Essay

GAY RIGHTS AND AMERICAN CONSTITUTIONALISM: WHAT'S A CONSTITUTION FOR?

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INTRODUCTION

A tragedy is befalling American constitutional law. Both left and right in the gay rights struggle have indiscriminately indulged the impulse to constitutionalize. Courts have used the Constitution to augment their own authority. Congress has debated amendments that would change the character of our founding charter. Even the states have joined the headlong rush to constitutionalize.

Misuse of constitutions is not an academic point. By traducing the American constitutional tradition, we are eroding not only our sovereign rights to self-governance, but our ability as a society to debate our deepest differences with even a modest measure of mutual respect. Lawmakers possess many legitimate ways to protect traditional marriage. But in filling founding charters with amendments fellow Americans perceive as punitive, we both do damage to the rule of law and embark on a course that will warrant history's censure. This Essay seeks to detail the full extent of the damage that constitutionalizing the issue of same-sex marriage has inflicted.

I. *LAWRENCE* AND *GOODRIDGE*: THE OPENING SALVOS

The first dramatic move to constitutionalize the subject of gay rights was the Supreme Court's decision in *Lawrence v. Texas*.[1] In it,

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1. Lawrence v. Texas, 539 U.S. 558 (2003).

the Court struck down a Texas statute criminalizing certain private consensual sexual conduct between adults of the same sex.[2] The Court's tone was emphatic and, at points, quite eloquent. "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[3]

Few decisions have been criticized on so many grounds. *Lawrence* has been taken to task for overblown rhetoric,[4] its overruling of precedent,[5] its repudiation of traditional moral values,[6] its reliance on unenumerated rights,[7] and its resort to foreign law, most especially a decision of the European Court of Human Rights.[8] Still, the result in *Lawrence* is eminently just and humane; the real flaw of the decision was to set the struggle over gay rights on a constitutional course. The Court's lack of faith and trust in democracy was endemic. The majority simply assumed that the people of America could not be trusted to curb sufficiently the intrusive powers of the state. Only courts acting as guardians of the Constitution could do this, though the evidence in *Lawrence* itself of the growing generosity of popular instincts was overwhelming. Ironically, the Court itself took notice of the "emerging awareness" in the political process "that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[9] And it admitted that "[t]he 25 States with laws prohibiting the relevant conduct [largely sodomy] are reduced now to 13, of which 4 enforce their laws only against homosexual conduct."[10] Prosecution even in those states was a rarity.[11] In short, democracy itself was on a decent and humane path, and the Court's decision to preempt it with a problematic constitutional pronouncement was dangerously shortsighted.

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2. *Id.* at 578.
3. *Id.* at 567.
4. *Id.* at 586 (Scalia, J., dissenting).
5. *Id.* at 586–92.
6. *See id.* at 602–03.
7. *Id.* at 592.
8. *Id.* at 598. The majority cites *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) ¶ 52 (1981), a decision of the European Court of Human Rights. *Id.* at 573 (majority opinion).
9. *Id.* at 572.
10. *Id.* at 573.
11. *Id.*

In *Goodridge v. Department of Public Health*,[12] the Massachusetts Supreme Judicial Court held that legislation denying the benefits and obligations of civil marriage to same-sex couples violated precepts of liberty and equality in that state's constitution.[13] As with *Lawrence*, the decision is moving as a matter of oration. "Because it fulfils yearnings for security, safe haven, and connection that express our common humanity," noted the Court, "civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."[14] To deny persons of the same sex this choice, the Court concluded, "works a deep and scarring hardship on a very real segment of the community for no rational reason."[15]

Justice Greaney, in concurrence, issued a simple and poignant plea. The plaintiffs, he noted, "are members of our community, our neighbors, our coworkers, our friends. . . . Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do."[16]

As well it may be. But the *Goodridge* court was so supremely sure of its own moral universe that it at best paid lip service to powerful opposing arguments, and at worst ran roughshod over them. *Goodridge* began by describing civil marriage as "a wholly secular institution," noting that "[n]o religious ceremony has ever been required to validate a Massachusetts marriage."[17] After thus draining the institution of spiritual significance, the majority proceeded to say the history of one-man, one-woman unions likewise mattered little, because "history must yield to a more fully developed understanding of the invidious quality of the discrimination."[18] The court likewise saw no state interest in promoting civil marriage as the optimal setting for procreation, noting simply that "[f]ertility is not a condition of marriage . . . . People who cannot stir from their deathbed may marry."[19] Indeed so convinced was the majority of its

12. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
13. *Id.* at 968.
14. *Id.* at 955.
15. *Id.* at 968.
16. *Id.* at 973 (Greaney, J., concurring).
17. *Id.* at 954 (majority opinion).
18. *Id.* at 958.
19. *Id.* at 961 (citation omitted).

view that it considered the opposing arguments to lack even a "rational basis."[20] In other words, centuries of common law tradition, legislative sanction, and human experience with marriage as a bond between one man and one woman were deemed unworthy to the point of irrationality.

Predictably, then, this ever-cresting judicial certitude manifested itself in the impulse to constitutionalize. The court found that "[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution."[21] Whether the basis of decision was the Federal Constitution (as in *Lawrence*) or state constitution (as in *Goodridge*), the effect was to subordinate the wishes of the people and their elected representatives to the wisdom of judges.

The fact that *Goodridge* invoked a state constitutional ground and thus immunized itself from Supreme Court review; embraced the jurisprudence of unenumerated rights; created potential turmoil in other states on such matters as divorce, custody, entitlements, and inheritance; and did this and more on the basis of a highly contentious four to three decision seemed to matter not much to the majority. One can credit the Massachusetts justices both for the sincerity and depth of their convictions and yet wonder how their own intensity of belief failed to apprise them of equally intense opposing views. Indeed, the depth and intensity of the arguments invited, not a constitutional ruling, but a passionate engagement of the people on the issue of same-sex marriage and a democratically derived solution.

II. THE FEDERAL CONSTITUTIONAL RESPONSE

In view of this extraordinary judicial overreaching, it would be entirely understandable for proponents of traditional marriage to respond in kind. And the first impulse was to curb judicial misadventures with constitutional handcuffs. Thus the Federal Marriage Amendment, which 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

20. *Id.*

21. *Id.* at 948.

> incidents thereof be conferred upon any union other than the union of a man and a woman.[22]

The whole idea of an amendment gained momentum only after *Lawrence* and *Goodridge*. The White House began researching the possibility of an amendment after the *Lawrence* decision,[23] and the president did not endorse an amendment until after *Goodridge*, when he said the Massachusetts decision was among the reasons for his endorsement.[24] The amendment has reached the floors of both houses of Congress twice since the *Goodridge* decision. The House voted on it for a second time in July of 2006, when 236 voted in favor, with 187 against and one voting present.[25] The tally is short of the two-thirds majority needed for passage, but a slight improvement over the 227 votes that the amendment received in September of 2004.[26] The Senate considered the amendment for a second time in June of 2006, when forty-nine senators voted to advance the amendment by closing debate[27]—considerably fewer than the sixty-seven votes required for passage, but one more vote than the amendment attracted in July of 2004.[28]

The amendment's backers described these initial defeats as just opening skirmishes in a long war. "'[H]istory has shown us that it can take several tries before an amendment builds the two-thirds support it needs in both houses of Congress,'" President Bush said after the Senate's 2006 vote.[29] Senator Allard promised to press the amendment again, saying, "'If it's up to me . . . we'll have a vote on this issue every year.'"[30]

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Supporters of the amendment have pitched it as a cure for judicial overreaching. "An amendment to Constitution is necessary,"

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22. S.J. Res. 1, 109th Cong. (2005).

23. Mike Allen & Alan Cooperman, *Bush Plans to Back Marriage Amendment*, WASH. POST, Feb. 11, 2004, at A1.

24. Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

25. 152 CONG. REC. H5320 (daily ed. July 18, 2006).

26. 150 CONG. REC. H7933 (daily ed. Sept. 30, 2004).

27. 152 CONG. REC. S5534 (daily ed. June 7, 2006).

28. 150 CONG. REC. S8090 (daily ed. July 14, 2004); *accord* Carl Hulse, *Senate Rebuffs Same-Sex Marriage Ban*, N.Y. TIMES, June 8, 2006, at A20.

29. Hulse, *supra* note 28.

30. *Id.*

President Bush said in June of 2006, "because activist courts have left our Nation with no other choice."[31] The majority leader of the Senate sounded the same theme in bringing the amendment to the Senate floor: "The truth is, on the question of marriage, the Constitution will be amended. The only question is whether it will be amended by Congress as the representative of the people or by judicial fiat."[32] The amendment, he said, would "settle the question of what marriage will be in the United States. . . . an issue that rightly belongs in the hands of the people . . . ."[33]

In fact, the amendment empowers judges. Its effect will be the opposite of what its backers intend. The proposed amendment would withdraw the debate over same-sex unions further from the democratic process than the courts did in *Goodridge* and *Lawrence*. Judges always have the last word when it comes to constitutions. They would be the ultimate interpreters of ambiguities that are the common and perhaps inevitable byproducts of drafting compromises. And although legislatures can reverse judicial interpretations of current laws with new laws, they cannot easily reverse interpretations of constitutional texts. As a result, the proposed amendment presents the ultimate irony: it would give final authority to the same judges that the amendment's proponents have accused of overreaching.

The present proposal illustrates these perils. It is the product of what has been described as "an informal, somewhat 'messy' process"[34] involving multiple constituencies with differing goals, so perhaps it is no surprise that the text answers some questions, but leaves unanswered many others. The definition of marriage as "only . . . the union of a man and a woman"[35] would seem to prevent courts from mandating same-sex marriage as the Massachusetts Supreme Judicial Court did in *Goodridge*. It would also forbid democratic majorities from sanctioning same-sex marriage through legislation. But as legislators considering the amendment and commentators evaluating it have noted, the terms "marriage" and "incidents of marriage" are

31. President's Radio Address, 42 WEEKLY COMP. PRES. DOC. 1073, 1074 (June 3, 2006).

32. 152 CONG. REC. S5393 (daily ed. May 26, 2006) (statement of Sen. Frist).

33. *Id.* at S5394.

34. Alan Cooperman, *Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text*, WASH. POST, Feb. 14, 2004, at A1.

35. S.J. Res. 1, 109th Cong. (2005).

ambiguous.[36] As a result, the amendment would leave to courts the question of whether civil unions are forbidden, required, or treated as a matter of legislative choice.

The ambiguities begin with the amendment's very first word. Courts might allow or forbid same-sex civil unions based upon their interpretation of "marriage" in the sentence, "Marriage in the United States shall consist only of the union of a man and a woman."[37] Under a narrow reading, marriage represents a legal status that states may define however they wish. The amendment simply forbids states from conferring that status—however states define it—upon same-sex couples. States could still give same-sex couples the benefits traditionally associated with marriage through civil unions or domestic partnerships. This narrow reading could be derided for formalism, or praised for acknowledging the symbolic significance of marriage as more than just the sum of its parts. It may find sanction in public opinion, because many Americans oppose same-sex marriage but support domestic partnership arrangements.

An alternative reading, however, would treat "marriage" as encompassing the rights and privileges to which the term has historically referred.[38] The amendment would thus forbid states from conferring those benefits upon same-sex couples. Two professors involved in drafting the amendment[39] have advanced that reading using the following analogy: If the Constitution prohibited states from keeping a navy, states could not maintain fleets of battleships just by calling them an armada.[40] Similarly, they argue, the amendment would not allow governments to give same-sex couples the rights and

36. For discussion of the amendment's ambiguities in Senate proceedings, see *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 45–46 (2004). Dale Carpenter has perceptively noted the disagreement among the amendment's drafters concerning whether the amendment's first sentence would ban civil unions, and has pointed out that the amendment would leave it to courts to resolve this and other ambiguities in the text. *Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 U. ST. THOMAS L.J. 71, 92–94 (2004).

37. S.J. Res. 1.

38. *See* Cooperman, *supra* note 34 (describing arguments of Robert P. George of Princeton University and Gerard Bradley of Notre Dame Law School).

39. *Id.*

40. Ramesh Ponnuru, Times *vs. Sullivan: In defense of the* New York Times, NAT'L REV. ONLINE, Feb. 9, 2004, http://www.nationalreview.com/ponnuru/ponnuru200402091407.asp (last visited Sept. 18, 2006).

privileges of marriage simply by retitling them.[41] It is easy enough to see how either conception could convince a court. Either way, the amendment leaves the final crucial say to judges.

Whereas the proposed amendment's first sentence would force judges to define marriage, its second sentence would force judges to define its "incidents." Through the provision that "[n]either 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,"[42] some backers hope to prevent judges, but not legislatures, from extending legal protections to same-sex couples. Like the first sentence, however, this second sentence raises as many questions as it answers, and requires judges to decide them once and for all.

In particular, it is unclear what "incidents" the amendment places outside state and federal constitutions. The incidents of marriage typically include certain government benefits and special property and inheritance rights, among others,[43] but these rights are defined almost exclusively by the states. The amendment might change this, by making the "incidents" of marriage a constitutional term of art. Courts would have to decide whether the amendment governed the incidents of marriage however they are defined by state law—meaning that the amendment would apply to differing benefits from state to state—or whether the amendment required courts to develop a uniform federal definition of the incidents of marriage. Existing jurisprudence offers precedent for both interpretations. For example, the Fourteenth Amendment provides in part that no state shall "deprive any person of life, liberty, or property without due process of law."[44] The Supreme Court has derived its definition of "property" under this amendment from state law,[45] but permitted courts to give independent content to "liberty."[46] Both approaches to the marriage amendment are possible, and judges would decide.

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41. *Id.*

42. S.J. Res. 1.

43. *See* Turner v. Safley, 482 U.S. 78, 96 (1987) (listing government benefits and property rights as "incidents of marriage").

44. U.S. CONST. amend. XIV, § 1.

45. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the constitution.").

46. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("While this court has not attempted to define with exactness the liberty thus guaranteed [by the Due Process Clause]. . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the

Nor would this be the end of the matter. If courts adopted a universal definition of marriage's incidents, what would they include? For instance, would a right be an incident of marriage if it were associated with marriage in every state, or in some proportion of states? Furthermore, under any approach, courts would need to decide whether incidents include only rights that are exclusive to marriage—such as the special tax treatment given to married couples—or whether they include rights made available on the basis of marriage and a few other special relationships, such as those relating to health insurance, hospital visitation, and rent control in many states. The interpretative difficulties run on and on.

Those who would respond to these ambiguities by explaining why their interpretation of the language is best are missing the point. The question is not how the ambiguities should be interpreted, but who will be responsible for the interpreting. Although the proposed amendment seeks to remove the judiciary from the same-sex marriage debate, the amendment will thrust the court further into the debate by giving judges that power. It will validate federal judicial oversight of marriage and all that pertains to it.

Whereas the amendment thus undermines its proponents' first objective of curbing activist judges, it is merely unnecessary to their second goal of preventing one state's recognition of same-sex marriage from forcing other states to follow suit.[47] President Bush has defended the amendment in these terms, saying, "Decisive and democratic action is needed, because attempts to redefine marriage in a single state or city could have serious consequences throughout the country."[48] The amendment's backers say they fear these consequences would come about through the constitutional provision which states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other

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individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

47. *See generally* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1086–97 (2d ed. 2004) (surveying issues in interstate recognition of same-sex marriage).

48. George W. Bush, President Calls for Constitutional Amendment Protecting Marriage: Remarks by the President (Feb. 24, 2004) (transcript available at http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html).

State."[49] As President Bush said in endorsing the amendment, "Those who want to change the meaning of marriage will claim that this provision requires all states and cities to recognize same-sex marriages performed anywhere in America."[50]

These concerns are misplaced, however, because states have long been free to disregard marriages performed in other jurisdictions when they deem the marriages contrary to their own public policies. Although the Full Faith and Credit Clause applies by its plain terms to "public Acts, Records, and judicial Proceedings of every other State,"[51] the Supreme Court has written that the clause "is not an inexorable and unqualified command."[52] The Court has applied the clause to require states to recognize each other's judgments under almost all circumstances.[53] But thus far it has treated other areas as giving rise to choice-of-law questions that states should be free to answer as they choose, so long as they have significant contacts with the parties or transactions at issue.[54] As the Court has put it, "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[55] Because marriages are not judgments,[56] courts have long interpreted the Constitution to allow states to deny recognition to marriages against their own public policies.[57]

All fifty states have adopted choice-of-law approaches that utilize this power. They recognize any marriage that was valid where it was celebrated, but only when doing so would be consistent with the state's strongly held policies.[58] This exception has been used to

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49. U.S. CONST. art. IV, § 1.

50. Bush, *supra* note 48.

51. U.S. CONST. art. IV, § 1.

52. Pink v. AAA Highway Express, Inc., 314 U.S. 201, 210 (1941).

53. *See* Baker *ex rel.* Thomas v. Gen. Motors Corp., 522 U.S. 222, 232–33 (1998) ("A final judgment in one state . . . qualifies for recognition throughout the land.").

54. *Id.* at 233.

55. Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (quoting Pac. Employers Ins. Co. v. Indus. Accident Comm'n of Cal., 306 U.S. 493, 501 (1939)).

56. David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 2D 7, 10 (1997).

57. *See, e.g.*, cases cited *infra* note 112.

58. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971); *see also* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971 (1997) ("A public policy exception in some form is recognized in every state of the United States and has always been part of conflict-of-laws analysis in this country.").

deny recognition to marriages regarded as polygamous or incestuous, and, tragically, to deny recognition to interracial marriages before the Supreme Court held that antimiscegenation laws were unconstitutional.[59] It provides a means by which states can ensure that any other sovereign's recognition of same-sex marriage has no effect within their borders. Indeed, the House of Representatives recognized as much when it took up the Defense of Marriage Act (DOMA),[60] for one thing that its supporters and opponents agreed upon was that states would be free to disregard same-sex marriages performed in other jurisdictions even without DOMA. The Act's supporters simply described this aspect of DOMA as a useful insurance policy, whereas its opponents characterized it as grandstanding that could weaken states' rights by implying congressional action was needed.[61]

DOMA adds an additional defense for states that wish to disregard same-sex marriages performed elsewhere. It provides,

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[62]

The act is premised upon Congress's power under the Constitution to "prescribe . . . the effect" of each state's "public Acts, Records, and

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59. *See* ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 221, 609–61 (4th ed. Michie Co. 1986) (1959).

60. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

61. *Compare* H.R. REP. NO. 104-664, at 9, *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2913 ("[T]he Committee believes that a court conscientiously applying the relevant legal principles would be amply justified in refusing to give effect to a same-sex 'marriage' license from another state. But even as the Committee believes that States currently possess the ability to avoid recognizing a same-sex 'marriage' license from another State, it recognizes that that conclusion is far from certain."), *with id.* at 37 ("[T]he prevailing view today is that states can by adopting their own contrary policies deny recognition to marriages of a type of which they disapprove, and it is incontestable that states have in fact done this on policy grounds in the past . . . . Indeed, given that the power that states have to reject marriages of which they disapprove on policy grounds derives directly from the Constitution and has never previously been held to need any Congressional authorization, the fact that Congress in this proposed statute presumes to gives the states permission to do what virtually all states think they already now have the power to do undercuts states rights.").

62. § 2(a), 110 Stat. at 2419.

judicial Proceedings."[63] Because DOMA is one of the first invocations of this power, there is no settled precedent on the extent of Congress's powers to pass such legislation. At a minimum, however, the law offers states another plausible argument to bolster their existing powers to deny recognition to marriages they deem contrary to their public policies. No court in the time since DOMA's passage has deemed the act unconstitutional. As a result, in this arena, a constitutional amendment is at most a backstop to DOMA's backstop for public policy powers that states possess without any congressional action at all. Although the Supreme Court is always free to change its existing jurisprudence, there are no signs that it is likely to do so in the Full Faith and Credit Clause context, and so there is no greater need for a constitutional backstop here than for a constitutional amendment bolstering states' authority to pass a sales tax, establish a transportation department, or support public education.

Some have argued that the Supreme Court's decisions in *Lawrence* and *Romer v. Evans*[64] do change this landscape by suggesting that disapproval of homosexuality is not a rational basis for state action. John Yoo and Anntim Vulchev have contended that the Court called into question public policy defenses against same-sex marriage by invalidating Texas's law against consensual same-sex sodomy and Colorado's constitutional amendment prohibiting governments from protecting gay citizens from discrimination.[65] But *Lawrence* dealt exclusively with the criminalization of consensual adult conduct, and it is a long leap from striking down a criminal statute governing private conduct to an unprecedented decision telling a state what it can and cannot do with respect to civil marriage. The *Lawrence* majority thus noted that "[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[66] Justice O'Connor made the point more explicit still in an opinion concurring in the judgment, writing, "Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral

63. U.S. CONST. art. IV, § 1.

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

65. John Choon Yoo & Anntim Vulchev, *A Conservative Critique of the Federal Marriage Amendment*, 33 HASTINGS CONST. L.Q. 725, 729–30 (2005).

66. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

disapproval of an excluded group."[67] Nor does the Court's handling of the novel Colorado restrictions that *Romer* deemed "unprecedented in our jurisprudence"[68] bear upon states' interests in maintaining a definition of marriage that is anything but unprecedented. It would be astonishing for a court applying the rational basis scrutiny used in *Romer* and arguably in *Lawrence*[69] to hold that a state lacks a rational basis to define marriage in its public policy, resting as that policy does on centuries of tradition and experience. It would be particularly astonishing for courts to make such a pronouncement in the domestic relations sphere that lies at the heart of states' competence. Given that *Lawrence* and *Romer* are a far cry from this momentous step, a federal constitutional amendment here would simply indulge the worst suspicions about the Supreme Court, preempting a decision that may never come.

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Although the Federal Marriage Amendment's conception of marriage is firmly rooted in our national tradition, the idea of constitutionalizing this conception is utterly foreign to that tradition. The amendment would trample values this nation has prized since its founding. In addition to shifting power from legislatures to courts, the amendment would impose the values of the present upon the future. The Framers conducted a revolution in favor of self-governance, however, and they were well aware that using a constitution to deny future generations the ability to rule themselves would threaten the charter's legitimacy. As Thomas Jefferson famously declared to James Madison, "The earth belongs always to the living generation," which "may manage it . . . and what proceeds from it, as they please, during their usufruct," but not "make a perpetual constitution, or

67. *Id.* at 585 (O'Connor, J., concurring in the judgment).

68. *Romer*, 517 U.S. at 633.

69. Although *Lawrence*, 539 U.S. 558, does not explicitly state the level of scrutiny it applied to Texas's statute, Justice Scalia concluded in a dissenting opinion that the majority must be applying rational basis review, *id.* at 599 (Scalia, J., dissenting). If *Lawrence* actually applied heightened scrutiny to Texas's statute under the precedents giving increased protection to private sexual conduct, as others have argued, it would further reduce *Lawrence*'s relevance to marriage, a legal status with ramifications far beyond the home.

even a perpetual law."[70] To do so, Jefferson explained, would be "an act of force, and not of right."[71]

The Constitution demonstrates that the Framers took this concern to heart. They drafted, first and foremost, a framework for majoritarian rule in the present, which enables self-governance rather than undermining it, as Madison suggested in response to Jefferson's letter.[72] The document's other provisions limit majority will, rather than simply embodying its dictates. In this respect, the American Constitution differs from the one proposed for the European Union,[73] whose more than four hundred articles spanning hundreds of pages bear an uncomfortable resemblance to the Federal Register. In contrast, America's founding charter does not "partake of the prolixity of a legal code"[74] that would "deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."[75] Rather, it granted Congress broad enumerated powers, but eschewed majoritarian prescriptions, because succeeding generations of majorities were quite capable of prescribing for themselves. The Framers did not handcuff the future to a mishmash of highly valued eighteenth century government programs. It was not that they believed these programs to be unimportant. But they did not equate importance with constitutional embodiment. Indeed, Thomas Jefferson's University of Virginia—whose founding was one of the three accomplishments for which he wished to be remembered—was established through ordinary state law.

In contrast, the proposed marriage amendment seems premised on the assumption that we must look to the Constitution to enshrine every value we hold dear. Contrary to our traditions of succeeding generations of self governance, it simply imposes the values of today upon tomorrow. In doing so the amendment is doubly hubristic, assuming that we know better than our children, whom we would

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70. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 1 THE FOUNDERS' CONSTITUTION 69 (Philip B. Kurland & Ralph Lerner eds. 2001), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html.

71. *Id.*

72. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 70, at 70–71, *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch2s24.html.

73. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) 1.

74. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

75. *Id.* at 415.

constrain, and our forefathers, whose example of restrained constitutionalism we would now disavow.

It is particularly sad that the amendment would impose national uniformity on the subject of domestic relations, an area that has long been a preserve of state and local control. For in contrast to the national government's "few and defined" powers, "[t]he powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State."[76] Domestic relations are the coin of the local realm. In fact, the Supreme Court has rejected a broad interpretation of Congress's power to regulate interstate commerce precisely because it could logically give Congress the power to regulate "marriage, divorce, and childrearing."[77] One benefit of reserving this power to the states is to facilitate experimentation.[78] Although Justice Brandeis's well-known warning against using the Constitution to stifle the diversity of state perspectives was directed to his colleagues on the Court, it is true for any branch that "[t]o stay experimentation in things social and economic is a grave responsibility," because in stymieing development of multiple approaches and competition among them, "[d]enial of the right to experiment may be fraught with serious consequences to the nation."[79]

Given this tradition, it is no surprise that after Hawaii's courts briefly legalized same-sex marriage,[80] many states deplored the prospect of having Hawaii's policy imposed upon them through the forced recognition of Hawaii marriages. The Defense of Marriage Act affirmed each state's right to avoid having its domestic relations policy determined by another sovereign. But the constitutional amendment that many of DOMA's backers now champion would

76. THE FEDERALIST NO. 45 (James Madison) (Isaac Kramnick ed., 1987).

77. United States v. Morrison, 529 U.S. 598, 616 (2000); *accord* United States v. Lopez, 514 U.S. 549, 564 (1995).

78. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

79. *Id.* at 386.

80. Baehr v. Miike, 950 P.2d 1234, 1234 (Haw. 1997), *aff'g* Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

undermine this tradition of state autonomy, depriving each state of the ability to define the most basic principles of domestic relations.[81]

Even as it would rework the balance between legislatures and courts, between state and federal governments, and between one generation and the next, the Federal Marriage Amendment would send a powerful message of exclusion, because it would mark the first time that the nation has used a constitutional amendment to limit the rights of one group of citizens. Throughout our history, amendments have been used to enlarge the American embrace. The Thirteenth, Fourteenth, and Fifteenth Amendments all send a message of welcome: The Thirteenth Amendment ended slavery,[82] and the Fourteenth Amendment extended citizenship to the newly freed slaves and guaranteed due process and equal protection of the law to all.[83] The Fifteenth Amendment promised the new citizens that neither their status as former slaves nor the color of their skin would be used to deny them the right to vote.[84] The franchise was extended to women through the Nineteenth Amendment in 1920[85] and to citizens eighteen years or older through the Twenty-Sixth Amendment in 1971.[86] These amendments represent the spirit of the Statue of Liberty: that all persons warrant respect. But many will interpret the proposed marriage amendment to stand for the opposite proposition, and to be motivated at least in part by animus for a particular subset of Americans. The message of exclusion would sound all the starker after so many years of inclusive amendments. And it would sound starker still for disregarding traditions of federalism and limited constitutionalization that have been with us since the Founding. In short, the Federal Marriage Amendment might mean that gay citizens would never see America's founding charter as their own.

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81. It is also noteworthy that the amendment would encroach on state power through extremely intrusive means. Its second sentence provides that states may confer the incidents of marriage upon same-sex couples through ordinary legislation, but not through their constitutions. S.J. Res. 1, 109th Cong. (2005). As a result, the amendment not only dictates what states may do in the domestic relations sphere, it also dictates how state governments may act with what remains within their power.

82. U.S. CONST. amend. XIII.

83. U.S. CONST. amend. XIV.

84. U.S. CONST. amend. XV.

85. U.S. CONST. amend. XIX.

86. U.S. CONST. amend. XXVI.

Many of the previous arguments may have a familiar ring because backers of the marriage amendment have made them so eloquently in earlier controversies. Consider the following statement concerning hasty federal intrusions upon the sphere of domestic relations:

> The very least that can be said is that the complex and delicate field of marital relationships and divorce, into which Congress has sedulously declined to enter in the past, would now be gravely affected by the tangential force of a constitutional amendment, which would not even rest on a study of the manifold problems involved.[87]

That comes not from a liberal critic of the present amendment, but from a canonical critique of the Equal Rights Amendment (ERA), a criticism that was embraced by many of the conservatives who champion the marriage amendment today. Or one could look to the critique of the ERA offered by Robert Bork, who properly said its transfer of power to the judiciary was "a means of displacing democratic choice by moral principle":

> That was the reason for the Equal Rights Amendment, which provided that it should be primarily the function of the judiciary to define and enforce equality between the sexes. . . . [T]he amendment represented less a revolution in sexual equality than a revolution in our attitudes about constitutional methods of government.[88]

Or one could recall the critique of *Roe v. Wade*[89] as a "procedurally deficient" intrusion upon state authority offered by Senator Orrin Hatch, who supports the present amendment: "Procedurally, [*Roe*] deprived elected state officials of any authority to govern abortions. It overturned the abortion laws of all fifty states. It overturned the rights of those legislators and the rights of the people who elected them in all fifty states."[90]

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87. 116 CONG. REC. 8019 (1946) (statement of Professor Paul Freund).

88. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 324 (1996).

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

90. Orrin G. Hatch & James MacGregor Burns, *Still Adequate for the Twentieth Century? A Debate*, 1987 UTAH L. REV. 871, 880–81. Others have also noted that "Justice Scalia's dissent in *Planned Parenthood v. Casey* could be read as an eloquent warning about the dangers of injuring federalism by nationalizing any social policy . . . ." Yoo & Vulchev, *supra* note 65, at 734.

To be sure, every proposed amendment is different. Some might argue that the text of the Equal Rights Amendment was particularly ambiguous, or that court-imposed uniformity concerning abortion is particularly inappropriate. And some national crises make amendments necessary no matter what their costs, as with the Reconstruction amendments after the Civil War. But as conservatives have long argued, the costs of constitutionalization are so considerable that the nation should not undertake the process lightly. There is no reason to backtrack on these principles now.

III. STATE CONSTITUTIONAL MARRIAGE AMENDMENTS

It apparently was not enough that *Goodridge* prompted a constitutional call to arms in Congress. The movement to constitutionalize the same-sex marriage debate proceeds apace in the states. The movement is as broad as it is swift: twenty states have already placed an amendment banning same-sex marriage into their constitutions,[91] and similar proposals are afoot in a number of other states. Four states have marriage amendments that predate *Lawrence*.[92] A surge of similar constitutional measures were adopted on the heels of *Lawrence* and *Goodridge*: thirteen states passed amendments in 2004 alone.[93] Two states—Kansas and Texas—passed a marriage amendment in 2005; and Alabama voters approved a constitutional amendment on June 6, 2006. Constitutional amendments appeared on the ballot in eight states in November 2006,[94] and, if approved (for the second time) by the legislature elected in November 2006, a constitutional amendment could appear on the Indiana ballot in 2008.

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91. The states are Alabama, Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Utah. *See* Sanctity of Marriage Amendment, No. 2005-35, 2005-1 Ala. Adv. Legis. Serv. 139–41 (LexisNexis); ALASKA CONST. art. 1, § 25; ARK. CONST. amend. LXXXIII, § 1; GA. CONST. art. I, § 4, ¶ I; HAW. CONST. art. I, § 23; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29.

92. The states are Alaska, Hawaii, Nebraska, and Nevada.

93. The states are Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah.

94. The states are Arizona, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin.

The precise wording of constitutional marriage amendments varies considerably; indeed, there are nearly as many renditions of marriage amendments as there are state constitutions. The vast majority begin by defining marriage solely as the union of one man and one woman. Alaska, for example, provides in Section 25 of Article I of its constitution: "To be valid or recognized in this State, a marriage may exist only between one man and one woman."[95] In contrast to every other marriage amendment, however, Hawaii does not purport to define marriage or to limit what the legislature could say about marriage. Rather, the Hawaii amendment constrains only its courts, providing: "The legislature shall have the power to reserve marriage to opposite-sex couples."[96]

In addition to defining marriage, marriage amendments typically prohibit recognition of any same-sex marriage even if valid in another jurisdiction.[97] Some states extend this nonrecognition mandate to civil unions, domestic partnerships, and other same-sex relationships.[98] And many constitutional amendments make explicit the assumption inherent in each constitutional amendment banning gay marriage: that same-sex marriage is contrary to the state's public policy.[99]

The biggest textual difference among constitutional marriage amendments is the extent to which they apply to domestic partnerships, civil unions, or other same-sex legal relationships. Some amendments appear to ban same-sex couples only from the institution of marriage; they do not facially preclude civil unions, domestic partnerships, or other same-sex legal relationships.[100] Other amendments, however, employ a variety of textual prohibitions designed to prevent both courts and legislators from creating any legal status similar to marriage. For example, Nebraska's constitution states, "[t]he uniting of two persons of the same sex in a civil union,

95. ALASKA CONST. art. I, § 25.

96. HAW. CONST. art. I, § 23.

97. *See, e.g.*, LA. CONST. art. XII, § 15 ("No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.").

98. *See, e.g.*, GA. CONST. art. I, § 4 (no recognition to any "union between persons of the same sex").

99. *See, e.g.*, KAN. CONST. art. 15, § 16 ("All other marriages are declared to be contrary to the public policy of this state and are void."); OR. CONST. art. XV, § 5a ("It is the policy of Oregon . . . that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

100. *See, e.g.*, MONT. CONST. art. XIII, § 7 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."[101] Other state amendments prohibit not only the recognition of same-sex relationships, but also receipt of the "incidents," "benefits," or "rights" of marriage by same-sex couples. The Oklahoma and Kansas constitutions, for instance, first define marriage as the union of one man and one woman and then provide that "[n]either th[e] Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."[102] Similarly, in Ohio the state may not "create or recognize a legal status for [same-sex] relationships . . . that intends to approximate the design, qualities, significance or effect of marriage."[103]

In stark contrast, other states—far from denying same-sex couples the incidents or rights of marriage—offer marriage-like benefits to same-sex couples pursuant to civil unions or domestic partnerships. Vermont and Connecticut, for example, define marriage as a union between a man and a woman, but afford same-sex couples access to state-level marriage benefits through civil unions. In those states, "[p]arties to a civil union . . . have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage."[104] Four additional states—California, Hawaii, Maine, and New Jersey—as well as the District of Columbia provide domestic partners with marriage-like benefits.[105]

* * *

The placement of bans on same-sex marriage in state constitutions is admittedly a more difficult question than the enactment of a federal constitutional prohibition. Many of the obvious drawbacks of a federal constitutional amendment are not present in the context of state constitutions. Indeed, it can be argued that state constitutional amendments embody the very multitude of

101. NEB. CONST. art. I, § 29. Constitutional amendments in North Dakota and Utah similarly provide that "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." N.D. CONST. art. XI, § 28; UTAH CONST. art. I, § 29.

102. OKLA. CONST. art. II, § 35; *accord* KAN. CONST. art. XV, § 16.

103. OHIO CONST. art. XV, § 11.

104. CONN. GEN. STAT. § 46b-38nn (2006); VT. STAT. ANN. tit. 15, § 1204(a) (2002).

105. CAL. FAM. CODE § 297.5 (West 2006); D.C. CODE § 32-701 to -705 (2001); HAW. REV. STAT. § 572C-1 to -6 (2005); ME. REV. STAT. ANN. tit. 22, § 2710 (2005); N.J. STAT. ANN. § 26:8A-4 (West 2006).

approaches to same-sex marriage that the federal system envisions. The amendments of Nebraska and Utah on the one hand, and the more liberal approaches of Vermont and Connecticut on the other, would appear to present precisely the sort of experimental diversity that Justice Brandeis envisioned. State constitutional provisions are also nothing if not democratic. The fact that the voters have approved them may seem to insulate them from the charge that constitutionalization takes government out of the electorate's hand.

Perhaps for these reasons, most arguments against constitutionalization have been directed at federal amendments.[106] But the focus on a federal marriage amendment ultimately misses the point. Constitutionalization at all levels is an inappropriate way of approaching many issues, same-sex marriage included. Amendments to the founding charters of the sovereign states are for many reasons a less desirable approach than legislation to the volatile questions they purport to address.

To begin with, it is doubtful such amendments are necessary. An observer of the same-sex marriage debate might believe—because of the rash of state marriage amendments—that a constitutional crisis is imminent. But this is hardly the case. Only one state currently recognizes same-sex marriage and not once has a state been forced to recognize a same-sex marriage celebrated elsewhere. Indeed, every appellate court to consider the issue post-*Lawrence*—with *Goodridge* being the exception that proves the rule—has left it to state legislatures to define the boundaries of marriage. In 2006, the high courts in three states—Georgia, New York, and Washington—rejected invitations to find a right to same-sex marriage in their respective state constitutions.[107] Federal judges are unlikely to take a

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106. *See, e.g.*, Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, 570 CATO INST. POL'Y ANALYSIS 3 (2006), *available at* http://cato.org/pubs/pas/pa570.pdf ("A [federal] constitutional amendment banning same-sex marriage is unnecessary . . . ."); Carpenter, *supra* note 36, at 71 ("In this article, I argue against a federal constitutional amendment preventing states from recognizing same-sex marriages."); Yoo & Vulchev, *supra* note 65, at 725 ("This essay . . . lays out the conservative case against the [Federal Marriage Amendment] . . . .").

107. Perdue v. O'Kelley, 632 S.E.2d 110, 113 (Ga. 2006); Hernandez v. Robles, Nos. 86–89, slip op. 5239 at 3, 10 (N.Y. July 6, 2006); Andersen v. King County, 138 P.3d 963, 968, 969, 990 (Wash. 2006). In *Lewis v. Harris*, No. A-68-05, slip op. at 33 (N.J. Oct. 25, 2006), the New Jersey Supreme Court required same-sex partners to be eligible for benefits equivalent to those enjoyed by heterosexual couples but left the question of same-sex marriage to the legislature, stating, "[W]e cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right." *See also*

different course. In fact, the Eighth Circuit in July 2006 rejected an equal protection challenge to Nebraska's constitutional ban on any form of legal recognition—including marriage, civil unions, and domestic partnerships—for same-sex couples.[108] The Eighth Circuit held that sexual orientation is not a suspect class and that Nebraska's constitutional ban was therefore valid under rational basis review and its "strong presumption of validity."[109] This is hardly the *Goodridge*-run-amok state of the world that marriage amendment proponents suggest.

The tools the states possess to protect their preferred policies short of a constitutional amendment are actually quite formidable. In this regard, the states confront two separate sets of problems. First, states must be able to hold their own activist judges in check. On this score, states have many options. To begin with, state court judges are subject to the democratic processes of the individual states to a much greater extent than life-tenured federal judges. The vast majority of state court judges—87 percent by one count—are subject to some form of election.[110] A judiciary that is so directly accountable will be less likely to impose under the guise of a state constitution an antimajoritarian view of marriage on its polity.

An activist judicial interpretation—should dire predictions actually come to pass—would, moreover, be reversible. Stare decisis, although an important promoter of predictability and consistency, is not an inexorable command, especially in the realm of constitutional,

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Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) ("[I]t is for the people of Arizona, through their elected representatives or by using the initiative process, rather than this court, to decide whether to permit same-sex marriages."); Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) ("[T]he Indiana Constitution does not require the governmental recognition of same-sex marriage, although the legislature is certainly free to grant such recognition or create a parallel institution under that document."); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[T]he [Equal Rights Amendment of Washington's constitution] does not require the state to authorize same-sex marriage."). *Contra* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948, 949, 969 (Mass. 2003). In addition, state courts have failed to find such a right in the Federal Constitution. Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973) ("We find no [federal] constitutional sanction or protection of the right of marriage between persons of the same sex."); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) ("We hold . . . that [denying a marriage license to a same-sex couple] does not offend the First, Eighth, Ninth, or Fourteenth Amendments of the United States Constitution.").

108. Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 863, 871 (8th Cir. 2006), *reh'g denied*, No. 05-2604, 2006 U.S. App. LEXIS 22372 (8th Cir. Aug. 30, 2006).

109. *Id.* at 867 (quoting Heller v. Doe, 509 U.S. 312, 319 (1993) (internal quotation marks omitted)).

110. Carpenter, *supra* note 36, at 76.

rather than statutory, interpretation. Adherence to a publicly censured constitutional interpretation will thus hold little sway, particularly over newly elected state court judges who campaigned on a different interpretation of the constitutional text. In fact, when a state court has suggested that same-sex marriage might be constitutionally required, a prompt democratic response has resulted.[111] In some cases, that response has been constitutional in nature, but there is a difference between an amendment adopted as a matter of last resort and one passed preemptively. The Alaska legislature passed a constitutional amendment banning same-sex marriage less than three months after a superior court interpreted the Alaska Constitution to require it, and Alaska voters approved the measure in November of the same year.[112] A constitutional response to *Goodridge* is currently underway; thus even the result in Massachusetts will ultimately be left to state citizens and their elected representatives. In short, states are perfectly capable of dealing in one fashion or another with their own activist judiciaries.

The second problem states face is that of not being subjected—under the Full Faith and Credit Clause or otherwise—to same-sex marriages performed in other jurisdictions. Here, just as in the case of holding their own courts accountable, the states are not defenseless in the face of other state enactments and celebrations of same-sex marriage. The previous discussion of the Federal Marriage Amendment made clear the options that states possess on their own

111. *See id.* at 77 ("[T]he democratic processes in those states [Alaska, Hawaii, and Vermont] immediately dealt with the issue by preventing the imposition of full-fledged gay marriage.").

112. On February 27, 1998, the Superior Court of Alaska decided *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). The marriage amendment passed the Senate on April 16, 1998, S. Journal 3300, 20th Leg., 2d Sess. (Alaska 1998), and then the House on May 11, 1998, H. Journal 3785, 20th Leg., 2d Sess. (Alaska 1998). Similarly, after the Vermont Supreme Court ruled that the state was constitutionally required to extend the benefits of marriage to same-sex couples, Baker v. Vermont, 744 A.2d 864, 867, 886 (Vt. 1999), the Vermont Legislature promptly obviated the need for a constitutional amendment by creating a system of civil unions while defining marriage as between one man and one woman, Act Relating to Civil Unions, 2000-91 Vt. Adv. Legis. Serv. 68 (LexisNexis) (codified at VT. STAT. ANN. tit. 15, § 1201 (2001)). Likewise, less than two years after a lower court appeared to require same-sex marriage, *see* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997), the Hawaii Legislature passed and Hawaii voters ratified a constitutional amendment overturning that decision, Bill for an Act Proposing a Constitutional Amendment Relating to Marriage, 1997 Haw. Sess. Laws 1246 (codified at HAW. CONST. art. I, § 23 (ratified Nov. 3, 1998)).

without the aid of any amendment to the Constitution.[113] Many of these options make a state as well as a federal constitutional amendment unnecessary, and I recap them only briefly here. The Full Faith and Credit Clause reserves to each state the right to refuse to recognize a marriage if contrary to that state's public policy. States have therefore long refused to recognize marriages that violate public policy regarding polygamy and bigamy, incest, and underage or mentally incompetent parties.[114] Further, the Federal Defense of Marriage Act not only defines marriage for purposes of federal law as the union of one man and one woman, it also authorizes states to deny recognition of same-sex marriages performed elsewhere.[115] In the unlikely event that a state's own policy was less than clear or an application of the public policy doctrine was otherwise in doubt, DOMA articulates an exception to full faith and credit and thus eliminates the need to resort to a public policy analysis at all.

Moreover, the rash of constitutional marriage amendments overlies a comprehensive and nationwide effort by state legislatures to address same-sex marriage. The vast majority of states—forty-five to be exact—preserve the traditional definition of marriage (as between a man and a woman) and/or prohibit same-sex marriage by statute.[116] These so-called "mini-DOMAs" normally authorize the

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113. *See supra* notes 51–63 and accompanying text.

114. *See, e.g.*, Loughran v. Loughran, 292 U.S. 216, 223 (1934) (stating that incestuous and polygamous marriages as well as marriages otherwise contrary to state statute need not be recognized by sister states); Beddow v. Beddow, 257 S.W.2d 45, 48 (Ky. 1952) (applying Kentucky law to the marriage of an incompetent rather than the law of the state where the marriage took place); Wilkins v. Zelichowski, 140 A.2d 65, 69 (N.J. 1958) (granting annulment to underage marriage though valid in sister state).

115. Defense of Marriage Act, 28 U.S.C. § 1738C (2000); *see supra* text accompanying note 62. Although supporters of constitutional marriage amendments have suggested that DOMA may have constitutional infirmities, every federal court to examine the issue thus far has upheld it under constitutional scrutiny.

116. At last count, twenty-six states expressly prohibit by statute same-sex marriage and an additional nineteen define marriage as a union between one man and one woman. *See* The Heritage Foundation, Assessment of Language Used in State Statutes, http://www.heritage.org/Research/Family/Marriage50/Dataforall50States.cfm (last visited Sept. 22, 2006) (summarizing statutory language regarding marriage)*; see also* ALA. CODE § 30-1-19(b), (d) (LexisNexis 1998); ALASKA STAT. § 25.05.013(b) (2004); ARIZ. REV. STAT. ANN. §§ 25-101(C) (2000); ARK. CODE ANN. §§ 9-11-107, -109, -208(b)–(c) (2002); CAL. FAM. CODE §§ 300, 308.5 (West 2004); COLO. REV. STAT. § 14-2-104(1)(b) (2005); CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2006); DEL. CODE ANN. tit. 13, § 101(a) (1999); FLA. STAT. ANN. § 741.212(1) (West 2005); GA. CODE ANN. § 19-3-3.1 (2004); HAW. REV. STAT. ANN. §§ 572-1, -3 (LexisNexis 2005); IDAHO CODE ANN. §§ 32-201(1), -209 (2006); 750 ILL. COMP. STAT. ANN. 5/212(5) (West 2005 & Supp. 2006); IND. CODE ANN. § 31-11-1-1 (LexisNexis 2003); IOWA CODE ANN. § 595.2(1) (West

state to refuse to recognize out-of-state same-sex marriages.[117] And a number make explicit what is apparent from statutory bans on same-sex marriage: that such marriages are contrary to the state's public policy.[118] Only a few states—Massachusetts, New Jersey, New Mexico, New York, and Rhode Island (as well as the District of Columbia)—have no statute regarding same-sex marriage.[119] With the exception of Massachusetts, however, the common law in all these states appears to leave with legislatures, not with courts, any decision to break from historical definitions of marriage as between a man and a woman.[120]

2001); KAN. STAT. ANN. § 23-101 (1995); KY. REV. STAT. ANN. § 402.040(2) (LexisNexis 1999); LA. CIV. CODE ANN. art. 89, 3520(B) (Supp. 2006); ME. REV. STAT. ANN. tit. 19-A, § 701(5) (1998); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2004); MICH. COMP. LAWS ANN. § 551.1 (West 2005); MINN. STAT. ANN. § 517.01 (West 2006); MISS. CODE ANN. § 93-1-1(2) (2004); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. § 40-1-401(1)(d) (2005); NEB. REV. STAT. ANN. § 42-103 (LexisNexis 2005); NEV. REV. STAT. ANN. § 122.020(1) (LexisNexis 2004); N.H. REV. STAT. ANN. § 457:1, :2 (LexisNexis 1992); N.C. GEN. STAT. § 51-1.2 (West 2000); N.D. CENT. CODE § 14-03-01 (2004); OHIO REV. CODE ANN. § 3101.01(C) (West 2005); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); OR. REV. STAT. § 106.010 (2005); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Supp. 2005); S.D. CODIFIED LAWS §§ 25-1-1, -38 (2004); TENN. CODE ANN. § 36-3-113 (2005); TEX. FAM. CODE ANN. § 6.204(b)–(c) (Vernon 2006); UTAH CODE ANN. § 30-1-2(5) (1998 & Supp. 2005); *id.* § 30-1-4 (1998); *id.* § 30-1-4.1 (Supp. 2005); VT. STAT. ANN. tit. 15, § 8 (2002); VA. CODE ANN. § 20-45.2 (2004); WASH. REV. CODE ANN. §§ 26.04.010(1), .020(1)(c) (West 2005); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2004); WIS. STAT. ANN. § 765.001(2) (West 2001); WYO. STAT. ANN. § 20-1-101 (2005).

117. *See supra* note 112. Twenty-eight states have statutory language denying recognition of out-of-state same-sex marriages. Heritage Foundation, *supra* note 116.

118. *See, e.g.*, GA. CODE ANN. § 19-3-3.1(a) (2004) ("It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state."). Fifteen states have statutory language indicating that same-sex marriage is contrary to public policy. Heritage Foundation, *supra* note 116.

119. Although Wisconsin does not specifically speak to the issue of same-sex marriage, it does speak in the gendered terms of husband and wife, and the Wisconsin court has interpreted the statute to prohibit same-sex marriage. *In re* Angel Lace M., 516 N.W.2d 678, 680 n.1 (Wis. 1994) (interpreting WIS. STAT. § 765.001(2) (1994) to mean that "Wisconsin does not recognize same-sex marriages").

120. The high courts in both New York and the District of Columbia have found no constitutional right to same-sex marriage and thus left it to the legislatures to address same-sex marriage. Dean v. District of Columbia, 653 A.2d 307, 308, 309, 359 (D.C. 1995) (per curiam) (rejecting claims under District statutes and the Federal Constitution that the District should recognize same-sex marriage); Hernandez v. Robles, Nos. 86–89, slip op. 5239 at 3, 10 (N.Y. July 6, 2006); *see also* Lewis v. Harris, No. A-68-05, slip op. at 59 (N.J. Oct. 25, 2006) (leaving it to the legislature "to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done"). The New Mexico Attorney General has issued an advisory letter interpreting New Mexico law as precluding same-sex marriage. Letter from Patricia A. Madrid, N.M. Att'y Gen., to Timothy Z. Jennings, N.M. State Senator (Feb. 20, 2004), *available at* http://www.ago.state.nm.us/divs/civil/opinions/a2004/SameSexMarriages.htm ("[N]o county

State law then, as a clear expression of public policy, precludes the forced recognition of same-sex marriage and renders state constitutional amendments superfluous, at least to the extent they purport to deny such recognition. In fact, a number of amendments merely replicate existing statutory prohibitions. Nevada, for example, incorporated the Federal Defense of Marriage Act into its state constitution in 2002.[121] Likewise, Alabama's 2006 constitutional amendment borrows word-for-word from its current legislative ban on same-sex marriage.[122] This effort at making doubly-sure only goes to show that state marriage amendments are a largely redundant effort.

The marriage amendment phenomenon then can only be viewed as a preemptive strike against what some hypothetical court in some hypothetical jurisdiction might some day say. This is an insufficient basis on which to amend foundational texts like state constitutions. A constitutional amendment is not by nature a preemptive device. It is instead an extraordinary mechanism—a tool of last resort properly reserved for situations which present no other choice. To amend a constitution preemptively, in anticipation of the proverbial rainy day, is, simply put, gratuitous. Such needless use of the amendment process is antithetical to the very essence of constitutional lawmaking and to the notion of a fundamental, guiding, and multigenerational charter. If state constitutional amendments were the only means of addressing public displeasure over the prospect of same-sex marriage then such amendments would certainly be a defensible undertaking. But they are not in any sense the only option. There is a world of difference between a constitutional amendment forced on a state and a constitutional amendment passed preemptively. Although a state with no other recourse is surely justified in responding to an activist constitutional interpretation, gratuitous amendments to our most basic documents of governance are hurtful and alienating in a way all their own. There is no reason to crowd the fundamental charters of this country with slights toward citizens whose friendship and

clerk should issue a marriage license to same-sex couples because those licenses would be invalid under current law."); *see also* R.I. GEN. LAWS §§ 15-1-1, -2, -6 (2003) (defining, in gender specific terms, whom an individual may not marry).

121. *See* NEV. CONST. art. 1, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state.").

122. *Compare* Sanctity of Marriage Amendment, No. 2005-35, 2005-1 Ala. Adv. Legis. Serv. 139–41 (LexisNexis), *with* ALA. CODE § 30-1-19 (LexisNexis 1998).

contributions we welcome with the rest. Such is not the function of our foundational legal texts.

IV. STATE CONSTITUTIONS AND AMERICAN CONSTITUTIONALISM

It is necessary finally to fit proposed amendments to state constitutions within some framework of American constitutionalism. In contrast to the Federal Constitution, the constitutions of the fifty states have given rise to over 5,800 amendments as of 1996.[123] For this reason, it is difficult to generalize about what state constitutions do, let alone what they do *not* do. Some state constitutions, like the Federal Constitution, speak mainly to the structure and function of government. Others cover matters as varied and particular as state lotteries[124] and proper care of pregnant pigs.[125] The amendment process, too, varies. For some states, the amendment process must begin in the legislature, whereas others allow amendment by popular initiative. Some constitutions can be amended in a matter of months, and others take years. In the face of such diversity of substance and process, it is difficult to posit a unified theory of state constitutionalism.

In some states, the incompatibility of a same-sex marriage amendment with constitutional traditions seems clear enough. Some state constitutions are, like the Federal Constitution, relatively spare. New Hampshire, Missouri, and Virginia are examples of states with constitutions that primarily address the structure and duties of state government, the powers of local governments, and the rights of citizens. For such constitutions, the inappropriateness of a same-sex marriage amendment is self-evident. A constitution concerned with the structure and function of government is no place for an amendment defining the substantive law.

Other state constitutions include a dizzying array of detailed provisions whose substance seems more traditionally legislative than constitutional. The Alabama Constitution, for instance, has over 770 amendments, the majority of which pertain to one county or city.[126] It also includes provisions to promote "the production, distribution,

123. Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y SYMP. 27, 52 (1996).

124. *E.g.*, LA. CONST. art. XII, § 6(A); MINN. CONST. art. XIII, § 5; N.Y. CONST. art. I, § 9.

125. FLA. CONST. art. X, § 21.

126. *See generally* ALA. CONST.

improvement, marketing, use and sale of catfish"[127] and to "suppress the evil practice of dueling."[128] The Arkansas Constitution devotes an entire article to railroads, canals, and turnpikes;[129] the Idaho Constitution devotes one to livestock.[130] Such constitutions resemble "super-codes" rather than constitutions. This approach to state constitutionalism owes something to the rise of amendment by popular initiative, which began with the progressive movement in the early twentieth century and as of 2006 exists alongside legislative amendment procedures in eighteen states.[131] But many of the most detailed state constitutions exist in states, like Alabama and Kentucky, which do not amend by initiative. In the specific context of same-sex marriage, amendments have arisen through both legislative proposal and popular initiative. Of the thirteen amendments passed in 2004, for example, seven began in state legislatures,[132] and six were products of popular initiatives.[133]

It seems undesirable to perpetuate the phenomenon of the detailed constitution, especially at a time when citizens seem increasingly ambivalent about doing so. Detailed constitutions routinely give rise to complaints from one corner or another that they are "too long."[134] In Florida, 82 percent of voters surveyed after the

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127. *Id.* amend. 492.

128. *Id.* art. XIV, § 86.

129. ARK. CONST. art. XVII.

130. IDAHO CONST. art. XVI.

131. *See* ARIZ. CONST. art. XXI; ARK. CONST. art. V, § 1; CAL. CONST. art. XVIII, § 3; COLO. CONST. art. V, § 1; FLA. CONST. art. XI; ILL. CONST. art. XIV, § 3; MASS. CONST. amend. art. XLVIII; MICH. CONST. art. XII; MISS. CONST. art. XV, § 273; MO. CONST. art. XII, § 2; MONT. CONST. art. XIV, § 2; NEB. CONST. art. III, §§ 2, 4; NEV. CONST. art. XIX; N.D. CONST. art. III, § 9; OHIO CONST. art. II, § 1; OKLA. CONST. art. V; OR. CONST. art. IV, § 1; S.D. CONST. art. XXIII.

132. The states are Georgia, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, and Utah. The legislative amendment procedures of every state but Delaware require amendments proposed in the legislature to be approved by popular vote in order to be enacted. Thus the distinction between legislative and popular amendments speaks to how an amendment is initially proposed, not how it is ultimately approved.

133. The states are Arkansas, Michigan, Montana, North Dakota, Ohio, and Oregon.

134. Press Release, Janet McCoy, Auburn Univ. Press, AU Experts: State Constitution Outdated, Abused and Too Long (Jan. 22, 1999), http://www.auburn.edu/administration/univrel/news/archive/1_99news/1_99constitution.html (last visited Oct. 7, 2006); *see also* Tom Atkinson, *Polparazzo: Constitutional Chicanery, Proposals to Amend Alaska's Constitution Abound*, ANCHORAGE PRESS, Mar. 19, 1998, at 5 ("Too many amendments."); Gary Lindstrom, *Constitutional Amendments Meet the Weissmann Method*, SUMMIT DAILY NEWS (Colo.), May 1, 2006, at A12 ("Constitutional amendments. You either love them or you hate them, but when it

2004 election believed that Florida "sometimes" or "often" had amendments on the ballot "that really should not be there," and 72 percent believed that proposed amendments were the product of "well-financed special interest groups."[135] In Alabama, an organization called Alabama Citizens for Constitutional Reform has started a petition drive for a constitutional convention, in part because the Alabama constitution, with over 770 amendments, "is easily the longest in the nation and is [twelve] times longer than the typical state constitution."[136]

I would argue that citizens undertake such efforts because overconstitutionalization is a bad idea. Constitutions should be articulations of fundamental law, not second layers of positive law. Some states have explicitly embraced the notion that not all changes in law rise to the constitutional level. The Kentucky Supreme Court, for instance, rejected a proposed constitutional amendment financing a veterans' bonus on the ground that the issue was an appropriate one for a legislative enactment but not for a constitutional amendment.[137] The court stated that the provision involved no "change in our organic law" and that a "constitutional amendment [was] neither necessary nor proper" to achieve its result.[138] In support of its position, the court cited an early Missouri Supreme Court case holding that "'[t]he purpose of constitutional provisions and amendments to the Constitution is to prescribe the permanent framework and a uniform system of government, and to assign to the different departments thereof their respective powers and duties.'"[139] The Montana Supreme Court rejected a state constitutional amendment directing the legislature to apply to the United States Congress for a federal constitutional convention.[140] Characterizing the amendment as "nothing but a legislative resolution" and a "transient amendment for a specialized purpose," the court held that the

comes down to it, amending the Constitution of the state of Colorado is a silly and lazy way to govern.").

135. SUSAN A. MACMANUS & SUSAN SCHULER, FLORIDA VOTER SURVEY: THE CONSTITUTIONAL AMENDMENT PROCESS 13 (Jan. 2005), *available at* http://jamesmadison.org/pdf/materials/318.pdf.

136. Alabama Citizens for Constitutional Reform, http://www.constitutionalreform.org/whatswrong5.shtml (last visited Sept. 6, 2006).

137. Stovall v. Gartrell, 332 S.W.2d 256 (Ky. 1960).

138. *Id.* at 262.

139. *Id.* (quoting State *ex rel.* Halliburton v. Roach, 130 S.W. 689, 694 (Mo. 1910)).

140. State *ex rel.* Harper v. Waltermire, 691 P.2d 826 (Mont. 1984).

provision "[was] not a part of the permanent fundamental law of a state and should not be submitted under the guise of a constitutional amendment."[141]

It is perhaps futile to bemoan the evolution of many state constitutions into baroque collections of essentially statutory material. But that does not mean that we should surrender our commitment to constitutions as articulations of fundamental rather than positive law. When states burden their constitutions with essentially statutory provisions, they risk trivializing them. Constitutions and statutes exist for very different reasons. The former set forth the architecture of government and certain basic rights that individual citizens enjoy against state infringement. The latter exist to regulate all sorts of matters—abortion and capital punishment, divorce and inheritance, schools, roads, property rights, and taxes—about which citizens may hold the most passionate and intense beliefs imaginable. That intensity, however, need not and should not translate into constitutionality. Rather, it is legislative bodies that broker compromises among opposing beliefs and zealous factions, and it is legislatures that adapt to changing public preferences and circumstances. It is impossible to predict what views electoral majorities may entertain five, ten, twenty, or fifty years hence on same-sex relations. It is the job of legislatures, not constitutions, to reflect evolving standards and to register change from whatever direction it may arrive. Statutes are more amenable to adjustment and modification than constitutional provisions are. And American constitutional tradition has always preserved for majorities the right to overrule courts on policy matters through statutory amendment rather than through the cumbersome process of constitutional change.

This difference between constitutional and statutory law bears quite directly on the question of gay rights. No constitution should ever assign its citizens pariah status. No constitution should relegate its citizens so symbolically and semipermanently to the shadows of national life. As a matter of statute, however, the balance changes. Statutes exist for the expression of values central to the imperative of social cohesion. Statutes legitimately articulate within limits a community's aspirations for marriage, the raising of children, and the

141. *Id.* at 828.

conduct of family life.[142] It is in this difference between constitutional and statutory law that America strikes the balance between claims of personal rights and assertions of community prerogative. Judges and legislators who upset this balance tamper with our legal birthright.

Should marriage, however, be an exception to the rule of limited constitutionalism? Marriage, of course, hardly belongs in the category of catfish, dueling, railroads, turnpikes, livestock, or the many other minutiae on which, as I have noted, the constitutions of some states have seen fit to opine. Marriage is rather society's most fundamental institution, and it is entirely a fair question to ask why such a fundamental matter as marriage should not make its way into fundamental law.

The simple answer is that what is fundamental as a matter of social policy has not often been thought to be fundamental as a matter of constitutional law. Traditionally, matters of family law have rarely found their way into state constitutions, even the most detailed ones. The major changes in family law in the nineteenth and twentieth centuries, such as the recognition of married women's property rights and the liberalization of divorce, occurred in most states at the statutory level, despite the fact that these issues were at least as appropriate constitutional material as same-sex marriage.[143] Even interracial marriage, which was infamously outlawed in forty-one states at one time or another,[144] was banned by constitutional

142. Of course, statutes banning interracial marriage are unconstitutional, Loving v. Virginia, 388 U.S. 1 (1967), and outside of the context of marriage, the Supreme Court has placed boundaries upon states' regulation of extended family relations, e.g., Troxel v. Granville, 530 U.S. 57 (2000) (invalidating a Washington statute allowing "any person" to petition for child visitation rights); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (invalidating city housing ordinance's constrictive definition of family).

143. A few exceptional states have constitutionalized such aspects of family law. *See, e.g.*, ALA. CONST. amend. CCXC (authorizing the legislature to provide for termination of alimony upon remarriage or cohabitation); ARK. CONST. art. IX, § 7 (recognizing married women's property rights); OR. CONST. art. XV, § 5 (same); S.C. CONST. art. XVII, § 3 (listing grounds for divorce). Some states used constitutional amendments to abolish legislative divorce, a practice in which state legislatures enacted special laws providing for the divorce of specific couples. *E.g.*, MD. CONST. art. III, § 33; N.Y. CONST. art. I, § 9.1; N.C. CONST. art. II, § 24; TENN. CONST. art. XI, § 4. Because the abolition of this practice redefined the powers of the legislative branch, it is unsurprising that it would be achieved constitutionally.

144. *See* Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50 n.9 (1964) ("It appears that forty-one states have at one time or another enacted miscegenation statutes.").

amendment in only six.[145] Until now, the constitutionalization of family law has been very much the exception rather than the norm.

Moreover, this is not just any family law measure, but one which singles out a particular group of citizens to confirm their lack of a constitutional right. State constitutions, like the Federal Constitution, are no place for such measures. Although it is not unheard of for state constitutional amendments to restrict individual rights, it is most unusual.[146] Very rare is a constitutional measure singling out a particular group of citizens for restriction of its access to the privileges of free society.[147] The few examples of such measures should give us pause: they include an Oklahoma amendment establishing a "grandfather clause" exempting white voters from literacy tests[148] and an Arkansas amendment directing the state legislature to resist desegregation by all lawful means in the aftermath of *Brown v. Board of Education*.[149]

Such restrictions are always wounding, but they are particularly so when they occur at the constitutional level. Making distinctions among citizens based upon facets of their identity is not what American constitutions do.[150] Constitutions should affirm our commonly accepted ideals of equality and our commonly held views of personal rights. To include a negative amendment stating that certain rights do not exist under the state constitution is not only unnecessary from a legal standpoint, but it is also contrary to the spirit of American constitutionalism, which is meant to affirm the rights we do have, not to confirm those we do not.

In abandoning the process of legislative change, state constitutional enactments restrict rather than enlarge democratic freedoms. Just as many in Congress would do with the Federal Marriage Amendment, state legislators and citizens are handing over

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145. *Id.* at 51; *see also* Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967) (noting constitutional antimiscegenation provisions on the books in 1967 in Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee).

146. *See* Galie & Bopst, *supra* note 123, at 35.

147. *See* Janice C. May, *The Constitutional Initiative: A Threat to Rights?*, *in* HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING 163, 171–72 (Stanley H. Friedelbaum ed., 1988) (discussing instances in which the Supreme Court has struck down state laws that discriminated against a segment of society).

148. *See* Guinn v. United States, 238 U.S. 347, 366 (1915) (invalidating OKLA. CONST. art. III, § 4a (1910)); *see also* May, *supra* note 147, at 171–72.

149. *See* May, *supra* note 147, at 175.

150. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution . . . neither knows nor tolerates classes among citizens.").

ultimate interpretive authority to the very judges they worry may prove too activist. Even the most carefully drafted amendment will not be immune from the unpredictable process of judicial interpretation. State constitutional amendments are no exception; indeed, they are replete with ambiguous language. State judges are therefore vested with the authority, indeed the duty, to interpret such ambiguity: "marriage," "domestic union," "similar to marriage," "substantially similar to marriage," "legal rights, obligations, privileges, and immunities of marriage," "benefits of marriage," and "rights or incidents of marriage" are only a few of the phrases that must be given constitutional meaning. These are not easy questions. Yet ironically, many states are ceding by way of initiative and ballot referenda—the most democratic forms of government—the ultimate interpretation of these difficult questions to judges, the least democratic branch of government.

The spate of constitutional amendments not only thrusts state courts into the unseemly task of constitutionalizing domestic relations law, it may also invite unintended consequences. Constitutional marriage amendments have already been interpreted in ways that interfere with the ability of unmarried couples—regardless of sexual orientation—to make health care decisions and have rendered domestic violence laws unconstitutional. Ohio's constitutional amendment, for example, is relatively simple. The two-sentence amendment, at first blush, appears straightforward.[151] Yet this "straightforward" amendment has led two judges to declare portions of Ohio's Domestic Violence Act unconstitutional, and, as a result, to dismiss felony charges of abuse against unmarried (but heterosexual) males accused of battery.[152]

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151. The Ohio Constitution states,

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

OHIO CONST. art. XV, § 11.

152. *See* State v. McCaslin, No. 05 CO 44, 2006 WL 459261, at *1 (Ohio Ct. App. Feb. 21, 2006) (reversing the trial court's dismissal of a domestic violence charge and invalidation of the state domestic violence statute); State v. Burk, No. CR 462510, 2005 WL 786212, at *8 (Ohio Ct. Com. Pl. Mar., 23 2005); *see also* Phelps v. Johnson, No. DV05 305642, 2005 WL 4651081, at *1–2 (Ohio Ct. Com. Pl. Nov. 28, 2005). In April, Ohio Representative William J. Healy introduced a bill that would clarify the amendment, allowing protections for cohabitating unmarried couples. H.R. 161, 126th Gen. Assemb., Reg. Sess. (Ohio 2005). But this bill misunderstands the fundamental nature of a constitutional amendment and thus highlights the difficulty with

Many amendments, moreover, prohibit a state or its subdivisions from recognizing any "legal status" for unmarried individuals. Such language could reasonably be interpreted to prohibit public employers from providing health care benefits to unwed heterosexual couples as well as same-sex partners. Indeed, according to Michigan's Attorney General this is just what the Michigan amendment means.[153] Common law marriages are yet another institution that may be called into question by marriage amendments. In Texas, for example, a couple may register an "Informal Marriage" by filing a declaration with the county clerk. It is not too much of a stretch to view this informal arrangement as a "legal status" granted to unmarried individuals and thus prohibited under the Texas constitutional marriage amendment. Again, it will be judges who decide.

The proposed Virginia amendment brings to a head all the pitfalls of constitutionalization that I have discussed in the preceding sections. For a constitutional amendment to take effect in Virginia, the legislature must twice pass the measure and then submit it to popular referendum.[154] The Virginia amendment, which appeared on the ballot in November of 2006, reads as follows:

> That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.
>
> This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.[155]

To say that this wording is opaque is an understatement. Although the Federal Marriage Amendment poses interpretative problems with

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constitutional marriage amendments: they cannot be changed by later legislation and any attempt to redefine marriage *legislatively* is thus misguided.

153. *See* Constitutionality of City Providing Same-Sex Domestic Partnership Benefits, Op. Mich. Att'y Gen. No. 7171 (Mar. 16, 2005). The attorney general found that health care is a benefit of marriage because routinely provided to an employee's spouse. Thus, provision of those benefits to an employee's domestic partner would constitute impermissible "recognition" of "a similar union for any purpose." *Id.*

154. VA. CONST. art. XII, § 1.

155. VA. CONST. art. I, § 15-A.

the term "incidents of marriage," the Virginia amendment creates a multitude of such quandaries, including what are the "design, qualities, significance, [and] effects of marriage" and what counts as a legal status "intend[ed] to approximate" those features, as well as what are the "rights, benefits, obligations, qualities, [and] effects of marriage," and what "union[s], partnership[s], or other legal status[es]" should be outlawed for bestowing them. The amendment's scope is similarly unclear. Although it speaks ostensibly to the Commonwealth and its political subdivisions, it may reach into the private sphere, because contracts between employers and employees or between two individuals are not permitted to offend the strong public policies of the state.[156] The only certainty is that it will be left to the courts to resolve these questions, and those resolutions will be years in the making. Private companies will be left to guess in the meantime whether their employee benefit plans are even lawful.

Moreover, the amendment essentially duplicates existing Virginia statutory law, which provides that "[a] marriage between persons of the same sex is prohibited"[157] and that

> [a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.[158]

It is unclear what the proposed constitutional amendment adds to the protection of marriage afforded by this statute. If the amendment's benefit to the institution of marriage is to say the least uncertain, its impact on the institutions of government is severe. It entails a massive transfer of power to courts and effectively silences legislators who, after a sincere gesture in support of traditional marriage, will be cut

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156. *See, e.g.*, Ulloa v. QSP, Inc., 624 S.E.2d 43, 48 (Va. 2006) ("Indeed, we have remained committed to the view that parties may contract as they choose so long as what they agree to is not forbidden by law or against public policy." (quoting Coady v. Strategic Res. Inc., 515 S.E.2d 273, 275 (Va. 1997) (internal quotation marks omitted) (internal citation omitted))); *see also* 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 12:1 (Richard A. Lord ed., 4th ed. 1993) ("Illegal bargains have been classified both by the common law and in statutory enactments as those opposed to positive law, those which are contrary to morality, and those which offend public policy.").

157. VA. CODE ANN. § 20-45.2 (2004).

158. *Id.* § 20-45.3.

off from making further clarifications or emendations by any means other than another constitutional amendment. It portends a diminution of representative government in favor of repeated and protracted litigation, an odd step for a Commonwealth whose House of Burgesses was the first representative assembly in the New World.

CONCLUSION

At the beginning of this Essay, I noted that a tragedy was befalling American constitutional law. And indeed the chief casualty of the same-sex marriage debate has been the American constitutional tradition. Although electorates understandably are more concerned with results than with process, the Framers were concerned supremely with process, and that process has made possible our civility, self-governance, and greatness as a democratic nation.

I must emphasize finally the boundaries of this argument. I do not contend that same-sex marriage is a good or desirable phenomenon, only that constitutional bans on same-sex unions carry terrible costs. Partisans see only one side of profound controversy, when in fact there are two. It is not wrong for gay citizens to wish to share fully in the life of this country, to partake of its most basic and sacred institution, and to experience the intimacy, bonding, and devotion to another that only an institution such as marriage can bring. To embrace this view one need not believe that sexual infidelities will disappear, but only that many gay couples will make good on their vows and lead fuller, richer, and more productive lives as a result.

That, however, is hardly the end of the matter. Marriage between male and female is more than a matter of biological complementarity—the union of the two has been thought through the ages more mystical and profound than the separate identities of each alone. Without strong family structures, there will be no stable and healthy social order, and alternative marriage structures may weaken the sanction of law and custom necessary for human families to flourish and children to grow. These are no small risks, and present trends are not often more sound than the cumulative wisdom of the centuries.

Is it too much to ask that judges and legislatures acknowledge the difficulty of this debate by leaving it to normal democratic processes? The dangers of doing otherwise are clear. When we

politicize our basic documents of governance, we deepen exponentially the wounds of civic life.

The more passionate an issue, the less justification there often is for constitutionalizing it. Constitutions tempt those who are much too sure they are right. Certainty is, to be sure, a constant feature of our politics—some certainties endure; others are fated to be supplanted by the certainties of a succeeding age. Neither we nor the Framers can be sure which is which, but the Framers were sure that we should debate our differences in this day's time and arena. Their message is as clear today as it was at the Founding: Leave Constitutions alone!