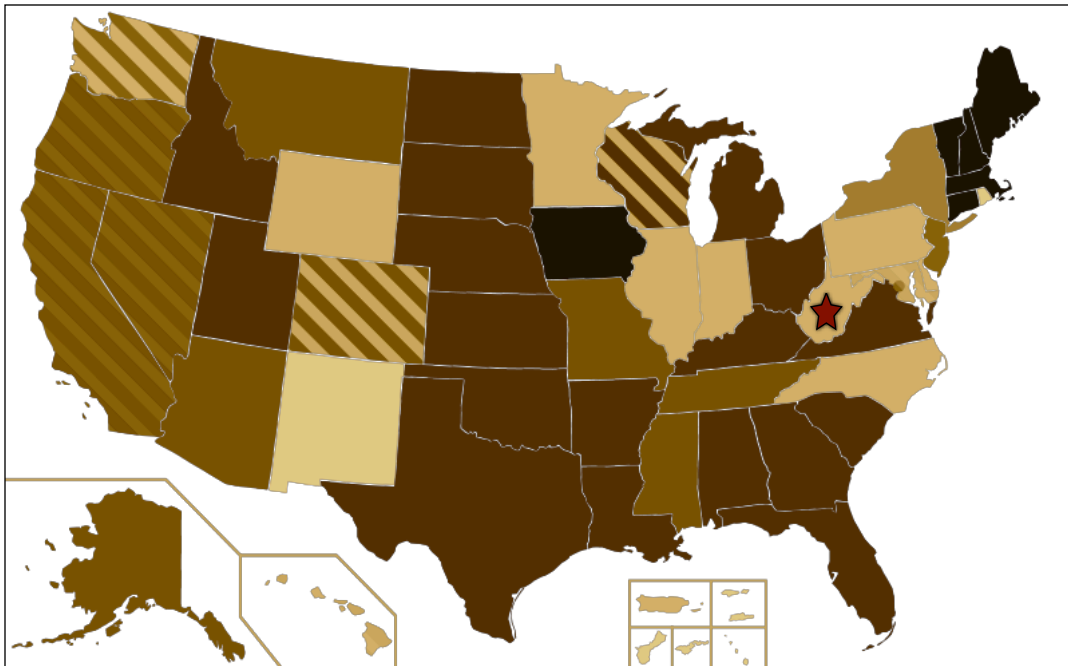




THE FAMILY
POLICY COUNCIL
OF WEST VIRGINIA

DEFENDING MARRIAGE

IN WEST VIRGINIA



Prepared by the Family Policy Council of West Virginia
for members of Subcommittee A of the
Joint Standing Committee on the Judiciary

Legislative Testimony of Jeremiah G. Dys, Esq.

Senator Snyder, Delegate Brown, and committee. Thank you for extending the opportunity to explain our support for allowing West Virginians to vote on the legal definition of marriage.

From the recent experience of several states, it appears that the debate over whether there is a nationwide effort to redefine marriage has now closed. Knowing that they routinely lose at the ballot box, to undermine laws that legally define marriage, proponents of same-sex “marriage” resort to a variety of strategies that take the question of marriage out of the hands of the people.

The Constitution of the State of West Virginia belongs to its people. There is no legitimate reason to *not* let the people decide the legal definition of marriage. As our Constitution says in Article II, Section 2-2, “The powers of government reside in all the citizens of the state, and can be rightfully exercised only in accordance with their will and appointment.”

West Virginians want to vote on the definition of marriage. It is the responsibility of our legislators to protect every West Virginian’s right to vote on this issue. Representative democracy means listening to your constituents when they ask to govern themselves. And West Virginians *are* asking.

In my remarks today, I would like to offer three fundamental reasons to support the conclusion that there is no legitimate reason not to let the people of West Virginia engage in the most basic form of self-governance.

First, it is no longer debatable that there exists a coordinated, nationwide effort to redefine marriage. It is no longer if, but when an attempt to redefine marriage will cross the borders into West Virginia. Marriage is too valuable an institution to West Virginia to subject it to attack when there is such a simple solution for its protection.

Second, West Virginia is now in the minority of states that has no legally binding definition of marriage within its constitution.

Third, West Virginians want to vote on the definition of marriage, but absent the Legislature fulfilling its responsibility to protect every West Virginian’s right to vote on this issue, “the powers of government” cannot be “exercised in accordance with their will and appointment.”

The National Effort to Redefine Marriage

Several months ago, there was a legitimate debate over whether a coordinated attack on marriage was slowly advancing nationwide. Even well-into the 2009 legislative session, there existed some reasonable cause to think the experiences of California and Massachusetts were isolated events. Arguments that marriage could be redefined in West Virginia made for good dinner conversation and even better media stories, but as the 2009 session came to a close, something changed.

Connecticut and Iowa

What changed actually began late in 2008 when the Connecticut Supreme Court, on October 10, ruled that the right to marry for same-sex couples was protected by that state’s constitution. Connecticut did not have a Defense of Mar-

riage Act (or “DOMA”), but Connecticut law did provide that, “the current policy of the state of Connecticut is now limited to a marriage between a man and a woman.”¹

That explicit definition of marriage did not prevent the Connecticut Supreme Court from creating a right to same-sex “marriage” within Connecticut’s constitution.

As the court was ruling in Connecticut, arguments were being prepared before the Iowa Supreme Court on a very similar case. It was not until April 3, 2009 - as our legislative session was coming to a close - that the Iowa Supreme Court redefined marriage without input by Iowan voters. There again, Iowa’s law was completely unambiguous, stating, “Only a marriage between a male and female is valid.”² Like West Virginia, the people of Iowa cannot directly amend their constitution. Instead, they must wait for their legislature to protect their right to vote on such an issue.

Vermont, New Hampshire, Maine, and Washington, D.C.

Just as the 2009 session ended in West Virginia, Vermont’s legislature was redefining marriage legislatively. While Vermont has been among the first to allow same-sex couples to have “everything-but-the-name” in the form of civil unions, same-sex “marriage” advocates were not be satisfied. After the legislature succumbed to the pressure of same-sex activists, so did its governor. Absent intervention by its citizens, Vermont will begin issuing “marriage” licenses to same-sex couples on September 1, 2009.

Not long after, the New Hampshire legislature followed Vermont’s lead - twice. After some legislative maneuvering, the Governor of New Hampshire vetoed a bill that would redefine marriage for his citizens. The legislature promptly addressed his areas of concern and sent it back. Governor Lynch then signed the second bill into law, which will allow the creation of same-sex “marriage” by January 1 of 2010 - unless the residents of New Hampshire are given the right to vote on the legal definition of marriage in that state.

Finally, Maine became the third state to legislate the redefinition of marriage and has set the state up for same-sex “marriage” sometime in October of 2009. However, a unique element of the Maine constitution allows the people of Maine to veto any law enacted by the legislature. It took Maine voters just four (4) weeks to amass the requisite 55,000 signatures to place the veto question for a popular vote.³

As of July 6, 2009, the ordinance passed in June by the City Council of the District of Columbia to recognize same-sex “marriages” performed in other states, went into effect. A proposal has already been made by a city council member to permit same-sex “marriages” to be performed within the District of Columbia. Washington, D.C.’s situation is significant not only for its being another legislative enactment of same-sex “marriage,” but also because it could force the United States Congress to exercise its oversight of the D.C. City Council elevating the question of marriage to the national stage.

¹ See C.G.S.A. s. 45a-727a.

² See Iowa Code Ann. section 595.2

³ A legal challenge has been brought questioning the validity of the signatures. Assuming the 55,000 signatures are validated, Maine residents will vote to accept or reject this legislative action at the next popular election.

New York and New Jersey

Neither New York, nor New Jersey have a state DOMA. New York has had several lawsuits filed with mixed results. New Jersey granted same-sex couples civil unions after the New Jersey Supreme Court ruled that the legislature must either open marriage or civil unions to same-sex couples. It is clear that activists are dissatisfied with the “everything-but-the-name” approach of civil unions in New Jersey and have set their sights on redefining marriage without voter input there as well.

Federal DOMA and Litigation

The Federal DOMA was passed and signed into law during the Clinton administration. Since that time, no Federal court has invalidated it. The Federal DOMA clearly defines marriage as “only the legal union between one man and one woman as husband and wife.”⁴

Recently, same-sex “marriage” activists explained their strategy in a memo released by a coalition including the ACLU, the Human Rights Campaign, and the National Gay and Lesbian Task Force. In it, they suggested:

There are two ways to get rid of DOMA: going to court to have the law declared unconstitutional or getting Congress to repeal it (something President Obama has said he supports). These approaches can work together, and we are doing both. We’re working with members of Congress on repeal legislation now.⁵

Same-sex advocates sense a friend in the current leadership of the Congress, as well as the White House and are attempting to once again bypass the American people and redefine marriage through litigation. Soon after the California Supreme Court upheld the definition of marriage as passed by 52% of Californian voters, a Federal lawsuit was filed in the Central District of California.

At nearly the same time, a lawsuit was filed in a Massachusetts Federal court seeking to invalidate portions of the Federal DOMA, including the section defining marriage as one man and one woman and limiting spouses to members of the opposite gender. Same-sex advocates seem more excited about that lawsuit, claiming, “If that lawsuit succeeds, it should establish a principle that will be fatal to DOMA, and we can bring other lawsuits addressing other federal protections to build on it.”⁶

Just last week, Massachusetts became the first state to sue the Federal government over the Federal DOMA, creating a third lawsuit.

Collateral Threats to Marriage

Even though President Obama campaigned from the position that marriage was the union of one man and one woman, his administration has begun calling for a repeal of the Federal DOMA. Not only that, but the White House

⁴ See 1 U.S.C. s 1783c (1997).

⁵ See “Why the ballot box and not the courts should be the next step on marriage in California,” accessed on July 9, 2009, at http://www.freedomtomarry.org/pdfs/why_the_ballot_box.pdf

⁶ *Id.*

has made several promises to same-sex activists, including the passage of Hate Crimes based upon “sexual orientation,” the Employment Nondiscrimination Act, and the repeal of the Don’t Ask, Don’t Tell policy for our military.

While each of these seem unrelated to marriage, each is designed to make same-sex activity a conspicuous part of American society, even though it reflects less than 2% of the national population. The hoped for result is the public acceptance of same-sex “marriage” and the homosexual lifestyle.

Again, relying simply on the words of same-sex activists:

The fastest way to win the freedom to marry throughout America is by getting marriage through state courts . . . and state legislatures . . . We need to start with the states where we have the best odds of winning. When we’ve won a critical mass of states, we can turn to Congress and the federal courts. At that point, we’ll ask that the U.S. government treat all marriages equally. And we’ll ask that all states give equal treatment to all marriages and civil unions that are celebrated in other states.⁷

The debate is over. There is a coordinated strategy to redefine marriage across America. And their threats have largely come true. As they predicted last summer,

[G]oing forward, we’ll use the California Supreme Court’s brilliant reasoning and stirring language to try to persuade legislatures to end marriage discrimination in several states that are nearly ready to pass marriage laws. We’ll show the opinion to courts in Connecticut and Iowa that are already considering marriage cases. We’ll work to identify other state legislatures and courts that are ready to do the right thing. And we’ll need everyone to help create a climate that helps judges and legislators do the right thing. . . . Courts and legislatures pay attention to what is going on in other states.⁸

While the debate over whether there is a nationwide effort to redefine marriage is over, the perception that same-sex “marriage” is inevitable is not based in reality.

West Virginia Among Minority of States with No Definition of Marriage within Constitution

In total, voters in 30 states have voted to define marriage within their state constitution. Of the 30 states that have given the control of the state constitution back to the people, all 30 have voted to define marriage as the union of one man and one woman.

Of the states sharing a border with West Virginia, voters in Virginia, Ohio, and Kentucky have been given the opportunity to vote on the definition of marriage. Only Pennsylvania and Maryland have prevented its citizens from so voting.

When given to the people for a vote, marriage amendments seem quite popular. In Virginia, the marriage protection amendment passed 92 of the 95 counties in Virginia. In the counties bordering West Virginia, it passed by margins between 69% and 89%. Exit polls in Virginia confirmed that even a majority of young voters in Virginia voted in favor of marriage as one man and one woman.

⁷ See “Make Change, Not Lawsuits,” accessed on July 9, 2009, at http://www.freedomtomy.org/pdfs/ca_joint_advisory.pdf

⁸ *Id.*

In 2004, Kentucky voters passed their marriage protection amendment with 75% of the vote, while Ohioans passed theirs with 62% of the vote.

Nationwide, support for marriage as one man and one woman seems to be climbing as well. On June 18, 2009, a CBS/New York Times poll found only 33% of respondents supported same-sex "marriage" - a 9% drop in less than 50 days from their previous poll on the topic.

Meanwhile, West Virginia's only protection against the redefinition of marriage rests with the West Virginia DOMA. Section 48-2-603 of the West Virginia Code theoretically prevents the state from being bullied into recognizing "a relationship between persons of the same-sex that is treated as marriage under the laws"⁹ of other states. The lack of a clear definition of marriage in that law stands in stark contrast to the unambiguous laws and statements of policy recently invalidated in both Connecticut and Iowa. While this law may prevent the state from recognizing the relationship of same-sex couples who "marry" in Massachusetts or Connecticut, or later in the year New Hampshire, Vermont, or Maine, it offers no legally binding definition of marriage.

What is more, it bears remembering that West Virginia's DOMA is an act of the legislature. It has not been codified within the state's constitution. Absent a clear definition of marriage in West Virginia, marriages here are vulnerable to redefinition from a variety of different strategies.

However, there is a singular solution to the myriad of threats: letting the people settle the legal definition of marriage.

West Virginians Want to Vote on the Definition of Marriage

The Constitution of the State of West Virginia belongs to its people. When it is feasible, the people ought to be the ones to articulate the principles by which they consent to be governed. It is the job of the legislator to protect every West Virginian's right to practice that self-governance. The question, therefore, is there a legitimate reason *not* to let the people decide this issue?

I do not believe there is. Some may argue optimistically that the battle to redefine marriage will never come to West Virginia. But that is no reason deny West Virginians the chance to engage in self-governance when the mountain of evidence suggests otherwise.

Others may argue that current law sufficiently guards against the redefinition of marriage in West Virginia. Yet, absent a clear definition even within state law, what would prevent a court from inventing a constitutional right to same-sex marriage in West Virginia?

Even if a court did, some may suggest, the legislature would be quick to respond and let the people veto the pen of the unaccountable judge. However, that just begs the question why wait? If a vote is to be had anyway, why force the state to spend potentially millions of dollars in legal fees in defense of marriage only to do what could have avoided the cost in the first place: let the people vote.

Moreover, those legislators fail to acknowledge the possibility that even their best of intentions may be handcuffed by unforeseen political realities. The experience of Iowa is instructive at this point. There, many legislators placed their trust in their DOMA and the belief that an Iowan Supreme Court would be unlikely to overturn such a clear legisla-

⁹ See W.Va. Code s. 48-2-603 (2009).

tive enactment. Then, due to a surprising shift in political leadership, when their supreme court reinvented marriage, the legislature was left impotent to make good on their promise to let the people correct the court's error.

But, if those realities are unconvincing, the voice of the governed should be. At its core, representative democracy means listening to one's constituents when they ask to govern themselves.

At the beginning of the 2009 legislative session, we called 80,000 homes in West Virginia. Of the 10,000 who completed the survey, 94% agreed that voters - not judges or politicians - should settle the legal definition of marriage in West Virginia. Rarely do West Virginians express such near unanimity, except when it comes to the democratic process.

Interestingly, though 94% of West Virginians want the opportunity to vote on the definition of marriage, a lesser percentage agree on what that definition should be. According to the poll we conducted in July of 2008, 73% of West Virginians agreed that the definition of marriage ought to be one man and one woman. Almost seven (7) months later, in February of 2009, that number rose to 86%. Clearly, regardless of one's position on the ultimate definition, West Virginians agree about who should be making that decision: the people.

Conclusion and Recommendation

Given the recent experience of several states, it is clear that West Virginia needs to act quickly to let the people articulate a clear definition of marriage. With no legitimate reason *not* to let voters decide this issue, it falls to the responsibility of our legislators to protect every West Virginian's right to vote on this issue.

That is why we recommend that this committee recommend that the people be allowed to vote on an amendment to the state constitution that reads, "*Only a union between one man and one woman shall be valid or recognized as marriage in West Virginia.*" That question should be put to the people as soon as practicable. To that end, the sensible approach would place this language before the people at a special election sometime in the year 2010.

The Constitution that belongs to the people of West Virginia instructs us once again: "The powers of government reside in all the citizens of the state, and can be rightfully exercised only in accordance with their will and appointment."

Thank you for your time. I am pleased to answer any questions the committee may have.

Respectfully submitted,



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