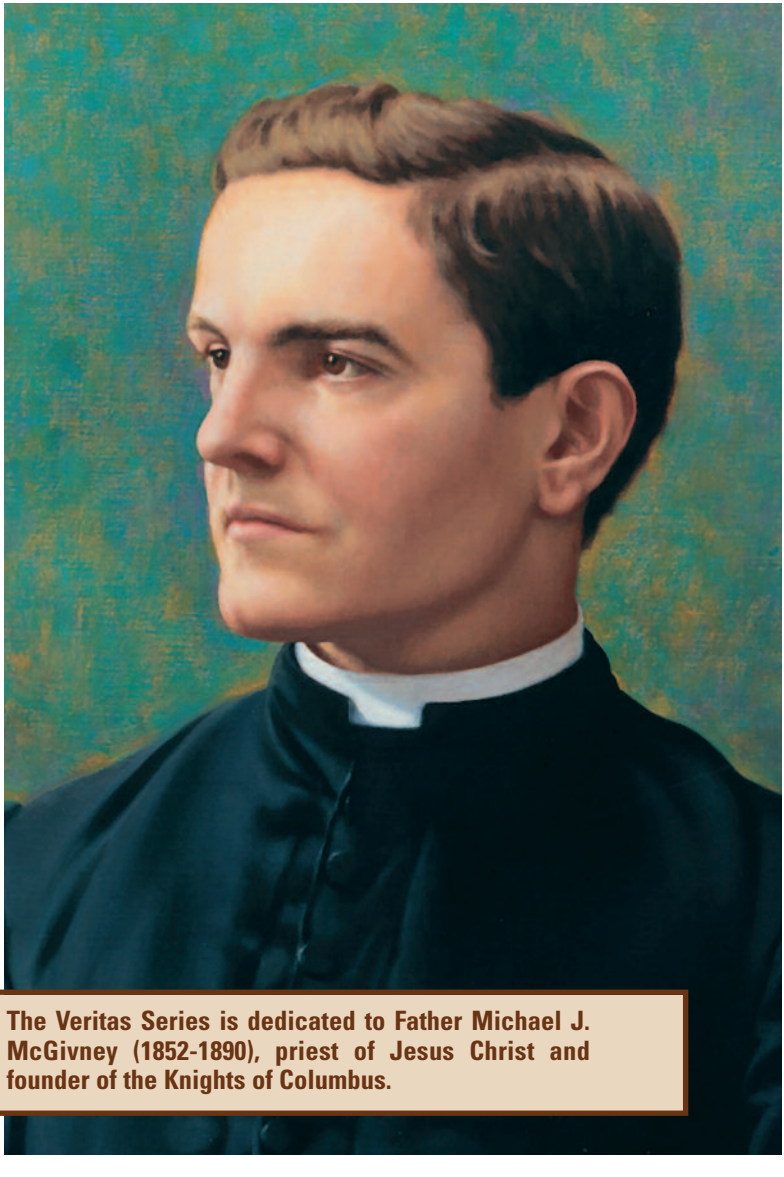
The Church, the Law, and Same Sex Unions



The Veritas Series is dedicated to Father Michael J. McGivney (1852-1890), priest of Jesus Christ and founder of the Knights of Columbus.

The Knights of Columbus presents
The Veritas Series
"Proclaiming the Faith in the Third Millennium"

The Church, the Law and Same-Sex Unions

by

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January 29, 2007

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Printed in the United States of America

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1. I'm confused. What exactly is the issue here?

The Short Answer

Since Adam and Eve, "marriage" has always been the union of one man and one woman. The issue here is whether the "gay rights" movement will succeed in redefining marriage so as to entitle same-sex couples to the name or legal benefits of marriage.

The Answer in Depth

The issue is whether a boy can grow up to marry a girl—or another boy. But what is a marriage? The law has traditionally recognized it as the union of one man and one woman. The law confers on that union exclusive "legal incidents." Those are legal rights, privileges and obligations not conferred on other relationships. The issue today is whether the law should recognize a same-sex union as a "marriage" or as entitled to the benefits the law confers on marriage.

Massachusetts, pursuant to a ruling by the highest court of that state, has legalized same-sex marriages.[1] Vermont, Connecticut and New Jersey have legalized same-sex "civil unions" as entitled to "the same benefits, protections and responsibilities under law... as are granted to spouses in a marriage."[2] Litigation is pending in other states to compel the recognition of same-sex marriage.[3]

The movement to legalize same-sex marriages or civil unions is part of a broader movement to obtain legal as well as cultural

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[1] *Goodrich v. Dept. of Public Health*, 440 Mass. 309, 798 N.E. 2d 941 (2003).

[2] *VT Statutes Annotated*, Title 15, §§ 1201-07: *Conn. Gen. Stat* §§ 46b-38aa to 46b-38pp; *Lewis and Winslow v. Harris*, 908A.2d196, 188N.J.415 (N.J., 2006); 2006 N.J. Sess. Law Serv. Ch. 103.

[3] See *Wash. Times*, July 27, 2006, p. A1.

validation of the homosexual lifestyle. Discrimination on the basis of sexual orientation is outlawed in federal employment.[4] In at least 45 states, state or local laws forbid such discrimination, with varied application to public and private employment, public accommodations, education, housing, credit and other issues. Other states and local governments provide benefits to domestic partnerships.[5] Fifty-one percent of Fortune 500 companies provide benefits to employees' same-sex domestic partners.[6] Later we will look at the legal issues in detail, including federal and state proposals to affirm the traditional definition of marriage. At this point we note merely that the "same-sex marriage" question is only one aspect of the broader cultural effort to legitimize the homosexual lifestyle.

2. Why did the law create the institution of marriage?

The Short Answer

It didn't. God—not the state or the human law—created marriage. It is the union of one man and one woman. The law cannot change that any more than it could make a man an aunt or a woman an uncle. Even if you don't believe in God, you can understand that marriage is established by nature rather than invented by mankind.

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[4] Executive Order no. 13087, 63 FR 30097 (May 28, 1998); see 10 U.S. Code Annotated, Sec. 654, enacted in 1993, for the "don't ask, don't tell" policy governing the armed forces.

[5] See www.lambdalegal.org. See generally, "Symposium, Interjurisdictional Recognition of Civil Unions, Domestic Partnerships, and Benefits," 3 *Ave Maria L. Rev.* 1 (2005).

[6] Leah Carlson Shepherd, *Employee Benefit News*, Sept. 15, 2006, p. 1; Human Rights Campaign Foundation, *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans*, 2005-2006, June 29, 2006.

The Answer in Depth

Marriage antedates the state. It was instituted by God himself at the Creation. "The intimate community of life and love which constitutes the married state has been established by the Creator and endowed by him with its own proper laws.... God himself is the author of marriage.... Holy Scripture affirms that man and woman were created for one another.... 'Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh.'"[7]

"Faith and Reason," said John Paul II, "are like two wings on which the human spirit rises to the contemplation of truth."[8] Marriage and the family are grounded not only in faith but also in the judgment of reason beyond the explicitly religious. You don't have to be Catholic, or even to believe in God, to understand the nature and importance of marriage and the family. "The family," according to Aristotle, "is the association established by nature for the supply of men's everyday wants." It is founded, he said, on "a union of those who cannot exist without each other; namely, of male and female, that the race may continue."[9]

In legal terms, the man and woman marry by making a contract. But marriage, in the words of Supreme Court Justice Stephen Field in an 1888 case, "is something more than a mere contract... It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the

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[7] *Catechism of the Catholic Church*, nos. 1603, 1605; *Genesis* 2:24.
[8] *Fides et Ratio*, Preamble.
[9] Aristotle, *Politics*, book I (Benjamin Jowett, transl.), in *Basic Works of Aristotle* (Richard McKeon, ed., 1941), 1127.

foundation of the family and of society, without which there would be neither civilization nor progress."[10]

The law gives exclusive rights, privileges and responsibilities, the legal "incidents" of marriage, to this union of man and woman because the spouses make a public commitment to each other, and a public commitment to the community, to raise and educate any children of that marriage. Those commitments confer a unique benefit on society and the state.

To put it simply, only a man-woman union can produce new taxpayers. A homosexual couple ("gay" or lesbian), in some states, can legally adopt a child. But homosexual activity is intrinsically a dead end. It cannot produce new life. "Society's stake in marriage," noted Methodist Pastor Donald Sensing, is "the perpetuation of the society itself."[11]

So the law did not create marriage. As the foundation of the family, marriage is prehistoric with its unchangeable nature known to reason as the union of one man and one woman. The law simply recognizes this reality by conferring the name and legal incidents of marriage only on such a union.

3. So legal benefits and obligations go along with marriage? What *are* they?

The Short Answer

Marriage and the family are the bedrock of society. To encourage them, the law gives to the married man and woman,

[10] *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).
[11] Donald Sensing, "Save Marriage? It's Too Late," *Wall Street Journal*, March 15, 2004, www.wsj.com Opinion Journal.

and to the family, privileges and responsibilities that no other union has.

The Answer in Depth

In *Turner v. Safley*,[12] the Supreme Court held unconstitutional a state prison regulation that allowed an inmate to marry only with the permission of the superintendent and only when there are "compelling reasons to do so," which are "generally only a pregnancy or the birth of an illegitimate child."[13] The Court held the regulation unreasonably deprived the inmate of "important attributes of marriage" which endure despite the physical separation of the spouses by incarceration. Those attributes include the following:

> [M]arital status often is a precondition to the receipt of *government benefits* (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These *incidents of marriage*, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.[14]

The Vermont law recognizing same-sex civil unions enumerated a "nonexclusive list" of 24 "legal benefits, protections and responsibilities of spouses, which shall apply

[11] 482 U.S. 78 (1987).
[12] 428 U.S. at 82.
[13] 482 U.S. at 96 (emphasis by Court).

in like manner to parties to a civil union," such as "family leave benefits," "family landowner rights to fish and hunt," etc.[15]

Each state or other jurisdiction has the power to decide what the "legal incidents" of marriage will be in that jurisdiction. If a state income tax deduction, for example, were available only to spouses in a marriage, that would be an incident of marriage. But if the deduction were cut loose from the marriage requirement and were made available to members of households generally, it would no longer be an incident of marriage. The legislature could strip marriage of any and all of the incidents attributable to it as "marriage" and make all those benefits available to spouses, same-sex couples, cohabiting heterosexual couples, etc. The pro-marriage movement should not try to limit this legislative power to define the legal incidents of marriage. The objective is rather to prevent legislatures and courts from recognizing non-marital unions as comparable to marriage by conferring on same-sex or heterosexual cohabiting couples either the name, "marriage," or any of the legal incidents of marriage as such incidents are defined by state law.

4. I still don't get it. How can it be reasonable and fair for the government to deny all those benefits and the status of marriage to a loving couple just because they are of the same sex?

The Short Answer

Common sense and right reason tell us, beyond doubt, that marriage and the family are essential to the common good of society. Only a union of a man and a woman can produce new

[15] *Vt. Statutes Annotated*, Title 15, § 1201-07.

citizens and the family provides the best environment for the raising of those new citizens.

The Answer in Depth

On July 26, 2006, the Washington State Supreme Court, in *Andersen v. King County*[16] upheld, as grounded on a "rational basis," the legislature's restriction of "the status of marriage" to a man-woman union. The court's explanation of why the restriction is rational is worth quoting at length:

> The State reasons that partners in a marriage are expected to engage in exclusive sexual relations with children the probable result and paternity presumed.... The State reasons that no other relationship has the potential to create, without third party involvement, a child biologically related to both parents, and the legislature rationally could decide to limit legal rights and obligations of marriage to opposite-sex couples. The legislature could also have found that encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.... In addition, the need to resolve the sometimes conflicting rights and obligations of the same-sex couple and the necessary third party in relation to a child also provides a rational basis for limiting traditional marriage to opposite-sex couples.... The sterile and elderly are allowed to marry, and married couples are not required to have children.... But... marriage is

[16] 138P3d.963 (WA, 2006).

> traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis....[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a "traditional" nuclear family where children tend to thrive.[17]

On July 14, 2006, a federal Court of Appeals upheld Nebraska's constitutional amendment that defined marriage as "between a man and a woman" and that said "The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."[18] The court upheld the state's contention that

> the laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into

[17] 138P.3d at 982-83.
[18] *Citizens for Equal Protection v. Bruning*, 455 F3d 859, 863, 867-68 (8th Cir., 2006).

> marriage.' By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws "encourage procreation to take place within the socially recognized unit that is best situated for raising children." .... The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature—or the people through the initiative process—may rationally choose not to expand in wholesale fashion the groups entitled to those benefits.

These courts deferred to the judgment of the legislature, or of the people voting in a referendum, upholding what the Court of Appeals called "the expressed intent of traditional marriage laws—to encourage heterosexual couples to bear and raise children in committed marriage relationships."[19] Other courts, of course, disagree. It remains to be seen what the outcome will be. But it is relevant to note here the comments of the courts in the Washington and Nebraska cases. They affirm the dictates of rationality and common sense.

"Because married couples ensure the succession of generations and are therefore eminently within the public interest," said the Congregation for the Doctrine of the Faith in 2003, "civil law grants them institutional recognition. Homosexual unions... do not need specific attention from the legal standpoint because they do not exercise this function for the

[19] 455 F3d at 868.

[20] Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (2003), no. 9.

common good."[20] There is no injustice here. Cohabiting homosexual or heterosexual couples still have the legal ability to protect their rights and interests, by contracts and otherwise, without the legal recognition of their unions as equivalent or analogous to marriage. "In reality, they can always make use of the provisions of law—like all citizens... to protect their rights in matters of common interest."[21]

5. Why are the Pope and the Catholic bishops so upset about this issue? How would the extension of marriage rights to same-sex couples hurt the family? Aren't homosexuals entitled to respect?

The Short Answer

Homosexuals are entitled to respect and protection from unjust discrimination. But the homosexual inclination is disordered and homosexual conduct is a moral and social evil. To raise same-sex unions to a level identical or analogous to marriage would devalue the family and undermine civil society.

The Answer in Depth

The Church is concerned because the legal status of the family affects the common good, which is "the sum total of social conditions which allow people... to reach their fulfillment more fully and more easily."[22] The Church is not the State. But "[t]he Church makes a moral judgment about economic and social matters, 'when the fundamental rights of the person or the salvation of souls requires it.'"[23]

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[21] *Ibid.*
[22] CCC no. 1906.
[23] CCC no. 2420.

On June 3, 2003, Joseph Cardinal Ratzinger (now Pope Benedict XVI), Prefect of the Congregation for the Doctrine of the Faith, issued *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*. The document, approved by Pope John Paul II, spelled out the reasons why "[t]here are absolutely no grounds for considering homosexual unions to be in any way similar or even analogous to God's plan for marriage and family. Marriage is holy, while homosexual acts go against the moral law."[24]

Considerations emphasized that "[l]aws in favor of homosexual unions are contrary to right reason because they confer legal guarantees, analogous to those granted to marriage, to unions between persons of the same sex."[25] *Considerations* noted "the difference between homosexual behavior as a private phenomenon and the same behavior as a relationship... approved by the law.... Civil laws... play a very important and sometimes decisive role in influencing patterns of thought and behavior. Lifestyles and the underlying presuppositions these express... tend to modify the younger generation's perception and evaluation of forms of behavior. Legal recognition of homosexual unions would obscure certain basic moral values and cause a devaluation of the institution of marriage.... The denial of the social and legal status of marriage to forms of cohabitation that... cannot be marital is not opposed to justice; on the contrary, justice requires it."[26]

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[24] No. 4.
[25] No. 6.
[26] Nos. 6, 8.

Benedict XVI, as Pope, has repeatedly reaffirmed that position he took in *Considerations*, insisting that "pseudo-marriages between people of the same sex, are instead an expression of anarchic freedom that are wrongly made to pass as true human liberation."[27]

It was John Paul II who said that "a family policy must be the basis and the driving force of all social policies."[28] The Catholic Church cannot compromise in its insistence that the common good requires the law to "recognize, promote and protect marriage as the basis of the family, the primary unit of society."[29]

The Catholic position on the family and same-sex marriage is not one of hostility toward homosexuals. The *Catechism* clearly presents that position:

> 2357 Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that "homosexual acts are intrinsically disordered." They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective

[27] Pope Benedict XVI, Address, June 6, 2005; *L'Osservatore Romano* (English ed.), June 15, 2005, p. 1.
[28] *Evangelium Vitae* (The Gospel of Life), no. 90.
[29] *Considerations*, no. 11.

and sexual complementarity. Under no circumstances can they be approved.

2358 The number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

2359 Homosexual persons are called to chastity. By the virtues of self-mastery that teach them inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.

The United States Conference of Catholic Bishops, in *Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care*, issued on Nov. 14, 2006,[30] detailed the requirements and implications of this teaching. "In fact," the statement said, "the Church actively asserts and promotes the intrinsic dignity of every person. As human persons, persons with a homosexual inclination have the same basic rights as all people, including the right to be treated with dignity."

[30] U.S. Conference of Catholic Bishops, "Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care" (Nov. 14, 2006), www.usccbpublishing.org.

Nevertheless "sexual orientation," said the statement, does not "'constitute a quality comparable to race, ethnic background, etc., in respect to non-discrimination.' Therefore, it is not unjust, for example, to limit the bond of marriage to the union of a woman and a man. It is not unjust to oppose granting to homosexual couples benefits that in justice should belong to marriage alone. 'When marriage is redefined so as to make other relationships equivalent to it, the institution of marriage is devalued and further weakened. The weakening of this basic institution at all levels and by various forces has already exacted too high a social cost.'"

The Bishops' statement quoted *Considerations* in explaining the Church's opposition to same-sex "marriage" and "civil unions": "The Church recognizes that 'marriage exists solely between a man and a woman, who by mutual personal gift, proper and exclusive to themselves, tend toward the communion of their persons. In this way, they mutually perfect each other, in order to cooperate with God in the procreation and upbringing of new human lives.' Consequently, the Church does not support so-called same-sex 'marriages' or any semblance thereof, including civil unions that give the appearance of a marriage. Church ministers may not bless such unions or promote them in any way, directly or indirectly. Similarly the Church does not support the adoption of children by same-sex couples since homosexual unions are contrary to the divine plan."

6. But what *is* the family? And why are its nature and purpose so irreconcilable with "same sex marriage"?

The Short Answer

The family is a community based on the union of two persons who are equal and who complement each other as man and woman. As a union of love, the family is an image of the Trinity.

The Answer in Depth

You don't have to believe in God to understand, through the use of reason, that the family is based on the union of one man and one woman and that it is essential to the common good of society. This conclusion of reason is confirmed by divine Revelation.

The family is the means designed by God for the creation of new citizens of the kingdom of heaven. The family is "the basic cell of society."[31] Just as the human person is made in the image and likeness of God, so, too, the "model of the family is ... in God himself, in the Trinitarian mystery of his life."[32] The life of persons of the family, like the life of the persons of the Trinity, is "a communion of love" and the "gift of self."[33]

The family relation is characterized by covenant, communion and community. The family arises from "the conjugal covenant of marriage, which opens the spouses to a lasting communion of love and of life, and it is brought to completion... with the procreation of children. The communion of the spouses gives

[31] Pope John Paul II, *Letter to Families* (LF) (1994), no. 4.
[32] LF, no. 6.
[33] Pope John Paul II, *On the Dignity and Vocation of Women* (1988), no. 7.

rise to the community of the family. The community of the family... is pervaded by... communion."[34]

So how is this relation different from same-sex unions? That's easy. The communion of spouses in the family is possible because of the complementarity of the spouses. Men and women are obviously not identical. But they do complement each other. "Every man and every woman," said John Paul, "fully realizes himself or herself through the sincere gift of self. For spouses, the moment of conjugal union constitutes a very particular expression of this. It is then that a man and woman, in the 'truth' of their masculinity and femininity, become a mutual gift to each other."[35]

"The natural truth about marriage," said Cardinal Ratzinger before he became Benedict XVI, "was confirmed by the... three fundamental elements of the Creator's plan for marriage, as narrated in the Book of Genesis."[36] Those three elements, founded on the complementarity of male and female, confirm that any similarity or analogy between homosexual unions and authentic marriage is utterly impossible:

> In the first place, man, the image of God, was created "male and female" (Gen 1:27). Men and women are equal as persons and complementary as male and female....
>
> [Second], Marriage is instituted by the Creator as a form of life in which a communion of persons is realized involving the use of the sexual faculty. "That

[34] LF, no. 7.
[35] LF, no. 12.
[36] *Considerations*, no. 3.

> is why a man leaves his father and mother and clings to his wife and they become one flesh" (Gen 2:24).
>
> Third, God has willed to give the union of man and woman a special participation in his work of creation.... "Be fruitful and multiply" (Gen 1:28). Therefore, in the Creator's plan, sexual complementarity and fruitfulness belong to the very nature of marriage.[37]

In the nature of things, a marriage between persons of the same sex is a contradiction in terms, an intrinsic impossibility. To ensure the perpetuation of the human race, God created a guy and a girl, named Adam and Eve. If he had started with two guys or two girls, whatever their names, the project would have gone nowhere.

7. Wait a minute. Don't we have a pluralistic society? What about the separation of Church and State? What right does the Church have to dictate public policy?

The Short Answer

The Church is not the State and the Church does not make public policy. The social teaching of the Church offers the conclusions of reason and natural law to help public officials and citizens to form their consciences with regard to the moral issues involved in policy and law.

The Answer in Depth

Pope Benedict put fears of collapsing the Church-State distinction to rest in his first encyclical, *Deus Caritas Est*

[37] *Ibid.*

(God is Love), issued on Christmas Day in 2005. He reviewed Catholic social teaching from the 19th century through the publication by the Vatican of the *Compendium of the Social Doctrine of the Church* in 2004.[38] "Fundamental to Christianity," Benedict said, "is the distinction between Church and State, or, as the Second Vatican Council puts it, the autonomy of the temporal sphere."[39] "The just ordering of society and the State" is the job of politics, not of the Church. Achieving justice is a problem of "practical reason." But reason requires "purification, since it can never be free of the danger of... ethical blindness caused by the dazzling effect of power and special interests. Here politics and faith meet."

Faith "liberates reason from its blind spots." "Catholic social teaching," said Benedict in language worth quoting at length:

> has no intention of giving the Church power over the State. Even less is it an attempt to impose on those who do not share the faith ways of thinking and modes of conduct proper to faith. Its aim is... to help purify reason and to contribute... to the attainment of what is just. The Church's social teaching argues on the basis of reason and natural law.... It ...is not the Church's responsibility to make this teaching prevail in political life. Rather, the Church wishes to help form consciences in political life.... The Church cannot... take upon herself the

[38] *Deus caritas est*, no. 27
[39] No. 28a.

> political battle to bring about the most just society possible. She cannot and must not replace the State. Yet at the same time she cannot... remain on the sidelines in the fight for justice. A just society must be the achievement of politics, not of the Church. Yet the promotion of justice... concerns the Church deeply.[40]

In summary, the Church does not, and cannot, do the job of the State. She seeks, instead, to appeal to the consciences of legislators, voters and others charged with the achievement of the common good. As John Paul II said to American bishops on December 4, 2004, "[w]hile fully respecting the legitimate separation of church and state in American life... for the faithful Christian there can be no separation between the faith which is to be believed and put into practice... and a commitment to full and responsible participation in professional, political and cultural life."[41]

The Church is not the State. But without the time-tested wisdom of the Christian tradition, as authoritatively interpreted by the Catholic Church, the State would be relatively clueless as to the meaning and requirements of justice. This is especially true with respect to the status of marriage in a culture dominated by a sexual ethic hostile to the nature and purpose of the family.

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[40] *Ibid.*

[41] Pope John Paul II, Ad Limina Address, Dec. 4, 2004; Originsonline.com, vol. 34, issue 30, no. 3.

8. Okay. So the Church says a same-sex union can't be a real marriage. But what is the law here and where is it going?

The Short Answer

The United States Constitution left the definition and regulation of marriage to the states. Congress could change that. And so could the courts—which is one of the problems.

The Answer in Depth

The Constitution of the United States says nothing about marriage. It left the definition and regulation of marriage to the states. The states' power to define and regulate marriage, however, is subject to constitutional restrictions, especially those imposed by the Fourteenth Amendment, adopted in 1868. That amendment provides that, "No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This booklet is not a legal brief. But we need to mention some of the relevant state and federal constitutional and statutory provisions and proposals that affect this marriage issue:

> 1. *The Full Faith and Credit Clause* (U.S. Constitution, Art. IV, Sec. 1): "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The Supreme Court has not yet decided

whether a state must give effect in its state law to a same-sex marriage legalized in the law of another state. The question is whether the state may apply its own policy or law barring same-sex marriage so as to refuse recognition to that same-sex marriage legalized in the other state.

2. *State Defense of Marriage Acts (DOMA)*, defining marriage as between a man and a woman. Forty-one states have DOMA statutes. At least six of these ban legal recognition of same-sex civil unions as well as same-sex marriage.

3. *State Constitutional Amendments Defining Marriage*. 27 states now have provisions in their state constitutions limiting marriage to a man-woman union.[42] Montana, for example, provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."[43] As with the statutory DOMAs, some state constitutional amendments also ban recognition of same-sex civil unions: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."[44]

4. *Federal DOMA—definition of "marriage" and "spouse" in federal law*. In 1996 Congress enacted a

[42] *Wash. Times*, Jan. 7, 2007, p. A2.
[43] Montana Constitution, Art XIII, Sec. 7.
[44] Michigan Constitution, Art I, Sec. 25.

Defense of Marriage act with two parts. One defined "marriage and "spouse" for purposes of federal law. It provides: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus or 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."[45]

5. *Federal DOMA—exemption of same-sex marriage from full faith and credit requirement*. The other part of the 1996 DOMA provides: "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."[46] This federal DOMA does not explicitly exempt states from giving effect to same-sex civil unions recognized in another state.

6. *Proposed Restriction of Supreme Court Jurisdiction*. Article III, Sec. 2, of the Constitution provides: "In all Cases affecting Ambassadors, other public ministers and consuls, and those in which a State

[45] U.S. Code, Title 1, Sec. 7.
[46] U.S. Code, Title 28, Sec. 1738C.

shall be Party, the supreme Court shall have original Jurisdiction." In original jurisdiction, the Supreme Court acts, in effect, as a trial court. Cases involving a state's definition of marriage could possibly involve a state as a party and therefore could be within the original jurisdiction of the Court, which Congress has no power to restrict. The jurisdiction of the Supreme Court to hear appeals from lower courts, however, can be restricted by Congress. Article III, Section 2, continues: "In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and render such regulations as the Congress shall make." Congress also has total control over the jurisdiction, and even the existence, of the lower federal courts. Various proposals have been introduced in Congress to remove from all federal courts, including the appellate jurisdiction of the Supreme Court, jurisdiction to decide the constitutionality of the federal DOMA provisions and the right to same-sex marriage.[47]

All of these state enactments, and federal enactments and proposals, would be subject to review by the Supreme Court, including a federal statute restricting the appellate jurisdiction of the Court. So the next thing we have to think about is the role of the Supreme Court and what, if anything, the Court is likely to do on this issue.

[47] See the proposed Marriage Protection Act, H.R. 1100, 109th Cong. (2005); see also H.R. 300, 110th Cong. (2007).

9. Doesn't the Supreme Court make the final call? What side are they on?

The Short Answer

The Supreme Court has jurisdiction to decide constitutional issues in cases brought before it. But Congress has the power to curtail the power of the Court to take control of the marriage issue.

The Answer in Depth

The Supreme Court makes the final call only if the Congress and the people let them make it. What side is the Court on? That depends.

The Supreme Court is one of the three coordinate branches of the federal government. In deciding cases, the Court has power to decide the constitutionality, under the United States Constitution, of federal and state laws including laws relating to same-sex marriage. Congress, however, could try to prevent, or respond to, a Supreme Court ruling on same-sex marriage by acting under Article III, Sec. 2, to remove that subject from the Court's appellate jurisdiction and from the jurisdiction of lower federal courts.[48] Such a removal of jurisdiction would leave in effect the Court decision which prompted the removal but would leave the highest court of each state free to make its own decision on the issue without fear of being overruled by the Supreme Court. Also, as discussed in Question 10, below, an amendment to the Constitution could determine the definition of marriage beyond the rightful power of the Court to disturb it. One problem with any constitutional amendment

[48] See Question 8, above.

or statute, however, is that it would be vulnerable to misinterpretation by the Court.

The potential involvement of the Supreme Court in the same-sex marriage issue is a major concern because of the Court's 2003 decision in Lawrence v. Texas.[49] In *Lawrence*, the Court, in a 6-3 decision, held unconstitutional a Texas law that made it a crime if a person "engages in deviate sexual intercourse," as defined in the statute, "with another individual of the same sex." Justice Anthony Kennedy, writing for five justices, held that the conviction violated the Due Process Clause of the 14th Amendment which provides that "No State shall... deprive any person of life, liberty or property, without due process of law." Justice Sandra Day O'Connor concurred in the 6-3 decision on the ground that the convictions deprived the defendants of the "equal protection of the laws." The court overruled its 1986 decision in *Bowers v. Hardwick*[50] in which a 5-4 majority had upheld Georgia's prohibition of consensual sodomy.

Justice Antonin Scalia dissented in *Lawrence v. Texas* and accurately summarized the impact of that case on state regulation of sexual activity and of marriage:

> Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation.... State laws against bigamy, same-sex marriage, adult incest,

[49] 539 U.S. 558 (2003).
[50] 478 U.S. 186 (1986).

> prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.[51]

"At the end of its opinion," Scalia asserted, "after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to 'personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,' and then declares that '[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.' Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[52]

In one way or another, the same-sex marriage issue is likely to reach the Supreme Court. What the Court does with it will depend on the changing membership of the Court. We should keep in mind, however, that the Constitution did not make the

[51] 539 U.S. at 589-90.
[52] 539U.S. at 604 (emphasis in Scalia's opinion).

Supreme Court totally supreme. The Court's authority is subject to Congress' control over its appellate jurisdiction and to the people's control through amendment of the Constitution.

10. So do we need to amend the United States Constitution?

The Short Answer

An amendment to the United States Constitution is a possible, but probably not practical, solution to the same-sex marriage problem.

The Answer in Depth

Do we need an amendment? Maybe. It would be unwise, however, to regard any legal enactment, even a constitutional amendment, as a magic bullet solution to a problem like same-sex marriage. That problem is moral and cultural more than legal. Legal measures, of course, are necessary. And a constitutional amendment could be needed if the Supreme Court were to enter the fray and usurp the rightful power of the states to define and regulate marriage. *Lawrence v. Texas*, in 2003, raised concern that the Court would do that.[53] Even if Congress responded by removing the Court's appellate jurisdiction in such cases, that removal of jurisdiction would not undo the Court's decision and would not be a permanent solution.

Adopting a constitutional amendment to "overrule" a Supreme Court decision, incidentally, has a theoretical downside. It would imply, erroneously, that a Supreme Court interpretation

[53] See Question 9, above.
[54] U.S. Constitution, Art IV, Sec. 2.

of the Constitution is "the supreme Law of the Land,"[54] on the same level as the words themselves of the Constitution. It was not until 1958 that the Supreme Court ever said that its decisions were "the supreme law of the land." That was in a case holding that a state was bound by a Supreme Court desegregation decree.[55] There is no decision or principle mandating comparable obedience by the Congress and the Executive to Supreme Court decrees. The amending process has been used to overturn Supreme Court rulings, as in the Civil War Amendments, the 13th, 14th and 15th, which were enacted in response to the Dred Scott case, when the Court held that a freed slave would not be a citizen and said that slaves were property rather than persons.[56] The 16th Amendment, authorizing a federal income tax, also was a response to a restrictive ruling by the Court.[57]

There is, therefore, precedent for using the amending process to undo a Supreme Court ruling. Those precedents would apply to a Court mandate for same-sex "marriage" or civil unions.

A strong argument can also be made for amending the Constitution on same-sex marriage, not in response to a Supreme Court ruling but rather as a preventive means of settling the question regardless of the action or inaction of the Court. The amending process could serve an educative role by involving the people through their representatives in Congress and the state legislatures. The amending process, however, as

[55] *Cooper v. Aaron*, 358 U.S. (1958).
[56] *Scott v. Sandford*, 60 U.S. 393 (1857).
[57] See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

provided in Article V of the Constitution, is complicated and difficult. Two methods can be used. The Congress, by a two-thirds vote of both the House of Representatives and the Senate, may propose an amendment to the states. Or on application by two-thirds (34) of the fifty states, Congress "shall call a Convention for proposing amendments." Once an amendment is proposed by Congress or by a Convention it will become part of the Constitution when it is ratified by the legislatures of three-fourths (38) of the states or by conventions in three-fourths of the states as one or the other mode of ratification has been proposed by Congress.

Realistically, the political obstacle course a constitutional amendment on same-sex marriage must negotiate would be so difficult as to make success unlikely. Nevertheless, a constitutional amendment remains on the table as a possible solution. Various amendments have been proposed on this issue. We ought therefore to consider what sort of amendment could be appropriate.

11. If we go for a constitutional amendment, what should it look like?

The Short Answer

A constitutional amendment should prohibit not only same-sex "marriage" but also the legal recognition of same-sex civil unions.

The Answer in Depth

A constitutional amendment to protect the traditional definition of marriage could be an appropriate remedy to forestall or undo a Supreme Court mandate imposing same-

sex marriage or civil unions on the states. Two general types of amendment are possible here. One would restrict the definition of a marriage to a man-woman union while allowing the legalization of Vermont-style civil unions. The second type would not only prevent the extension of the name, "marriage," to same-sex unions but would also forbid the courts and legislatures to give to same-sex unions any of the legal incidents, or rights, benefits, privileges and responsibilities of marriage.

The proposed Federal Marriage Amendment (FMA) is an example of the first type. It provides:

> 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.[58]

Under the FMA, state legislatures would be able to legalize Vermont-style same-sex civil unions, with the legal incidents of marriage, but courts could not do so on the pretext that the federal or state constitution should be "construed to require" such a result. The legislature could legalize civil unions under the FMA because such legislation could be based on the theory that the Constitution permits, but does not "require" their legalization. The main purpose of the FMA is to prevent

[58] S.J. Res. 30 (108th Cong: 2004).

[59] See Robert Bork, "Stop Courts from Imposing Gay Marriage," *Wall Street Journal*, Aug. 7, 2001; Robert P. George, "The 28th Amendment," National Review, July 23, 2001, p. 32.

the courts from ruling that legalization of same-sex marriage or civil unions is required by the federal or state constitution.[59]

A *First Things* editorial accurately described the purpose and effect of the FMA: "The first sentence [of the FMA] means that no legislature or court may confer the name of marriage on same-sex unions or recognize a same-sex marriage contracted in another country, such as Canada or the Netherlands. The second sentence is aimed more specifically at activist courts, both state and federal, preventing them from imposing same-sex marriage or its equivalent. The question of adopting arrangements other than marriage, such as civil unions, is left to the determination of the people through the democratic process in the several states."[60]

The FMA is based on the erroneous premise that the essential problem here is judicial activism. It is clear, rather, that the problem is not merely juridical or political. It is cultural, moral and, indeed, religious. The majority vote of a legislature cannot make right what is intrinsically wrong and contrary to the common good.

The promotion of a principled amendment to affirm traditional marriage could serve an educational purpose—to reconvert the American people to the conviction that marriage is intrinsically between one man and one woman because "the Laws of Nature and of Nature's God,"[61] irrevocably so prescribe. Many secular and pragmatic reasons confirm the wisdom of that divine plan. Marriage antedates the state. It is

[60] *First Things* editorial, "The Marriage Amendment," Oct. 2003, p. 14.
[61] Declaration of Independence.

beyond the power of the state to alter the nature of marriage or to raise any other relation to its legal equivalent.

For a proposed amendment to have a positive educational impact, it must be grounded on principle, without compromise. What sense does it make to say, as the FMA provides, that a court may not give legal recognition to a same-sex union by giving it either the name or legal incidents of marriage but that a state legislature, or Congress, may give legal recognition to that union by giving it the legal incidents of marriage, thus making it legally identical to marriage in everything but the name? That is a distinction without any real difference. The FMA, incidentally, would appear also to conflict with the teaching of the Church, discussed below in Question 12, on the legal recognition of same-sex unions.

A further question arises from the fact that the United States Constitution is "the supreme Law of the Land."[62] The FMA would write into that Constitution the power of legislatures to confer the rights, benefits and other legal incidents of marriage on same-sex unions. The FMA therefore could be interpreted to render unconstitutional any provision of a state constitution that would forbid the legislature of that state to recognize Vermont-style civil unions by conferring on them the legal incidents of marriage.

A Catholic member of Congress or of a state legislature, in the constitutional amendment process, would evidently be obliged to vote against the FMA. This is so because of the mandate of *Considerations* that, "When legislation in favor of the

[62] U.S. Constitution, Art. VI, cl. 2.

recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic lawmaker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favor of a law so harmful to the common good is gravely immoral."[63]

The FMA would present to members of Congress considering whether to send it to the states for ratification, and to members of state legislatures considering whether to ratify it, a situation where "legislation in favor of the recognition of homosexual unions is proposed for the first time in a legislative assembly" acting as the proposing Congress or the state ratifying legislature in the constitutional amendment process. It is fair to conclude that *Considerations* would require a Catholic member of Congress or state legislator to vote against the FMA.

The law is an educator. The FMA would intrude the text of the Constitution, for the first time, into the business of defining marriage. While it would prevent Congress, state legislatures, and the courts from giving the name "marriage" to same-sex unions, it would legitimize such unions by nailing into the Constitution permission for Congress and state legislatures to confer on them all the legal incidents of marriage so long as the union is called something other than "marriage." This is symbolism over substance. The contradiction inherent in the FMA would reduce its advocates, and the pro-family position, to incoherence.[64]

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[63] No. 10.

[64] See Charles E. Rice, "The Federal Marriage Amendment is Symbolism over Substance," *The Wanderer*, July 22, 2004, p. 4.

The conflicted text of the FMA would be likely to fail of adoption and to leave confusion in its wake. No amendment can be guaranteed against misinterpretation. But an alternative Marriage Protection Amendment could clearly forbid not only formal recognition of same-sex "marriage" but also the recognition of Vermont-style civil unions:

> Marriage in the United States shall consist only of the union of one man and one woman. Neither the United States nor any State shall recognize any other union as a marriage or as entitled to any of the legal incidents of marriage as such incidents are defined by law.

The Constitution should be amended only as a last resort. If you are going to amend the Constitution, do it right. Or don't do it at all.

12. You make a big deal about legalizing same-sex civil unions. What does the Church say about putting same-sex unions on the same level as marriage?

The Short Answer

Whether you give same-sex unions the name of marriage or the rights and benefits of marriage under another name, the result is equally catastrophic for the common good. Either way, the Church is opposed.

The Answer in Depth

Let's go right to the source. *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* was issued by the Congregation for the Doctrine of the Faith in 2003 when Cardinal Joseph Ratzinger, now Benedict XVI,

was its prefect. "Moral conscience requires," said *Considerations*, "that, in every occasion, Christians give witness to the whole moral truth, which is contradicted both by approval of homosexual acts and unjust discrimination against homosexual persons.... [O]ne needs first to reflect on the difference between homosexual behavior as a private phenomenon and the same behavior as a relationship in society, foreseen and approved by the law, to the point where it becomes one of the institutions in the legal structure.... Legal recognition of homosexual unions would obscure certain basic moral values and cause a devaluation of the institution of marriage."[65]

Clearly, the criteria expressed in *Considerations* would apply to the conferral of the legal incidents of marriage on same-sex civil unions as fully as to the conferral of the name, "marriage," on them:

> By putting homosexual unions on a legal plane analogous to that of marriage and the family, the state acts arbitrarily and in contradiction with its duties.... Not even in a remote analogous sense do homosexual unions fulfill the purpose for which marriage and family deserve specific categorical recognition. On the contrary, there are good reasons for holding that such unions are harmful to the proper development of human society, especially if their impact on society were to increase.[66]

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[65] Nos. 5, 6.
[66] No. 8.
[67] No.11.

Considerations condemned "[l]egal recognition of homosexual unions or placing them on the same level as marriage."[67] Pope Benedict XVI reinforced that conclusion in a March 30, 2006, address to European parliamentarians. He spelled out three "non-negotiable" principles for the public arena. They are not "truths of faith," but rather "are inscribed in human nature" and are therefore "common to all humanity," including, of course, candidates and voters in the United States.[68]

The first principle stated by Benedict requires "protection of life in all its stages, from the first moment of conception until natural death." Benedict's third principle requires "the protection of the rights of parents to educate their children." Benedict's second non-negotiable principle affirms the teaching of *Considerations*. It requires "recognition and promotion of the natural structure of the family—as a union between a man and a woman based on marriage—and its defense from attempts to make it juridically equivalent to radically different forms of union which... harm it and contribute to its destabilization, obscuring its particular character and its irreplaceable social role."

The teaching of the Church clearly affirms the duty of the state both to promote marriage as the union of one man and one woman and to reject the elevation of any other union to the same or an analogous legal plane.

As noted in Question 5, above, the United States Conference of Catholic Bishops, in November, 2006, reaffirmed the opposition of the Church to "granting to homosexual couples

[68] *L'Osservatore Romano* (English ed.), April 12, 2006, p. 4.
[69] USCCB, *Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care*, Nov. 14, 2006.

benefits that in justice should belong to marriage alone." "[T]he Church," said the Bishops' statement, "does not support so-called same-sex 'marriages' or any semblance thereof, including civil unions that give the appearance of a marriage."[69]

13. Are Catholic politicians obliged to oppose same-sex marriage?

The Short Answer

Yes, period, paragraph.

The Answer in Depth

Here again, we find a clear answer in *Considerations*. Section IV, "Positions of Catholic Politicians With Regard to Legislation in Favor of Homosexual Unions," states in its entirety:

> If it is true that all Catholics are obliged to oppose the legal recognition of homosexual unions, Catholic politicians are obliged to do so in a particular way, in keeping with their responsibility as politicians. Faced with legislative proposals in favor of homosexual unions, Catholic politicians are to take account of the following ethical indications.
>
> When legislation in favor of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic law-maker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favor of a law so harmful to the common good is gravely immoral.

> When legislation in favor of the recognition of homosexual unions is already in force, the Catholic politician must oppose it in the ways that are possible for him and make his opposition known; it is his duty to witness to the truth. If it is not possible to repeal such a law completely, the Catholic politician, recalling the indications contained in the Encyclical Letter *Evangelium vitae*, "could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality," on condition that his "absolute personal opposition" to such laws was clear and well known and that the danger of scandal was avoided. This does not mean that a more restrictive law in this area could be considered just or even acceptable; rather, it is a question of the legitimate and dutiful attempt to obtain at least the partial repeal of an unjust law when its total abrogation is not possible at the moment.[70]

Bishop Thomas J. Olmsted of Phoenix, Arizona, wrote a booklet in 2006, *Catholics in the Public Square*, which included pointed observations on "candidates or politicians in our country who label themselves as Catholic." "Regrettably," said Bishop Olmsted, "some of these are an embarrassment to the Church and a scandal to others by virtue of their support of issues that are intrinsically evil. A candidate who is authentically Catholic is one who always defends the dignity of every human person and who puts the welfare of the

[70] *Considerations*, no. 10.
[71] Thomas J. Olmsted, *Catholics in the Public Square* (Basilica Press, 2006), 43.

common good over various partisan or self interests. His personal and public life is shaped by faith in Christ and His teachings. Such a candidate can be from any political party, but will never support matters that are intrinsically evil such as abortion, euthanasia, or 'same-sex marriage'."[71]

These statements from *Considerations* and Bishop Olmsted accurately express the clear position of the Catholic Church on the duty of Catholic politicians to form their consciences correctly and to act in accord with the truth, especially on moral and political issues that are, in Pope Benedict's words, "non-negotiable."

14. Hold it. Let's go back to basics. How did we get into this mess? Where did the idea of "same-sex marriage" come from?

The Short Answer

The United States is a contraceptive society. But a society cannot accept contraception without approving the homosexual culture as well as abortion, euthanasia and other evils.

The Answer in Depth

The trajectory is a straight line from the Anglican Lambeth Conference of 1930 to the legalization of same-sex marriage. That conference was the first time any Christian denomination ever said that contraception could ever be objectively right. The Catholic Church stood, and stands, virtually alone in defending the traditional Christian position.[72] The contraceptive ethic, based on the

[72] See *Compendium of the Social Doctrine of the Church* (2005), no. 233; *Catechism of the Catholic Church* (1997), nos. 1652-54.

Enlightenment premises of secularism, relativism and individualism, makes man, of both sexes, the arbiter of whether sex will have any relation to procreation.

The United States Conference of Catholic Bishops, in its November, 2006, statement, *Married Love and the Gift of Life*, described the contrast between the contraceptive culture and the rich and hope-filled teaching of the Church:

> Our culture often presents sex as merely recreational, not as a deeply personal or even important encounter between spouses. In this view, being responsible about sex simply means limiting its consequences—avoiding disease and using contraceptives to prevent pregnancy.
>
> This cultural view is impoverished, even sad. It fails to account for the true needs and deepest desires of men and women. Living in accord with this view has caused much loneliness and many broken hearts.
>
> God's plan for married life and love is far richer and more fulfilling....
>
> Suppressing fertility by using contraception denies part of the inherent meaning of married sexuality and does harm to the couple's unity. The total giving of oneself, body and soul, to one's beloved is no time to say: "I give you everything I am—except...." The Church's teaching is not only about observing a rule, but about preserving that total, mutual gift of two persons in its integrity.

> This may seem a hard saying.... But as many couples who have turned away from contraception tell us, living this teaching can contribute to the honesty, openness, and intimacy of marriage and help make couples truly fulfilled....
>
> A couple need not desire or seek to have a child in each and every act of intercourse. And it is not wrong for couples to have intercourse even when they know the wife is naturally infertile, as discussed below. But they should never act to suppress or curtail the life-giving power given by God that is an integral part of what they pledged to each other in their marriage vows. This is what the Church means by saying that every act of intercourse must remain open to life and that contraception is objectively immoral.[73]

In the nature of things, sex is reserved for marriage, and marriage is permanent, because sex has something to do with babies who need a stable and caring environment. But if there is no intrinsic relation between sex and procreation, why should sex be reserved for marriage, why should marriage be permanent, and why should marriage be limited to a man and a woman?

> The contraceptive society cannot deny legitimacy to homosexual activity without denying itself. If it is entirely man's decision whether sex will have any

[73] USCCB, *Married Love and the Gift of Life*, Nov. 14, 2006; www.usccbpublishing.org.

[74] Charles E. Rice and Theresa Farnan, *Where Did I Come From? Where am I Going? How Do I Get There?* (St. Augustine's Press, 2006), p. 141.

> relation to reproduction, if no one can really know what is right and if God's law is excluded, then the objections to allowing two men or two women to marry each other are reduced to the aesthetic and arbitrary.[74]

You don't have to be Catholic to recognize the connection between contraception and the same-sex marriage movement. In a *Wall Street Journal* column in 2004, Methodist Pastor Donald Sensing of Franklin, Tennessee, said, "Opponents of legalized same-sex marriage [are] a little late. The walls of traditional marriage were breached 40 years ago. What we see now is a storming of the last bastion." Marriage, says Sensing, was done in by the contraceptive pill, which severed "[t]he causal relationships between sex, pregnancy and marriage," obviating "[t]he fundamental basis for marriage."[75] Sensing makes the point that, in a contraceptive society, marriage loses its reason for being. "Sex, child-bearing and marriage now have no necessary connection to one another," he says, "because the biological connection between sex and child-bearing is controllable." The dominance of the pill made weddings, in Sensing's words, "symbolic rather than substantive," serving "for most couples [as] the shortest way to make the legal compact [on] property rights and other... benefits."

The pill undercut the legal basis to deny homosexuals the right to enter the contract of marriage in order to regulate, in

[75] Donald Sensing, "Save Marriage? It's Too Late," *Wall Street Journal*, March 15, 2004, www.wsj.com.

Sensing's words, "their legal and property relationship... to mirror exactly that of hetero, married couples."

What has the contraceptive ethic brought us? If man, of both sexes, makes himself the arbiter of whether and when life shall begin, he will predictably make himself the arbiter of when it will end. And if man is the ultimate arbiter of whether sex will have any relation to procreation, marriage loses its reason not only for permanence but also for its restriction to the union of a man and a woman. In this essay we focus mainly on same-sex marriage. But it is important to note that the contraceptive mentality that has brought us same-sex marriage has brought us also abortion, euthanasia, promiscuity, pornography, divorce, *in vitro* fertilization, embryonic stem-cell research, cloning and other refinements that can only be imagined.[76]

Pope Benedict put all of this in context as a rejection of authentic love: "[We] are witnessing on a planetary level, and in the developed countries in particular, two... interconnected trends:... an increase in life expectancy and... a decrease in birthrates... [M]any nations... lack a sufficient number of young people to renew their population. The situation is the result of... complex causes... But its ultimate roots can be seen as moral and spiritual; they are linked to a... deficit of faith, hope, and, indeed, love. To bring children into the world calls for... a creative [love] marked by trust and hope in the future. By its nature, love looks to the eternal. Perhaps the lack of

[76] See discussion in Charles E. Rice, *The Winning Side* (2000), 107-25.
[77] Pope Benedict XVI, Message to Pontifical Academy of Social Sciences, April 27, 2006. *L'Osservatore Romano* (English ed.), May 10, 2006, p. 4.

such creative and forward-looking love is the reason why many couples today choose not to marry, why so many marriages fail, and why birthrates have significantly diminished."[77]

15. So you blame it on the contraceptive mentality. But where did *that* come from?

The Short Answer

The contraceptive ethic is a product of the secularism, relativism and individualism that dominate modern culture.

The Answer in Depth

The contraceptive ethic is itself a symptom of the prevailing errors of the Enlightenment, the effort by philosophers and politicians over the past three centuries and more to build a society as if God did not exist. The Enlightenment premises are:

Secularism. There is no God or if there is, he is unknowable. But we know from reason that an eternal being with no beginning, i.e., God, had to have always existed. If there was ever a time when there was nothing, there could never be anything. The movie version of the Sound of Music had it right: "Nothing comes from nothing. Nothing ever could." This was spelled out by St. Thomas Aquinas.[78]

Relativism. There are no objective moral norms. But the statement that all things are relative is absurd. If it were true, that statement itself would have to be relative. Our universities are full of relativist professors who are sure that they can't be

[78] See *Summa Theologiae*, I, Q. 2, art. 3.

sure of anything. Or if they are not sure even of that, they are sure at least that they are not sure of it. Or they might say that the only propositions that are meaningful are those that can be empirically verified by the scientific method. But that proposition itself cannot be empirically verified.[79] In reality, we can know objective truth, including moral truth, through reason as well as faith.[80]

Individualism. Each person is an autonomous individual with no relation or obligation to others except as he consents. He is his own arbiter of right and wrong; he is his own god. An "individualistic concept of freedom," John Paul II said, "ends up by becoming the freedom of 'the strong' against the weak who have no choice but to submit."[81]

Especially over the past century, these errors have come to pervade American education, law and culture. Inevitably, they have affected the most elemental human activity—the generation of new life. And they have done so through a distorted notion of conscience. If there is no God and no objective right or wrong, the conscience becomes, not a judgment about the objective morality of a specific act, but an exercise of the will, a "choice" rather than a judgment. Whatever I "feel" is right becomes therefore the right choice for me. This divorce of freedom from truth makes no more sense in sexual matters than it would in driving a car. If you "feel" that you want to put sand in the gas tank of your car, you will be "free" to do so. You are sincere and you are "pro-choice."

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[79] See Charles E. Rice, *50 Questions on the Natural Law* (1999), 133-34.
[80] See generally, Pope John Paul II, *Fides et Ratio* (Faith and Reason) (1998).
[81] *Evangelium Vitae* (The Gospel of Life), no. 19.

But you will no longer be free to drive your car. That is so because you have violated the nature of your car. You have not done what is good for your car. The good is that which is in accord with the nature of the thing. The truth of the nature of the car is that gasoline is good for it and sand is not. Similarly, a relativistic, individualist concept of freedom may result in two guys or two girls choosing to "marry" each other. But that will no more result in their own good or happiness than putting the sand in the tank will result in the good of the car and the freedom to drive it.

In *Veritatis Splendor*, in 1993, Pope John Paul II said that the "acceptance of truth is the condition for authentic freedom."[82] He explained "the full meaning of freedom" as "the gift of self in service to God and one's brethren."[83] But then he said that the separation of freedom from truth results from "another more serious and destructive dichotomy, that which separates faith from morality."[84] In other words, when you deny God you end up making yourself a god and you become confused in your moral choices.

In his homily to the College of Cardinals at the Mass before the conclave which elected him Pope, then-Cardinal Ratzinger warned of a "dictatorship of relativism that recognizes nothing as absolute and which only leaves the 'I' and its whims as the ultimate measure. We have another measure: the Son of God, true man. He is the measure of true humanism."

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[82] Pope John Paul II, *Veritatis Splendor* (The Splendor of Truth) (1993) no. 87.
[83] *Ibid.*
[84] No. 88.

So where does the contraceptive mentality come from? It comes from the idea that there is no eternal Being, that something can therefore come from nothing, that there is no objective moral truth, that I am my own autonomous self, with no intrinsic relation to others, and that I can therefore set my own rules even as to the generation of new life. This leads to negative personal and social consequences, as we shall see in the next question.

16. Suppose we did legalize same-sex "marriage" or civil unions. What would come next? Where would it all end?

The Short Answer

Don't kid yourself. The recognition of same-sex "marriage" is just for openers. The militant homosexual movement seeks nothing less than the destruction of the social order based on the family as instituted by God and known through reason as well as faith.

The Answer in Depth

> The legal recognition of same-sex unions as "marriages" or as entitled to the legal incidents of marriage would open the door to an interesting array of "progressive" developments.
>
> In his response to the New Jersey Supreme Court's mandate for legal recognition of same-sex marriage or civil unions, Archbishop John Myers, of Newark, painted a picture of the future. We quote it at length. Read it and think about it:
>
> As many supporters of the idea of same-sex "marriage" (or its equivalent, using other words such

as civil union or domestic partnership) admit, the logic of their position points to the abolition of marriage as a socially normative institution. Anyone who teaches—or preaches—that marriage is an exclusive union of one man and one woman will be labeled a bigot. Anyone who teaches—or preaches—that sexual relations outside of marriage are sinful will be accused of intolerance. Anyone who teaches—or preaches—that sexual relations between a man and a man or a woman and a woman are morally wrong will be charged with prejudice. Anyone who teaches—or preaches—that children need a mom and a dad and that two moms or two dads are not the same will be marginalized as an enemy of equality.

And everyone knows what will soon follow: Christian, Jewish, Muslim and other religious communities will come under intense political pressure and legal attack. By standing by their principled beliefs regarding marriage and sexual morality, they will be rendered vulnerable to laws prohibiting what advocates of sexual liberation and same-sex "marriage" will insist is "discrimination."

We have already seen this wherever same-sex relations have been given legal standing—in Canada, in Sweden and right here in the United States in the commonwealth of Massachusetts where four judges imposed same-sex marriage in an opinion now cited with approval by the New Jersey court. In Canada and Sweden pastors were

> prosecuted for preaching from the Bible about homosexuality. In Massachusetts Catholic Charities was forced to abandon its 100-year-old program of helping to place children with adoptive parents. And this is just the beginning.
>
> As one legal scholar who advocates same-sex "marriage" bluntly put it, religious liberty and sexual freedom will clash, and religious liberty will usually have to lose. Among the places it will lose, of course, is in schools, where children will be indoctrinated into the ideology of same-sex "marriage" in open defiance of their parents' beliefs.[85]

If one guy may "marry" another, why can't they include a third guy in the mix? Or a third guy, a girl or two and another guy? The legal recognition of same-sex "marriage" or civil unions would predictably extend to all the varieties of the Gay, Lesbian, Bisexual, Transgender and Discerning culture. That would include relations amounting in effect to polygamy (one husband, multiple wives), polyandry (one wife, multiple husbands), polyamory (three or more partners where all have sexual relations with all the others) and, of course, bestiality. Princeton University Professor Peter Singer, the founder of the animal rights movement, noted that, "[o]ne by one, the taboos have fallen. The idea that it could be wrong to use contraception in order to separate sex from reproduction is now merely quaint.... The existence of sexual contact between humans and animals, and the

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[85] 36 *Origins*, Nov. 9, 2006, pp. 345-46.
[86] Peter Singer, "Heavy Petting," www.nerve.com/opinions/Singer/heavypetting/.
[87] *Opinion Journal*, www.wsj.com, March 30, 2001.

potency of the taboo against it, displays the ambivalence of our relationship with animals."[86] In Singer's view, commented a *Wall Street Journal* editorial, "when it comes to sex with farm animals, the only real issues are whether you get the animal's consent—and you don't kill it as part of your pleasure."[87]

As Justice Scalia indicated in his opinion in *Lawrence v. Texas*,[88] legal recognition of same-sex unions would lead to the legalization of incest, pedophilia, prostitution and other immoral and socially harmful activities.

The bottom line? The legal recognition of same-sex "marriage" or civil unions will be just for openers. A society in which it makes no legal or cultural difference whether a boy marries a girl or another boy or a mix-and-match group of both, is so bereft of reason so as to be clinically insane. That society cannot survive.

17. Okay. Let's get to the bottom line. Are we winning or losing this fight? And what can I, a Catholic citizen, do about it?

The Short Answer

We will suffer persecution and defeats. But victory is certain. No doubt about it. We *are* on the winning side. The other side has nothing to offer except a culture of death and despair. Our job is to educate, to trust God and, most important, to pray, especially to Mary, the Mother of God.

[88] See Question 9, above.

The Answer in Depth

We *are* on the winning side. Guaranteed. The family, based on authentic marriage, is rooted in nature according to the plan of God, beyond the power of any state—or even the media—to destroy or change it. That does not mean that, in the short term, the law will not be changed to allow same-sex marriage and civil unions as well as other refinements of the contraceptive culture. Those legal changes, to the extent they occur, will reflect the homosexualization of the culture, especially in education and the media as well as the law. That homosexualization will continue as long as the secularist, relativist and individualist premises of that culture dominate.

So, for the near future, the defense of the family may be a legal and political loser. But that is cause for realism, not pessimism. The other side has nothing to offer except a dead-end culture, the defects of which are increasingly evident. In that culture, among other things, the intentional infliction of death, even on the innocent, is widely accepted as an optional and sometimes legal problem-solving technique; the human person is valued not for what he is but for what he can do that is useful in the eyes of those in control; the generation of new human life is trivialized and reduced to a laboratory process; and the future is foreclosed by an unwillingness to give life to a new generation. That combination fits Pope John Paul II's description of a "culture of death," "a culture which denies solidarity" and becomes "a war of the powerful against the weak."[89]

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[89] *Evangelium Vitae* (The Gospel of Life), no. 12.
[90] *Deus caritas est*, no. 28 (a); See Question 7, above.

The answer to such a degraded civilization can be found only in the social and moral teachings of the Catholic Church. Those teachings provide reasons and a motivation for the reconversion of the American people to a sound recognition of the natural law and its Lawgiver. "The Church's social teaching," said Benedict XVI in his first encyclical, "argues on the basis of reason and the natural law.... to help form consciences in political life."[90]

But, we might ask, what can we as Catholic citizens do to put that teaching into effect? "The mission of the lay faithful," said Benedict, is "to configure social life correctly, respecting its legitimate autonomy and cooperating with other citizens."[91] One way to carry out that mission is, simply, to speak the truth in our personal environments and contacts. In a 1989 address, Edouard Cardinal Gagnon recounted a conversation he had with Pope John Paul II:

> I went to see the Holy Father and talk to him about all those problems and he told me, "error makes its way because truth is not taught. We must teach the truth whenever we see something which is against the truth. We must teach truth, repeat it, not attacking the ones who teach errors because that would never end—they are so numerous. We have to teach the truth." He told me truth has a grace attached to it. Anytime we speak the truth, we conform to what Christ teaches and what is being taught us by the Church. Every time we stand up for

[91] *Deus caritas est*, no. 29.

> the truth, there is an internal grace of God that accompanies that truth. The truth may not immediately enter in the mind and heart of those to whom we talk, but the grace of God is there and at the time they need it, God will open their heart and they will accept it. He said, error does not have grace accompanying it. It might have all the external means, but it does not have the grace of God accompanying it. This encouraged me very much.[92]

Whatever our state in life, we should do what we can to advance the truth generally but especially as it bears upon marriage and the family. We should do so with confidence that, maybe even in the not-so-long run, we are on the winning side, for sure. In 1998, John Paul II told American bishops that "A new phase in the history of freedom is opening up.... [T]he time is right. For other culture-forming forces are exhausted, implausible or lacking in intellectual resources adequate to satisfy the human yearning for genuine liberation—even if those forces still manage to exercise a powerful attraction especially through the media."[93]

The culture of death, as a civilizational suicide pact, is necessarily short-lived. We can already see signs, among younger people and families, that validate John Paul's assurance in 1994 that "The future of the world and the Church belongs to the younger generation."[94] And at the Mass

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[92] Edouard Cardinal Gagnon, Address to Church Teaches Forum, Louisville, KY, July 1, 1989; *Lay Witness* (Catholics United for the Faith), March 1990, p. 6, 7.
[93] 43 *The Pope Speaks* 238, 241 (1998).
[94] *Tertio Millennio Adveniente* (1994), no. 58.

for the Inauguration of his Pontificate, Pope Benedict XVI said, "[T]he Church is alive.... And the Church is young. She holds within herself the future of the world and therefore shows herself the future of the world and therefore shows each of us the way towards the future."

How, then, can a Catholic citizen do something really practical about all this? We have to educate ourselves and do our best to help others understand the issues involved. Beyond that, we have to commit ourselves to live according to the Truth, who is a person—Jesus Christ. But the most immediately practical thing we can do is to pray, especially to Mary, the Mother of God. The Rosary is our weapon of choice.

In *Deus Caritas Est*, Benedict XVI put God and his creation in the context of love. The same-sex marriage movement is a perversion of love. That is why it makes sense to rely on Mary. Benedict concluded *Deus Caritas Est* with an appeal to Mary, who "has truly become the Mother of all believers.... Mary, Virgin and Mother, shows us what love is and whence it draws its origin and its constantly renewed power. To her we entrust the Church and her mission in the service of love:

Holy Mary, Mother of God,
You have given the world its true light,
Jesus, your Son—the Son of God.
You abandoned yourself completely
To God's call

[95] *Deus caritas est*, no. 42.

And thus became a wellspring
Of the goodness which flows forth from him.
Show us Jesus. Lead us to him.
Teach us to know and love him,
So that we too can become
Capable of true love
And be fountains of living water
In the midst of a thirsting world.[95]

About the Author

Charles E. Rice is Professor Emeritus at the University of Notre Dame Law School. Professor Rice was born in 1931, received the B.A. degree from the College of the Holy Cross, the J.D. from Boston College Law School and the LL.M. and the J.S.D. from New York University. He served in the Marine Corps and is a Lt. Col. In the U.S. Marine Corps Reserve (Ret.). He practiced law in New York City and taught as New York University Law School and Fordham Law School as well as Notre Dame. He served for eight years as State Vice-Chairman of the New York State Conservative Party.

Professor Rice has served as a member of the Education Appeal Board of the U.S. Department of Education, and as a consultant to the U.S. Commission on Civil Rights and various Congressional committees. He is an editor of the American Journal of Jurisprudence and a member of the governing boards of Franciscan University of Steubenville, The Thomas More College of Liberal Arts and the Eternal Word Television Network. His series, "The Good Code: The Natural Law," appears on EWTN. He has written nine books

on natural law, constitutional and family issues, including *Where Did I Come From? Where Am I Going? How Do I Get There?*, co-authored with Dr. Theresa Farnan in 2006. He and his wife, Mary, have ten children and 37 grandchildren and reside in Mishawaka, Indiana.

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