing Effort to Ban Same-Sex Marriage in Massachusetts Defeated* (July 18, 2002), <http://www.ngltf.org/news/release.cfm?releaseID=470>. NGLTF's mission statement advocates "a world that respects and celebrates the diversity of human expression and identity where all people may fully participate in society." *Id.*

¹⁷ 15 V.S.A. § 1201 (2002).

¹⁸ Contrary to popular belief, Hawaii's state constitution does not ban same-sex marriage; it merely allows the state legislature to decide the question. H.R.S. Const. Art. I, § 23 (2001) ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

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To conform with Nevada Supreme Court Rule 199, Ms. Williams will practice under the firm name SPM Law, LLP, an affiliate of Senn Palumbo Meulemans, LLP

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