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Federal Marriage Amendment: Yes or No?

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Marriage Amendment

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Fides et Iustitia

ARTICLE

RESTORING DEMOCRATIC SELF- GOVERNANCE THROUGH THE FEDERAL MARRIAGE AMENDMENT

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The debate regarding the Federal Marriage Amendment (“FMA”) presents fundamental issues concerning the ordering of American political life. The issues presented include who determines the principles by which we order our common life together, and what those principles should be. This article argues that the citizens and our elected representatives ultimately should determine the principles guiding our common life—not the judiciary—and the definition of marriage, as a civil institution, is a matter of foundational social order properly left to the people and their elected representatives. The argument progresses in three parts. First, the need for a constitutional amendment is explained. Second, the inadequacy of state constitutional amendments as a response to federal judicial overreaching is discussed. Third, the contours of a federal constitutional amendment relating to marriage are described. The final section responds to some objections that have been raised to the FMA.

I. WHY A CONSTITUTIONAL AMENDMENT?

The need for a constitutional amendment regarding the definition of marriage is far from self-evident to the average citizen. Public opinion polls show that Americans agree that marriage should be defined as only the union of one man and one woman—often by a margin of two to one.¹

* Professor of Law, University of St. Thomas School of Law, Minneapolis, Minn. This article reflects my involvement in the national debate over the Federal Marriage Amendment, and insights gained from participating in this symposium. I am grateful for the efforts of the staff of the St. Thomas Law Journal to insure a vigorous, yet reasoned debate of these issues.

1. See The Pew Forum on Religion & Public Life, *The American Religious Landscape and Politics*, 2004 tbl. 23, <http://pewforum.org/publications/surveys/green.pdf> (55% favor traditional marriage, 27% favor same-sex marriage); Dana Blanton, *Majority Opposes Same-Sex Marriage*, <http://www.foxnews.com/story/0,2933,103756,00.html> (June 18, 2004) (66% oppose same-sex marriage, 25% favor); ABC News, *Washington Post Poll: Same-Sex Marriage*, <http://abcnews.go.com/images/pdf/951a2SameSexMarriage.pdf> (Mar. 10, 2004) (59% believe same-sex marriage should be illegal, 38% believe it should be legal); see also Rasmussen Reports, *55% Said Same-*

They are less certain, however, that the United States Constitution needs to be amended to include this definition.² Federal constitutional amendments, as described by Article V of the Constitution,³ appear to be extraordinary measures that should be reserved for matters of grave national importance.⁴

In the twentieth century the people and their elected representatives have exercised this power twelve times, enacting almost half of the present twenty-seven amendments to the United States Constitution.⁵ This number reflects only part of the process of constitutional change. During the twen-

Sex Marriage Issue Important, <http://www.rasmussenreports.com/Same%20Sex%20Marriage%20November%202004.htm> (Nov. 8, 2004) (60% favor legally defining marriage as union of a man and a woman, 30% oppose).

2. Pew Research Center Pollwatch, *Reading the Polls on Gay Marriage and the Constitution*, <http://people-press.org/commentary/display.php3?AnalysisID=92> (July 13, 2004). A variety of public opinion polls regarding recognition of same-sex unions and the desirability of a constitutional amendment are collected in Karlyn Bowman & Bryan O'Keefe, *Attitudes about Homosexuality and Gay Marriage*, http://www.aei.org/docLib/20050121_HOMOSEXUALITY.pdf (updated Dec. 31, 2004).

3. Article V states that:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Const. art. V.

4. Alexander Hamilton affirmed the right of the people to amend the Constitution, and the obligation of the government officials to observe Constitutional limits as written.

Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.

Alexander Hamilton, *The Federalist Papers*, No. 78, 468-70 (Clinton Rossiter ed., Penguin 1961).

5. Amend. XVI, Income Taxes (ratified Feb. 3, 1913); Amend. XVII, Popular Election of Senators (ratified Apr. 8, 1913); Amend. XVIII, Liquor Prohibition (ratified Jan. 16, 1919); Amend. XIX, Woman Suffrage (ratified Aug. 18, 1920); Amend. XX, Lane Duck Amend. (ratified Jan. 23, 1933); Amend. XXI, Repeal of Prohibition Amend. (ratified Dec. 5, 1933); Amend. XXII, Limitation on Presidential Terms (Feb. 27, 1951); Amend. XXIII, Presidential Electors for District of Columbia (ratified Mar. 29, 1961); Amend. XXIV, Qualifications of Electors/Poll Tax Amendment (ratified Jan. 23, 1964); Amend. XXV, Succession to Presidency and Vice-Presidency/Disability of President (ratified Feb. 10, 1967); Amend. XXVI, Right to Vote/Citizens Eighteen Years of Age or Older (ratified July 1, 1971); and Amend. XXVII, Congressional Salaries (ratified May 7, 1992).

tieth century, the United States Supreme Court has engaged in what some have characterized as “judicial amendment”⁶ and others have called “interpretation” of the Constitution, resulting in significant changes in the charter governing our common political life.

Of the 151 federal statutes declared unconstitutional in whole or in part by the Court between 1789 and June 2000, 40—over 26 per cent—were declared unconstitutional since 1981. This number might be misleading, of course, because it is difficult to come up with a baseline figure of the total volume of federal legislation enacted since 1981. However, a significant number of the recent cases of invalidation result from wholly new doctrine or standards of review. It is hard to escape the impression that the Court is not approaching its review functions modestly, but instead actually is inventing new reasons for invalidating legislation.⁷

The number is under-inclusive by its exclusion of state laws declared unconstitutional, such as the Nebraska statute banning partial birth abortions,⁸ the Texas statute prohibiting flag desecration,⁹ and the Kentucky law that provided for the posting of the Ten Commandments in public schools.¹⁰

In the first third of the twentieth century, this process of “judicial amendment” or “interpretation” dealt primarily with economic issues, resulting in the Court striking down legislation that interfered with its understanding of substantive due process and the contracts clause of the Constitution.¹¹ This era came to an end in 1937, however, with the political challenges posed by the Great Depression, and President Franklin Roosevelt’s determination to implement responsive economic legislation—even if doing so required dramatic changes in the composition of the Supreme Court via his “court-packing” plan.¹² The plan proved both unpopu-

6. Professor Raoul Berger characterizes judicial activism as a “continuing constitutional convention.” Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 3-4 (2d ed., Liberty Fund 1997) (quoting James M. Beck, *The Constitution of the United States* (1922)). Justice John Marshall Harlan wrote that when the Court refuses to let the “language and history of the controlling provisions of the Constitution” limit interpretation, its “action . . . amounts to nothing less than an exercise of the amending power.” *Reynolds v. Sims*, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting). Similarly, Professor Ira Lupu argues that the Supreme Court should perform a “function akin to that performed in other contexts by the amending process.” Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 1040 (1978-1979).

7. Peter M. Shane, *When Inter-branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups”*, 12 Cornell J.L. & Pub. Policy 503, 510 (2003) (footnotes omitted).

8. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

9. *Tex. v. Johnson*, 491 U.S. 397 (1989).

10. *Stone v. Graham*, 449 U.S. 39 (1980).

11. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §11.3, 374-75 (5th ed., West 1995). See Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Praeger 2001).

12. Nowak & Rotunda, *supra* n. 11, at §§ 11.3, 11.4.

lar (the Congress ultimately voted against Roosevelt's plan for expanding the number of justices) and unnecessary, since the Court ultimately began to recognize congressional authority to enact economic legislation as part of the power to regulate interstate commerce.¹³

The last third of the twentieth century saw continued restraint by the Court regarding national economic legislation,¹⁴ but new judicial adventures regarding legislation directed at protecting public health and morals. An example of this line of cases began with *Griswold v. Connecticut*,¹⁵ in which the Court struck down a statute that prohibited the use of contraception by married couples,¹⁶ finding that it violated the "right to privacy," which emanated from the penumbras of the Bill of Rights.¹⁷ Ultimately too ethereal to withstand scrutiny while standing alone, this right found a home in the due process clause as a protected form of "liberty," where it expanded to include the rights of single adults¹⁸ and minors¹⁹ to use contraception, the right of women to obtain abortions,²⁰ and most recently the right of homosexual adults to engage in sodomy.²¹

The [sodomy] case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitu-

13. William E. Leuchtenberg, *F.D.R.'s Court-Packing Plan: A Second Life, A Second Death*, J. S. Ct. History (1988), (available at http://www.supremecourthistory.org/04_library/subs_volumes/04_c10_m.html).

14. See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003).

15. 381 U.S. 479 (1965).

16. Only four years earlier, in *Poe v. Ullman*, 367 U.S. 497 (1961) (plurality), the Court had declined to rule on the constitutionality of the very same statute on the basis that the plaintiffs lacked standing because the statute was virtually unenforced.

Neither counsel nor our own research[] have discovered any other attempt to enforce the prohibition of distribution or use of contraceptive devices by criminal process. The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would m[o]re quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed.

Id. at 502.

17. 381 U.S. at 484.

18. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

19. *Carey v. Population Services Intl.*, 431 U.S. 678 (1977).

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Lawrence v. Tex.*, 539 U.S. 558 (2003).

tion that there is a realm of personal liberty which the government may not enter.”²²

While some lower courts have interpreted *Lawrence* as denying the state any power to criminalize non-commercial, consensual adult sexual conduct,²³ at least two courts have read the opinion as a constitutional mandate for legal recognition of same-sex unions as marriages.²⁴ It is this interpretation that requires a constitutional response by the people.

The campaign to redefine marriage by court action began in the 1970’s²⁵ when same-sex couples brought suits in Minnesota,²⁶ Kentucky,²⁷ Washington,²⁸ Colorado,²⁹ Ohio,³⁰ and Washington D.C.³¹ In each case the plaintiffs claimed a constitutional right to recognition of their unions as marriages. None of these initial suits were successful.

It was only in the 1990’s that litigants began to enjoy success—and then only through state constitutional interpretation. Based upon assorted theories of equal protection, privacy, and sex discrimination, judges in Hawaii,³² Alaska,³³ Vermont,³⁴ Washington,³⁵ New York,³⁶ California,³⁷ and

22. *Id.* at 578.

23. See *Williams v. Pryor*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002) *rev’d sub nom. Williams v. Atty. Gen. of Ala.*, 378 F.3d 1232, 1235 (11th Cir. 2004); *Martin v. Zihler*, 607 S.E.2d 367 (Va. 2005) (striking down state’s anti-fornication law); *cf. In re J.M.*, 575 S.E.2d 441 (Ga. 2003) (striking down Georgia anti-fornication law as applied to teens); see generally Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 Sup. Ct. Rev. 27 (2003).

24. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Hernandez v. Robles*, ___ N.Y.S.2d ___, 2005 WL 363778 (N.Y. Sup. Feb. 4, 2005).

25. Human Rights Campaign, *Current Marriage Cases in the U.S.*, http://www.hrc.org/Content/ContentGroups/Issues1/Marriage/Current_Cases.htm (accessed Jan. 28, 2005).

26. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); see also *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (increased educational benefits not available to veteran related to his entry into same-sex relationship); *Church of the Chosen People (N. Amer. Panarchate) v. U.S.*, 548 F. Supp. 1247 (D. Minn. 1982) (denying tax-exempt status to organization that had only a single-faceted doctrine of sexual preference and secular lifestyle, organization lacked external manifestation analogous to other religions, required no formal or informal education of its leaders, and conducted no religious ceremonies); *McConnell v. U.S.*, 2005 WL 19548 (D. Minn. Jan. 3, 2005) (plaintiff not entitled to claim married filing joint status for federal income tax purposes based upon same-sex union).

27. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973).

28. *Singer v. Hara*, 522 P.2d 1187 (Wash. App. Div. 1 1974); but see *Castle v. State*, 2004 WL 1985215 (Wash. Super. Sept. 15, 2004) (finding state defense of marriage act violates state constitution); see also *Singer v. U.S. Civ. Serv. Commn.*, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977).

29. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

30. *Irwin v. Lopardus*, 1980 WL 355015 (Ohio App. 8th Dist. June 26, 1980).

31. *Dean v. D.C.*, 653 A.2d 307 (D.C. 1995).

32. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (equal protection clause requires state show compelling interest in restricting marriage to one man and one woman).

33. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (state constitutional right of privacy requires recognition of same-sex marriage).

34. *Baker v. State*, 744 A.2d 864 (Vt. 1999) (common benefits clause requires recognition of same-sex unions).

Massachusetts³⁸ ordered legal recognition of same-sex unions. In Hawaii and Alaska, the people responded by amending their state constitutions.³⁹ The people of Vermont wanted the same opportunity to amend their constitution, but the Vermont legislature resisted,⁴⁰ instead passing Act 91, *An Act Relating to Civil Unions*,⁴¹ providing all the benefits and obligations of marriage to same-sex couples except the title “marriage.” The Massachusetts legislature has taken the first steps toward amending that state’s constitution by statewide ballot in 2006, but additional legislative action must be taken.⁴² The Washington, New York, and California opinions are before higher courts in their respective states.⁴³

A. *The Creation of Defense of Marriage Acts*

The immediate result of these cases was the passage of the Defense of Marriage Act (“DOMA”) by Congress in 1996⁴⁴ and “mini-DOMAs” in a majority of the states.⁴⁵ The federal DOMA defines marriage as a legal union between one man and one woman for purposes of all federal laws, and provides that states need not recognize a marriage from another state if it is between persons of the same sex.⁴⁶ The state DOMAs also define marriage as the legal union of one man and one woman, and deny recognition of same-sex unions as marriages.⁴⁷ The state statutes vary, however, in

35. *Andersen v. King County*, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004); *Castle v. State*, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004).

36. *Hernández*, 2005 WL 363778.

37. David Stout, *California Court Rules Same-Sex Marriage Ban Unconstitutional*, N.Y. Times (Mar. 14, 2005).

38. *Goodridge*, 798 N.E.2d 941.

39. See David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. Haw. L. Rev. 19 (2000); Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 Alaska L. Rev. 213 (2000).

40. Cary Goldberg, *Vermont Senate Votes for Gay Civil Unions*, N.Y. Times A12 (Apr. 11, 2000) (available at http://www.inform.umd.edu/EdRes/Topic/Diversity/Specific/Sexual_Orientation/Reading/News/vt.html). “No opinion poll run by a neutral organization has asked specifically whether Vermonters support civil unions, but the vast majority of towns that discussed the issue in town meetings last month opposed the idea, and past polls show that a majority, although a shrinking one, opposed gay marriage.” *Id.* See David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 Vt. L. Rev. 61 (2000).

41. Vt. Stat. Ann. tit. 15, §§ 1201-07 (2000).

42. Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban*, Boston Globe http://www.boston.com/news/specials/gay_marriage/articles/2004/03/30/vote_ties_civil_unions_to_gay_marriage_ban/ (Mar. 30, 2004).

43. *Andersen*, 2004 WL 1738447; Mark Fass, *NY High Court Ends Session with No Decision on Same-Sex Marriage*, N.Y. Lawyer (Feb. 23, 2005) (available at <http://www.nylawyer.com/news/05/02/022305p.html>). An appeal is expected.

44. Pub. L. No. 104-199 § 2, 100 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1996)).

45. Kavan Peterson, *50-state Rundown on Gay Marriage Laws*, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15966> (Nov. 3, 2004).

46. Pub. L. No. 104-199 § 3, 110 Stat. 2419 (1996).

47. Peterson, *supra* n. 45.

the extent to which they deny recognition of other legal statuses afforded same-sex unions. Some states prohibit recognition of same-sex marriage only,⁴⁸ while others forbid recognition of civil unions and domestic partnerships as well.⁴⁹ The legal effectiveness of these statutes is controversial.

Two early challenges to the federal DOMA were unsuccessful,⁵⁰ but they did not involve marriages per se. Similarly, a recent bankruptcy case rejecting a claim for recognition of a Canadian same-sex marriage did not implicate the full faith and credit clause of the Constitution because it involved a foreign union.⁵¹

Consensus among the legal commentators on DOMA's constitutionality is not encouraging for supporters of traditional marriage. Whether the product of the legal profession's political preferences⁵² or an accurate prediction of the Court's legal analysis, most articles predict a ruling that the federal DOMA is unconstitutional.⁵³ One of the legal predicates for such a ruling only arose, however, when the Massachusetts Supreme Judicial Court rendered its opinion in *Goodridge v. Department of Public Health*,⁵⁴ declaring that state's marriage laws unconstitutional insofar as they excluded same-sex couples.

Chief Justice Margaret Marshall opened the *Goodridge* opinion with a review of the United States Supreme Court's reasoning in *Lawrence*⁵⁵ as it related to the centrality of intimacy in the construction of personal relationships. The Massachusetts' court then opined that there is no rational reason supporting the traditional definition of marriage and ordered the legislature to include same-sex couples.⁵⁶ The opinion engendered substantial public opposition and the Massachusetts legislature is moving forward with a state constitutional amendment defining marriage as the union of a man and a woman. However, due to the amendment process in that state, the people will not be allowed to vote on the issue until the fall of 2006.⁵⁷

Although a Massachusetts statute prohibits issuing marriage licenses to non-residents whose home states would not recognize their unions,⁵⁸ out-of-state couples flocked to Massachusetts to be married. This was due, in

48. *Id.*

49. *Id.*

50. See *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002) (denying recognition in Connecticut to a Vermont civil union); *Burns v. Burns*, 560 S.E.2d 47 (Ga. App. 2002) (denying the same, in Georgia).

51. *In re Kandu*, 315 B.R. 123, 131 (W.D. Wash. 2004).

52. See *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

53. E.g. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1 (1997); Matthew Spaulding, *Will DOMA Protect Marriage?*, WebMemo #532, <http://www.heritage.org/Research/Family/wm532.cfm> (July 12, 2004).

54. 798 N.E.2d at 941.

55. *Id.* at 948.

56. *Id.* at 969.

57. Klein, *supra* n. 42.

58. Mass. Gen. Laws Ann. ch. 207 §§ 11-12 (2005).

part, to the announced intention of several town clerks to disregard what they characterized as an “archaic” law⁵⁹ and issue licenses without regard to residency.⁶⁰ Thirteen city and town clerks filed suit seeking to enjoin enforcement of the statute prohibiting the issuing of licenses to non-residents.⁶¹ A separate lawsuit to enjoin the statute was filed by eight non-resident couples.⁶² Citizens representing the other side of the issue also sought their day in court when two private citizens filed suit to enjoin the issuing of marriage licenses to non-residents.⁶³ Preliminary injunctions were denied in all the cases on the basis that there was no irreparable harm.⁶⁴ Massachusetts marriage licenses of questionable validity were issued to out-of-state residents until the state attorney general issued a five-page letter to communities known to be violating the residency requirement, advising them of criminal penalties for such conduct.⁶⁵

Massachusetts issued one of its first marriage licenses to a Minnesota same-sex couple who describe their relationship as an “open marriage,” saying the concept of permanence in marriage is “overrated.”⁶⁶ Another was issued to Nancy Wilson and Paula Schoenwether, which they subsequently presented to a Florida court clerk requesting a Florida marriage license.⁶⁷ Upon the Florida clerk’s refusal to issue the license, the couple brought suit in federal district court alleging violation of their constitutional rights by both the federal and state governments. The United States responded that recognition was not required under DOMA, that DOMA was a constitutional exercise of Congressional power under the Full Faith and Credit Clause, and that there was no violation of the plaintiffs’ rights to due process and equal protection. The federal government prevailed on all points.⁶⁸

59. *Compl. Seeking Declaratory and Injunctive Relief* at 2, *Johnstone v. Reilly*, No. 04-2655-G (Mass. Super. 2004) (available at http://www.domawatch.org/cases/massachusetts/cote-whitacre_departmentofhealthandJohnstonevreilly/clerksComplaint.pdf) (consolidated with *Cote-Whitacre v. Dept. of Pub. Health*, 18 Mass. L. Rptr. 190 (Mass. Super. 2004)).

60. *E.g. Issuance of Marriage Licenses in the Town of Provincetown*, <http://www.provincetowngov.org/marriage.html> (May 10, 2004); Human Rights Campaign, *Massachusetts Marriage/Relationship Recognition Law*, <http://www.hrc.org/Template.cfm?Section=home&CONTENTID=21686&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (accessed Mar. 2005).

61. *Johnstone*, No. 04-2655-G.

62. *Cote-Whitacre*, 18 Mass. L. Rptr. 190.

63. *Flynn v. Johnstone*, No. 04-3136-A (Mass. Super. 2004) (pleadings available at <http://www.domawatch.org/stateissues/massachusetts/flynnvjohnstone.html>).

64. *Supra* nn. 61-63.

65. Kristen Lombardi, *State of Matrimony*, Boston Phoenix, http://www.bostonphoenix.com/boston/news_features/other_stories/multi-page/documents/03902603.asp (June 11, 2004).

66. Franci Richardson, *P'town Ready for the 'Big Day'*, Boston Herald, <http://news.bostonherald.com/localRegional/view.bg?articleid=28184> (May 17, 2004) (“The couple who expect to be the first to receive a marriage application here on this landmark day is from Minnesota, and despite legal obstacles the governor has tried to enforce, they plan to marry around noon.”).

67. *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. Jan. 19, 2005).

68. *Id.*

It would seem that this ruling confirms the arguments of FMA opponents that the federal DOMA and the ability of states to enact mini-DOMAs are adequate safeguards for the political prerogative of the people to define the civil institution of marriage.⁶⁹ Yet careful scrutiny suggests otherwise.

B. Cause for Continuing Concern

Opponents and proponents of a federal marriage amendment agree that the United States Supreme Court has made marriage a question of constitutional concern for over a century. Confronted with a claim that the free exercise of religion required recognition of polygamy, the Court addressed the role that marriage and family play in preparing children to assume their responsibilities as citizens in a free society, and rejected the claim.⁷⁰ Suffice it to say that in the intervening century, the views of those who serve as Justices on the Supreme Court have changed, so that the unanimous conclusion of the Court in *Reynolds* (that polygamy can be outlawed) is no longer assured—as evidenced by Justice Ginsburg’s writings before she took the bench.⁷¹

Advocates seeking to characterize same-sex unions as marriages routinely invoke *Loving v. Virginia*,⁷² the Supreme Court case striking down anti-miscegenation laws as precedent for the idea that racial discrimination and sexual discrimination are identical, in that they are both constitutionally impermissible bases for limiting access to marriage.⁷³ The Massachusetts Supreme Judicial Court found the analogy compelling. Notwithstanding the court’s admission that its decision “marks a change in the history of our marriage law,”⁷⁴ it equated those who support traditional marriage with racists, stating: “The Constitution cannot control such prejudices but neither

69. See Sen. Jud. Comm., *Preserving Traditional Marriage: A View from the States*, http://judiciary.senate.gov/testimony.cfm?id=1234&wit_id=2874 (June 22, 2004) (testimony of former U.S. Representative Bob Barr); see also Dale Carpenter, 2 U. St. Thomas L.J. 71 (2005).

70. See *Reynolds v. U.S.*, 98 U.S. 145 (1878) (upholding federal law making bigamy a crime in United States territories).

71. Ruth Bader Ginsburg & Brenda Feigen Fasteau, *Report of Columbia Law School Equal Rights Advocacy Project: The Legal Status of Women Under Federal Law 190-91* (Sept. 1974) (provision restricting bigamy “is of questionable constitutionality since it appears to encroach impermissibly upon private relationships”). Compare Chris Cobb, *Polygamy, The Next Debate: Government Launches Urgent Study as Same-Sex Unions Open Door to Charter Challenges Claiming Plural Marriages are a Religious Right*, *The Ottawa Citizen* (Jan. 20, 2005) (available at <http://www.igs.net/~tonyc/sspolygamy.html>).

72. 388 U.S. 1 (1967).

73. *Id.* See e.g. William Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* 128-37 (Free Press 1996); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. Rev. 1501, 1571 (1997); Vincent J. Samar, *Gay-Rights as a Particular Instantiation of Human Rights*, 64 Alb. L. Rev. 983, 1030 (2001). For the view that *Loving* is distinctive, see e.g. David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. Pub. L. 201 (1998); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. Pub. L. 239 (1998).

74. *Goodridge*, 798 N.E.2d at 948.

can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁷⁵

Such unfounded attacks on the good faith of citizens who disagree with judicial political preferences unfortunately may also be found in recent U.S. Supreme Court opinions. In *Romer v. Evans*, the Court struck down a popularly enacted Colorado referendum restricting the passage of anti-discrimination laws on the basis of sexual orientation to statewide enactment.⁷⁶ In the majority opinion, Justice Kennedy speculated about the motives of those who supported the referendum: “A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”⁷⁷ Yet as Justice Scalia wrote in dissent:

The constitutional amendment before us here is not the manifestation of a “bare . . . desire to harm” homosexuals, *ante*, at 1628, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion’s heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.⁷⁸

This attribution of animus emerged again in Justice O’Connor’s concurring opinion in *Lawrence* when she suggested that the restriction of the Texas sodomy statute to same-sex acts was the product of a bare desire to harm homosexuals.⁷⁹

Regardless of one’s perception of the political motivation behind the Colorado referendum at issue in *Romer* or the Texas statute in *Lawrence*, such speculation seems odd in a setting where the Court’s sole task is to determine whether the law comports with the terms of the United States Constitution. It is particularly disturbing when the Court is addressing issues of substantial political controversy, and lends support to Justice Scalia’s statement that “the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”⁸⁰

Building on the Court’s statements in *Lawrence* equating heterosexual and homosexual experiences,⁸¹ and its statements in *Romer* attributing ani-

75. *Id.* at 968 (quoting *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

76. *Romer v. Evans*, 517 U.S. 620 (1996).

77. *Id.* at 634.

78. *Id.* at 636.

79. 539 U.S. at 581.

80. *Id.* at 602.

81. *Id.* at 574.

mus to those who would make any distinctions,⁸² many constitutional law scholars have opined that the Court appears poised to mandate same-sex marriage in the upcoming years. In commenting on the *Lawrence* opinion's relationship to judicial recognition of same-sex marriage, Professor Laurence Tribe of Harvard said "I think it's only a matter of time."⁸³ Professor Erwin Chemerinsky of USC has observed: "Justice Scalia likely is correct in his dissent in saying that laws that prohibit same-sex marriage cannot, in the long term, survive the reasoning of the majority in *Lawrence*."⁸⁴ After the *Lawrence* opinion, Professor Joanna Grossman of Hofstra University, in her column for an electronic national legal commentary, noted: "Such laws [treating same-sex unions and marriage differently] have no valid justification; they are based either on pure animus against homosexual persons, or on so-called 'morality' considerations that *Lawrence* and *Romer* have made clear cannot alone support a liberty- or equality-infringing law."⁸⁵

Counsel for the prevailing plaintiffs in *Goodridge* publicly attributed their success to *Lawrence*.

The *Goodridge* decision "is absolutely consistent with and responsive to *Lawrence*," Suzanne Goldberg, a professor at Rutgers University Law School who represented the two men who challenged the Texas sodomy law in the initial stages of the *Lawrence* case, said in an interview. Ms. Goldberg added: "It's impossible to overestimate how profoundly *Lawrence* changed the landscape for gay men and lesbians."

Professor Goldberg said that sodomy laws, even if not often enforced, had the effect of labeling gays as "criminals who deserved unequal treatment." With that argument removed, discriminatory laws have little left to stand on, she said, adding that the Supreme Court "gave state courts not

82. 517 U.S. at 634-35.

83. Joan Biskupic, *Decision Represents an Enormous Turn in the Law*, USA Today (June 27, 2003) (available at <http://www.usatoday.com/news/Washington/2003-06-26-inside-sodomy-x.htm>). In commenting on the *Goodridge* opinion, Professor Tribe stated:

Well, the opinion this Supreme Court rendered in *Lawrence v. Texas* about equal dignity and respect for homosexuals suggests that after a sufficient breathing space where the public gets used to what the principles involved are, it would be prepared to uphold a decision rather like this and to reach a similar conclusion, but I doubt they would want to do it the day after tomorrow.

Natl. Pub. Radio, *Professor Laurence Tribe Discusses the Supreme Judicial Court of Massachusetts Ruling that Same-Sex Couples are Legally Entitled to Marry*, Morning Ed. (Nov. 18, 2003) (emphasis added) (transcr. available in LEXIS, News & Business database, NPR file). Vincent Samar, an adjunct professor at Chicago Kent Law School and author of two books about same-sex unions, predicted national recognition of same-sex unions as marriages could be required by the judiciary in "five to six years." OnlineNewsHour, *Focus: Gay Marriage* (July 31, 2003) (transcr. available in LEXIS, News & Business database, The NewsHour with Jim Lehrer file, No. 5534).

84. Erwin Chemerinsky, *October Term 2002*, 6 Green Bag 2d 367, 370-71 (2003).

85. Joanna Grossman, *The Consequences of Lawrence v. Texas*, Findlaw's Writ, <http://writ.findlaw.com/grossman/20030708.html> (July 8, 2003).

only cover but strength to respond to unequal treatment of lesbians and gay men."⁸⁶

These comments proved to be far more than idle academic bravado.

Immediately after the *Lawrence* opinion, marriage laws throughout the country came under renewed attack. In many states, same-sex couples filed suit asserting a constitutional right to receive marriage licenses.⁸⁷ In California,⁸⁸ New Mexico,⁸⁹ New York,⁹⁰ and Oregon,⁹¹ local officials claimed a right to issue licenses to same-sex couples. Documents purporting to be marriage licenses were issued to thousands of couples residing throughout the country.⁹² Courts are continuing to sort through the legal consequences.

86. Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision*, N.Y. Times A24 (Nov. 19, 2003).

87. See Ann Rostow, *Gay Couples Sue in L.A., Fla. To Marry*, <http://www.gay.com/news/article.html?2004/02/26/4> (Feb. 26, 2004); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005); *Deane v. Conaway*, 24-C-04-005390 (Cir. Ct. Baltimore City Md. filed 2004) (available at <http://www.domawatch.org/stateissues/maryland/>); Sen. Jud. Comm., *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?*, http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3073 (Mar. 3, 2004) (testimony of Neb. Atty. Gen. Jon Bruning); Amend. Compl. of Pet., *Lewis v. Harris*, No. L-00-4233-02 (N.J. Super. L. Div. Oct. 8, 2002) (available at <http://www.lambdalegal.org/cgi-bin/iowa/cases/complaint.html?record=1070>); Joseph A. Gambardello et al., *Shore Town is First in N.J. to Let Gays Marry*, <http://www.philly.com/mld/inquirer/news/front/8138474.htm> (Mar. 9, 2004) (A New Jersey mayor performed a ceremony for a lesbian couple after Shore Town issued a marriage license to the couple in contradiction to the trial court ruling in that state. The mayor announced the city's intention to continue to defy the court until ordered otherwise. The state attorney general has responded that he will seek a court order that the city stop its unlawful conduct.); Amend. Compl. of Pet., *Hernandez v. Robles*, No. 103434/2004 (N.Y. Sup. Ct. Mar. 24, 2004) (available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1461>); see also Robert D. McFadden, *Bloomberg Is Said to Want State to Legalize Same-Sex Marriages*, N.Y. Times A1 (Mar. 6, 2004); Peter Wong & Steve Law, *State Supreme Court Steps Into Fight on Gay Unions*, Statesman Journal (Salem, Or.) (Mar. 18, 2004) <http://news.statesmanjournal.com/article.cfm?i=77247>; Pervaiz Shallwani, *Gay Couple Denied Bucks [County] Marriage License*, Morning Call (Allentown, Pa.) B4 (Mar. 16, 2004); *Kept for the Altar*, The Herald (Rock Hill, S.C.) (Mar. 21, 2004) <http://www.heraldonline.com/local/story/3436508p-3054678c.html>; Bill Poovey, *Gay Couple Ready for Marriage Battle*, Associated Press (Mar. 10, 2004) (available at <http://www.gmx.co.za/100k04/03/11-USmarry.html>); Lynn Marshall & Elizabeth Mehren, *Same Sex Marriage Battle Moves to Seattle*, L.A. Times A11 (Mar. 9, 2004). Cases collected at DOMA Watch, *Index of Cases*, http://www.domawatch.org/case_names_index.html (accessed Mar. 14, 2005).

88. *Lockyer v. City & County of S.F.*, 95 P.3d 459 (Cal. 2004).

89. *New Mexico Clerk Publicly Rebuked for Issuing Gay Marriage Licenses*, <http://www.365gay.com/newscon04/02/022404nmFolo.htm> (Feb. 24, 2004) (66 marriage licenses issued to same sex couples before attorney general issued opinion that such licenses would be invalid); N.M. Atty. Gen. Op., 2004 WL 2019901 (Feb. 20, 2004).

90. *People v. West*, 780 N.Y.S.2d 723 (N.Y. Just. Ct. 2004); Jesse J. Smith, *Charges Reinstated against West in Gay Marriage Case*, http://www.dailyfreeman.com/site/news.cfm?BRD=1769&dept_id=74969&newsid=13879801&PAG=461&rfi=9 (Feb. 3, 2005) (indicating that the trial court in *West* was subsequently reversed).

91. *Li v. State*, 2004 WL 1258167 (Or. Cir., Apr. 20, 2004), *review granted*, 95 P.3d 730 (Or. 2004).

92. Officials in San Francisco issued 4,037 licenses to same-sex couples from forty-six states. Suzanne Herel et al., *Numbers Put Face on a Phenomenon: Most Who Married Are Middle-Aged, Have College Degrees*, S.F. Chron. (Mar. 18, 2004) <http://www.sfgate.com/cgi-bin/arti->

Supporters of the people's right to define civil marriage did not stand idly by during this assault. State legislatures debated, and many passed, proposals to put the question of whether to define marriage in the state constitution before the people.⁹³ Of the thirteen constitutional provisions voted on by the citizens in 2004, all of them passed by significant margins.⁹⁴ Seventeen states now define marriage as the union of a man and woman in their constitutions.⁹⁵

Same-sex marriage proponents, however, are working overtime to ensure that the people's will does not control the definition of marriage. In almost every state where the people have been successful in placing the issue of defining marriage on the ballot, constitutional challenges have been brought, and gay rights activists have tried to tie the matter up in courts.⁹⁶ At this point in time, state courts appear unwilling to disturb the political judgment of the people,⁹⁷ but these are "early returns" by a largely elected judiciary in the midst of, or immediately after, a contentious political year in which "activist judges" was an issue. Whether such judicial restraint will continue, even at the state level, is an open question.

Far more dubious is a similar exercise of judicial restraint by the United States Supreme Court. The Court had the opportunity to forswear radically redefining marriage in the *Lawrence* case, and instead provided only the tepid observation that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."⁹⁸ This is true notwithstanding the fact that the dissent argued that the logic of *Lawrence* leads inexorably to constitutional recognition of same-sex unions as marriages.

The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). At the end of its opinion—after having laid waste the foundations of our ra-

cle.cgi?file=c/a/2004/03/18/MNGTB5MUOI1.DTL. The licenses were subsequently held to be invalid by the California Supreme Court. *Lockyer*, 95 P.3d at 473.

93. Peterson, *supra* n. 45.

94. Traditional Values Coalition, *50-State Survey of Marriage Protection Amendments*, http://www.traditionalvalues.org/pdf_files/MarriageAmendments50States.pdf (accessed Mar. 14, 2005).

95. Peterson, *supra* n. 45.

96. In Arkansas, a divided state Supreme Court rejected last-minute efforts to remove the question from the ballot. *May v. Daniels*, ___ S.W.3d ___, 2004 WL 2250882 (Oct. 7, 2004). In Georgia, suit was filed on Sept. 16, 2004 in Fulton County to remove the issue from the ballot. *O'Kelly v. Cox*, No. 2004CV9112 (Ga. Super. Ct. 2004) (available at <http://www.domawatch.org/stateissues/georgia/okelleyvcox.html>). See also *Forum for Equality PAC v. McKeithen*, ___ So. 2d ___, 2005 WL 106567 (La. Jan. 19, 2005) (reversing trial court judgment that Louisiana amendment violated the single object rule); *Citizens for Protec. of Marriage v. Bd. of State Canvassers*, 688 N.W.2d 538 (Mich. App. 2004); *Essig v. Blackwell*, 817 N.E.2d 5 (Ohio 2004).

97. See Traditional Values Coalition, *supra* n. 94.

98. 539 U.S. at 578.

tional-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.” (emphasis added). 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. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.⁹⁹

A majority of the Massachusetts Supreme Judicial Court agreed with the dissent, as evidenced by their opinion in *Goodridge*.¹⁰⁰ Similarly a majority of academic legal commentators seemingly share Professor Tribe’s colorful opinion that “[y]ou’d have to be tone deaf not to get the message from *Lawrence* that anything that invites people to give same-sex couples less than full respect is constitutionally suspect.”¹⁰¹ Organized bar leadership also seem to understand the logic of *Lawrence* as mandating recognition of same-sex unions as marriages, and support that outcome.¹⁰²

99. *Id.* at 604-05 (citations omitted).

100. *Goodridge*, 798 N.E.2d 941.

101. Greenhouse, *supra* n. 86.

102. See Mass. Bar Assoc., *MBA Opposes Constitutional Amendment on Marriage*, http://www.massbar.org/article.php?c_id=6279 (Mar. 25, 2004); N.Y. State Bar Assoc., *Same-Sex Issues Report*, http://www.nysba.org/Content/ContentGroups/Reports3/Same-Sex_Marriage_Report/Same-SexIssuesReport2004.pdf (Oct. 2004); Bar Assoc. of City of New York, *Marriage Rights for Same-Sex Couples in New York*, http://www.abcny.org/currentarticle/samesex_marriage.pdf (May 2001); Justin Katz, *An Invidious Prohibition*, *Natl. Rev.*, <http://www.nationalreview.com/comment/katz200410040858.asp> (Oct. 4, 2004). The American Bar Association has formally opposed the Federal Marriage Amendment, and issued a study of the legal status of same-sex unions throughout the country. Ltr. from Robert J. Grey, Jr., ABA President, to Members of the

Given this virtual phalanx of elite legal opinion, it seems foolhardy for supporters of the traditional definition of marriage to await further events before seeking a constitutional resolution through the amendment process.

II. THE FEDERAL MARRIAGE AMENDMENT RESPONDS TO JUDICIAL OVERREACHING

It is common to use the amendment process to correct a judicial error. As Professor Cass Sunstein has noted, it is also proper to use the amendment process to forestall erroneous constitutional decisions. Constitutional amendments have been ratified “in response to actual or anticipated decisions.”¹⁰³

Examples of federal constitutional amendments responding to judicial decisions that did not reflect the will of the people are plentiful. The first sentence of the Fourteenth Amendment was ratified to reverse the result of *Dred Scott v. Sanford*,¹⁰⁴ and thereby guarantee U.S. citizenship to all persons born in the United States. The Fourteenth Amendment was also ratified to reverse the rule of *Barron v. City of Baltimore*,¹⁰⁵ which held that the Bill of Rights applies only to the federal government. The Sixteenth Amendment, ratified specifically to authorize a federal income tax, effectively reversed *Pollack v. Farmer's Loan and Trust Co.*¹⁰⁶ The Nineteenth Amendment, guaranteeing the right to vote against sex discrimination, reversed the outcome of *Minor v. Happersett*,¹⁰⁷ which had held that the U.S. Constitution, under the Privileges and Immunities Clause of the Fourteenth Amendment, did not guarantee female suffrage. The Twenty-Fourth Amendment, prohibiting poll taxes, reversed the outcome of *Breedlove v. Suttles*,¹⁰⁸ which upheld poll taxes against challenges under the Fourteenth and Nineteenth Amendments. The Twenty-Sixth Amendment, guaranteeing the right to vote against age discrimination for individuals eighteen years old or over, reversed the outcome of *Oregon v. Mitchell*,¹⁰⁹ which held that Congress had no authority to give 18-year-olds the right to vote in state and local elections. In the case of the Federal Marriage Amendment, the process is being initiated preemptively in order to ensure that the people have the opportunity to express their will on the issue.

U.S. House of Representatives, (Sept. 20, 2004), http://www.house.gov/judiciary_democrats/abamariageltr92004.pdf (accessed Feb. 5, 2005).

103. Cass R. Sunstein, *Federal Appeal*, *The New Republic* 21 (Dec. 22, 2003).

104. 60 U.S. 393 (1856), *rev'd*, U.S. Const. amend. XIV.

105. 32 U.S. 243 (1833), *rev'd*, U.S. Const. amend. XIV.

106. 157 U.S. 429 (1895), *rev'd*, U.S. Const. amend. XVI.

107. 88 U.S. 162 (1874), *rev'd*, U.S. Const. amend. XIX.

108. 302 U.S. 277 (1937), *rev'd*, U.S. Const. amend. XXIV.

109. 400 U.S. 112 (1970), *rev'd*, U.S. Const. amend. XXVI.

III. WHAT SHOULD THE AMENDMENT DO?

Assuming there is a need for a federal constitutional amendment, what should such an amendment do? The amendment must do three things. First, it must protect the most important right of every citizen—the right of political self-governance. This is assured by providing the states the opportunity to vote on the adoption of a constitutional amendment.

Second, the amendment must ensure that marriage is recognized as only the union of a man and a woman. This is because the civil institution of marriage is society's means of channeling reproductive conduct into permanent exclusive unions to provide children, who are conceived by that conduct, with the necessary support of a mother and father joined together in a mutually supportive relationship.¹¹⁰ Research establishes that, on average, children flourish when raised by their biological mother and father united in marriage.¹¹¹

Third, the amendment should leave it to the states to decide whether to adopt alternative legal arrangements for people who are ineligible to marry. There are loving, committed relationships between same-sex couples, and others who cannot marry by law. Presently states and municipalities are experimenting with a number of legal devices and the creation of new legal statuses. It is impossible to summarize all possible arrangements. Some of the existing arrangements that would still be possible under the FMA include Vermont civil unions, Hawaii reciprocal beneficiaries, and New Jersey and California domestic partnerships. Each is distinctive and responsive to the concerns of the people in the state in which the laws were adopted. The FMA does not, and should not, preclude such experimentation by the states where it represents the will of the people, and is not imposed upon the people through some act of willfulness by the judiciary.¹¹²

IV. RESPONSE TO COMMON OBJECTIONS

There are four common objections to the proposed FMA. Opponents claim that the FMA is internally contradictory, and that it prohibits private recognition of same-sex unions as marriages. They argue that the amendment is anti-democratic because it removes the definition of marriage from the arena of state law and creates a uniform federal definition. Finally, and in contradiction to the last point, they argue that the amendment will in-

110. For an extended discussion of the characteristics of marriage see Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 *Cath. U. L. Rev.* 1245 (1998).

111. Maggie Gallagher & Joshua K. Baker, *Do Mothers and Fathers Matter?: The Social Science Evidence on Marriage and Child Well-Being*, <http://www.marriedebate.com/pdf/MothersFathersMatter.pdf> (Feb. 27, 2004).

112. Compare the legislative history of the California domestic partnership act with that of Vermont civil unions. See Megan E. Callan, Student Author, *The More, the Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 *San Diego L. Rev.* 427 (2003).

crease litigation over the meaning of marriage. None of these objections have merit.

A. *The Amendment is Not Internally Contradictory*

The starting point for any analysis of a constitutional amendment is the text, with an intention to give effect to every word.¹¹³ As proposed, the FMA 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.¹¹⁴

The meaning of the first sentence of the FMA is clear. Opponents typically do not dispute this. Rather they assert the confusion arises because it is possible to read the second sentence of the FMA as allowing legislatures to create that which the first sentence clearly prohibits—same-sex marriage (at least insofar as it is done, not due to constitutional imperative, but rather due to some alternative legitimate legislative motivation). While such a reading is theoretically possible, it violates one of the most basic canons of construction: “The plain meaning of a statute’s text must be given effect ‘unless it would produce an absurd result or one manifestly at odds with the statute’s intended effect.’”¹¹⁵ Since such an interpretation would render the FMA “self-contradictory” and ineffectual, it should be rejected under ordinary principles of construction.

Opponents also argue that the phrase “legal incidents” of marriage is unclear and will require extensive judicial interpretation.¹¹⁶ Yet this is a phrase that has been used routinely in the discussion of marital rights. Justice Brennan used it in his concurring opinion in *Boddie v. Connecticut*.¹¹⁷ “Legal incidents of marriage” is also found in various state appellate opinions that have been rendered over the past sixty years.¹¹⁸ It is a phrase that

113. *Marbury v. Madison*, 5 U.S. 137 (1803); see also *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

114. Sen. Jt. Res. 40, 108th Cong. § 2 (July 7, 2004).

115. *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (quoting *Parisi ex rel. Cooney v. Chater*, 69 F.3d 614, 617 (1st Cir. 1995)).

116. John Hill, *Gay Marriage Ban’s Language Impact Debated*, The Town Talk (June 13, 2004) (available at <http://www.hrc.org/Template.cfm?Section=home&CONTENTID=19799&TEMPLATE=/ContentManagement/ContentDisplay.cfm>).

117. 401 U.S. 371, 387 (1971).

118. See e.g. *Perrin v. Perrin*, 408 F.2d 107, 110 (3d Cir. 1969); *Sanders v. Altmeyer*, 58 F. Supp. 67, 68 (W.D. Tenn. 1944); *In re Marriage of Epstein*, 592 P.2d 1165, 1169 (Cal. 1979); *Baker v. Baker*, 468 A.2d 944, 947 (Conn. Super. 1983); *Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993) (Heen, J., dissenting); *In re Op. of the JJ. to the Sen.*, 802 N.E.2d 565, 572 (Mass. 2004); *Meremoff v. Meremoff*, 388 A.2d 951, 953 (N.J. 1978); *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709, 712 (N.Y. 1965); *Koppelman v. O’Keefe*, 535 N.Y.S.2d 871, 873 (N.Y. App. Div. 1st Dept.

indicates the rights, privileges, duties, and responsibilities that arise from the legal relationship of marriage.

The proper interpretation of the amendment is that offered by the sponsors and drafters: to preserve marriage as the union of a man and a woman, while leaving to states the question of whether to legislatively create alternative legal arrangements such as civil unions or reciprocal beneficiary status for individuals who are not eligible to marry.¹¹⁹

Fair-minded opponents of the FMA have acknowledged that the current language is clear in its prohibition of same-sex marriage and its recognition of the legislative ability to create alternative legal relationships such as civil unions. On March 22, 2004, Professor Eugene Volokh, who opposes the FMA, noted on his web log that the amended language “clearly lets state voters and legislatures enact civil unions by statute.”¹²⁰ Professor Cass Sunstein, another opponent to the FMA, also agreed that the state legislature could pass a law to establish civil unions.¹²¹

B. *The Amendment Does Not Prohibit Private Recognition of Same-Sex Unions*

Perhaps the most creative argument of opponents is that the FMA would allow states and other governmental bodies to “punish religious organizations and individuals for performing or participating in religious marriages of same-sex couples.”¹²² This argument is crafted by analogizing the FMA to the Thirteenth Amendment, which provides in pertinent part: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” The Thirteenth Amendment is the exception to the general rule that constitutional provi-

1988); *Adler v. Adler*, 81 N.Y.S.2d 797, 800 (N.Y. Dom. Rel. Ct. 1948); *Shipp v. Shipp*, 383 P.2d 30, 32 (Okla. 1963); *Ramsay v. Ramsay*, 90 A.2d 433, 435 (R.I. 1952).

119. See Sen. Jud. Comm., *Testimony on S.J. Res. 30, the Federal Marriage Amendment*, http://allard.senate.gov/issues/item.cfm?id=219463&rand_type=4 (Mar. 23, 2004) (testimony of Senator Wayne Allard); U.S. H.R. Comm. on the Jud., *The Musgrave Federal Marriage Amendment*, <http://judiciary.house.gov/HearingTestimony.aspx?ID=212> (May 13, 2004) (statement of U.S. Rep. Marilyn Musgrave); U.S. H.R. Comm. on the Jud., *The Musgrave Federal Marriage Amendment*, <http://judiciary.house.gov/HearingTestimony.aspx?ID=213> (May 13, 2004) (statement of U.S. Rep. Robert H. Bork); see also Rahul Mehra, *Professor Helps Draft Amendment*, *The Daily Princetonian*, <http://www.dailyprincetonian.com/archives/2004/02/18/news/9652.shtml> (Feb. 18, 2004).

120. Eugene Volokh, *The Volokh Conspiracy*, http://volokh.com/archives/archive_2004_03_21.shtml (Mar. 22, 2004).

121. Lou Chibbaro, Jr., *Frank: 'Who are we hurting?'*, <http://www.washblade.com/2004/3-26/news/national/frank.cfm> (Mar. 26, 2004).

122. Memo. from David H. Remes, Covington & Burling, *Proposed Federal Marriage Amendment Raises Issues of Meaning, Reach, and Consistency with Fundamental Constitutional Principles* 4 (Sept. 17, 2004) (available at http://www.house.gov/judiciary_democrats/covingtonmarriagememo91704.pdf).

sions are limitations on state action, rather than private action.¹²³ Based upon this fact, and the absence of any language in the FMA expressly limiting the amendment to state action, opponents claim that any private recognition of same-sex marriages would become punishable at law.

This ignores important differences in the language of the two amendments, however. Section (a) of the Thirteenth Amendment is written as a prohibition, with a narrow exception. In contrast, the first sentence of the FMA is written as an affirmation of the nature of marriage, with the second sentence limiting the ability of courts to redefine marriage in the guise of constitutional adjudication. Rather than a distinct provision, the first clause functions as an introduction to the second. There is nothing in the language of the FMA, or the legislative history to date, that suggests any intent to disrupt the current ability of religious communities to determine their understanding of marriage and divorce.¹²⁴

Given the long history of détente between Church and State in this country regarding the regulation of marriage and divorce, the reasonable assumption is that the FMA will control governmental actions related to civil marriage, and religious bodies will continue to define their own entry and exit requirements for marriage.¹²⁵ To the extent there is any merit in opponents' analogy to the Thirteenth Amendment, its interpretation supports this conclusion. In *Robertson v. Baldwin*,¹²⁶ two deserting seamen argued that they could not be forced to fulfill their commitment in light of the constitutional prohibition of involuntary servitude. The Court disposed of this argument opining:

It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents

123. Compare *Jones v. Alfred H. Mayer Co.*, 392 U.S. 408, 438 (1968) (Congress has power under Thirteenth Amendment to enact legislation to prohibit private acts that erect racial barriers to the acquisition of property) with *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) (no violation of constitutional right to privacy occurs absent state interference with woman's right to abortion); *United Bhd. of Carpenters and Joiners of Am. v. Scott*, 463 U.S. 825, 831-32 (1983) (state action is necessary to establish conspiracy to violate First Amendment).

124. See *Hames v. Hames*, 163 Conn. 588 (Conn. 1972) (religious ceremony insufficient to constitute civil marriage); *Marazita v. Marazita*, 27 Conn. Supp. 190 (Conn. Super. 1967) (wife's religious belief in indissolubility of marriage not sufficient to deprive court of jurisdiction in divorce proceeding); *Knibbs v. Knibbs*, 94 N.J. Eq. 747, 748 (N.J. 1923) (suit for divorce due to refusal to marry in church); *Victor v. Victor*, 177 Ariz. 231 (Ariz. App. Div. 1 1993) (court without authority to order Jewish divorce); *In re Marriage of Dajani*, 204 Cal. App. 3d 1387 (Cal. App. 4th Dist. 1988) (American court could not enforce Islamic law).

125. The only prosecution related to the performance of a ceremony uniting same-sex partners was on the basis that the ministers insisted that the ceremony be given civil effect, notwithstanding that the ministers knew that the partners did not meet the statutory requirements for civil marriage in the jurisdiction. It was subsequently dismissed. *People v. Greenleaf*, 780 N.Y.S.2d 899 (2004).

126. 165 U.S. 275 (1897).

and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.¹²⁷

The continuing viability of this case is evidenced by the Court's reliance on it in *U.S. v. Kozminski*.¹²⁸

While opponents raise the specter of organized persecution of religious communities that perform same-sex marriage rituals, the international experience suggests quite the opposite. It is defenders of traditional marriage that have cause to worry. Last fall at Outfest, a gay-pride event in Philadelphia, eleven religiously-motivated protestors were arrested for their attempts to witness to attendees. Upon the protestors arrival, they were surrounded by a group of counter-demonstrators identified as the "Pink Angels."¹²⁹ The Pink Angels encircled the protestors and held up large insulation boards to block both the protestors and their signs from the view of by-passers. When the protestors attempted to communicate their message verbally, the Pink Angels blew loud whistles. The local police, who were present during the entire encounter between the two groups, ultimately demanded that the protestors move away from the event. The protestors refused and were arrested and charged with various crimes. If they had been convicted on all counts, they could have been sentenced to serve up to 47-years in jail.¹³⁰ Ultimately, however, the court dismissed the case against the protestors on the basis that they were exercising their rights of free speech.¹³¹

Events in Europe are even more disturbing. A pastor in Sweden was sentenced to one month in jail based on a sermon opposing homosexual

127. *Id.* at 282.

128. 487 U.S. 931, 942-44 (1988) (adopting a narrow construction of coercion sufficient to constitute involuntary servitude).

129. Repent America, *Video Footage of the "Outfest" Arrests*, <http://www.repentamerica.com/index.php> (Oct. 10, 2004) (online video); Jason McKee, *Judge Tosses Charges Against Marcavage*, *The Del. County Daily Times*, http://www.delcotimes.com/site/news.cfm?BRD=1675&dept_id=18171&newsid=13987075&PAG=461&rfti=9 (Feb. 18, 2005); Philly Pride Presents, *News: The Arrest of 11 Demonstrators at Outfest 2004*, <http://www.phillypride.org/news.html> (accessed Mar. 9, 2005).

130. Gil Spencer, *The Door to Free Speech Opens Both Ways*, *The Del. County Daily Times*, http://www.zwire.com/site/news.cfm?newsid=13987074&BRD=1675&PAG=461&dept_id=18168&rfti=6 (Feb. 18, 2005).

131. Larry Eichel, *Charges Against "Phila. 4" Tossed*, *The Phila. Inquirer*, <http://www.philly.com/mld/inquirer/news/front/10929066.htm> (Feb. 18, 2005).

conduct, although the verdict was subsequently reversed on appeal.¹³² In Canada, there have been criminal convictions under hate speech laws for publication of an advertisement opposing same-sex marriage that merely cited Bible verses without quoting them.¹³³ The Irish Council on Civil Liberties publicly threatened priests and bishops who distribute a Vatican publication regarding homosexual activity with “prosecution under incitement to hatred legislation.”¹³⁴ In Spain, Madrid’s Cardinal Varela gave a sermon condemning gay marriage. He has been sued by the Popular Gay Platform for “‘slander and an incitement to discrimination’ on the basis of sexual orientation.”¹³⁵ In England, self-defense was denied to a pastor who defended himself when assaulted by several attackers while carrying a sign citing Bible verses regarding homosexual conduct.¹³⁶ An Anglican Bishop in England was investigated under hate crimes legislation and reprimanded by the local Chief Constable for observing that some people can overcome homosexual inclinations and “reorientate” themselves.¹³⁷ In Belgium, an 80-year-old Cardinal was sued over his comments regarding homosexuality.¹³⁸ In each of these countries what began with demands for “tolerance” has transformed into demands for acceptance at the price of religious liberty.

A similar transformation seems plausible in light of the continuing attacks on the integrity of the proponents and supporters of the FMA. Opponents of the FMA consistently seek to associate the effort of those who seek to protect the institution of marriage with those who sought to stabilize the institution of racial segregation.¹³⁹ This charge is both insulting and inaccurate. While leadership of the African-American community may be divided over whether to support the FMA at this time, they are not divided over whether racial segregation is desirable. Although they differ in their

132. *Swedish Pastor Sentenced to One Month’s Jail for Offending Homosexuals*, Ecumenical News Intl., <http://www.eni.ch/highlights/news.shtml?2004/06> (June 30, 2004); Mattias Karen, *Sweden: Pastor Acquitted Over Hate Speech*, http://www.gay.com/news/article.html?coll=news_articles&sernum=2005/02/11/4&page=1 (Feb. 11, 2005).

133. John-Henry Westen, *Religious Persecution Next?*, Catholic World News, <http://www.cwnews.com/news/viewstory.cfm?recnum=26363> (Nov. 1, 2003).

134. Liam Reid, *Legal Warning to Church on Gay Stance*, Irish Times, <http://www.ireland.com/newspaper/front/2003/0802/720611077HM1POPE.html> (Aug. 2, 2003).

135. *In Brief: Gay Group Sues After Sermon*, Wash. Post, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A50826-2004Jan2¬Found=true> (Jan. 3, 2004).

136. See Robert Knight, *When You Hear of ‘Civil Unions’ Recall Czechoslovakia, Sweden*, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=37410 (Mar. 3, 2004).

137. Richard Alleyne, *Bishops Anti-gay Comments Spark Legal Investigation*, The Telegraph, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/11/10/nbish10.xml&sSheet=/portal/2003/11/10/ixportal.html> (Oct. 11, 2003).

138. Expatica, *Rights Group Sues Cardinal Over ‘Gay’ Pervert Comments*, http://www.expatica.com/source/site_article.asp?subchannel_id=48&story_id=4015 (Jan. 26, 2004).

139. See Remes, *supra* n. 121, at n. 5.

positions on the merits of the amendment itself, Rev. Jesse Jackson,¹⁴⁰ Rev. Walter Fauntroy,¹⁴¹ and Hilary Shelton of the NAACP¹⁴² are all unwilling to equate defense of traditional marriage with racial discrimination, as are other prominent civil rights leaders.¹⁴³ Similarly, the willingness of a substantial majority of both chambers of Congress just a few short years ago to vote for the federal DOMA does not equate with bigotry. Any attempts to do so are merely activists' attempts to cut off public debate regarding the need of a child to be raised by his or her mother and father.

C. *The Amendment Is Unlikely to Increase Litigation*

Marriage has become a question of constitutional law through gay activists' unrelenting attacks on marriage statutes in the courts.¹⁴⁴ Judges in Hawaii,¹⁴⁵ Alaska,¹⁴⁶ Vermont,¹⁴⁷ Washington,¹⁴⁸ New York,¹⁴⁹ California,¹⁵⁰ and Massachusetts¹⁵¹ have already attempted to judicially impose recognition of same-sex unions as marriages on the people of those states. Lawsuits continue in numerous other states where activists either seek recognition of same-sex unions or to overturn state constitutional amendments defining marriage as the union of one man and one woman.

140. David Ehrenstein, *The Black Divide*, *The Advocate*, http://www.advocate.com/html/stories/913/913_ehrenstein.asp (Apr. 27, 2004); see also Harvard Law School, *Jesse Jackson Reflects on '84 Campaign*, http://media.law.harvard.edu:8888/ramgen/saturday_school/spring_04/2004-02-16_ames_0200-0500b.rm (accessed Mar. 14, 2005) (online video).

141. Maggie Gallagher, *Hate Speech from Gay Marriage Advocates*, <http://www.townhall.com/columnists/maggiegallagher/printmg20010807.shtml> (Aug. 7, 2001).

142. Sen. Jud. Comm., *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?*, http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3076 (Mar. 3, 2004) (testimony of Hilary Shelton).

143. Sen. Jud. Comm., *A Proposed Constitutional Amendment to Preserve Traditional Marriage*, http://judiciary.senate.gov/testimony.cfm?id=1118&wit_id=3075 (Mar. 23, 2004) (testimony of Rev. Richard Richardson); Sen. Jud. Comm., *What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996*, http://judiciary.senate.gov/testimony.cfm?id=906&wit_id=2541 (Sept. 4, 2003) (testimony of Rev. Dr. Ray Hammond). *But see* Sen. Jud. Comm., *Judicial Activism vs. Democracy: What are the Judicial Invalidation of Traditional Marriage Laws?*, http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3074 (Mar. 3, 2004) (testimony of Pastor Daniel de Leon, Sr. representing Hispanic Evangelical community).

144. The long-standing nature of this effort is evidenced by cases that found the definition of marriage—requiring one man and one woman—not discriminatory. *Baker*, 191 N.W.2d 185; *Singer*, 522 P.2d 1187.

145. *Baehr*, 852 P.2d 44 (equal protection clause requires state show compelling interest in restricting marriage to one man and one woman).

146. *Brause*, 1998 WL 88743 (state constitutional right of privacy requires recognition of same-sex marriage).

147. *Baker*, 744 A.2d 864 (common benefits clause requires recognition of same-sex unions).

148. *Anderson*, 2004 WL 1738447.

149. *Hernandez*, 2005 WL 363778.

150. Stout, *supra* n. 37.

151. *Goodridge*, 798 N.E.2d 941.

It seems unlikely that the passage of the FMA, which removes the definition of marriage from further judicial redefinition, could increase litigation beyond the present level.

V. CONCLUSION

Activists have been unable to succeed in changing the definition of marriage legislatively so they have turned to the courts. Unfortunately, some judges are increasingly willing to disregard the text of the laws—as well as the political will of the people—in judicial efforts to remake the institution of marriage to suit their particular political views. This is not the proper process to be followed in a democratic republic. It is the people and their elected representatives who should determine the meaning and structure of marriage—through the process of political debate and voting.

The FMA, with its requirements of passage by two-thirds of each house of Congress and ratification by three-quarters of the states, follows the Founders' model for open, yet orderly change in our governing document. The text of the Amendment is clear and preserves the understanding of marriage that has existed throughout this nation's history, while allowing for individual states to experiment with alternative legal structures as their citizens deem appropriate. Unlike the hypothetical threats that opponents attempt to manufacture, the FMA addresses real cases and real problems that the people of this nation are encountering with the judicial usurpation of the political process.

In his first inaugural address on March 4, 1861, Abraham Lincoln warned that “if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”¹⁵² It is time for the people to assert self-rule again on this foundational issue of how we order our common life.

152. Abraham Lincoln, *First Inaugural Address*, in *Inaugural Addresses of the Presidents of the United States* 133, 139 (Joint Cong. Commn. on Inaugural Ceremonies ed., 1989).