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The U.S. Senate last year rejected the Federal Marriage Amendment (FMA), the object of which is to confine marriage throughout the United States to one man and one woman.[1] In light of the results of this past year's national and state elections, it is likely that this issue will continue to be pressed in the U.S. Congress in the near future—though its success is doubtful, given the enormous obstacles to such an undertaking.

The amendment issue has been forced on the country by gay rights advocates and activist lawyers and judges unhappy with their inability to achieve their objectives through the democratic process. Many of those opposed to gay marriage would have been just as happy not to go the amendment route.[2] There are serious reasons, however, to think that it is just as well that the battle over the amendment has been joined.

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1. Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, at A1. The proposed amendment, S.J. Res. 30, 108th Cong. (2004), reads:

> 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.

2. *See* Joshua L. Weinstein, *Senators Balk on Gay-Marriage Amendment; Snowe and Collins Signal They Will Join the Majority in Defeating the Proposal*, PORTLAND PRESS HERALD, July 13, 2004, at A1 (citing Republican Senator Snow, "I believe that marriage should be defined as a marriage between man and woman, but I don't think that a constitutional amendment is necessary."); *see also* John DiStaso, *Sununu Stance Stirs Conservatives*, THE UNION LEADER, Aug. 16, 2004, at A1 ("Sununu opposed President George W. Bush and most of his GOP Senate colleagues in voting against the Federal Marriage Amendment last month. He said states, not the federal government, should decide whether to recognize same-sex marriages.").

In this article I will argue in favor of a Federal Marriage Amendment. In the first section, I will examine the broader context of this battle, which suggests that the FMA offers us an opportunity to "shore up" the original design of the Constitution, in the face of two profound assaults on it. In the second section, I will respond to an article that criticizes the FMA and suggests, instead, an amendment that would protect state power to set policy on this issue. In the third section, I will briefly set out why marriage is an issue of such importance as to merit a constitutional amendment.

I. CHANGES IN THE ORIGINAL DESIGN OF THE CONSTITUTION: TWO PROBLEMS

Two kinds of fundamental constitutional change have occurred in the twentieth century, though without adherence to the formal mechanisms of change, and without securing democratic approval. In both cases, the changes were illegitimate—imposed on the nation by courts and the elites such courts represent. These changes should be reversed and the original constitutional design reestablished.

A. Illegitimate and Relatively Unchecked Judicial Power

The first change involves judicial power in the United States. The American Constitution was framed by men who distrusted unchecked power, and the Constitution is replete with checks and balances. However, they are imposed especially on the legislative power (naturally the strongest power in a republic, the Founders thought) and the executive power (a power inherently broad and difficult to define, especially in its exercise of "the power of the sword"). The Founders paid less attention to checks on the judiciary, which was, after all, incomparably the branch "least dangerous to the political rights of the constitution . . . ."[3] Hamilton even mocked fear about judicial power as a "phantom," in *Federalist No. 81*, because of all the inherent limits on judicial power.[4]

The Founders could view judicial power this way because they could take for granted that Americans shared the idea that judicial power was quite limited. There were differences regarding the scope of that power. Most, but not all, of the Founders, for example, accepted the relatively novel notion of judicial review, the power of courts to strike down

3. THE FEDERALIST NO. 78, at 575 (Alexander Hamilton) (John C. Hamilton ed., 1892).

4. THE FEDERALIST NO. 81, at 598 (Alexander Hamilton) (John C. Hamilton ed., 1892).

unconstitutional laws.[5] Nevertheless, even those who accepted judicial review understood it as a very exceptional power limited to rare circumstances, when a constitutional violation was manifest or clear.[6]

Moreover, in the ordinary exercise of common law judicial power, where it might be said that judges sometimes exercised a more discretionary power, such exercises occurred in the *absence* of law, not in cases *overriding* it.

Since the founding, however, judicial review has been transformed, from an essentially interpretive power to a legislative power. Oliver Wendell Holmes, Jr. played the central role in bringing about a transformed understanding of judicial power, beginning with *The Common Law* (1881), and his intellectual progeny completed the application of the new view in stages following the constitutional revolution of 1937.[7] Today, people from both ends of the political spectrum recognize the enormous power the judiciary wields, though they often disagree normatively about the propriety of such power, depending on the case.[8]

The argument for this transformation was the need for a more effective check on the ordinary democratic process, in order to protect the democratic values of liberty and equality.[9] The paradigm case was the judicial intervention that served as a catalyst to achieve racial equality, in cases such as *Brown v. Board of Education*. Only by transforming judicial review into something much more than simply effectuating the provisions of the Constitution could judges achieve the Constitution's "sparkling vision of the supremacy of the human dignity of every individual."[10]

This transformation was based on a trust in judges that would be touching, were it not so self-serving. The constant denigration of the political branches—fostered by the increasing political cynicism of the

5. FORREST MCDONALD, NOVUS ORDO SECLORUM 254 (1985).

6. On the Founders and judicial review, see CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 73–120 (rev. ed. 1994).

7. *See id.* at 121–322.

8. For an argument that judicial power is excessive from the right, see ROBERT BORK, THE TEMPTING OF AMERICA (1990) and for an argument on the left, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

9. *See* CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 47–68 (rev. ed. 1996).

10. William Brennan, Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985) *reprinted in* THE FEDERALIST SOC'Y, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 18 (1986).

late twentieth century—was an excuse to exalt judicial power, with judicial critics being characterized simply as those whose oxen were being gored.[11] The problem with this new power was magnified by the dearth of effective checks on the judiciary in the Constitution, based on the original, much more limited understanding of judicial power. Had the Framers thought that judges were to exercise the power they routinely exercise today, they would have been appalled at the thought of leaving them so unchecked.

There are some checks on the judiciary, of course. Impeachment is pretty much dead, except in cases of outright corruption, as a means to check the judiciary.[12] However, the appointment power remains and can sometimes be used to reverse the Court, as in the response to the laissez-faire Court in the 1930s, or at least rein it in, as in response to the Warren Court in the 1960s. Furthermore, in extreme cases, constitutional amendments can override judicial decisions.

Nevertheless, the obstacles to the exercise of these powers is enormous. Today, when intense minorities that support Supreme Court decisions are willing to use the filibuster against Supreme Court appointments, Court legislating can be slowed down, but not reversed. The Court majorities that have given us *Planned Parenthood v. Casey* and *Lawrence v. Texas*, reaffirming abortion rights and creating gay rights, would not have been majorities without members appointed by Republican presidents clearly opposed to such decisions. [13]

> 11. [There is] a growing trend to label decisions upholding or expanding civil rights as the product of judicial activism, with the pejorative implication that such decisions represent an attempt by judges to improperly disregard legal precedent or to thwart . . . "the will of the people." Conversely, decisions that are consistent with a more politically conservative outlook are typically portrayed as products of judicial restraint.
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> It seems to me, however, that the term 'judicial activism' ultimately depends upon whose ox is being gored, and not upon judicial, political, or social persuasion. . . .
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> . . . The persistent campaign against judicial activism inevitably contributes to the politicalization of the judiciary, especially at the federal level, which can only serve to undermine the overall independence of the judiciary and, in turn, the legitimacy and effectiveness of our courts as an institution. . . .

Thelton Henderson, *Social Change, Judicial Activism, and the Public Interest Lawyer*, 12 WASH. U. J.L. & POL'Y 33, 39, 41 (2003). Judge Henderson is a District Court Judge for the Northern District of California.

12. *See* Luke Bierman, *Judicial Independence: Beyond Merit Selection*, 29 FORDHAM URB. L. J. 851 (2002) (noting the rarity of judicial impeachments within the last 200 years).

13. Planned Parenthood v. Casey, 505 U.S. 833 (1992); Lawrence v. Texas, 539 U.S. 558 (2003). Justices O'Connor and Kennedy (appointed by Reagan) and Justice Souter (appointed by George H.W. Bush) have been particularly important figures in these decisions.

The constitutional amendment process, like other legislative checks on the judiciary, ironically, reverses the practical effect of checks and balances. The Framers originally intended checks to prevent the imposition of policies that lacked broad public support.[14] The burdens of inertia were on those who wanted to change the status quo. Today, the checks in Congress, and from federalism, operate to *prevent* checks from being effectively employed to limit a judiciary that is free to impose policies lacking sufficient support to be legislated.[15]

B. The Judicial Expansion of Sexual Autonomy

The second change concerns one important substantive component of contemporary judicial activism, namely, its jurisprudence on "social issues."[16] The modern judicial juggernaut has touched on many areas, but one area of particular emphasis—often across partisan affiliations—has been the sexual revolution. The Court hopped on that particular bandwagon in the 1960s, with its decisions legalizing pornography and especially its *Griswold* decision, which created a right to privacy in sexual matters, at least for married couples (a decision hardly necessary, even on the views of its supporters, given the trajectory of social mores that guaranteed imminent oblivion for laws against contraception).[17] That foothold quickly and dramatically expanded with application of the *Griswold* right to the unmarried in *Eisenstadt v. Baird*[18] and its extension to abortion in *Roe v. Wade*.[19]

The Justices—likely encouraged by the great controversy occasioned by *Roe*—seemed willing to rein in judicial injunctions on behalf of sexual autonomy in *Bowers v. Hardwick*.[20] In that case, the Court

14. This can be seen most clearly in the implications of the "extended republic" principle of *Federalist No. 51*: "In the extended republic of the United States, and among the great variety of interests, parties, and sects, which it embraces, a coalition of a majority of the whole society could seldom take place on other principles, than those of justice and the general good." THE FEDERALIST NO. 51, at 402 (Alexander Hamilton) (John C. Hamilton ed., 1892).

15. CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY 60–61 (rev. ed. 1997).

16. A more extensive discussion of this trend appears in Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65 (2000).

17. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

18. 405 U.S. 438, 443 (1972).

19. 410 U.S. 113, 169–70 (1973).

20. 478 U.S. 186 (1986).

refused to establish a constitutional right to homosexual sodomy.[21] By the end of the 1980s it also seemed that the Court would likely overrule, or at least drastically prune, the *Roe v. Wade* abortion right. However, the allegedly "conservative Court" of the 1990s reaffirmed broad abortion rights in *Casey* (piously endorsing a broad view of stare decisis, and refusing to overrule *Roe*), upheld the barbaric practice of partial-birth abortion in *Stenberg v. Carhart,*[22] and moved on to establish a right to sodomy in *Lawrence* (this time, hypocritically giving short shrift to stare decisis, and overruling *Bowers*).[23]

One of the key factors that indirectly helped make this judicial campaign possible was the fact that it had to be carried on merely in the *absence* of anything in the Constitution to support it. It did not have to contend with positive and explicit substantive *obstacles* in the text of the Constitution. Why not?

The Framers established a limited federal government whose primary responsibilities were conducting war and foreign affairs, and providing a framework for a national economy (especially by removing domestic protectionist obstacles to it).[24] No one dreamed of entrusting fundamental social issues (such as marriage and family law, or laws regulating sexual morality) to the federal government, since those were firmly left in the hands of the states. There was little to worry about, in any case, since there was little controversy about such issues at the time, due largely to the consensus on family and sexual morality that flowed from common religious beliefs of Americans (largely Protestant Christianity, at a time when Christians differed little on such matters). Thus, the Founders could more or less take for granted social mores (reflected in, and supported by, state laws) that would support the traditional family and channel sexual activity in directions that reinforced it. There was no need even to think about such matters at a national constitutional convention.

Of course, the Framers' assumptions have since been blown away. Since the 1960s, in particular, social mores have changed substantially, with the aggressive support of judges committed to an agenda of relative sexual autonomy (and dismissive of popular doubts or opposition).[25] As Justice Scalia famously pointed out in *Romer v. Evans* (1997): "When the Court takes sides in the culture wars, it tends to be with the knights

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21. *Id.* at 190–91.
22. 530 U.S. 914 (2000).
23. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
24. *See* MARTIN DIAMOND, THE FOUNDING OF THE DEMOCRATIC REPUBLIC 111–51 (1981).
25. *See* Gerard Bradley, *The New Constitutional Covenant*, 9 THE WORLD AND I 359 (1994), http://www.worldandi.com/specialreport/1994/March/Sa12153.htm.

rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."[26] These views are in opposition to "the more plebeian attitudes that apparently still prevail in the United States Congress" and in various state legislatures.[27]

Just as the Constitution lacked effective handles to latch on to in order to resist the expansion of judicial power—because the Framers could take a limited concept of judicial power for granted—so the Constitution lacks effective handles for resisting the exaltation of sexual autonomy by judicial invalidation of state laws intended to support the traditional family. In both cases there was no warrant in the Constitution for the judicial pretensions, but the problem of resisting such pretensions was exacerbated by the absence of provisions explicitly contrary to such pretensions. That absence was occasioned by the fact that there was no need for them when the Constitution was being written, and for a long time thereafter, because at the time modern forms of judicial activism and sexual autonomy were virtually unthinkable.

C. The FMA: Reinforcing the Design of the Constitution

The Federal Marriage Amendment is highly desirable precisely because it is a structural response to these two problems: the general exaltation of judicial power, and the judicial exaltation of sexual autonomy. It will place in the Constitution, not only a specific principle that resolves the specific issue of same-sex marriage, but a principle that can exercise a more general "gravitational" force.

First, it will provide explicit constitutional grounds for rejecting judicial pretensions to resolve social policy, especially in the direction of sexual autonomy. The background and history of the amendment will make it clear that the American people consider these judicial pretensions to be, not only *unsupported* by the Constitution, but *directly opposed* to it. It will reinforce the fact that, in our form of government, the resolution of such issues belong to the people.[28]

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26. Romer v. Evans, 517 U.S. 620, 652 (1995) (Scalia, J., dissenting).
27. *Id.* at 653.
28. In his response to my article, Donald A. Dripps makes an unconvincing case that the FMA entrusts the definition of marriage to federal judges, and imagines a string of unlikely possibilities. *See* Donald A. Dripps, *Three Tensions, and One Omission, in the Case for the Federal Marriage Amendment*, 42 SAN DIEGO L. REV. 935, 937–39 (2005). Of course, given the power of various forms of legal realism, it is hard to

Second, the gravitational force of the amendment will also support a presumption in favor of state (and, within the limits of its powers, federal) legislation on behalf of marriage and other traditional sexual mores against judicial assaults based on the federal Constitution. State legislatures would remain free to alter social policy, except with regard to gay marriage itself, but it would be more difficult for judges to take advantage of the fact that the Constitution says nothing about these social issues in order to impose their own policy preferences.

II. CONSERVATIVES, FEDERALISM, AND THE FMA

While most of the people who support the FMA are political conservatives, there are numerous conservatives who do not support the

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absolutely rule out any abuses of judicial power. However, Professor Dripps's suggestions are unpersuasive. In general, they ignore the force of the word "only" in the amendment, which shows its clear intent to be exclusion of other forms of marriage—homosexual marriage, polygamy—rather than shifting marriage law in general to federal jurisdiction. His suggestions also ignore "the reason and spirit" of the law, 1 WILLIAM BLACKSTONE, COMMENTARIES 61, and the "objects" of the law, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), that should guide intelligent interpretation. *See* WOLFE, *supra* note 9, at 17–72.

No one can reasonably argue that the amendment's purpose is to transfer to federal judges the power of defining the age of consent. The clear purpose of the amendment—to exclude from marriage unions other than a union between a man and a woman—has no bearing on the age of consent. States can continue to define the age of consent, and even to have different ages of consent. The amendment does not reject jurisdictional pluralism on that issue. The language offers no grounds for judges to overrule a state decision on that matter. Just consult state law—no need to ask your local federal judge.

Likewise, the rejection of unions other than those between a man and a woman as marriage does not in any way imply that all unions between a man and a woman are automatically legitimate (as in the case of adult incest Professor Dripps offers). Dripps, *supra* note 28, at 942. His assertion that "the textual argument is straightforward" is unjustified and unjustifiable. *Id.* Limitations on some man-woman unions are neither nonexistent nor left to judicial interpretation. They are left where they are, with state law.

The same can be said of possible judicial definitions of essential constituents of a "union" (such as terminability, property sharing, child maintenance, possible procreation, and the machinations of dogged divorce litigants). All are left where they are, with state law, because there is no reasonable interpretation of the amendment, in light of its known purposes, that would entrust such matters to federal jurisdiction. The active imagination of Professor Dripps and other lawyers proves nothing.

It is true that activist judges may deliberately misinterpret the amendment, though more likely by narrowing it than by expanding it. However, even many activist judges have some sense of being subordinate to law and also some sense of institutional self-interest in the face of majorities strong enough to pass a constitutional amendment. While no one can guarantee that judges will honor the intent of the FMA, it seems likely that they will. Moreover, why should the FMA's proponents just give up, on the grounds that some judges might be willing to violate certain fundamental principles of political morality, putting themselves above the law?

This section of Professor Dripps' paper reminds us of nothing so much as opponents of a law trying to impose on it a meaning directly at odds with the purpose of its proponents. *Id.* at 937–39. Such efforts usually are, and should be, ignored.

FMA. These conservatives generally oppose the amendment on federalism grounds.[29] Since the conservatives who support the FMA rightly value the constitutional principle of federalism, these arguments have to be taken seriously. In the end, however, the arguments are mistaken, on both theoretical and practical grounds.

A. Yoo and Vulchev's Conservative Case Against the FMA

John Yoo and Anntim Vulchev lay out these arguments in *The Conservative Case against the Federal Marriage Amendment*.[30] They maintain that the Federal Marriage Amendment is opposed to the principles of federalism, but, recognizing honestly that it is likely that legislative bars to same-sex marriage will be overridden by judges.[31] They propose a different amendment, which would simply ensure the right of states to determine policy in this area for themselves, without federal interference.[32]

Yoo and Vulchev argue that "a) the starting observation that the citizenry's significant opposition to same-sex marriage rights is a manifestation of what is best termed 'philosophical conservatism,' leads to b) the conclusion that the very principles which animate opposition to same-sex marriage should also lead to strong doubts about the FMA."[33] They define philosophical conservatism (following J.G.A. Pocock) as "the claim that human beings acting in politics always start from within

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29. [A] federal amendment to define marriage would do nothing to strengthen families—just the opposite. And it would unnecessarily undermine one of the core principles I have always believed the GOP stood for: federalism.

In our system of government, laws affecting family life are under the jurisdiction of the states, not the federal government. This is as it should be. After all, Republicans have always believed that government actions that affect someone's personal life, property and liberty—including, if not especially, marriage—should be made at the level of government closest to the people.

Alan Simpson, Editorial, *Missing the Point on Gays,* WASH. POST, Sept. 5, 2003, at A21. Simpson is a former Republican senator.

30. John C. Yoo & Anntim Vulchev, *The Conservative Case Against the Federal Marriage Amendment*, 2004 ISSUES IN LEGAL SCHOLARSHIP: SINGLE SEX MARRIAGE art. 3, http://www.bepress.com/ils/iss5/art3.

31. Their arguments on this point, *id.* at 1–6, form a persuasive response to Professor Dripps' doubts about the likelihood of judicial imposition of gay marriage.

32. Yoo and Vulchev do not offer specific language, but they suggest that "[s]uch an amendment might be similar to the second part of DoMA, its purpose being to ensure each state's right to not recognize out-of-state same-sex marriages." *Id.* at 10 (internal citation omitted).

33. *Id.* at 6.

a historically determined context, and that it is morally as well as practically important to remember that they are not absolutely free to wipe away this context and reconstruct human society as they wish."[34] This, they argue, is "the essence of the principled disapproval of the rush toward same-sex marriage," and "it is this historical sensibility that should give marriage traditionalists pause in their current attempts to amend the Constitution."[35]

The Framers made the constitutional amendment process difficult, "to be done only in response to strict necessity."[36] Amendments have, therefore, been few, and used mostly to modernize the workings of democracy (for example, expanding suffrage, direct election of Senators) and "organizing or limiting the powers of the federal or state governments."[37] Yoo and Vulchev observe that the "most notable effort to regulate purely private conduct—the 18th Amendment's establishment of Prohibition—failed miserably and led to the rise of organized crime."[38]

The Founders' primary goal was liberty, and "federalism was the great guarantor of liberty."[39] "According to Tocqueville, the 'distinguishing characteristics' of the original republic were 'decentralized order' (federalism) and 'mediating institutions,' and the latter were reinforced by the former."[40] What opponents of same-sex marriage must face is that federalism's survival depends on the willingness of citizens to defend state autonomy even against national policies they find attractive.

Yoo and Vulchev invoke the analogies of Prohibition and *Roe v. Wade*'s nationalization of abortion policy. Prohibition was a failure. Not only was its enforcement uneven, brutal, and ineffective, but it ironically "ended up greatly enhancing the power of the federal government" through burgeoning federal agencies and broad Congressional powers under the Eighteenth Amendment's enabling clause.[41] Since many Americans believe passionately in gay marriage (and their numbers might increase) what will be the outlet for these passions, and how "will the nation cope with inevitable civil disobedience?"[42]

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34. *Id.* at 6–7 (quoting Edmund Burke, *Introduction*, *in* REFLECTIONS ON THE REVOLUTION IN FRANCE vii (J.G.A. Pocock ed., Hackett Publishing Co. 1987) (1789–1799)).
35. *Id.* at 7.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 8.
40. *Id.* (quoting John McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 507–11 (2002)).
41. Yoo & Vulchev, *supra* note 30, at 8.
42. *Id.* at 9.

Roe v. Wade exacerbated the deeply divisive issue of abortion. Abortion protests now plague national politics, instead of the disagreement being worked out at the state level, despite the fact that "more people would be satisfied with the results of state-by-state resolution, [and] those results would be more stable."[43] The effort to nationalize marriage might produce similar results, plaguing national politics, when allowing "gay marriage to be decided state-by-state could avoid the political divisiveness produced by *Roe v. Wade* and, in fact, lead to a more enduring settlement of the issue."[44]

A federalism-gay-marriage amendment, on the other hand, would have the advantages of preserving the benefits of federalism. States could "compete for residents and businesses by offering different mixes of economic and social policies" and citizens "can satisfy their preferences by deciding to live in states that provide the . . . policies with which they agree."[45] Moreover, the states could serve as Justice Cardozo's "laboratories of democracy," adopting different policies on gay marriage, so that it would be possible to test empirically the contentions of proponents and opponents about its effects.

B. The Case Against the Conservative Case Against the FMA

Yoo and Vulchev are right to value the principles of conservatism and federalism. Unfortunately, their understanding of the proper application of these principles to the same-sex marriage issue is mistaken.

1. Conservatism

The essence of the conservative opposition to same-sex marriage is not that it is a rush to a new social policy. If the movement were slower, its end would be just as objectionable. The essence of conservative opposition lies in its rejection of the radical aim of altering the nature of the marriage, depriving it of its universally recognized characteristic–throughout human history and in all parts of the world—of gender complementarity.

There is more substance in the idea that philosophical conservatives object to efforts to "wipe away historically determined context and "reconstruct human society as they wish."[46] However, this does not

43. *Id.* at 10 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 995 (1992)).
44. *Id.*
45. *Id.*
46. *Id.* at 6–7 and text accompanying note 34.

advance Yoo and Vulchev's case. First, there is nothing in their article that suggests that opponents of same-sex marriage are attempting so egregious a reconstruction. The FMA, in fact, does little more than reinforce a long-established status quo policy against efforts to supplant it with a radical new policy. The FMA does not radically change our form of government—as an amendment shifting general control over family law to Congress would, for example—but simply resolves one specific issue.

Second, Yoo and Vulchev, not their opponents, are the ones who seem relatively tolerant about experimenting with radical new social policies, even if that experimentation is at the state level. The philosophical conservatism they describe, however, would be opposed to efforts by people to "reconstruct society as they wish" at any level of government.

2. Caution in Amending the Constitution

It is true that the Framers were opposed to multiplying amendments. However, those who oppose the FMA do not argue, as did Thomas Jefferson, for frequent amendment of the Constitution.[47] The only question, then, is whether the FMA meets the criterion of amending the Constitution only on matters of the utmost importance. Its backers—rightly, I think—say that same-sex marriage is a profoundly important issue, and therefore justifies an amendment.[48]

Yoo and Vulchev try to narrow the criteria for appropriate constitutional amendments by arguing that most of the amendments to the Constitution have either (a) "focused on modernizing the workings of our democracy" and/or (it's not clear which) (b) had "the purpose of either organizing or limiting powers of the federal or state governments."[49] They point out that "the most notable effort to regulate purely private conduct—the 18th Amendment's establishment of Prohibition—failed miserably."[50]

It is clear that both "a" and "b" provide independent grounds for reasonable constitutional amendments (that is, one cannot say that "a" is a requirement for all amendments). If constitutional amendments were limited to modernizing the workings of our democracy, then—as they apparently recognize, given their inclusion of "b"—certain amendments could not be explained. The most egregious example would be the Thirteenth Amendment, which dealt with an issue—slavery—much more profound than the modernizing of government. Of course, the

47. Yoo & Vulchev, *supra* note 30, at 7.
48. *See infra* Section III.
49. Yoo & Vulchev, *supra* note 30, at 7.
50. *Id*.

Thirteenth Amendment fits nicely into category "b"—organizing or limiting the powers of the federal or state governments. So does the FMA, by prohibiting federal and state governments from doing something very specific: making marriage anything but a union of one man and one woman.

The reference to Prohibition as an effort to regulate purely private conduct is revealing. Is drinking purely private conduct? The newly enfranchised women who led the fight for Prohibition did not think so. The collateral effects of excessive use of alcohol—especially on wives and children—was certainly one of the driving forces behind the amendment.[51] The Eighteenth Amendment was a mistake—but not because it dealt with purely private conduct. Most fundamentally, it failed to distinguish between the kinds of drinking that are morally unobjectionable, and even good, and the kinds that are excessive and harmful.

More importantly, though: Is the implication here that marriage is, as Prohibition supposedly was, purely private conduct? If Yoo and Vulchev are implying that marriage is purely private conduct, then their conservative case against the FMA rests on a distinctly unconservative view of marriage, which is a very social, very public institution.

3. Federalism

The analogy of abortion, as Yoo and Vulchev suggest, is instructive, but in ways different from their own argument. They maintain that we should want to avoid nationalizing the gay marriage issue when we see the effects of nationalization of abortion after *Roe v. Wade*, with abortion protests plaguing the nation, rather than policy being worked out at the state level.[52] However, this argument is unpersuasive to those who also oppose the attempt to simply "refederalize" the abortion issue.

Why do abortion protests plague national politics? The reason is simple: because it is such a fundamental issue of moral principle. Abortion is more like slavery than it is like seatbelt laws or minimum wage laws. Those who oppose abortion in principle cannot be satisfied with working out the issue

51. *See* Eileen L. McDonagh & H. Douglas Price, *Woman Suffrage in the Progressive Era: Patterns of Opposition and Support in Referenda Voting, 1910-1918*, 79 AM. POL. SCI. REV. 415, 419 (1985) ("Temperance and prohibition were a response to a social problem—drunkenness and alcoholism—viewed as threatening a democratic conception of community and society.").

52. Yoo & Vulchev, *supra* note 30, at 9–10.

at the state level, any more than opponents of slavery were satisfied with working out that issue at the state level. (Unlike abolitionists, opponents like Lincoln could tolerate temporary—even long-term, temporary— compromises, but they could not forego the ultimate goal of eliminating slavery throughout the nation.)

As has been noted often, the federalism solution to an issue like slavery is a variation of the "pro-choice" argument. Yoo and Vulchev are content to leave the same-sex marriage issue to the states, resulting in a "different mix of economic and social policies" from which Americans can choose.[53] This parallels Stephen Douglas' position, when he argued that the issue of slavery should be left up to the territories—that he didn't care which way they decided.[54] Similarly, "pro-choice" advocates say that abortion decisions should be left up to individuals. However, opponents of slavery had to care whether slavery was prohibited in the territories—whether the national government would tolerate slavery, not only in the states (as the Constitution required) but in the territories (which the Constitution did not require), thus undermining its abiding commitment to the eventual elimination of slavery, pursuant to the principles of the Declaration of Independence. Opponents of abortion, believing that abortion is the taking of innocent human life, also must care whether abortion is a permitted individual choice.

In all three cases (slavery, abortion, marriage), the question comes down to this: Is the principle at issue so fundamental that it cannot be left optional either for individuals or for states? The person who advocated strict legal or federal neutrality on slavery—opposing the position of Lincoln that the federal government, and ultimately all American government, had to recognize that slavery was incompatible with the nation's founding principles—had to say that permitting slavery was morally tolerable (even if the justification for it were that it was merely a necessary evil or that the issue was too divisive to resolve politically). The person who advocates *legal* neutrality on abortion has

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53. Yoo & Vulchev, *supra* note 30, at 10.

54. Lincoln stated:

> Every thing that emanates from him or his coadjutors in their course of policy, carefully excludes the thought that there is any thing wrong in slavery. All their arguments, if you will consider them, will be seen to exclude the thought that there is any thing whatever wrong in slavery. If you will take the Judge's speeches, and select the short and pointed sentences expressed by him—as his declaration that he "don't care whether slavery is voted up or down"— you will see at once that this is perfectly logical, if you do not admit that slavery is wrong.

4 ABRAHAM LINCOLN, THE WRITINGS OF ABRAHAM LINCOLN 122 (Arthur Brooks Lapsley ed., 1906) (1858).

to maintain that permitting abortion is morally tolerable (even if its justification is merely that of being a necessary evil or that it is too divisive an issue to resolve politically). The person who advocates strict *federal* neutrality on abortion—favoring a federalism amendment that simply returns the issue to the states, and being content with a "different mix" of state policies on the issue—has to maintain that abortion is morally tolerable.[55] The person who advocates a federalism amendment on the gay marriage issue, which simply returns the issue to the states, and is content with a different mix of state policies on the issue, does not think that gay marriage is a fundamental issue. However, the crux of the real conservative case in favor of the FMA is that gay marriage, like slavery and abortion, is precisely such a fundamental issue.

The ready acceptance of a checkerboard pattern of state policies either does not understand, or, more likely, simply does not agree with the justification for defending certain essential features of marriage. Yoo and Vulchev's "conservative case against the FMA" reflects fundamental agreement with the advocates of gay marriage that gender complementarity is not *essential* to the maintenance of marriage as the fundamental social institution on which society rests.[56]

Moreover, the acceptance of varying state policies allows more than just the proverbial camel's nose into the tent. If a certain number of states authorize gay marriage, and if one considers the de facto nationalization of various media, then one can assume that formally "married" gay couples will become staples on television, in movies, and in books. This normalization of gay marriage would act powerfully to undermine residual opposition to it, because there is a strong, though often inexplicit, connection between the moral ideals of citizens and their sense of what is normal in their society. The most principled and fundamental case against gay marriage is not that it should not be permitted (as if it were genuinely an optional matter), but rather, that it is

55. I concede that the moral implications of the federalism approach to abortion would look different, however, if it were intended simply as a step to a more comprehensive solution. I think that such a strategy would still be a misplaced one, however, since an effort to achieve a federalism amendment would likely exhaust the political capital of the forces opposed to abortion and make a more comprehensive solution less likely rather than more likely.

56. That is why Yoo and Vulchev can talk about "different mixes of . . . social policies," apparently not concerned that there are core features of marriage, such as gender complementarity, that should be preserved from experimentation. Yoo & Vulchev, *supra* note 30, at 10.

impossible. Any purported gay marriage lacks essential and necessary qualities of real marriage, irrespective of what the law says, just as a bigamous marriage or a marriage between a man and an animal would be impossible. However, the normalization of gay marriage inevitably tends to promote even among the *opponents* of gay marriage the view that gay marriage should not be permitted, rather than the view that gay marriage is impossible.[57] This is, of course, precisely one of the goals of those who seek to legitimize gay marriage in some jurisdictions, as a step toward complete legitimization of it. The backers of the federalism-gay-marriage amendment ought to be forthcoming about their acceptance of this effect of such an amendment.

Yoo and Vulchev appeal to some of the benefits of federalism that could be derived from a federal gay marriage amendment: more people are satisfied, national political divisiveness is avoided, and states can compete by offering different mixes of social policy and also can thereby serve as laboratories of experimentation so that we can evaluate claims of proponents and opponents of gay marriage. However, these effects of a federalism approach are not always genuinely beneficial. Net popular satisfaction would arguably have been increased by Congress leaving polygamy to the territories, since the sum of pro-monogamy sentiment in all of the states except Utah, and the pro-polygamy sentiment of Utah would exceed the total national pro-monogamy sentiment. Nevertheless, the nation rightly decided not to weigh all preferences equally on that issue, because it believed that the pro-polygamy sentiment was wrong and should not be given equal weight (any more than pro-slavery sentiment should be given equal weight).

Abortion will continue to be the source of political divisions—to "plague" national politics—for as long as its opponents do not accept its legitimacy, just as slavery "plagued" national politics because its opponents were not willing to accept its legitimacy. If things had settled down into peaceful acceptance of the status quo, the slave interest would have achieved its goal. Likewise, the elimination of the "political divisiveness" of abortion would be a signal that the new, judicially-imposed, pro-abortion status quo had won. Similarly, elimination of controversy about gay marriage in national politics would likely mark the victory of the soon-to-be-imposed judicial regime of gay marriage.

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57. An example of this socialization effect can be found in attitudes toward divorce among Roman Catholic Americans. Their church teaches, not just that divorce is not a good idea or that it is wrong, but rather that it is an impossibility—because the original marriage is still intact, and will remain so until the death of one of the spouses. Yet many American Catholics view the prohibition as a "rule for Catholics" imposed on them by church leaders, rather than as a statement about reality. Not surprisingly, such a view has led to increasing acceptance of divorce by some Catholics.

States often do serve as laboratories of experimentation, but the question is whether society should be experimenting with its most fundamental social institution in this way. The very principle that Yoo and Vulchev see as key to philosophical conservatism—its opposition to experiments that "wipe away" historically determined context and to those who would "reconstruct human society as they wish"[58]—grounds conservatives' opposition to carrying out radical experiments with marriage, such as the elimination of gender complementarity (or monogamy).

Moreover, it is not clear that state experimentation with marriage will provide us with much genuine evidence. First, the effects of gay marriage most emphasized by its opponents are the less tangible and long-term effects on marriage as an institution, which because of their nature are difficult to measure. Second, the experiment itself—the existence of different laws in different states—undermines the socializing effect of a legal system that prohibits gay marriage entirely and itself promotes views tolerant of diverse marriage forms. Third, different state laws are likely to have comparatively little impact on the attitudes that ground marriage as an institution, relative to the effect of national cultural influences (especially the national media and entertainment and popular culture) and the constant interaction of citizens of various states. Finally, another reason to limit experimentation with important social institutions is that it is unclear whether certain experiments are reversible, irrespective of whether their effects are good or bad (a judgement which is likely to be subject to heated ideological controversy anyway). For example, *Miller v. California* and *Paris Adult Theatre v. Slaton* reversed the legal basis for a judicially-compelled experiment with a very narrow view of what constituted obscenity, as represented by *Memoirs v. Massachusetts* and *Stanley v. Georgia*.[59] Nonetheless, the

58. Yoo & Vulchev, *supra* note 30, at 7.

59. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theater v. Slaton, 413 U.S. 49 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Stanley v. Georgia, 394 U.S. 557 (1969). The similarity here is that these Warren Court cases were an experiment with more relaxed standards of obscenity, but once the genie was out of the bottle (that is, society had experienced a growth in obscene materials), it wasn't possible to get it back in (that is, return to greater limits on obscenity). The experiment with more freedom for obscene materials had expanded society's "outer limits of tolerance," and therefore even when the Burger Court restored a broader power to regulate obscenity, the political will to use it had been significantly undermined. Likewise, experimentation with same-sex marriage will help to "normalize" it, and thereby make it more difficult to restore limits on it.

damage to social mores had been done, and even after the Court restored greater legal authority for communities to regulate obscenity, the power was not widely exercised.

4. A Federalism Amendment and the Status Quo

Yoo argues elsewhere that "the purpose of a constitutional amendment should be to restore the status quo ante that existed" prior to recent pro-gay marriage activism (like that of the court decision in Massachusetts and local officials in San Francisco).[60] But what exactly is the "status quo" to be restored? Is it simply the non-gay-marriage status quo before *Goodridge v. Department. of Public Health*?[61] Was it the status quo before *Texas v. Lawrence* struck down state anti-sodomy laws or *Romer v. Evans* struck down a state constitutional amendment preventing gay rights ordinances?[62] Or should we try to return to the status quo before privacy decisions like *Roe v. Wade* and *Griswold v. Connecticut*?

Gay marriage is part of a larger movement of ersatz sexual liberation. Simply returning the issue to states—a deliberately purely procedural goal—would likely accomplish little. The preservation of marriage requires something more substantial—an amendment that is, in fact, substantive, that takes a stand on the nature of marriage itself.

One is tempted to wonder whether the goal of a federalism amendment on the same-sex marriage issue may have a sort of Kissinger-esque quality. Some have contended (fairly or unfairly) that the goal of Henry Kissinger's foreign policy in Vietnam, and perhaps more broadly, was to secure a "decent interval" between American withdrawal and a Communist takeover of South Vietnam.[63] The goal was to put at least a little better face on an inevitable defeat: we could say that we had made an honorable effort to buttress our allies there and to give them a chance to win on their own. Likewise, a federalism amendment—devoid of any substantive endorsement of any view of marriage, and, in fact, opposed in principle to any such endorsement—would likely end up providing little more than a decent interval before the inevitable defeat of those who sought to stem the tide of a new understanding of marriage (itself only part of a broad new understanding of sexuality and family).

Yoo and Vulchev point out that according to Tocqueville "the 'distinguishing characteristics' of the original republic were 'decentralized

60. John Yoo, Editorial, *Let States Decide*, WALL ST. J., Mar. 1, 2004, at A8, *available at* http://www.berkeley.edu/news/media/releases/2004/03/01_yoo.shtml.

61. 798 N.E.2d 941 (Mass. 2003).

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

63. *See generally* JEFFREY KIMBALL, UNCOVERING THE SECRET HISTORY OF NIXON ERA STRATEGY (2003); FRANK SNEPP, DECENT INTERVAL (1977).

order' (federalism) and 'mediating institutions,' and the latter were reinforced by the former."[64] Therefore, "federalism was the great guarantor of liberty."[65]

The mediating institutions to which Yoo and Vulchev refer were historically reinforced by the decentralized order of federalism. However, that leaves out a very important fact: The mediating institutions included, and some of them depended on, what Tocqueville called "the first of [American] political institutions," namely religion.[66] Religion (that is, the nearly universal adherence to Christianity in early America) was important politically, not so much for its own sake, but because it promoted a necessary moral framework for society, a moral framework that included especially a certain view of marriage, sex, and family. The states could have responsibility for social institutions, and could experiment with various details, because there was broad social agreement (which precluded experimentation) on the fundamental principles that derived from the dominant religious views of the time.[67] Federalism is not the only guarantor of liberty, rather, it is simply one of the guarantors of liberty. That federalism is an important end, but not an unalterable means, to protect liberty is seen, above all, in the movement to end slavery that culminated in the Thirteenth Amendment.

In the final analysis, the conservative case against the FMA turns on the question of how important it is to maintain traditional marriage and whether a federalism amendment can achieve that goal. Marriage is a social institution of such importance that preserving it easily qualifies as an appropriate object of constitutional protection. Furthermore, it is very doubtful that a federalism amendment would do much more than slow down social changes in the meaning of marriage, and therefore it is an inadequate response to the problem. The only adequate response is an amendment that will establish a substantive principle that reinforces marriage against the efforts of those who would change it radically.

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64. *See supra* text accompanying note 36.
65. *See supra* text accompanying note 35.
66. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305 (Philips Bradley ed., Francis Bowden trans., 1999) (1835).
67. Note that, though these principles were derived from the dominant religious views of the times, they are not necessarily inherently or exclusively religious. In fact, much of the Christian teaching on marriage, family, and sexuality is based on natural law—or at least can be defended on that basis—rather than on revelation.

III. WHY TRADITIONAL MARRIAGE?

In one sense, I think it is self-evident that marriage is a profoundly important issue, which is deserving of society's attention. For a great part of American history there was a sufficient consensus on the general nature of marriage that public policy regarding the details of marriage could be left to the states. While there was some variation from state to state, for example, with regard to the grounds of divorce and the time frame for accomplishing it, those differences did not lead to changes in the essential characteristics of marriage as a social institution. However, that has changed.

A. Recent Developments Regarding Marriage

In the last three decades or so, more dramatic changes have occurred, and they do bear upon the very nature of marriage. These changes have paved the way for the even more dramatic changes implicit in the adoption of homosexual marriage.

The widespread adoption of different versions of no-fault divorce by most states after 1970 was a profound change. The traditional strong presumption of the relative permanence of marriage, except for certain defined reasons, gave way to a situation in which one of the partners, for whatever reason, could unilaterally end the marriage. This shift assumed a new view of marriage, which involved a shift from regarding it as a truly fundamental social institution to regarding it primarily as a personal union, in which there was a very limited social interest—virtually as a private contract terminable at the will of either party.[68]

This shift occurred in conjunction with other changes, most notably the widespread availability of contraception, which made possible a radical change in social attitudes toward sexuality.[69] Traditionally, sexual intercourse always carried with it the possibility of conceiving a child, and social norms generally dictated that a man marry the woman with whom he had conceived a child. With contraception, sex could be, and was, separated from marriage as an autonomous activity independent of childbearing, engaged in for pleasure and personal intimacy, and often engaged in without regard to marriage (present or potential). Elite intellectuals and those who took their ideology as a reference point

68. On the magnitude of present current efforts to change the meaning of marriage, see Elizabeth Fox-Genovese, *Thoughts on the History of the Family*, *in* THE FAMILY, CIVIL SOCIETY, AND THE STATE 3 (Christopher Wolfe ed., 1998).

69. *See* Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2272–73 (2001) (explaining the relationship between the increasing availability of contraception and sexual liberation).

(including especially the media elite) generally welcomed these changes as opportunities for sexual liberation.[70] These attitudes spread swiftly in society, and were manifested in earlier ages of first sexual experience (especially for women), more sexual partners, and widespread cohabitation, as well as lower birth rates.[71] For reasons that were not entirely accidental, they were also accompanied by growth in pornography and abortion.[72]

With these developments, homosexuality emerged as a new theme of sexual liberation. If heterosexuals could engage in sexual activity for pleasure and personal intimacy, apart from children and marriage, why not homosexuals as well? This sort of logic was implicit in judicial opinions such as the *Bowers v. Hardwick* dissents. In his dissent, Justice Stevens pointed out that the majority's treatment of the case as one of homosexual sodomy did not square with the actual law—a law that prohibited sodomy (oral or anal sex) whether it was heterosexual or homosexual.[73] The assumption behind this observation seemed to be that, since the statute would probably not survive a challenge by heterosexuals—certainly married ones, and probably unmarried ones—its application to homosexuals was dubious as well.[74]

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70. On the ideology of "expressive individualism" among media elites, see Robert Lerner & Althea K. Nagai, *Family Values and Media Reality*, *in* THE FAMILY, CIVIL SOCIETY, AND THE STATE 173 (Christopher Wolfe ed., 1998). On elite values more generally, see ROBERT LERNER, ALTHEA K. NAGAI & STANLEY ROTHMAN, AMERICAN ELITES (Yale Univ. Press 1996). Of course, many married couples welcomed contraception too, but they were less likely to connect it with a broader form of sexual liberation.)

71. On first age and number of partners, see EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 322–26, 327–28 (1994); on cohabitation, see LYNNE M. CASPER ET AL., *HOW DOES POSSLQ MEASURE UP? HISTORICAL ESTIMATES OF COHABITATION, U.S. CENSUS BUREAU* (1999), *available at* http://www.census.gov/population/www/documentation/twps0036/twps0036.html. ("Our Adjusted POSSLQ estimates indicate that the number of cohabiting households increased from 1.1 million in 1977 to 4.9 million 20 years later in 1997. Cohabiting households made up 1.5 percent of all households in 1977, increasing to 4.8 percent by 1997.").

72. *See* Gerard V. Bradley, *The End of Marriage*, *in* MARRIAGE AND THE COMMON GOOD 99, 99–103, 100 (Kenneth Whitehead ed., 2001).

73. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

74. *Id*. at 220. "The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions." The vulnerability of the prohibition for unmarried heterosexuals, as well as homosexuals, appears in Stevens' observation, *id.* at 216, that previous cases have determined that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."

Public opinion has generally moved in the direction of supporting the elimination of legal prohibitions on homosexual activity per se, but that movement has stopped short of legitimizing same-sex marriage. Americans continue to regard monogamous heterosexual marriage as the normative ideal, and they are unwilling to extend the mantle of marriage to homosexual relationships. The question is whether that attachment to monogamous heterosexual marriage is simply the retention of an ancient prejudice, or a position grounded in some reasonable principles.

B. Grounds for Traditional Marriage

The case for traditional marriage is grounded in a conviction that marriage is not simply a man-made or socially-devised and revisable institution that can be adapted or accommodated at will to changing social circumstances. While it is true there are many ancillary features of marriage that are quite variable (for example, the multifarious forms of property arrangements associated with marriage at different times and places), there is a true core of marriage that exists by nature, and is unrevisable. Marriage is fundamentally a pre-political institution, rooted in a natural union of a man and a woman that is ordered to family life and childbearing and childrearing. The political community has very important interests affected by this institution—it is a deeply integral element of the common good—and therefore has a legitimate right and duty to regulate it in certain ways. However, the political community should always act with respect for marriage's essential features. The most fundamental duty of the political community regarding marriage is to help ensure the availability of marriage as a stable institution promoting the well-being of couples and children, by providing a supportive social ecology.

The fact that marriage is natural is in no way contradicted by the fact that it is also fragile, and in need of social support.[75] It is natural that human children grow up, become adults, and develop the capacities associated with fully developed human beings; that is, this pattern is an unfolding of inherent capacities that properly allow human beings to grow and flourish. Yet, this whole process very much requires various forms of social support, the absence of which will lead to a frustration of their proper development and flourishing. While human beings are naturally ordered to certain ends—that is, certain ends are "natural" in the sense that they constitute the full development and flourishing of a human being—they are also subject to tendencies that are somewhat at

75. As Professor Dripps suggests in the first part of his response. *See* Dripps, *supra* note 28, Part I.

war with their natural ends. For example, one natural end of a person is to cultivate a body that is healthy, yet human beings are also subject to desires that cause them to eat too much, in ways that harm their health.

What are the core natural elements of marriage that a political community ought to respect and promote? Marriage is the permanent union of one man and one woman, the mutually intertwined ends of which are the good of the spouses and the bearing and raising of children. The political community has a particularly intense interest in children, because they are an essential prerequisite for its preservation and perpetuation. Children benefit most from having a biological mother and father married to each other and raising their children together, and therefore, society has strong reasons to promote marriage as a way of ensuring the best interests of children.[76] Moreover, insofar as marriage is an ordinary means to the happiness of people, and both depends on social support and is part of the common good, the political community also has an interest in marriage being available for people.[77] Nor are these two interests, children and mutual love, separate and independent—they are, rather, deeply intertwined. The commitment of the spouses to love each other—their exclusive, permanent reciprocal self-giving—contributes powerfully to their education of their children, and the joint project of raising their children contributes powerfully to deepening ties between the parents.

People generally take it for granted that marriage will be available, but, despite the powerful forces inclining people to marry, the availability of marriage as an institution they can choose to enter cannot be taken for granted. There are powerful forces inclining human beings to accumulate property, and there is a strong natural basis for properly qualified property rights. However, in a given society such property rights may not be available. Property is both natural and pre-political,[78] on one hand, and also a social institution essentially dependent on various legal arrangements, on the other. Likewise, marriage is natural

76. *See, e.g.*, SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT (1994).

77. On the benefits of marriage to the married partners, see LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE (2000).

78. In Aristotle's *Politics*, the rudiments of economics are identified with "household management"; that is, the efforts to provide the resources necessary for life (property) begin with the most basic (and pre-political) community, the household. ARISTOTLE, POLITICS 8–38 (Ernest Barker ed. & trans., Oxford Univ. Press 1946).

and pre-political, but also a social institution dependent on various legal arrangements.

One of the ways in which marriage can become unavailable to people is for the political community to offer people an institution called "marriage" that is not really marriage. By inculcating in its citizens—through social practices and laws—a notion of marriage that lacks some of its essential ingredients, a political society could, effectively, make "real marriage" impossible for most of its citizens.

One way to do this is to make marriage a contract that is temporary and terminable at the will of either party. Whatever the impact of the allowance of divorce in a certain limited number of cases has been, the shift to no-fault divorce has profoundly changed the very notion of marriage among Americans, and has deeply damaged it.

How does this change in law affect marriages?[79] In 1970, how easily people could say, "if I want to get divorced, that's my business—I'm not making anyone else (except my former spouse) do it. If others want to stay married, let them." The problem is that such an attitude ignores the subtle interplay of personal choice and social mores. So many of our conceptions are shaped by our sense of what is normal, by the social ecology of which we are a part. No-fault divorce has created a world in which divorce is normal, and it is now a part of the ordinary psychological landscape of many people.[80] For them, marriage is a permanently tentative and revisable commitment. Therefore, not surprisingly, more marriages break up, and more of the children they produce grow up without a father and mother working together to carry out the profoundly exalting, and often terribly difficult, task of childrearing. Furthermore, people

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79. No-fault divorce is a good example, I think, of the kind of causal process about which Professor Dripps asks. *See* Dripps, *supra* note 28, at 937–38:

> Thus far I have treated the causal connection between gay marriage and marriage-as-institution as one unmediated by personal decisions of the sort that break the normatively relevant chain of causes. There comes a point, however, when but-for causes lose their normative relevance . . . . If all such changes do is increase or decrease the range of options people considering marriage or divorce have to choose from, can those who change the menu be held accountable for what others choose from that menu?
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> Suppose Professor Wolfe is asked to speak about the state of marriage as an institution in Denmark or some other jurisdiction where gay marriage has been sanctioned by positive law. What should he say? "Well, good people, time to give up. Copulate like bonobos, and devil take the children! Nothing any of you might do, or fail to do, can save marriage as an institution." I find this implausible, and so illuminating. Gay people are not responsible for the choices straight people make about their relationships.

80. *See* Francis George, *Law and Culture in the United States*, 48 AM. J. JURIS. 131, 142 (2003) ("Misguided law and policy, starting with no-fault divorce, have obscured for Americans the nature and intrinsic goodness of marriage and have taught Americans to treat this institution as a mere instrument for the achievement of subjective interests.").

grow up believing that couples are unlikely to "remain in happy, monogamous marriages for thirty, forty, or fifty years after their last child reaches the age of majority."[81] Nor will they be as likely to consider what kind of parents men and women will be if they more or less expect to dispense with their first partners after the children are grown. Marriage as an institution may continue to evolve pragmatically, it is true, but it should give us pause that part of that evolution is helping children cope with the pain inflicted on them, in many cases, by their parents' pursuit of their own self-fulfillment.

Another way to make real marriage unavailable to people—by changing social understandings of its very nature—is to make marriage *essentially* separable from children. This is what happens when homosexual "marriage" is legitimized despite the fact that homosexual unions are essentially—of their very nature—incapable of procreation. (There are, of course, many instances in which a heterosexual union is incapable of leading to procreation *in practice*, by reason of age or physical defect; but the nature of the union remains the kind of union capable of producing children.)

Homosexual marriage is one more indication from society that marriage is whatever we want it to be: a malleable human institution that we can shape, rather than a natural institution, with its own internal dynamics and demands, to which we must submit.[82] As Professor Dripps suggests, in his response to this article: If we live longer, we can decide to abandon our spouses when they cease to be meaningful partners for us.[83] Living longer and experiencing more opportunities means being able to find a new partner that will be better for us than the last one. Moreover, we can decide to marry a person of our own sex. Or

81. Dripps, *supra* note 28, at 939.

82. The fact that the legitimization of gay marriage would deeply influence our social understanding of marriage is the reason it will affect marriage in a way that is essentially different from the interplay of homosexuality and other institutions cited by Professor Dripps (homosexuality and the military, churches, spectator sports, politics [voting], property, and jury service). *Id.* at 937.

83. *Id.* at 939. As Dripps states:

> People will continue to enjoy longer, healthier, and richer lives. As they do so they are likely to see both stronger reasons to divorce and weaker reasons to remain married. No one, outside al Qaeda, is seriously against the demographic dynamics. I find it as difficult to believe that marriage as an institution is headed for the scrap-heap of anthropology, as I find it difficult to believe that people will remain in happy, monogamous marriages for thirty, forty, or fifty years after their last child reaches the age of majority.

Id.

several people. Or one person for a period of ten, or five or three years. However, if we go down the road of making marriage such a malleable institution, why should we be surprised if it does not fulfill the functions it is designed to fulfill?[84]

There are many more heterosexuals than homosexuals. As a result, I very much agree with those who point out that the most profound damage to marriage as an institution has been wrought by heterosexuals, not homosexuals.[85] Gay marriage is far from the most harmful aspect of contemporary marriage trends. Heterosexuals, without the help of homosexuals, have done an extraordinary job of weakening the family, through the adoption of no-fault divorce (which did not so much reflect a social consensus as legitimize and make socially dominant, elite views),[86] and the growth of widespread promiscuity and cohabitation.[87]

Professor Dripps, in his response, says that marriage has survived many social events, including the sexual revolution, and it will survive gay marriage too.[88] To the contrary, I do not think marriage survived the sexual revolution. Every war has winners and losers, and, as some have argued, the boys won the sexual revolution (because it legitimized

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84. My argument is not, it should be clear, an argument that homosexuals are per se hostile to the general concept of marriage. Some homosexuals want to marry to express deep and enduring love for one another. At the same time it remains unclear how many homosexuals really want marriage for itself, and not as a simple way of furthering social legitimization of homosexuality. Moreover, it seems plausible that most homosexuals want marriage only under certain conditions, which include non-permanence and even sexual non-exclusivity; that is, as one person has said, homosexuals "want what marriage has now become," not what it once was thought to be. Bryce Christensen, *Why Homosexuals Want What Marriage Has Now Become*, *in* THE FAMILY IN AMERICA , Apr. 2004.

85. *See, e.g.*, Dripps, *supra* note 28, at 939:

> The urgency of the Paul Revere style warnings about gay marriage stands in surreal contrast to the majority culture's smug complacency about such genuine threats to durable and happy marriages as adultery, substance abuse, compulsive gambling and domestic violence. Those are evils undermining millions of marriages, evils that get a political pass because they happen to be practiced by the general, mostly heterosexual, population.

86. *See* HERBERT JACOB, SILENT REVOLUTION 85 (1988).

87. For the record, I would be happy to help resolve, to the extent I can, Professor Dripps' unhappiness about "the majority culture's smug complacency about such genuine threats to durable and happy marriages as adultery, substance abuse, compulsive gambling and domestic violence." Dripps, *supra* note 28, at 939. I am not entirely sure that these phenomena get the simple political pass that Professor Dripps thinks they do, *see id.* at 939, but I agree much more needs to be done. We could work on domestic violence, for example, by reducing cohabitation by both different-sex and same-sex partners, which is more highly correlated with domestic violence than marriage. *See, e.g.*, Gregory L. Greenwood et al., *Battering Victimization Among a Probability-Based Sample of Men Who Have Sex with Men*, 92 AM. J. PUB. HEALTH 1964, 1967 (2002); Kersti Yllo & Murray A. Straus, *Interpersonal Violence Among Married and Cohabiting Couples*, 30 FAM. REL. 339, 339–47 (1981).

88. Dripps, *supra* note 28, at 938.

recreational sex and even induced many women to adopt such male attitudes, especially among elites). The most prominent victims were the children who have been deprived of the enduring husband-and-wife family that should ordinarily be their birthright.[89]

If it is true that heterosexuals have already deeply damaged marriage as a social institution, that still leaves the question of whether these wounds already inflicted on marriage justify the further infliction of additional wounds, in the form of legitimizing homosexual marriage, with its much more radical separation of marriage and children.[90] The more sensible path would be to resist further erosion of the institution, and to undertake substantial efforts to reconstitute marriage as a stable institution in our society.[91] The battle over the FMA is a key moment to make the public argument for, and shape a public consensus on, the necessity of restoring marital stability. That goal will not be achieved if marriage is considered to be a malleable institution, revisable by society, and unfettered by deep natural requirements such as monogamy and gender differentiation—a view that is at the heart of the movement for same-sex marriage.

IV. CONCLUSION

The obstacles to the Federal Marriage Amendment are, of course, overwhelming, as they are for any constitutional amendment. However, this is a battle that needs to be fought. It is necessary in order to place in the Constitution a principle that will resist judicial dominion over social issues. It is necessary in order to place in the Constitution a principle that will resist the movement (largely, but not exclusively pursued through the courts) toward sexual autonomy. It is necessary in spite of the fact that it calls for a modification—in light of great changes in the country—of federalism, precisely in order to protect the Founders' broader constitutional design. Finally, it is necessary because there are reasonable grounds to protect, promote, and make available to people a

89. See Barbara Dafoe Whitehead's insightful, and bleak, analysis of current mating mores in *How We Mate*, CITY J., Summer 1999, at 38, *available at* http://www.city-journal.org/html/9_3_how_we_mate.html.

90. For a succinct survey of grounds for opposing same-sex marriage, with citations to social science sources, see Witherspoon Institute, *Arguments Against Same Sex Marriage (SSM)*, http://www.winst.org/toptenlists.htm (last visited June 10, 2005).

91. *See* Inst. for Am. Values, *What's Next for the Marriage Movement*, *at* http://www.marriagemovement.org/wnxt/what_next.php (Dec. 16, 2004).

genuine institution of marriage—monogamous and heterosexual—both for the social interests it advances and the personal happiness it makes possible.

A Postscript

I think it is necessary to respond to the last point that Professor Dripps makes in response to this article, namely, that I have "nothing to say about what might be good for gay people, about how some regard for our welfare and happiness should influence public policy."[92] He concludes from this that "[o]ur emotional lives our material interests, and our political dignity merit no discussion. We are, for all he has to say about us, mere means to the end of preserving marriage for the benefit of others."[93]

I did not discuss this topic—the well-being of homosexuals—in this article because I was dealing with a more limited topic (the FMA). I have had something to say about this issue elsewhere.[94] I strongly affirm that it is an important principle of political morality that those with charge of the common good be concerned about the well-being of every single member of the community.

One way to respond to Professor Dripps' charge would be a minimalist approach. That is, one might respond that the FMA would pretty much leave homosexuals alone, permitting them to live the lives they want to live, but denying them something they have no "right" to: the moral approval of other people and the legitimization of their relationships by society.[95] Society denies marriage to homosexuals in the same way that it denies marriage to those who wish multiple spouses or marriage with one of their parents—not because it entertains any animus against such people themselves, but because it reasonably adopts a view of marriage different from the one they have.

A fuller response to the charge would go much further. It would be similar in many ways to the proper response to those who suffer from alcoholism or addiction. According to this view, the best thing for gay people—that is, for those afflicted with same-sex attractions—is not to act on those inclinations. Regard for the welfare and happiness of

92. Dripps, *supra* note 28, at 947–48.

93. Dripps, *supra* note 28, at 948.

94. *See, e.g.*, Christopher Wolfe, *Homosexuality in American Public Life*, *in* SAME-SEX MATTERS 3 (Christopher Wolfe ed., 2000); Christopher Wolfe, *Being Worthy of Trust: A Response to Joseph Raz*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 131 (Robert P. George ed., 1996).

95. Indeed, it is not clear why, on the emerging view of marriage, society should legitimize anyone's relationships, as some scholars have argued. On their view, marriage as a public legal form should just be abolished and left to private arrangements.

homosexuals in public policy would best be expressed by the refusal of society to be collective "enablers," encouraging people to follow inclinations that are harmful socially and morally, and often emotionally and physically as well.[96] Public policy should show its deep concern for homosexuals by helping them to see the disorder in their sexual attractions, and by adopting policies that would, as much as possible, prevent the formation of same-sex attractions and offer possibilities for changing them, where possible.[97]

The latter, and fuller, response is, unfortunately, likely to be rejected by many people in our society today. I do think it is important for some people to make such a response publicly, however, in order to reinforce the moral grounds of the surprisingly durable opposition to homosexual marriage. This durable opposition to homosexual marriage is surprising considering the crusading commitment of intellectual elites and the tireless propagandizing of those who disseminate their views, such as the media, and often judges.

To avoid one sort of possible misunderstanding—the false idea that I might want to return to some alleged golden age in the past—I would add that the movement away from certain typical responses to homosexuals in the past, including loathing and contempt (an attitude that is, thankfully, no longer publicly tolerated) is a great advance. Indeed, today, it is probably more common and socially acceptable—and certainly in academic settings and among media elites—for gay rights advocates to paint their opponents (those who consider homosexuality immoral and socially harmful) as irrational and hateful bigots.

At any rate, the accusation that those who are opposed to legitimizing homosexual activity and relationships do so out of disdain for

96. The evidence of physical harms resulting from male homosexual activity (especially anal intercourse) is powerful. *See* JEFFREY SATINOVER, HOMOSEXUALITY AND THE POLITICS OF TRUTH 49–70 (1996). The emotional harm is suggested by the higher levels of domestic abuse among homosexual couples, as well as by an analysis of the psychological wounds that often underlie homosexual inclinations. On the former, see *supra* note 87; on the latter, see Richard Fitzgibbons, *The Origins and Therapy of Same-Sex Attraction Disorder*, *in* HOMOSEXUALITY AND AMERICAN PUBLIC LIFE 85 (Christopher Wolfe ed., 1999).

97. There is considerable controversy about the possibility of change, but this is largely a function of people not wanting to hear the truth. It is important to note, however, that advocates of change have to avoid any suggestion that change is an easy matter, which it is clearly not. On the possibility of change, see the websites of The National Association for Research and Therapy of Homosexuality, http://www. narth.org (last visited Aug. 1, 2005) and Positive Alternatives to Homosexuality, http://www. pathinfo.org (last visited Aug. 1, 2005).

homosexuals and their welfare—out of "meanness"—is unjustifiable. I am under no illusion that the rancor of many gay rights advocates toward their opponents—which so often results in simple name-calling—will be assuaged by this defense.[98] One would expect that those who have come to believe that their personal identity is defined by their same-sex attractions would react strongly, and even bitterly, to their opponents. Moreover, if homosexual inclinations generally rest on certain psychological wounds, that would reinforce such expectations.[99] Nonetheless, even if those opposed to legitimizing homosexuality cannot expect to assuage the anger of gay rights advocates, it is important for them to make it clear that their case against legitimizing homosexual activity and relationships is based, not on hostility to homosexuals, but on an equal concern and respect for them.

98. I want to emphasize that the conversation at the conference on which the volume is based—conducted on all sides with admirable civility—was an honorable exception.

99. *See* GERARD J.M. VAN DEN AARDWEG, THE BATTLE FOR NORMALITY (1996).