

# Three Tensions, and One Omission, in the Case for the Federal Marriage Amendment

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Professor Wolfe's paper is a valuable reminder of how strongly many thoughtful people regard the risks of legally recognizing relationships they socially oppose.<sup>1</sup> Those who thought that the Federal Marriage

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1. Christopher Wolfe, *Why the Federal Marriage Amendment is Necessary*, 42 SAN DIEGO L. REV. 895 (2005). In the revised version, Professor Wolfe responds to some of the arguments made herein. The author of the principal paper deserves the last say, and I expect readers can guess the sort of points that might be made in rebuttal. I will say a word about his claim to regard homosexuals with equal concern and respect, a claim supported by his argument that society should devote some measure of public wealth and power, the precise mix unspecified here, to the project of "helping" homosexuals "see the disorder in their sexual attractions," to "prevent the formation of same-sex attractions" and to "offer possibilities for changing them, where possible." *Id.* at text accompanying note 97. I am quite unscandalized by this commendably honest passage, but it seems to me that Professor Wolfe avoids the charge of indifference to the well-being of gay people only by embarking on one of two highly dubious paths.

The first path combines a strong and frighteningly confident form of paternalism with a view of well-being that gives little, if any, weight to pleasure and misery in the assessment of welfare. The second path rejects the revealed preferences of the empirical homosexual in favor of preferences imputed to a hypothetical heterosexual otherwise identical to the empirical self. This latter path attempts the "monstrous impersonation" of "equating what X would choose if he were something he is not, or at least not yet, with what X actually seeks and chooses, [the equation that] is at the heart of all political theories of self-realization." Isaiah Berlin, *Two Concepts of Liberty*, in LIBERALISM AND ITS CRITICS 15, 24–25 (Michael Sandel ed., 1984). As Berlin says, "[e]nough manipulation with the definition of man, and freedom can be made to mean whatever the manipulator wishes. Recent history has made it only too clear that the issue is not merely academic." *Id.* at 25.

Amendment (FMA) had served its purpose by energizing Religious Right support for the Administration in the late election have, it would appear, another thing coming. Some folks evidently take social issues as seriously as war and peace.

Disagreement on these issues runs the risk of escalating up the ladder of generality until the conversation gets to the nature of Truth or the existence of God, both sides claiming victory after putting the burden of proof on the other. In the hope of teasing out some strands of public reason from the considerable intellectual horsepower Professor Wolfe has invested in his cause, I decline to initiate any such tedious escalation of contesting premises.

What I choose to pursue are certain tensions *within* the case for the Federal Marriage Amendment. Perhaps these do not amount to contradictions in the most formal sense. They do, however, suggest that something odd is going on with public reason when it comes to homosexuality. So I offer to add to the familiar yet evolving conversation about gay unions, both the rather critical point that Professor Wolfe makes his case not wisely but too well, and the more positive point that our public discourse may yet overcome the derangement apparently produced in otherwise cogent minds by the open admission that the conversation not only involves, but includes, people who like gay sex.

#### I. THE FIRST TENSION: MARRIAGE IS BOTH FRAGILE AND FUNDAMENTAL

Professor Wolfe premises the case for the FMA on the idea that the impending recognition of gay marriage imperils marriage as an institution—a result that would undermine one of society’s most critical foundations. The two halves of this claim, however, resist one another. If traditional marriage has served society well for millennia, it seems highly unlikely that gay marriage is going to do the institution grave damage.

Indeed, it is not entirely clear what FMA advocates mean by damage, or through what causal mechanisms this damage might be done. No-fault divorce entered American life in the decade *before* the Stonewall riots inaugurated the modern movement for gay rights. The no-fault movement reflected a social consensus that forcing partners to remain together after at least one of them desires a separation does more harm than good. The

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For my part I would prefer to be told I am being sacrificed for the greater good after an honest Benthamite balancing than to be told either that I and my potential partners are really better off in a permanent state of sexual frustration, or that I am being herded into therapy by the better angels of my nature, assisted rather than compelled by the external pressures of a well-meaning majority.

roots of that consensus grew out of basic demographic facts of a rather good sort; people were living longer and enjoying more opportunities. Women saw labor markets opening up, and oral contraceptives gave heterosexuals new options for recreational sex. As marital wealth grew, divorce became more affordable. These changes continue to this day, and they have no obvious connection to the legal rights of gays and lesbians.

If we compare marriage to other important institutions, we may be hard pressed to explain exactly how gay marriage might undermine marriage as an institution. Open homosexuals are excluded, whether de jure or de facto, from the military, from some posts in some churches, and from playing the most popular professional spectator sports. Open homosexuals are allowed to vote and stand for office, to hold property and enforce contracts, and to serve on juries. I do not see the majority culture avoiding democratic politics, disregarding property rights, or attacking trial by jury. I do see front page stories about the behavior of our forces at Abu Ghraib prison, about the Catholic Church paying millions of dollars to settle sexual abuse lawsuits, and about major league baseball's steroid scandal. Which of these important institutions is in better shape; democratic politics, private property, and jury trial, or marriage, the Church, baseball, and the military? If the answer is "I don't know" or "impossible to tell," have the FMA advocates made the kind of showing that ought to precede a constitutional amendment?

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; a murderer's parents caused the victim's death but are not responsible for it. Many things give people reasons not to get married, or to divorce once married. If retirement funds are doing very well, we may see some scrupulously-controlled study showing an effect on marriage or divorce rates. Is this a reason to isolate retirement fund performance as a family law issue? 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?

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,<sup>2</sup> and devil take the children! Nothing any of you might do, or fail to do, can save marriage-as-institution.” I find this implausible, and so illuminating. Gay people are not responsible for the choices straight people make about their relationships. Suppose Alexander and Allison say: “We would have gotten married, but we heard that Ben and Bill got hitched, so it’s rather a rum go and all off.” Who is to blame here? Ben and Bill? Denmark? Or God forbid, the straight folks who take state-sanctioned gay marriage as an excuse to bypass otherwise applicable moral standards? At best it sounds like a remote and feeble version of the abuse excuse, an excuse the moralistic right condemns as a decadent flight from responsibility even when the causal process operates personally and violently on the person whose behavior is modified.<sup>3</sup>

In the gay marriage context, the influence on straight folks would be nonviolent and exemplary, not the sort of pressure that should permit the straight-but-not-married or straight-married-but-divorcing to plead as an excuse. Reverse the situation for purposes of illustration. Suppose Ben says to Bill: “Well, we can’t get married, so I might as well beat you up.” Who is to blame: Ben, the state, or Alexander and Allison?

Now compare the causally and morally speculative damage gay marriage might do with the manifestly robust history of marriage as an institution. Marriage has survived the Huns, the Vandals, the Visigoths, and the Mongols; smallpox, the Black Death, Spanish flu and AIDS; slavery, the Holocaust, and the gulag archipelago; the French Revolution, the Industrial Revolution, the Russian Revolution, and the sexual revolution; global war, Cold War, and the War on Terror. But marriage, we are told, stands no chance against the Supreme Judicial Court of Massachusetts.

Convicted felons may lose the right to vote,<sup>4</sup> but not the right to marry.<sup>5</sup> Wife-beaters, rapists, pimps, and pornographers may wed with the law’s approval. The drug dealer can marry the child abuser because they’re straight, but the accountant can’t marry the doctor because they’re gay. If marriage can survive the drug dealer marrying the child abuser, it can probably weather the storm of the accountant marrying the doctor.

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2. The bonobo chimpanzees have been called “the horniest apes on Earth.” Susan Block, *The Bonobo Way*, <http://www.blockbonobofoundation.org> (last visited June 24, 2005).

3. See, e.g., JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?* (1997).

4. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

5. *Turner v. Safley*, 482 U.S. 78 (1987) (holding that the state may not deny incarcerated prisoners the right to marry). Felons never imprisoned or released from custody presumably have the same right.

Marriage as an institution faces far more serious challenges than gay marriage. 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 scrapheap 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. What I find quite easy to believe is that marriage as an institution will evolve pragmatically, much as it has in the past. I see no reason why experiments with same-sex marriages should be excluded by fiat from the evolutionary process.

If the silence of FMA proponents about the pressures put on marriage by modernity's positive side is understandable, there is no excuse at all for the silence, all around, about some of the manifestly bad things in modern life that happen to put stresses on marriages at the retail level, and so, ultimately, on marriage as an institution at the wholesale level. 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.

If marriage as an institution finally becomes dysfunctional for most ordinary people, that outcome will have more to do with causes such as these than it will with how the legal system handles same-sex couples. The obsessive focus on gay marriage reflects any number of sociopolitical pathologies, but indifference to the real risk factors attending modern marriage may well rank first among them.

## II. THE SECOND TENSION: ACTIVIST JUDGES THREATEN TRADITIONAL MARRIAGE, SO MARRIAGE SHOULD BE DEFINED BY FEDERAL CONSTITUTIONAL LAW

The FMA's proponents claim that a constitutional amendment is necessary to prevent activist judges from forcing gay marriage on an unwilling polity. Thus far, no court has held that the federal Constitution requires gay marriage, and only one has held that a state constitution requires gay marriage.

The continued suspicion of the courts seems a relic from some past age. The most liberal justice on the Supreme Court may well be John Paul Stevens, who was appointed by Gerald Ford. Anthony Kennedy, who spoke for the majority in *Romer* and *Lawrence*, is a self-identifying Catholic appointed by Ronald Reagan.<sup>6</sup> The Georgia Supreme Court rejected *Bowers v. Hardwick* before the U.S. Supreme Court did likewise in *Lawrence*.<sup>7</sup> If you cannot trust Reagan appointees or the Supreme Court of Georgia, you cannot trust anybody, which seems to be a *leit motif* in arguments for the amendment.

Whenever I hear the phrase “liberal judges,” I can’t help thinking about Elmer Fudd’s permanent paranoia about that “wascally wabbit” Bugs Bunny. Perhaps we need a new term for the judicial activists who exist more in the minds of social conservatives than in the chambers of appellate courts: “wiberal wudges” should do nicely.

The claim that “wiberal wudges” will foist gay marriage on the electorate seems like an unlikely prediction. Nevertheless, those who accept that claim ought to oppose the FMA, because the FMA entrusts the definition of marriage to those same activist judges. The amendment provides as follows:

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.<sup>8</sup>

What does “the union of a man and a woman” mean?

Here we must consider what proponents of the amendment, such as Professor Wolfe, are saying. Marriage, in his view, has an essence that cannot be changed by positive law to the contrary.<sup>9</sup> A same-sex marriage is conceptually impossible, and will remain so even when a legal system as sophisticated and humane as Canada’s embraces a different meaning of the word.<sup>10</sup> Thus any legislation, in any jurisdiction under the power

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6. See The Supreme Court Historical Society, *Anthony M. Kennedy*, <http://www.supremecourthistory.org/myweb/justice/kennedy.htm> (last modified Mar. 2, 2000) (“Kennedy remains a devout adherent to the Roman Catholic faith in which he was raised.”).

7. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Lawrence v. Texas*, 539 U.S. 558 (2003).

8. S.J. Res. 1, 109th Cong. (2005). That is the latest version, apparently amended to permit legislatures, but not courts, to recognize civil unions, as distinct from marriage. It is by no means clear that judges could not construe the second sentence to invalidate civil unions as well; after all, the commonsense appeal of the civil union arrangement is to create the functional equivalent of marriage under a different label.

9. See Wolfe, *supra* note 1, at 910.

10. At this writing, the liberal government plans to introduce legislation authorizing gay marriage. With the expected cooperation of two other parties the measure seems likely to pass. See CBC News, *Liberals to Introduce Same-Sex Marriage Bill in January*,

of the proponents, that departs from the conceptual essence of marriage is to be unconstitutional.

Note that jurisdictions under the power of the proponents include not only states with electoral majorities that might support gay marriage now, but future majorities in perpetuity, regardless of experience, and regardless of how large a majority might support gay marriage in any individual state. Professor Wolfe's agenda is not to abide by the popular will, but to achieve a particular policy result without regard to majority sentiment.

So, for Professor Wolfe, federal pluralism is no more tolerable than temporal pluralism with respect to the definition of marriage.<sup>11</sup> It will not do for Massachusetts to vary from Mississippi. This rejection of federal pluralism is profoundly ironic, for the amendment would leave the natural law meaning of marriage to be determined for every jurisdiction in the country by a majority of the United States Supreme Court. You will recall that these are the same activist judges whose cryocratic tendencies require the amendment in the first place. Now think for a bit about what activist judges, aided and abetted by clever lawyers, might find in the text and history of the FMA.<sup>12</sup>

To begin with, the age of consent to marry would be fixed by judicial decision, because the meaning of man and woman would be made a question of federal constitutional law. Below a certain age a union of two persons would be one involving a boy and/or a girl. Does the

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<http://www.cbc.ca/story/canada/national/2004/12/09/martin-samesex041209.html> (last updated Dec. 10, 2004).

The Canadian government has come to the conclusion that pluralism among the provinces is, for pragmatic reasons, unworkable, an important but debatable point quite different from the conceptual claim advanced by Professor Wolfe. The closest that Professor Wolfe comes to advancing some sort of pragmatic claim for national uniformity in marriage standards is an expressed dread that those now opposed to gay marriage might see the sun come up the day after it arrives. *See Wolfe, supra* note 1, at 909–10.

11. *Id.* at 909. (“The ready acceptance of a checkerboard pattern of state policies either does not understand, or, more likely, simply doesn’t agree with the justification for defending certain essential features of marriage.”)

12. In this symposium, Brian Bix reminds us that legal academics have limited expertise related to questions of social policy. *See* Brian H. Bix, *Everything I Know About Marriage I Learned from Law Professors*, 42 SAN DIEGO L. REV. 823, 827–31 (2005). It seems to me that we might well distinguish between the questions of whether legal academics should have the last word on gay marriage and whether we should be contributing to the debate. For example, legal academics really do have a comparative advantage in considering how a proposed constitutional amendment might be interpreted.

amendment authorize a thirty-year-old male to marry a four-year-old female? Presumably not. Jurisdictional pluralism being rejected by the amendment, some age must be selected at which young people across the nation may enter wedlock, the legislation of a given state notwithstanding. Perhaps impressed by the centrality of reproduction to the conception of marriage urged by some FMA proponents,<sup>13</sup> the judges might conclude that anyone who has reached a stage of physical fertility has reached the age of consent. Then again, the judges might reason that marriage is a solemn undertaking not to be made by anyone still too youthful to be trusted with beer, and fix the age at twenty-one. Want the answer in a hurry? Ask your local federal district judge.<sup>14</sup>

Then there is the rather more striking problem of saying what conditions are essential to a union of the sort that constitutes marriage. The amendment explicitly excludes same-sex and polygamous marriages; does it exclude some other arrangements by implication? For instance, an adult mother and son might claim the right to marry, notwithstanding a state statute to the contrary, on the theory that the plain meaning of the new constitutional text requires only that the couple demanding marriage from the state consist of a man and a woman. Another couple might make a similar argument to overcome state laws that prevent a valid marriage when one, or both, of the partners is legally insane. So might a couple who openly admit that one has entered the marriage for a specific price paid to secure the other's immigration status, and who expressly disclaim any interest in consummating the marriage sexually or otherwise.

In each of these cases, the petitioners are undeniably a man and a woman. After the amendment, marriage in the United States, the laws of any state notwithstanding, shall consist only of the union of a man and a woman. The textual argument is straightforward; any man and any woman, not currently in some other union of a man and a woman, have a constitutional right to marry. Limitations excluding some unions of a

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13. Robert George, for instance, defends the Judeo-Christian understanding of marriage as a bodily, emotional, and spiritual union of one man and one woman, ordered to the generating, nurturing, and educating of children, marked by exclusivity and permanence, and consummated and actualized by acts that are reproductive in type, even if not, in every case, in fact. *A Clash of Orthodoxies*, FIRST THINGS: MONTHLY J. RELIGION & PUB. LIFE, Aug.–Sept. 1999, at 33, available at <http://orthodoxytoday.org/articlesprint/GeorgeClashOrthodoxiesP.htm>.

14. Would a surviving partner who entered into marriage, perhaps decades before the death of the supposed spouse, at an age sanctioned by state law but contrary to the federal judiciary's interpretation of a man and a woman be denied rights under state wrongful death or estate laws? Or would a marriage, invalid when contracted, become valid when the parties arrive at the age of eligibility set under the new constitutional definition of marriage? Again, ask your friendly local federal district judge.



man and a woman from marriage in the United States either do not exist or are to be left to judicial implication.

If there are unions of a man and a woman that do not constitute marriages under the amendment, where does the process of exclusion, on textually unenumerated grounds, end? It ends where the courts say it ends, but on the view of proponents, these are activist judges, unworthy of trust. What is to stop them from saying that there is no such thing as a union terminable at will by either party (an argument Lincoln made about the union proclaimed in our Constitution)? What is to stop them from saying that no genuine union can exist without an equal sharing of property among the spouses, regardless of what state law or antenuptial contracts may provide? Or that any genuine union requires more or less than state law requires by way of child support or maintenance? Or that there can be no real union of man and woman absent the possibility of producing children?

The activist judges, you say, will be stopped by original intent? That begs the question of just what the intentions of the amendment's proponents are with respect to these questions. Suppose that intentions were clear on some of these issues. According to FMA proponents, activist judges are not stopped now by original intent; why should that change? Indeed, if an elitist judiciary is hell-bent on gay marriage, we can expect the amendment to be given the most unpopular construction by the courts, for such interpretations would offer a promising route to forcing the public to repeal the FMA and return the insidious gay marriage conspiracy to its present posture of incipient triumph.

Divorce litigants are notoriously dogged. The amendment gives them a federal forum to vent their spleens on, with no clear answers to the issues they are certain to raise. Justifying this result on the theory that self-willed judges stand poised to usurp legitimate legislative prerogatives fails the most minimal tests of rationality. The premise is not true, and even if it were, it would counsel against, rather than in favor, of defining marriage in the Constitution of the United States.

### III. THE THIRD TENSION: THE CONSTITUTION, PROPERLY UNDERSTOOD, PROTECTS RELIGIOUS, BUT NOT SEXUAL, EXPERIENCE FROM STATE INTERFERENCE

Professor Wolfe's essay brings together some familiar themes: an admitted religious motivation, hostility to sexual freedom, and an appeal

to our Constitution's founders. To invoke the authority of the Framers as constitutional authority, and to claim special constitutional rights for organized religion or religious exercise, as I think Professor Wolfe plainly does, is to announce title to a doctrinal cake and then serve the same for a celebratory dessert.

Technically there is something a bit off with Professor Wolfe's argument; he is hostile to *Roe*, but the FMA would do nothing about *Roe*.<sup>15</sup> Rather, the absence of language to undo *Roe* in an amendment on social issues might well be seen as cementing abortion rights—hardly Wolfe's purpose. Let us nonetheless take seriously his more general hostility to the judicial recognition of textually-unenumerated rights, together with the rather vague originalism in which that hostility is wrapped.

That the Framers did not overtly proclaim an atomistic liberal order hostile to all known religions is not much of a surprise. It is equally clear that they did not embrace the particulars of any specific faith. What exact precepts, from which known religions, did they agree on, and agree on so strongly that these should be read into the warp and woof of the Constitution even without specific textual support? Answering this sort of counterfactual question seems to condense to remolding the Founders in the image of how one wishes one's neighbors to behave. Which Founders does Professor Wolfe have in mind? The flirtatious Washington? The amorous Franklin? The adulterous Hamilton? Jefferson, perhaps?

For reasons I've always found suspicious, ancestor-worship in American constitutional rhetoric seems to stop with the revolutionary generation. I'm suspicious because that generation acted at a remove of time, and at a level of generality, that permits the ancestor-worshippers to worship themselves. The Civil War generation is much more like us, and so less congenial.

But the Civil War generation made the country. They dealt with the specter of devolution, and the monster of slavery, that the revered Founders had found fit either to neglect or to nurture. Their constitutional ecology is far closer to ours, and it is that ecology that governs both my rights and obligations in relation to the state of California, and Professor Wolfe's rights and obligations in relation to the state of Wisconsin.

What provision of the Constitution prohibits California from punishing my gay sex life as a crime? It is the same provision of the Constitution that prohibits Wisconsin from punishing Professor Wolfe's spiritual life as a crime. The First Amendment has nothing to do with Wisconsin, except to the extent that the Fourteenth Amendment makes the First Amendment's provisions applicable to Wisconsin.

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

Before the Civil War, the general police authority of states was understood to permit local majorities to both support established churches, and to regulate religious exercises; nothing in the federal Constitution was thought to stand in the way.<sup>16</sup> Not until *Cantwell v. Connecticut*, decided after the outbreak of the Second World War, did religious liberty against the states become enforceable in federal courts.<sup>17</sup> Further, the theory of the *Cantwell* case, like that of *Pierce, Near*, and *Gitlow*, was that the sometimes-maligned doctrine of substantive due process includes, in the ranks of fundamental freedoms, the rights of conscience and expression.<sup>18</sup> Substantive due process, however, is the same doctrine that supports *Griswold*, *Roe*, and *Lawrence*.<sup>19</sup> Professor

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16. See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting):

As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. See *McGowan v. Maryland*, 366 U.S. 420, 440–41. Each State was left free to go its own way and pursue its own policy with respect to religion. Thus Virginia from the beginning pursued a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the nineteenth century.

So matters stood until the adoption of the Fourteenth Amendment, or more accurately, until this Court's decision in *Cantwell v. Connecticut*, in 1940. 310 U.S. 296. In that case the Court said: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." (footnotes and parallel citations omitted). See also *Permoli v. New Orleans*, 44 U.S. 589 (1845) (rejecting free exercise challenge to ordinance prohibiting display of corpses pursuant to funeral rites of bona fide religious faith).

17. 310 U.S. 296 (1940).

18. See *id.* at 303. "We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." *Id.* (internal footnote omitted). The supporting footnote cites *Schneider v. State*, 308 U.S. 147 (1939), which in turn cites *Gitlow v. New York*, 268 U.S. 652 (1925). *Gitlow* cites *Coppage v. Kansas*, 236 U.S. 1 (1915), a notorious substantive due process case that prompted Holmes, in dissent, to reiterate his disagreement with *Lochner v. New York*, 198 U.S. 45 (1905). See also *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Near v. Minnesota*, 283 U.S. 697 (1931).

19. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 413 U.S. 113 (1973), *Lawrence v. Texas*, 539 U.S. 558 (2003).

Wolfe, like Samson, aims to pull down the house of the Philistines.<sup>20</sup> Unlike Samson, it is not at all clear that he realizes he stands inside it.

Those who, fancying themselves more clever in the pursuit of a given result than the justices and the lawyers for the parties, look for some alternative constitutional hook for religious rights against the states (privileges or immunities is the usual dodge) are invoking some other constitutional chancellor's foot, rather than a specific textual provision protecting religion against state (as opposed to federal) interference.<sup>21</sup> Any theory of privileges or immunities that carries the modern burden of freedom of religion, and the clearly-intended contemporary burden of protecting private law rights to hold and convey property, enforce contracts, and so on, has no textually specified limits. One may approve or disapprove of sodomy or baptism, but the constitutional theory immunizing both practices from state interference is the same.<sup>22</sup> At least substantive due process has the advantage of prohibiting de jure racial segregation in Washington, D.C., which no provision in the Fourteenth Amendment possibly could do.

What does this have to do with the debate over the Federal Marriage Amendment? Much; for ordinarily, the case for a constitutional amendment is based on some failure of omission or commission in the Constitution. The rhetoric put forth by Professor Wolfe is quite different; the Constitution is fine, only the judges need correcting. Though, the error he says the judges have fallen into is one that Professor Wolfe would be loathe for them to undo, unless he is eager to test the electoral power of his faith against the electoral power of the adherents to the other religions, the atheists open or disguised, and such shifting alliances as they might make amongst one another in his despite.

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20. *Judges* 16:26–30.

21. On the privileges-or-immunities strategy, the *Lochner* problem, and possible approaches to it, see, e.g., Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996).

22. Others more sympathetic to religion than I have come to similar conclusions from the cases. See Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce, and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 891 (1996):

[T]he constitutional bases for parental rights and free exercise claims in the 1920s were more closely connected than we might have thought at first glance. Indeed, for the Court in that era, free exercise rights were substantive due process rights. Deciding *Meyer* and *Pierce* on the basis of parental rights, rather than free exercise grounds, imposed few additional intellectual costs on the Court and, importantly, absolved the Court of some difficult questions surrounding the relationship between the First and Fourteenth Amendments. Like the Court's earlier substantive due process cases, *Meyer* and *Pierce* are without constitutional rigor, thereby giving the Court great flexibility to support benevolent causes.

Substantive due process is logical, historically plausible, and dangerously empty.<sup>23</sup> Its very emptiness invites the likes of Professor Wolfe to fill the vacuum with their personal preferences, treat this invasion as natural, and dismiss any other suggested content as illegitimate judicial usurpation. Perhaps I have misunderstood him; he may yet, I suppose, offer some un-loaded theory that justifies *Cantwell* without countenancing *Griswold* (for after *Griswold*, the jump to *Lawrence* is a short one, however many hurdles might stand between *Griswold* and *Roe*, or between *Lawrence* and *Goodridge*). If he cannot produce such a theory, however, I shall feel compelled to conclude that, however revolting we may find it, he and I are, for purposes of constitutional law, in bed with each other.

#### IV. THE OMISSION

Professor Wolfe and I disagree about many things besides the FMA. Those who subscribe to a comprehensive view similar to his are not likely to be persuaded by anything I have to say about comprehensive views. I offer, however, the narrower suggestion that, if Professor Wolfe's premises lead to his chosen result only after intellectual maneuvers of the sort reviewed herein, something is not quite right somewhere.

This suggestion assumes that the previous arguments about the awkward tensions in the case for the FMA are well taken; if those claims are wrong, well then, this is just another waste of paper. If those claims are well taken, we well might ask whether the thing that is not quite right is the comprehensive view, or its application to homosexuality, a subject that seems to derange otherwise rational discourse across wide sections of American opinion.

Sometimes what goes unsaid is as important as what gets said. Professor Wolfe concerns himself with the nominal purity of marriage and with promoting the good life in some highly abstract sense. He has nothing to say about what might be good for gay people,<sup>24</sup> about how

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23. For a fuller discussion of my views on substantive due process, see DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE* 133–36, 153–55 (2003).

24. It may well be that marriage would be bad for gay people, or that the good of opening marriage to gay people is outweighed by damage to the interests of other persons. For instance, gay marriages might be less durable than straight marriages, and it might be true of marriage and divorce, as Sparky Anderson said of baseball, “that losing hurts worse than winning feels good.” Then again, it may be that marriage's monopoly on legal recognition of personal relationships should be revised to reflect the contingent relationship between conjugality and caregiving. Opening marriage to gays might strengthen this undesirable monopoly. On these sorts of questions I remain

some regard for our welfare and happiness should influence public policy. Our 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.

That view is common enough. Its very meanness seems rather at odds with the teachings of Jesus, although in tendering that suggestion I immediately admit to being profoundly out of my depth. I feel less out of my depth in suggesting that second-class citizenship is at odds with the Fourteenth Amendment. Indeed, I have always regarded the inclusiveness of the Fourteenth Amendment's first section as one of the proudest achievements of American constitutionalism. Whatever the stakes in the controversy over gay marriage may be, they aren't worth compromising that achievement.

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agnostic. What I object to in Professor Wolfe's paper is the failure to acknowledge that we as a polity should count the welfare of homosexuals, no more nor less than we count the welfare of other persons.