Why the Federal Marriage Amendment is Not Only Not Necessary, But a Bad Idea: A Response to Christopher Wolfe

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As of March 22, 2004, the text of the proposed Federal Marriage Amendment (FMA) states:

> 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.[1]

Assume that, like Christopher Wolfe, we are morally opposed to granting the legal status of marriage to any couple other than a man and a woman.[2] Presumably, then, we would oppose a legislative effort to grant such status to same-sex couples. Troubled by some recent, high-profile judicial decisions, we might also want to amend the Constitution of the United States to prevent any court, federal or

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1. S.J. Res. 1, 109th Cong. (2005). An earlier draft of the FMA stated:

> 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, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

http://usgovinfo.about.com/cs/usconstitution/a/marriage.htm (last visited Aug. 21, 2005).

2. *See* Christopher Wolfe, *Why the Federal Marriage Amendment is Necessary*, 42 SAN DIEGO L. REV. 895 (2005).

state, from ruling that the Constitution requires states to grant such status to same-sex couples. The proposed FMA would do this.

However, it would do more—and it is that "more" that concerns me here: The proposed FMA would also prevent any state court from ruling that the state constitution requires the state to grant marital status (that is, the legal status of marriage) to same-sex couples. Why should we want to amend the U.S. Constitution to do that? Assume that a generation from now the people of California, in part inspired by the Constitution of South Africa, would like to amend their constitution to forbid discrimination on the basis of sexual orientation; in particular, they would like to entrench in their constitution a rule granting the marital status to same-sex couples. Why should we want the U.S. Constitution to prevent the people of California from doing that?

The proposed FMA would do still more: It would prevent the legislature of any state from *choosing to* grant marital status to same-sex couples. Why should we want the U.S. Constitution to prevent the California legislature, say, from doing that?[3]

I can understand why we would want the U.S. Constitution to prevent California and every other state from enacting/enforcing laws or pursuing policies that would violate the human rights of its citizens or any other persons subject to its jurisdiction—laws/policies that would treat persons as if they lacked the "inherent dignity" that, according to the morality of human rights, each and every human being has.[4] I can

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3. Notice that the present text of proposed FMA, unlike the earlier text, *supra* note 1, does not forbid state legislatures to grant the status of "civil union" to same-sex couples. If I understand his argument, Wolfe prefers the earlier text, according to which no state may choose to grant civil union status to same-sex couples.

4. *See* Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?,* 54 EMORY L.J. 97 (2005).

We who affirm the morality of human rights, *because* we affirm it, should do (we have good reason to do) what we can, all things considered, to prevent government from violating human beings. That is, we should do what we reasonably can to prevent government from taking actions or pursuing policies that deny that one or more human beings have, or treat them as if they lack, inherent dignity. One of the things that we in liberal democracies can do, that we are politically free to do, to prevent governments—our own government as well as other governments—from violating human beings is support laws that forbid, or if enacted would forbid, governments to take actions or pursue policies that violate one or more human beings.

When I say that a government action/policy violates a human being, I mean that the rationale for the action/policy violates a human being; that is, the rationale either denies that one or more human beings have inherent dignity or treats them as if they lack it. What the Nazis did to Jews was embedded in an ideology according to which Jews are pseudohuman; the Nazis denied that Jews have whatever moral status—whatever dignity, whatever worth—true human beings have. (According to the morality of human rights, the moral status that human beings have is inherent dignity.) Whether or not Bosnian Serbs believed that Bosnian Muslims were pseudohuman, Bosnian Serbs certainly treated Bosnian Muslims as if they lacked inherent dignity. How else to understand what Bosnian Serbs did to Bosnian Muslims—humiliation, rape, torture, murder? In that

also understand why we would want the U.S. Constitution to prevent California and every other state from unjustifiably tolerating private actions that violate human rights—that treat persons as if they lack "inherent dignity." So, we are happy that the Constitution bans slavery. If one believes, as Professor Wolfe and many others do, that abortion violates the human rights of unborn children,[5] one may want to push for a constitutional amendment banning abortion.[6] However, granting civil union status or even marital status to same-sex couples does not violate anyone's human rights, it does not treat anyone as if he or she lacks "inherent dignity." Some argue that *refusing to* grant such status to same-sex couples violates the human rights of those couples, but to reject that claim—as, of course, those who are morally opposed to

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sense, what Bosnian Serbs did to Bosnian Muslims constituted a *practical* denial—an *existential* denial—that Bosnian Muslims have inherent dignity.

It would be a mistake, however, to think that we who affirm the morality of human rights should want the law to ban *only* actions/policies that violate (that is, whose rationales violate) one or more human beings. We should also want the law to ban actions/policies that, even if they (their rationales) do not violate any human being—even if they neither deny that any human being has inherent dignity nor treat any human being as if she lacks it—are nonetheless a source of unwarranted human suffering or other harm. I am referring here to significant human suffering (or other harm), not trivial human suffering. If we decline to do what we can, all things considered, to diminish unwarranted human suffering (or other harm)—and by "we" I mean here primarily the collective we, as in "We the People," acting though our elected representatives—we decline to do what we can, all things considered, to protect those who endure that suffering. We thereby fail to respect their inherent dignity; *we violate them by treating them as if they lack inherent dignity*. Martin Luther King Jr. said, "Man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good." Nicholas D. Kristof, *The American Witness*, N.Y. TIMES, Mar. 2, 2005, at A19 (quoting Martin Luther King, Jr.). Sometimes it is not, or not only, a government action/policy that violates human beings; sometimes the violation consists in our failure to do what we can, all things considered, to protect human beings from the action/policy.

To say, in the present context, that an instance of human suffering is "unwarranted" is to say that the action/policy that is a source of the suffering—that is a cause of the suffering or that fails to intervene to diminish the suffering—is not warranted, that it is not justified. Not justified *from whose perspective*? It is scarcely surprising that the action/policy, and therefore the suffering that it causes, or fails to intervene to diminish, is justified from the perspective of those whose action/policy is in question. But theirs is not the relevant perspective. The relevant perspective belongs to those of us who, in coming face to face with the suffering, must decide what, if anything, to do, or to try to do, about it; in making that decision, we must reach our own judgment about whether the suffering is warranted.

5. Wolfe, *supra* note 2, at 907–08.

6. *But see* M. Cathleen Kaveny, *Toward a Thomistic Perspective on Abortion and the Law in Contemporary America*, 55 THE THOMIST 343, 393–94 (1991).

granting such status to same-sex couples do—is not to deny that choosing to grant such status to same-sex couples does not violate anyone's human rights.

Why, then, does Professor Wolfe want to entrench in the U.S. Constitution a rule that would prevent the people of each and every state, acting through their elected representatives, from granting marital status to same-sex couples? This is the heart of Wolfe's argument:

> [G]ender complementarity is . . . *essential* to the maintenance of marriage as the fundamental social institution on which society rests.
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> . . . 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 impossible"—that 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.[7]

Whether, according to Wolfe's understanding of marriage, a same-sex "marriage" is, as he claims, "impossible," it is certainly possible for a state legislature to grant marital status to same-sex couples—though Wolfe, like most other Americans, opposes its doing so. As I said, I can understand why, if we are morally opposed to granting marital status to same-sex couples, we would oppose a legislative effort to do so. The issue before us now is different, however: Assuming that we are morally opposed to granting marital status to same-sex couples, why should we want the U.S. Constitution to prevent the citizens of a state, acting through their legislators, from choosing to grant marital status to same-sex couples? Our moral opposition to granting marital status to same-sex couples easily explains our opposition to legislative efforts to do so. Further, if we thought that granting marital status to same-sex couples violated human rights, our moral opposition to granting marital status to same-sex couples would also explain our appetite for a constitutional amendment preventing any state from granting marital status to same-sex couples. To enslave someone or to permit the enslavement of someone—or, arguably, to abort someone or to permit the aborting of someone—is to violate someone's human rights. However, to grant marital status to same-sex couples is not to violate anyone's human rights; it is not to treat anyone as if he or she lacks inherent dignity. Therefore, even if we are morally opposed to granting marital status to same-sex couples, why should we want the U.S. Constitution to prevent each and every state legislature from granting marital status to same-sex couples? This is the question-in-chief—a question that is all the more

7. Wolfe, *supra* note 2, at 909–10. I wonder whether Wolfe believes polygamous marriages to be impossible too?

urgent when we realize that Wolfe's principal claim, about "gender complementarity," is greatly controversial, even among Wolfe's own co-religionists. There are many examples of Roman Catholic theologians and philosophers who reject the gender-complementarity claim.[8]

Why is the gender-complementarity claim so controversial? Catholic theologian Rosemary Ruether has explained that for anyone who rejects the Catholic Church's official teaching (the teaching of the magisterium of the Church) on sex and procreation—the teaching that it is immoral for anyone, male or female, to choose (a) to engage in any species of sex (coital) act that of its nature cannot be procreative (for example, oral sex) or (b) to prevent any particular sex act from being procreative (for example, by using a contraceptive device):

> it is no longer possible to argue that sex/love between two persons of the same sex cannot be a valid embrace of bodily selves expressing love. If sex/love is centered primarily on communion between two selves *rather than on biologistic*

8. *See* Stephen J. Pope, *The Magisterium's Arguments against Same-Sex Marriage: An Ethical Analysis and Critique*, 65 THEOLOGICAL STUD. 530 (2004). Pope is a Catholic theologian at Boston College, a Jesuit university; THEOLOGICAL STUDIES is published by Jesuits in the United States. There are many other examples. *See, e.g.*, Jack A. Bonsor, *Homosexual Orientation and Anthropology: Reflections on the Category "Objective Disorder"*, 59 THEOLOGICAL STUDIES 60 (1998) (Bonsor teaches theology at Santa Clara University, a Jesuit institution); Margaret A. Farley, *An Ethic for Same-Sex Relations*, *in* A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH (Robert Nugent ed., 1983) (Farley, a member of the Sisters of Mercy, is the Gilbert L. Stark Professor of Christian Ethics at Yale University and a former president both of the Society of Christian Ethics and of the Catholic Theological Society of America); Luke Timothy Johnson, *A Disembodied 'Theology of the Body': John Paul II on Love, Sex and Pleasure*, COMMONWEAL. Jan. 26, 2001, at 11 (Johnson, a laicized priest, is the Robert W. Woodruff Professor of New Testament and Christian Origins at the Candler School of Theology, Emory University); PATRICIA BEATTIE JUNG & RALPH F. SMITH, HETEROSEXISM: AN ETHICAL CHALLENGE (1993) (Jung teaches theology at Loyola University of Chicago; Smith, now deceased, was an ordained Lutheran pastor who taught at Wartburg Theological Seminary, Dubuque, Iowa); KEVIN T. KELLY, NEW DIRECTIONS IN SEXUAL ETHICS (1998) (Kelly, a Catholic priest in England with broad pastoral experience, is a moral theologian); David McCarthy Matzko, *Homosexuality and the Practices of Marriage*, 13 MODERN THEOLOGY 371 (1997) (McCarthy teaches theology at Mount Saint Mary's College, Emmitsburg, Maryland); Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, *in* SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 227 (David M. Estlund & Martha C. Nussbaum eds., 1997) (Weithman, a Catholic, teaches philosophy at the University of Notre Dame); DICK WESTLEY, MORALITY AND ITS BEYOND 169–98 (1984) (Westley, a Catholic, teaches philosophy at Loyola University of Chicago); Jon D. Fuller, The Catholic Church, Homosexuality, and Cognitive Dissonance (2000) (unpublished manuscript, copy on file with author) (Fuller, Associate Professor of Medicine at the Boston University School of Medicine, is a Jesuit priest and a member of the adjunct faculty at the Weston Jesuit School of Theology and at the Harvard Divinity School).

> *concepts of procreative complementarity*, then the love of two persons of the same sex need be no less than that of two persons of the opposite sex. Nor need their experience of ecstatic bodily communion be less valuable.[9]

Ruether's position does not mean that with respect to sex, anything goes. Consider what Margaret Farley, a Catholic sister and Stark Professor of Christian Ethics at Yale University has written:

> My answer [to the question of what norms should govern same-sex relations and activities] has been: the norms of justice—the norms which govern all human relationships and those which are particular to the intimacy of sexual relations. Most generally, the norms are respect for persons through respect for autonomy and rationality; respect for relationality through requirements of mutuality, equality, commitment, and fruitfulness. More specifically one might say things like: sex between two persons of the same sex (just as two persons of the opposite sex) should not be used in a way that exploits, objectifies, or dominates; homosexual (like heterosexual) rape, violence, or any harmful use of power against unwilling victims (or those incapacitated by reason of age, etc.) is never justified; freedom, integrity, privacy are values to be affirmed in every homosexual (as heterosexual) relationship; all in all, individuals are not to be harmed, and the common good is to be promoted.[10]

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9. Rosemary Ruether, *The Personalization of Sexuality*, *in* FROM MACHISMO TO MUTUALITY: ESSAYS ON SEXISM AND WOMAN-MAN LIBERATION 70, 83 (Eugene C. Bianchi & Rosemary Ruether eds., 1976) (emphasis added). *Cf.* Edward Collins Vacek, *The Meaning of Marriage: Of Two Minds*, COMMONWEAL, Oct. 24, 2003, at 17, 18 ("When, after Vatican II, Catholics began to connect sexual activity more strongly with expressing love than with making babies, it became harder to see how homosexual acts are completely different from heterosexual acts.").

10. Farley, *supra* note 8, at 105. Farley adds, "The Christian community will want and need to add those norms of faithfulness, of forgiveness, of patience and hope, which are essential to any relationships between persons within the Church." Farley, *supra* note 8, at 105. *Cf.* Vacek, *supra* note 9, at 19 ("There are many other functions that current marriages fill: interpersonal commitment, permanence, sexual exclusivity, economic rights. Prima facie, these benefits seem to be as good for homosexual persons as they are for heterosexual persons, and thus they seem to warrant equivalent public recognition.").

In "Preserve, Promote, Protect Marriage," the Administrative Committee of the U.S. Conference of Catholic Bishops, in support of its "[strong opposition to] any legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means," gives a (nonreligious) reason that does not presuppose the Church's official teaching on sex and procreation. Pope, *supra* note 8, at 537. Such reason is that, in *the long run*, extending the benefit of law to same-sex unions would have subversive consequences for marriage as we have known it.

> The magisterium fears that a purely non-procreative, contractualized notion of marriage might lead to the elimination of the family and to anarchy in child-rearing practices. They believe that even conservative gays who want to have the monogamous commitments receive the social support that comes from legal validation are, unwittingly or not, pursuing a Trojan horse policy in which entry into the institution will eventually lead to its demise. Instead of helping matters, contractualism would leave them on their own and make it easier for fathers routinely to abandon their children.

Pope, *supra* note 8, at 559 (citing Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce,* 86 CORNELL L. REV. 251). *Cf.* Geoffrey

Nunberg, *Wed the People? (In Order to Form a More Perfect Gay Union)*, N.Y. TIMES, Feb. 22, 2004, § 4, at 7 ("For opponents [of recognizing same-sex unions as marriages], broadening the definition of marriage is like opening an exclusive hotel to package tours, with the result that the traditional clientele will no longer feel like checking in.").

Although this is the principal argument advanced in public political debate by activists opposed to the legal recognition of same-sex unions, there is scant (if any) empirical data to support it. For a careful presentation and vigorous rebuttal of the argument, one should read William N. Eskridge, Jr. et al., *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, *in* 2004 ISSUES IN LEGAL SCHOLARSHIP: SINGLE-SEX MARRIAGE art. 4, http://www.bepress.com/ils/iss5/art4.

> In the 1990s, the opponents of same-sex marriage created a new line of argument critique . . . . The new line, which has been embraced within the White House and the most anti-gay circles of Capitol Hill, is this: "We love gays and lesbians—but as a society we cannot give them things that would undermine traditional marriage, which is the foundation of America's values and culture. Same-sex marriage would do precisely that—undermine marriage and the nuclear family. For that reason, neutral people should be skeptical of complete equality for these people. . . . We traditionalists love just about everyone—and look what we've done for homosexuals, we don't put them in jail anymore. But a positive and loving approach requires that we consider the public welfare, especially the welfare of children, our most vulnerable charges. So we cannot go along with the entire 'homosexual agenda,' for it sacrifices a great institution and the public welfare."

Id. at 1–2.

Significantly, some Catholic bishops in the United States have recently expressed a willingness to consider supporting, as a matter of distributive justice, the extension of *some* of the benefits of law to same-sex unions. *See* Editorial, *Bishop Brings Reason to Issue of Gay Benefits*, NAT'L CATHOLIC REP., Nov. 7, 2003, at 24:

> [Daniel P. Reilly, Roman Catholic bishop of Worcester, Massachusetts,] told legislators that the Massachusetts Catholic Conference, made up of the dioceses of Boston, Worcester, Springfield and Fall River, was unequivocally opposed to legislation that would recognize gay "marriage" or "civil unions." But the church is open, he said, to discussing what public benefits should accrue to those in non-traditional living arrangements.
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> . . . "If the goal is to look at individual benefits and determine who should be eligible beyond spouses, then we will join the discussion," said Reilly.
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> . . . [Reilly] engaged the issue on the church's terms, saying such benefits are a matter of "distributive justice."
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> "Some argue that it is unfair to offer only married couples certain socioeconomic benefits," Reilly told [a committee of Massachusetts legislators]. "That is a different question from the meaning of marriage itself."
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> "The civil union bill before this committee confuses the two issues, changing the meaning of spouse in order to give global access to all marital benefits to same-sex partners in a civil union. This alters the institution of marriage by expanding whom the law considers to be spouses. Let's not mix the two issues."

Id.

Even more recently, the papal nuncio to Spain, Archbishop Manuel Monteiro de Castro, "has surprised public opinion by defending legal same-sex unions as a 'right.'" Julius Purcell, *Nuncio Backs 'Right' to Gay Unions*, THE TABLET, May 15, 2004, at 30.

Of course, the fact that the gender-complementarity claim is controversial is not to say that one should reject the claim. I am not assuming here that the claim is false. I mean only to suggest how problematic it would be to amend the U.S. Constitution on the basis of such a controversial claim. Why tie the hands of each and every state legislature—not just today, but tomorrow, and the day after tomorrow, and the day after that—in the way the proposed FMA would do? Why should we presume that our moral insight into the question of gender complementarity and marriage is so secure and immune to revision that we should be willing to tie the hands of our children, and of our children's children, and so on, with respect to the issue?[11] Is that an appropriate, prudent, or judicious use of the constitutional amendment process?

> The nuncio's words took commentators by surprise, as the Spanish bishops officially hold the view that homosexual relationships cannot receive any kind of approval. . . .
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> "It is right that other types of relationship are recognized," the nuncio said. He added that those in such unions should have the same rights to social security "as any other citizen." But "let's leave the term 'marriage' for that to which it has always referred," he added.

Id. *See also Results on Gay Marriage, Stem Cell Research*, AMERICA, Nov. 15, 2004, at 5:

> Bishop George H. Niederauer of Salt Lake City did not endorse the proposed constitutional amendment in Utah, saying that he believed that state law already prohibited same-sex marriages. He said he shared concerns voiced by all three candidates for attorney general about the amendment's stipulation that "no other domestic union may be recognized as a marriage given the same or substantially equal legal effect."

Cf. Brian Lavery, *Ireland: Premier Backs Rights for Gay Couples*, N.Y. TIMES, Nov. 16, 2004, at A6 ("Prime Minister Bertie Ahern said his government might consider giving same-sex couples more rights, which would allow them to benefit from cheaper tax rates and more favorable inheritance laws."); Jennifer 8. Lee, *Congressman Says Bush Spoke About Options on Gay Rights*, N.Y. TIMES, Feb. 9, 2004, at A15 ("President Bush believes states can use contract law to ensure some of the rights that gay partners are seeking through marriage or civil union, a South Carolina congressman said Sunday.").

11. *Cf.* John Mahoney, THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION.

> At any stage in history all that is available to the Church is its continual meditation on the Word of God in the light of contemporary experience and of the knowledge and insights into reality which it possesses at the time. To be faithful to that set of circumstances . . . is the charge and the challenge which Christ has given to his Church. But if there is a historical shift, through improvement in scholarship or knowledge, or through an entry of society into a significantly different age, then what that same fidelity requires of the Church is that it respond to the historical shift, such that it might be not only mistaken *but also unfaithful* in declining to do so.

Id. at 327 (emphasis added).

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If you, like Christopher Wolfe, are morally opposed to granting marital status to same-sex couples, then you have good reason to oppose a legislative effort to grant such status to same-sex couples. Moreover, you also have good reason to support an amendment that would prevent judges from interpreting the U.S. Constitution to require states to grant such status to same-sex couples.

However, I suggest that even if you are morally opposed to granting marital status to same-sex couples, you nonetheless have good reason *not* to support the effort to amend the U.S. Constitution. Put another way, you have good reason not to support the effort to amend the Constitution to prevent our children, and their children, from deciding for themselves, when they are adults, through the ordinary political process, whether to grant marital status to same-sex couples. You have good reason *not* to insist that our children, or their children, do much more than change the law on the books, which a legislative majority can do (if it can overcome the normal burden of legislative inertia), if they reject the current generation's moral opposition to granting marital status to same-sex couples. Under the proposed FMA, future generations would be forced to surmount an extremely high hurdle: they must succeed in *re-amending* the U.S. Constitution. This task, recall, is governed by

> supermajority requirements both in Congress and in the states: an amendment must be proposed, either by 2/3 of each House of Congress or by a convention called at the request of the legislatures of 2/3 of the states, and then the proposed amendment must be approved by the legislatures of or conventions in 3/4 of the states. This makes the U.S. Constitution one of the most deeply entrenched [in the world].[12]

I cannot discern why we should want to burden our children, or their children, with that effort—even if we are morally opposed to granting marital status to same-sex couples.[13]

12. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 414 (1999).

13. After I had drafted this comment on Wolfe's paper, the following article, which contends against the FMA, was published: Ronald James Krotoszynski & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. (forthcoming Summer 2005), *available at* http://ssrn.com/abstract=661244.

Wolfe complains about the growth of judicial power in the United States, a growth that, he says, is "illegitimate." Wolfe, *supra* note 2, at 896. The issue is much more complicated than Wolfe's comments suggest. In the period since the end of the Second

World War, there has been a significant growth of judicial power not just in the United States, but in many liberal democracies around the world. This growth has been nourished principally by a desire to protect human rights laws more vigorously than, many fear, they would otherwise be protected. Now, one may want to argue—as even some liberal political and legal theorists such as Jeremy Waldron have done—that, all things considered, this development is a bad thing and, to the extent possible, should be reversed. But, again, the issue is much more complicated than Wolfe's comments suggest. Does Wolfe oppose the growth of judicial power in, say, Canada, under the 1982 Charter of Rights and Freedoms (which is part of the Canadian Constitution)? In South Africa, under the 1996 South African Constitution? In the United Kingdom, under the Human Rights Act of 1998 (which entered into force in 2000)? In Europe, under the European Convention for the Protection of Human Rights and Fundamental Freedoms? And so on. For my own take on the issue, see Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?,* 38 WAKE FOREST L. REV. 635 (2003).

Second, Wolfe complains about "the judicial expansion of sexual autonomy." Wolfe, *supra* note 2, at 899. This too, says Wolfe, is "illegitimate." *Id*. at 896. In elaborating his complaint, Wolfe proceeds as if it is not important to distinguish between *Roe v. Wade* and its progeny on the one side and a case like *Lawrence v. Texas* on the other. However, it *is* important to distinguish the two. There is good reason for concluding that *Roe v. Wade* was wrongly decided—indeed, that *Roe* is a paradigm of (what Wolfe has elsewhere called) "judicial imperialism"—while at the same time concluding that *Lawrence v. Texas* was rightly decided. *See* Christopher Wolfe, *The Rehnquist Court and "Conservative Judicial Activism," in* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION 199, 199 (Christopher Wolfe ed., 2004) ("I want to take us this charge of conservative judicial activism and, for the most part, agree with it, though for reasons quite different from many other critics."). In fact, several liberal constitutional scholars have made this very argument, including John Ely, Gerald Gunther, and Ruth Ginsburg, and, albeit belatedly, myself. *See* MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 151–68 (1999) (analyzing liberal arguments to *Roe v. Wade*). In any event, this issue too is much more complicated than Wolfe's comments suggest.