

Policy Analysis

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Routing

The Federal Marriage Amendment Unnecessary, Anti-Federalist, and Anti-Democratic

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Executive Summary

Members of Congress have proposed a constitutional amendment preventing states from recognizing same-sex marriages. Proponents of the Federal Marriage Amendment claim that an amendment is needed immediately to prevent same-sex marriages from being forced on the nation. That fear is even more unfounded today than it was in 2004, when Congress last considered the FMA. The better view is that the policy debate on same-sex marriage should proceed in the 50 states, without being cut off by a single national policy imposed from Washington and enshrined in the Constitution.

A person who opposes same-sex marriage on policy grounds can and should also oppose a constitutional amendment foreclosing it, on grounds of federalism, confidence that opponents will prevail without an amendment, or a belief that public policy issues should only rarely be determined at the constitutional level.

There are four main arguments against the FMA. First, a constitutional amendment is unnecessary because federal and state laws, combined with the present state of the relevant constitutional doctrines, already make court-ordered nationwide same-sex marriage unlikely for the foreseeable future. An amendment banning same-sex

marriage is a solution in search of a problem.

Second, a constitutional amendment defining marriage would be a radical intrusion on the nation's founding commitment to federalism in an area traditionally reserved for state regulation, family law. There has been no showing that federalism has been unworkable in the area of family law.

Third, a constitutional amendment banning same-sex marriage would be an unprecedented form of amendment, cutting short an ongoing national debate over what privileges and benefits, if any, ought to be conferred on same-sex couples and preventing democratic processes from recognizing more individual rights.

Fourth, the amendment as proposed is constitutional overkill that reaches well beyond the stated concerns of its proponents, foreclosing not just courts but also state legislatures from recognizing same-sex marriages and perhaps other forms of legal support for same-sex relationships. Whatever one thinks of same-sex marriage as a matter of policy, no person who cares about our Constitution and public policy should support this unnecessary, radical, unprecedented, and overly broad departure from the nation's traditions and history.

A constitutional amendment defining marriage would be a radical intrusion on the nation's founding commitment to federalism.

Introduction

Members of Congress have proposed a federal constitutional amendment preventing states from recognizing same-sex marriages. As of now, a nationwide policy debate is under way on the merits of providing full marital recognition to gay couples. That debate is still in its infancy and is proceeding in a variety of ways with divergent policy choices being considered in the states. It should not be cut off by a constitutional amendment that would substantially delay or *permanently foreclose* what might otherwise turn out to be a valuable social reform. Such an amendment was not needed even two years ago when Congress last considered it, and the passage of time has further weakened the case for an amendment.

Pointing to litigation pressing for the recognition of state and federal constitutional rights to same-sex marriage, especially the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*,¹ and to the actions of various local officials around the country recognizing gay marriages,² proponents of the Federal Marriage Amendment have claimed that an amendment is needed immediately to prevent same-sex marriages from being forced on the nation. Since there is little likelihood that will happen anytime soon, this argument for an amendment fails. In addition, proponents argue that whatever role the courts may play, a single national policy on the matter is necessary to prevent the confusion and disruption that would attend divergent state outcomes. Since the legal complications arising from having different states recognize different relationships as marriages would be no greater than they have been throughout our history, during which divergent state policies on family law and other important matters have been the norm, this argument also fails. The policy debate between the contending sides should continue without one side playing the trump card of an amendment.

This paper does not make an argument for same-sex marriage on policy grounds.³ The argument here is directed entirely to whether a

constitutional amendment should dispose of the matter. Whether states *should* recognize same-sex marriages is one question. Whether they should be *permitted* to recognize same-sex marriages is a separate question. A person who opposes same-sex marriage on policy grounds can and should also oppose a constitutional amendment foreclosing it.⁴ An opponent of gay marriage might oppose a constitutional amendment for any one or combination of the following reasons: (1) he believes that federalism—the traditional, decentralized structure of American government—is the best answer to most disputes about public policy; (2) he is confident that his opposition will prevail without the need for a constitutional amendment; (3) although he opposes gay marriage, he is open to subsequent persuasion by arguments and evidence against his current view and wants public policy to remain flexible enough to adjust over time. Not every policy position one holds must be imposed forevermore on the whole nation by constitutionalizing it. For the same reasons, one who is unsure how he feels about same-sex marriage can and should oppose a constitutional amendment foreclosing it.

To summarize the four main points: First, a constitutional amendment is unnecessary because federal and state laws, combined with the present state of the relevant constitutional doctrines, already make court-ordered, nationwide same-sex marriage unlikely for the foreseeable future. Therefore, an amendment banning same-sex marriage is a solution in search of a problem. Second, a constitutional amendment defining marriage would be a radical intrusion on the nation's founding commitment to federalism in an area traditionally reserved for state regulation, family law. There has been no showing that federalism has been unworkable in the area of family law. Third, a constitutional amendment banning same-sex marriage would be an unprecedented form of amendment, cutting short an ongoing national debate over what privileges and benefits, if any, ought to be conferred on same-sex couples and preventing democratic processes from recognizing more individual rights.

Fourth, the amendment as proposed is constitutional overkill that reaches well beyond the stated concerns of its proponents, foreclosing not just courts but also state legislatures from recognizing same-sex marriages and perhaps other forms of legal support for same-sex relationships. Whatever one thinks of same-sex marriage as a matter of policy, no person who cares about our Constitution and public policy should support this unnecessary, radical, unprecedented, and overly broad departure from the nation's traditions and history.

The Proposed Federal Marriage Amendment

Several versions of a federal marriage amendment are being considered in Congress. All of the versions would, at a minimum, forbid states to recognize same-sex marriages. One version of the amendment was introduced in the House of Representatives in 2004 by Rep. Marilyn Musgrave (R-CO) as H.J. Res. 56. The Musgrave version would amend the Constitution as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or [sic] the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

In the Senate, an amendment with somewhat different language has been introduced as S.J. Res. 1. The Senate version would amend the Constitution as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

A third version of the amendment would consist solely of the first sentence of the above two amendments: "Marriage in the United States shall consist only of the union of a man and a woman."

The second sentences of the Senate version and the Musgrave version are similar but differ in three substantive respects. First, the Senate version drops the Musgrave version's reference to "state or federal law." Second, the Senate version replaces the Musgrave version's reference to "marital status" with "marriage." Third, the Senate version replaces the Musgrave version's reference to "unmarried couples or groups" with "any union other than the union of one man and one woman." Although in some respects the Senate version appears narrower than the Musgrave version, its practical effect may be nearly as sweeping.

On July 15, 2004, the Senate rejected an attempt to invoke cloture to proceed with consideration of the Senate version of the FMA. The vote was 48 in favor of cloture and 50 opposed.⁵ Under Senate rules, cloture would have required 60 votes. The FMA likewise fell short of the supermajority needed for passage in the House of Representatives on September 30, 2004, with 227 members in favor, 186 against, and 20 not voting.⁶ Ratification of an amendment under the usual procedure would require a two-thirds vote in the Senate and the House, followed by approval from three-fourths of the states.⁷

Except where necessary to distinguish among the various amendments, I will use the acronym FMA to refer to the amendments generally.

A Federal Amendment Is Unnecessary

A constitutional amendment banning same-sex marriage is unnecessary, even if one opposes same-sex marriage as a matter of policy.

The Alleged Threat from Courts and Local Officials

Advocates of the proposed FMA claim it is

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needed to prevent activist state and federal courts, at the request of gay-rights advocates, from imposing same-sex marriage on the whole country. The Senate Republican Policy Committee, in a policy position paper titled “The Threat to Marriage from the Courts,” has used this fear to urge the Senate’s consideration of an amendment. “Activist lawyers and their allies in the legal academy have devised a strategy to override public opinion and force same-sex marriage on society through pliant, activist courts,” warned the policy committee in the summer of 2003.⁸

In 2004 President George W. Bush used the specter of judicial activism and lawlessness on the part of local officials to justify his support of a federal amendment. In the aftermath of the Massachusetts high court decision and the sporadic actions of local officials, including San Francisco mayor Gavin Newsom, recognizing gay marriages, Bush announced his support for a constitutional amendment. “After more than two centuries of American jurisprudence and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization,” Bush said on February 24, 2004.⁹ “If we’re to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America.” Bush also warned of unspecified “serious consequences throughout the country” if a city or state recognized gay marriages even in its own jurisdiction.

Thus, argue proponents of an amendment, the matter will be decided at the national level whether we enact an amendment or not: either activist courts and local officials will foist same-sex marriage on an unwilling nation, they claim, or the people will “protect” marriage by enacting a constitutional amendment establishing the definition of marriage as the union of one man and one woman.

The “threat” from courts is more imagined than real. At the state level, while advocates of gay marriage may win some battles in state court litigation, they will lose many others. So far, same-sex marriage has been recog-

nized in only 1 of the 50 states as the result of court order. In any event, as we shall see, state court activism and disregard of state definitions of marriage by local officials are phenomena the states are well equipped to handle without federal interference. Even where a state court orders same-sex marriage in its jurisdiction, that should be a matter for a state to resolve internally, through its own governmental and constitutional processes, as the states have so far done. There is no particular reason to believe New Yorkers will think of judicial “activism” the same way Iowans do. At the federal level, as we shall see, given the present state of the relevant constitutional doctrines, courts are unlikely to impose gay marriage on the entire nation for at least the foreseeable future. Certainly, no federal court has yet done so. Warnings about judicial activism on this issue, while fashionable, are premature and overblown.

Forty-five states have explicitly declared same-sex marriages contrary to their own public policy, barring recognition of same-sex marriages under state statutes or state constitutions.¹⁰ The 1996 Defense of Marriage Act bars recognition of such marriages for federal purposes.¹¹ It is unlikely that courts will impose immediate, nationwide gay marriage contrary to this powerfully expressed legislative and popular will.

Neither federal nor state courts are likely to order same-sex marriage under the traditional interpretation of the Constitution’s Full Faith and Credit Clause. Nor, for the foreseeable future, are courts likely to mandate same-sex marriage under substantive federal constitutional doctrines, such as the Fourteenth Amendment’s Due Process Clause or the Equal Protection Clause. Supporters of a federal amendment have made much of the fact that same-sex marriage lawsuits are pending in several states. Anyone with a printer and enough money for a filing fee can file a lawsuit, of course, and advocates of gay marriage are likely to continue to do so.¹² But winning is a very different matter. This paper will now address each of the above points in greater detail.¹³

Substantive State Constitutional Law, the Role of Local Officials, and the National Effect of Individual State Recognition of Same-Sex Marriages

Going back to the early 1970s, in cases challenging state marriage laws under substantive doctrines of state constitutions, such as state constitutional equal rights provisions, most state courts have rejected arguments for same-sex marriage.¹⁴ Since *Goodridge*, no state supreme court has definitively addressed the same-sex marriage issue. While advocates of same-sex marriage have won in three state trial courts since *Goodridge*, they have not won in a single state appellate court and have lost in most state trial courts.¹⁵ Although it is still early, *Goodridge* has not resulted in the deluge of successful state court litigation for same-sex marriage predicted by supporters of the FMA.

The strong resistance of state courts to same-sex marriage should not be surprising since 87 percent of all state court judges are subject to some form of election.¹⁶ Thus, state courts are accountable to a public that in most jurisdictions still opposes same-sex marriage by fairly large margins. Public opposition has been strongly reinforced by the passage of constitutional amendments banning gay marriage in several states, all by wide margins. This public resistance will likely make most state courts even more reluctant than federal courts to order the recognition of same-sex marriages.

On the three occasions prior to *Goodridge* that state courts moved to order the recognition of same-sex marriage in their states under their own substantive state constitutional doctrines—in Alaska, Hawaii, and Vermont—the democratic processes in those states immediately dealt with the issue by preventing the imposition of full-fledged gay marriage. In Hawaii, for example, the state legislature and the people themselves voted to amend their own constitution to confine decisions about the definition of marriage to the state legislature.¹⁷ In Vermont, the state legislature created a system of civil unions that extends the benefits and responsibilities of marriage (under state law only) to same-sex couples but reserves marriage itself for opposite-sex couples.¹⁸

In Massachusetts, the state legislature has been considering a state constitutional amendment to reverse *Goodridge*.¹⁹ There is no reason to believe that the citizens of Massachusetts or any other state are incapable of dealing with their own courts if they choose to do so. Historically, the states themselves have been trusted to rein in the activism of their state courts. The states certainly have the power to do so, whether or not they choose to use it. Voters in 18 states so far have decided to amend their state constitutions to ban the recognition of same-sex marriages. Constitutional amendments will be considered in several more states in the near future. The states have not previously asked for, or received, the assistance of federal authorities to deal with their own state courts, state statutes, or state constitutions.

It is true that some state constitutional amendment procedures, as in Massachusetts, are time-consuming and cumbersome. This makes it possible that, in the interim between a state court decision ordering the recognition of same-sex marriages and a state constitutional amendment reversing that decision, same-sex marriages will be recognized in an individual state. Yet this lag between judicial action and democratic response is familiar in all states where state constitutional amendment procedures are time-consuming and cumbersome. These states, too, have always been trusted to handle their own courts and constitutions. There is no reason to believe that the temporary recognition of same-sex marriages in a state presents such a special and immediate danger to the nation that it can be handled only by a federal constitutional amendment.²⁰

Even where a state supreme court orders the recognition of full-fledged, same-sex marriage in a state, the ruling is limited in its reach to the state itself. A state court ruling favoring same-sex marriage could not require other states to recognize such marriages. That could be accomplished only by additional hypothetical rulings by courts of last resort in other states requiring their own jurisdictions to recognize such marriages. A pro-gay-mar-

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riage ruling, as in Massachusetts, would likely be based on the state, not the federal, constitution. The immediate legal effect of the decision would be confined to the state itself.

Could a pro-gay-marriage ruling in a state affect the outcomes of such litigation in other states by influencing other state courts' substantive interpretations of their own constitutions?²¹ Certainly such a ruling would not bind other states' interpretations of their own state constitutions. Although courts in sister states might regard the pro-gay-marriage ruling as persuasive authority in the interpretation of their own state constitutions, they would also have a much larger body of contrary authority from other states to follow. The lone state or few states to recognize same-sex marriages will hold the minority view for a very long time. As noted above, judges in most state courts are both accountable to the state's voters and reversible by democratic processes. Both of those factors will likely make them reluctant, as they historically have been, to impose gay marriage even in their jurisdictions. As discussed above, very few state trial courts have followed the lead of Massachusetts; most state courts have rejected challenges to state marriage laws since *Goodridge*.

The threat of "lawlessness" on the part of local officials is even more remote. In each of the few locales where same-sex marriages were performed in February and March 2004, those marriages were soon halted by the officials themselves, by higher state officials, or by state courts. Although more than 4,000 same-sex marriages were performed in San Francisco last February, for example, the California Supreme Court subsequently nullified them, holding that the mayor did not have the power to order marriage licenses issued to gay couples in defiance of state law.²² A state court also put a stop to the issuance of marriage licenses to same-sex couples by officials in Multnomah County, Oregon.²³ After a brief flurry of actions by local officials recognizing gay marriages early in 2004, they have now stopped. The use of these isolated and now defunct local actions to justify a federal marriage amendment has

been a particular embarrassment to FMA supporters.

Even if and when individual states recognize same-sex marriages, while other states refuse to recognize them, there is no reason to believe these discordant approaches will create insurmountable legal or public policy problems. There is no uniform national family law, just as there is no uniform national property law or criminal code. Throughout the nation's history, states have adopted their own family law policies, including their own requirements for marriage. These divergent policies have not created intolerable levels of confusion or conflict among the states.

There is no reason to believe that the difficulties that may occasionally arise from diverse state policies on same-sex marriage will be any more intractable for state courts and other officials than they have been for other diverse family and marriage law policies. The existence of same-sex marriages will call for courts in sister states to respect the particular judgments of other state courts, as in child custody and property disputes between same-sex partners who divorce. But that does not mean that same-sex marriage will spread from state to state; it merely ensures legal regularity and predictability with respect to particular disputes between spouses.

Although respecting the power of the states to determine their own policies on matters as fundamental as property, criminal, and family law means there is a lack of uniformity in these areas, the corresponding benefits of state experimentation and local control have always been regarded as overwhelmingly compensating advantages of our federal system.

In any event, if FMA supporters are correct that the amendment (in any of its forms) would permit state legislatures and Congress to recognize civil unions or domestic partnerships granting some or all marital benefits to same-sex partners, the FMA will not solve the "problem" of discordant laws across the nation. After all, same-sex couples with a "domestic partner" or "civil union" license in their home state will move to new states. In

their new states, they will become embroiled in contract, property, tort, and custody disputes that will have to be addressed in their new state's (and in federal) courts. Those courts will reach varying results, with some recognizing and others not recognizing the "civil union" or "domestic partnership." The upshot will be the same sort of "confusion and chaos" that supporters of the FMA claim to fear from divergent state marriage policies.²⁴ This sort of confusion and chaos, however, has for more than two centuries operated under a more kindly description: federalism.

Federal Constitutional Doctrines

The Full Faith and Credit Clause

Supporters of the FMA argue that if a state court imposes same-sex marriage on a state, then courts in other states or federal courts might require states in their jurisdictions to recognize such marriages under the Constitution's Full Faith and Credit Clause (FFCC) of Art. IV, Sec. 1.²⁵ This fear is hypothetical and exaggerated. As a nation, we have addressed this issue. In 1996, in reaction to litigation for same-sex marriage in Hawaii, Congress passed, and President Bill Clinton signed, the Defense of Marriage Act. DOMA defines marriage as the union of one man and one woman for purposes of federal law, such as entitlement to Social Security benefits and federal taxation.²⁶ DOMA also provides that states may refuse to recognize same-sex marriages performed elsewhere.²⁷ A state court decision recognizing same-sex marriages in a given state does not by itself make DOMA invalid. No federal or state court has held DOMA unconstitutional; so far, in the aftermath of *Goodridge*, the only federal courts to examine the matter have upheld DOMA.²⁸

Let's examine the particulars of the FFCC fear. Supporters of a constitutional amendment warn that Adam and Steve, or Sue and Ellen, will go to a state that has just recognized same-sex marriages, get married there, and then return to their home state demanding recognition of their union under the FFCC. By this method, supporters conjecture, gay marriage would gradually sweep the nation.²⁹

However, the FFCC has never been interpreted to mean that every state must recognize every marriage performed in every other state.³⁰ It is true that, under the place-of-celebration rule, states usually recognize the validity of marriages performed in other states. But each state also reserves the right to refuse to recognize a marriage performed in another state—or performed in a foreign country, such as Canada—if that marriage would violate the state's public policy.³¹ Under this public policy exception to the general rule of recognition, states will generally overlook small or technical differences in the marriage laws of other states. For example, the fact that a marriage was witnessed by only two people (as required in a sister state), instead of three (as required in the home state) would not usually prevent recognition of a marriage validly performed in the sister state.

But under the public policy exception, states do not ordinarily overlook major differences in the marriage laws of foreign jurisdictions. For example, under longstanding principles, states are not required to recognize a marriage they deem incestuous, even if that marriage was valid in the state where it was performed.³² The Supreme Court has never suggested that this practice is invalid under the FFCC.

Forty-five states have already declared by statute or state constitution, or both, that it is their public policy not to recognize same-sex marriages.³³ Even in the four states without gay marriage, state policy may be adequately declared on the issue to allow those states to refuse to recognize same-sex marriages from a foreign jurisdiction. In that sense, DOMA and the 45 "little DOMAs" passed by the states are probably redundant, a form of added insurance against the recognition of same-sex marriage by activist judges. Even former Republican congressman Bob Barr, who opposes same-sex marriage and was the main author of DOMA, has argued that DOMA is more than adequate to prevent the imposition of nationwide same-sex marriage.³⁴

Under the traditional understanding of the FFCC and choice-of-law principles, then, it is doubtful that state or federal courts would

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require states to recognize same-sex marriages performed elsewhere.³⁵ This does not mean, of course, that litigants might not be able to find a state or federal court judge willing to do so. But it does mean that the chances of having such a ruling withstand appellate review are slim. In fact, in the first attempt of a married gay couple from Massachusetts to have their marriage recognized in their new home state, DOMA was upheld against precisely this FFCC challenge.³⁶

Substantive Federal Constitutional Doctrines

It is also unlikely that the Supreme Court or the federal appellate courts, for the foreseeable future, would declare a constitutional right to same-sex marriage under present understandings of substantive doctrines arising from the Fourteenth Amendment's Due Process Clause or the Equal Protection Clause. No federal or state appellate court, to date, has declared such a right under any substantive federal constitutional doctrine. Thus, once again, we are dealing with a purely hypothetical fear of a possible future ruling by a court of last resort.

The Due Process Clause. *Lawrence v. Texas*,³⁷ the 2003 Supreme Court decision using the Due Process Clause to strike down Texas's law criminalizing homosexual sex, has been transformed by some popular media and by FMA supporters into a pro-gay-marriage decision. It is not that. In *Lawrence*, the Court emphasized that the Texas law violated the right to liberty insofar as it intruded on private sexual relations between adults in the home.³⁸ The interest involved was the liberty to avoid state intrusion into the bedroom via criminal law. It did not involve the liberty to seek official state recognition of the sexual relation, along with all the benefits state recognition entails.³⁹ *Lawrence* involved the most private of acts (sexual conduct) in the most private of places (the home); marriage is widely understood to be a public institution freighted with public meaning and significance.

The Court noted explicitly that it was not dealing with a claim for formal state recognition of same-sex relationships. Especially in

light of Justice Scalia's fretting that same-sex marriage may soon be the child of *Lawrence*,⁴⁰ these qualifications signal a Court that seems very unlikely even to address the issue in the near future, much less take the bold step of ordering nationwide recognition of same-sex marriage.

Judicial decisions since *Lawrence* have interpreted it to have a very limited reach. The Eleventh Circuit, for example, held in 2004 that *Lawrence* did not render unconstitutional a Florida law that barred homosexuals from adopting children.⁴¹ Whether or not such decisions are correct in their application of *Lawrence*, they do signal that federal courts have been very cautious in its wake. There is simply no ground to believe that they will use *Lawrence* as the progenitor of gay marriage any time in the foreseeable future.

A separate argument could be made that same-sex marriage is protected by the fundamental right to marry—also protected by the Due Process Clause.⁴² But, again, regardless of the merits of such a claim, since no federal court has yet accepted an argument that the fundamental right to marry extends to gay couples, the possibility of a future ruling on this basis is purely hypothetical and in any event unlikely for the prudential reasons discussed below.

The Equal Protection Clause. The Equal Protection Clause hardly seems more promising in the near term for advocates of gay marriage. The only justice in *Lawrence* to embrace this seemingly more gay-marriage-friendly argument, Justice O'Connor, made clear her unwillingness to take the doctrine that far,⁴³ and has since retired from the Court.

Romer v. Evans,⁴⁴ sometimes cited as an example of judicial activism that might lead to gay marriage, has not had much generative force in fighting legal discrimination against gay people. That may be because of the unprecedented nature of the law the Court confronted in *Evans*: a state constitutional amendment that (1) targeted a single class of people (homosexuals) and (2) sweepingly denied them all civil rights protections in every area of life, from employment to housing to education.

Because the law was so overly broad, the narrow justifications the state offered could not sustain it, leaving only impermissible animus as a motivating force behind the law.⁴⁵ *Evans* was one of the few times in the Court's history when a law failed the lowest level of constitutional scrutiny, the rational basis test.

Unless the Court were to apply strict scrutiny to laws that fence out gay couples from marriage, a step neither it nor any federal court has taken, states will need to show only a rational basis for their marriage laws. This test requires the state to show only that the law is rationally related to a legitimate governmental end. That is not a difficult task. Thus, there is little reason to believe a court would strike down all state marriage laws or DOMA on equal protection grounds, at least given the present state of that doctrine. Certainly, no court has yet done so.

The Exaggerated Fear of a Threat from the Courts

Aside from the merits of a constitutional claim for same-sex marriage, it is unlikely for practical and historical reasons that the Court would impose it on the nation in the near future. The Court rarely strays far or long from a national consensus on any given issue.⁴⁶ When it does, it risks its own institutional standing and credibility. *Lawrence* is no exception to this rule since sodomy laws existed only in a minority of states (13 of 50), were rarely enforced, and were opposed by most Americans at the time the Court struck them down.

By contrast, only one state has recognized same-sex marriages, and laws limiting marriage to opposite-sex couples enjoy broad popular support in most states and nationwide. If the Court were to order same-sex marriage, whether under the FFCC or a substantive constitutional doctrine, it would be opposing almost the entire country. I cannot think of another time the Court has done that in modern times, with the instructive and chastening exception of *Roe v. Wade*.⁴⁷ The stark fact remains that no federal court, at any level, has ordered the recognition of same-sex marriages or declared DOMA unconstitutional.

It is possible that a federal district court could declare DOMA unconstitutional or hold a state ban on same-sex marriage unconstitutional. Such a ruling would be of no consequence, however, since it would be immediately reviewed by the governing appellate court. It is also possible, though very unlikely for the foreseeable future, that such future litigants could find a panel of an appellate court somewhere that would declare DOMA unconstitutional or hold a state ban on same-sex marriage unconstitutional. Such a ruling would also be of little consequence, however, since it would be reviewed *en banc* or by the Supreme Court, or both. As noted above, given the present state of the relevant constitutional doctrines and the usual reluctance of the Supreme Court to oppose a large national consensus on an important social issue, it is extremely unlikely that the Court would allow such a hypothetical future appellate court ruling to stand. The likelihood is that the Supreme Court would use one of a number of the procedural techniques available to it to dismiss the claim, without even reaching the merits of the issue.⁴⁸

In short, the fear of court-imposed, nationwide gay marriage is exaggerated and hypothetical. To amend the Constitution now to prevent it would be to do so on the basis of fear of a future, hypothetical adverse decision by the Supreme Court. Proponents of the FMA are asking the nation to amend the Constitution preemptively, something we have never before done.

The Constitution is the nation's founding blueprint. We should not trifle with it. There have been more than 11,000 proposed constitutional amendments, all supported by advocates who no doubt sincerely believed that their causes required immediate constitutional support in order to save the Republic. Yet leaving out the extraordinary founding period that produced the 10 amendments known as the Bill of Rights and the extraordinary post-Civil War period that produced three amendments, we have amended the Constitution only 14 times in more than two centuries. In contrast to the present move to amend the Constitution in anticipation of possible adverse court rulings

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sometime in the future, the Framers believed the amendment process should be reserved “for certain great and extraordinary occasions.”⁴⁹

The Constitution should not be tampered with to deal with hypothetical questions as if it were part of a national law school classroom. It should be altered only to deal with some clear and present problem that cannot be addressed in any other way. We are nowhere near that point on the subject of same-sex marriage. The “problem” of nationwide same-sex marriage is neither clear nor present. At the very least, we should wait until an issue calling for a national solution actually arises before we address it by changing the Constitution.

A Federal Amendment Intrudes on Federalism

A constitutional amendment would be a radical intrusion on federalism. From the founding of the nation, our federal system has been designed such that the federal government has limited and enumerated powers and the state governments have residual powers. The states have been free to legislate on all matters not reserved for federal authority (such as interstate commerce) or for the people. State power has been limited only insofar as necessary to protect nationhood, the national economy, and individual rights. The basic constitutional design was best explained by James Madison in *Federalist* no. 45:

The powers delegated by the proposed Constitution are few and defined. Those which are to remain to the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and in the internal order, improvement and prosperity of the State.⁵⁰

The nation’s commitment to federalism is enshrined in the Constitution’s enumeration of congressional powers in Article I and in the reservation of other powers to the states or the people in the Tenth Amendment. Specifically, states have traditionally controlled the content of family law, including the definition of marriage, in their own jurisdictions. Though federal law has recognized marriages validly performed in the states, there has never been a national definition of marriage independently imposed on all the states by Congress or federal courts.

Concern over preserving the traditional authority of the states has been a central theme of the Supreme Court’s recent jurisprudence. In its recent Commerce Clause cases, the Court has emphasized the need for limits on federal power in the interest of preserving states’ domain over areas like criminal law and family law.⁵¹ Those decisions upholding the role of the states were supported by the Court’s most conservative justices: Chief Justice William Rehnquist and Justices Clarence Thomas and Antonin Scalia.

Federalism is not valuable simply as an abstract or dusty tradition. It has a couple of practical benefits especially relevant to the debate over a federal marriage amendment. First, it allows incremental innovation in public policy. Second, it maximizes individual choice and liberty by allowing citizens to live in states that most closely suit their preferences. Let’s examine each of these benefits in more detail.

First, federalism has served the country well insofar as it has allowed the states to experiment with public policies, to determine whether those policies work or need to be amended, and then to follow or to decline to follow the example of other states. Acting as laboratories of social change, the states have been responsible for some of the most important innovations in American law. Those innovations have included allowing women to vote, setting maximum hours for working, adopting minimum wage requirements, and prohibiting child labor. To some observers, those state-initiated policies undoubtedly

created the appearance of “confusion and chaos”; to others, they illustrated the principle that the people of the states should be permitted to govern themselves with minimal federal intrusion.

Repudiating that long history, the FMA would impose on the states a single, nationwide definition of marriage. It would prohibit state courts or even state legislatures from authorizing same-sex marriages. The supporters of the FMA freely acknowledge that much. But in addition, it would tell states how to interpret their own state constitutions and state statutes by prohibiting them from “construing” their own laws so as to permit same-sex marriages or to grant marriage-like benefits to same-sex couples. Although state legislatures might be free to adopt “marriage-lite” institutions like domestic partnerships or civil unions that accord some of the benefits of marriage to same-sex couples, those laws might be practically unenforceable in state courts. State courts, asked to referee a dispute between the couple and the state over whether they qualified for benefits under a domestic partnership law, would be prohibited by the Musgrave and Senate versions of the FMA from “construing” the law to grant “the legal incidents [of marriage]” to the couple. Purporting to “protect” the states from gay marriage, the FMA tramples their historic prerogative to set family policy.

Yet federalism is working on this subject. All over the nation cities and states are debating whether to grant some form of legal recognition to same-sex couples. States and localities are trying a variety of approaches, from complete nonrecognition to recognizing domestic partnerships that grant some benefits to recognizing civil unions that grant all of the benefits of marriage itself. California, for example, has legislatively recognized domestic partnerships that include many of the benefits and protections of marriage.⁵² Connecticut has legislatively created civil unions that grant same-sex couples all of the “legal incidents” of marriage.⁵³ These experiments test whether encouraging stable same-sex unions through some formal legal recognition and support is, on balance, a good or a bad thing. Under fed-

eralism, states have the opportunity to see whether such recognition truly has the ill effects predicted by opponents.

Second, federalism maximizes individual choice and liberty. By allowing states to make different policy choices, we leave open the possibility that citizens can move to states where public policy best reflects their preferences and values. A citizen who highly values low taxes may choose to live in Mississippi, which spends relatively little on public education. But a citizen who highly values a strong system of public education may choose to live in Minnesota, a high-tax state that spends proportionately much more than Mississippi on education. A citizen of Massachusetts who strongly opposes gay marriage can also move to Mississippi, for example, where a large proportion of the population shares the anti-gay-marriage perspective. A proponent of gay marriage living in Mississippi can move to a state with a more hospitable public policy environment, such as California, Connecticut, or Massachusetts. A nationally imposed definition of marriage, by contrast, forecloses this opt-out choice by erasing individual state differences.

Beyond the issue of choice, there is a related point to be made about the role of federalism in maximizing liberty. A constitutional ban on gay marriage *decreases* the liberty of some citizens who want to marry—same-sex couples—and who would otherwise be able to marry in some states. Yet, at the same time, a constitutional ban does not *increase* the liberty of anyone. The result of anti-federalism on the marriage issue is a net loss of liberty. By contrast, allowing states to choose to recognize same-sex marriages *increases* the liberty of citizens who want to enter such marriages without *decreasing* the liberty of those who do not want to enter such marriages. The result of federalism on the marriage issue is a net increase of liberty. Individual liberty is not the only value in our national heritage, and it can be outweighed by other considerations, but liberty is surely a very important and traditional part of our constitutional and political order. An approach that takes liberty from some without increasing it for others,

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as a federal marriage amendment would do, starts the debate with a strike against it.

It is true that there have been limited historical exceptions to the general rule that states control their own family law, including the definition of marriage. State power to define marriage is not plenary; there are a few narrowly confined constitutional limits. The Supreme Court decided in *Loving v. Virginia*,⁵⁴ for example, that a state anti-miscegenation law was unconstitutional. That decision was grounded in two parts of the Fourteenth Amendment that explicitly restrain state power: the fundamental right to marry protected by the Due Process Clause and the anti-racist principles of the Equal Protection Clause. The decision altered state law to uphold individual rights and to make the institution of marriage more inclusive, not to derogate individual rights and to make marriage more exclusive. The decision was thus distinct in substance and spirit from the FMA.⁵⁵

There has been only one congressional limit placed on the ability of a state to define marriage for itself. In the 19th century, Congress required Utah and a few other states to relinquish polygamy as a condition for entering the union. Yet in so doing, Congress was exercising its existing constitutional power to admit new states, an issue not present in the FMA context. Further, Congress did not attempt to limit other states' ability to recognize plural marriages. It was not imposing a single definition of marriage on all states via the Constitution. The fact that there has been only one such very limited congressional attempt to override a state's definition of marriage in more than 200 years suggests how deeply rooted respect for state power in this area is. In short, there is simply no precedent for amending the Constitution to intrude on states' structural constitutional power to determine their own definitions of marriage.

Federalism is not an inexorable command. First, Congress may set national policy on matters within its constitutional powers, even at the expense of states that dislike the national policy. Second, the federal government, including all three of its branches, has a role in ensuring that the states respect constitutional

rights. But neither of these important exceptions to federalism applies to an amendment banning same-sex marriage.

Conservatives, including many who publicly oppose gay marriage as a matter of public policy, have been especially troubled by the anti-federalism consequences of a federal marriage amendment. Vice President Cheney, publicly disagreeing with President Bush, has argued that states should decide the issue of same-sex marriage for themselves.⁵⁶ Many other prominent American conservatives—including Bob Barr,⁵⁷ former representative Chris Cox (R-CA),⁵⁸ and legal affairs writer Bruce Fein⁵⁹—oppose the FMA on federalism grounds. Under federalism principles, this is not an area where federal policy needs to intrude.

A Federal Amendment Would Be Unusually Anti-Democratic

A constitutional amendment would be peculiarly anti-democratic, the first of its kind in the nation's history. At first, this claim is counterintuitive. To be adopted using the usual procedure, an amendment would be "superdemocratic" in the sense that it requires two-thirds approval of both houses of Congress and the approval of three-fourths of the states. But even though an amendment requires a supermajority in Congress and among the states, it has three anti-democratic effects that should be considered. The first two are common to all constitutional amendments; the third is peculiar to the FMA. The anti-democratic effects of all constitutional amendments are reason enough to be very cautious in adopting them, but the FMA magnifies democratic concerns.

First, any amendment is anti-democratic as to the states that refuse to ratify it. There could be as many as 12 states, perhaps among them our most populous, such as California, New York, New Jersey, and Massachusetts, that would be stripped by the actions of the Congress and the 38 ratifying states of their traditional power to decide the issue democratically.⁶⁰

Second, an amendment would bar the people of all the states, even those states that had approved the amendment, from ever reconsidering the issue democratically (except through another federal constitutional amendment). Under the present system, states may opt for one policy choice now but are free to revise their own choice at a later date on the basis of new knowledge, arguments, and experience. The FMA would preclude that normal democratic process, binding the people of the states forever to an earlier decision made by an earlier generation lacking their experience.

Finally, the proposed FMA would be “peculiarly” anti-democratic, that is, anti-democratic in a way that no other amendment has ever been. It would be the first time we amended the Constitution to limit states’ ability to decide democratically to *expand* rights and to *include* more people in the fabric of national life. Up to now, the constitutional constraints on democratic processes have been designed to limit states’ ability to *diminish* rights and to *exclude* people from national life. Rather than setting a *constitutional floor* on rights and inclusion, for the first time in our history the FMA would set a *constitutional ceiling* on them.⁶¹

The FMA would thus be a significant and needless departure from our legal history and traditions. A constitutional amendment would have the effect of allowing the people of some states to order the people of other states not to experiment with their own state family law. The people of the states, traditionally free to act either through popular initiative or through their own state legislatures, would lose their right to consider the issue of same-sex marriage (and, as a practical matter, perhaps even domestic partnerships or civil unions). Their family law would be frozen by the will of people in other states or, alternatively, by the will of people in their own state from an earlier generation.

Further, domestic partnership laws and civil unions in states and localities across the country might be effectively repealed. Democratic outcomes would be reversed. Public debate through normal democratic processes would be cut short. As conservative legal scholar Bruce

Fein wrote in the *Washington Times*:

The amendment would enervate self-government. . . . Simple majority rule fluctuating in accord with popular opinion is the strong presumption of democracies. But that presumption and its purposes would be defeated by the constitutional rigidity and finality of a no-same-sex-marriage amendment.⁶²

Of course, in certain areas democratic experimentation should be limited, by constitutional provisions if necessary. States should not be free, for example, to experiment with racial segregation or with denying women the right to vote. But such limitations on the democratic process should be imposed, and historically have been imposed, only to vindicate individual rights, not to deny individual rights. As discussed above, limitations on democratic decisionmaking have heretofore been imposed only to broaden the stake that individuals and groups have in our nation, not to fence them out.

Moreover, although proponents of the FMA are no doubt sincere in their defense of traditional marriage, the FMA may be largely a cynical way to defend it. As the Senate leaders supporting an amendment have acknowledged, popular opposition to gay marriage is gradually waning.⁶³ There was a “stronger societal consensus [against same-sex marriage] at the time” Congress passed DOMA in 1996 than there is today.⁶⁴ If present trends in popular opinion continue, that consensus will be even weaker in the future. In general, time has not been on the side of those who oppose equal civil rights for gays. The FMA appears to be an effort by opponents of same-sex marriage to set in constitutional cement their current advantage in popular opinion before they lose that advantage. Though they claim primarily to fear the courts, and not popular opinion, it appears to be the people themselves they fear. The people simply cannot be trusted, on this view, to adhere to the “right” position in the future. To the extent such considerations lie behind the drive to pass a mar-

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riage amendment, the FMA reflects a deeply anti-democratic impulse, a fundamental distrust of normal political processes.

The Proposed Federal Amendment Is Overly Broad

The FMA is constitutional overkill. If the fear prompting serious consideration of the FMA is that a state court decision in favor of same-sex marriage might be leveraged onto other states via Full Faith and Credit Clause principles, the FMA is an overreaction. As discussed above, it would do far more than prohibit such impositions via the FFCC. If the fear is that courts will impose same-sex marriage on the country through the Equal Protection Clause or the Due Process Clause, that fear is exaggerated and hypothetical.

But even if I have been wrong about the likelihood of a court-led marriage revolution, the FMA is not a carefully tailored response to that problem. A much narrower amendment, dealing only with courts' role in deciding the particular question of same-sex marriage, could be proposed. Even such a narrower amendment would be unnecessary to prevent the imposition of court-ordered nationwide same-sex marriage for the foreseeable future. But at least it would not amount, as the FMA does, to killing a gnat with a sledgehammer.

The Senate version of the FMA, which has been promoted as a narrower amendment allowing state legislatures to recognize civil unions and domestic partnerships, corrects none of the problems of the Musgrave version on which it is based. Like the Musgrave version, it is unnecessary, is an unprecedented intrusion on our nation's historic commitment to federalism, is unlike any other constitutional amendment in that it limits the ability of the democratic process to expand individual rights, and is overly broad as a remedy for its proponents' stated concerns about judicial activism. I laid out the arguments supporting each of these points above and will not repeat them in detail here.

The Overbreadth of All Proposed Versions of the FMA

All proposed versions of the FMA would forever prohibit the democratic recognition of same-sex marriages. Since marriage shall consist "only of the union of a man and a woman," no state legislature will be free to authorize same-sex marriages. Similarly, the people of a state will be prohibited from recognizing same-sex marriages through initiative. Further, no state could amend its own constitution to provide for the recognition of same-sex marriages. Normal democratic politics would simply be shut down on this issue.

All proposed versions of the FMA would be unprecedented intrusions on the historic power of the states to define marriage. They would also intrude on the historic power of state courts to interpret their own state constitutions. Those powers have been basic components of our system of federalism since the founding period. Nothing in any of the proposed versions eliminates those affronts to federalism.

If the fear prompting the push for an amendment is that judges will require states to recognize same-sex marriages, all of the proposed versions of the FMA are overly broad responses to that concern. As noted above, they would not only prevent *judges* from ordering the recognition of same-sex marriages, they would also prevent *legislatures* and *popular majorities* from authorizing them.

All of the proposed versions of the FMA might also call into question legislatively enacted civil unions and broad domestic partnership laws. Civil unions, which (in Vermont and Connecticut) grant to same-sex couples all of the privileges and rights of marriage under a different name, might be prohibited by all pending versions of the FMA, which strictly limit marriage to opposite-sex couples. Once the amendment in any of its forms is ratified, opponents of civil unions can be expected to argue that legislatures cannot circumvent the substance of the amendment by giving same-sex couples everything marriage confers under a different title. Consider an analogy. If a state were forbidden to maintain a "navy," it could

not avoid that prohibition simply by the ruse of calling its fleet an “armada” instead of a “navy.”⁶⁵ Similarly, a person could not be convicted of treason on the testimony of one witness, rather than the constitutionally required two witnesses, simply by calling the same offense “Schmeason.” Even some drafters of the FMA have argued that the limitation of “marriage” to “a man and a woman” prohibits both same-sex marriage and civil unions.⁶⁶ Since the first sentences of all versions of the proposed FMA are substantively identical, any of them might be held to prohibit legislatively created civil unions.

While it is not a foregone conclusion that the first sentence of the various versions will prohibit the legislative enactment of civil unions and domestic partnerships, there will certainly be a reasonable constitutional argument to that effect. If the purpose of the second sentence in the Senate version is to make it clear that legislatures (but not courts or executives) may grant same-sex couples “the legal incidents” of marriage, it does not clearly accomplish that goal. Why not make legislative power over civil unions and domestic partnerships explicit rather than a negative implication?

Moreover, this very uncertainty about the constitutionality of civil unions and domestic partnerships will be used in state legislatures as an argument against creating them to begin with. State legislators will be wary of acting in an unconstitutional fashion and will be especially wary of creating a status full of entitlements and responsibilities for same-sex couples only to have that status stripped away in subsequent litigation. Thus, even if the revised amendment is ultimately interpreted to allow the legislative creation of civil unions and domestic partnerships, it will have delayed and deformed democratic debate on the issue.

All versions of the FMA suffer another potential overbreadth problem. Almost every provision in our Constitution contains a state action requirement. (The only relevant exception is the Thirteenth Amendment, which forbids slavery.) Yet there is no explicit state action element in any of the pending versions

of the FMA. For example, there is nothing akin to “*Neither the United States nor any State shall recognize any marriage other than the union of one man and one woman.*” On its face, the FMA appears to forbid both public and private recognition of same-sex marriages. At the extreme, it could be interpreted to prohibit religious denominations from recognizing same-sex marriages, as some now do. More likely, it could be interpreted to prohibit private employers from making benefits available on an equal basis to married employees and employees with same-sex partners. At the very least, it could be interpreted to prohibit courts from deciding disputes over private benefits accorded same-sex couples because to do so might mean granting same-sex couples “the legal incidents” of marriage.

The application of the FMA to private action is not an inevitable interpretation; supporters deny that they intend such an interpretation. But their intent will not decide the issue when it reaches federal courts; the text of the amendment itself will be the main basis for any decision. The issue will have to be litigated, and the uncertainty thus created may delay or completely prevent the adoption of private-employer domestic partnership policies.

Other difficult issues, such as the definition of “the legal incidents” of marriage, will also generate considerable litigation. Up to now, these matters have been left largely to the states. Now federal judges will be called upon to decide them. It is ironic that an amendment designed to avoid judicial activism in family law will invite much more of it.

Particular Overbreadth Problems with the Senate Version of the FMA

Sponsors of the Senate version claim that it clarifies their intention to allow state legislatures to authorize “civil unions” and “domestic partnerships.”⁶⁷ That, however, is not clear in the Senate version, which nowhere actually states that intention. By striking the reference to “federal or state law” contained in the Musgrave version, the second sentence of the Senate version seems to leave more room for the statutory recognition of civil unions and

If the purpose of the second sentence in the Senate version is to make it clear that legislatures (but not courts or executives) may grant same-sex couples “the legal incidents” of marriage, it does not clearly accomplish that goal.

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domestic partnerships than does its parallel in the Musgrave version. But the new language by no means solves the problem.

The second sentence of the Senate version provides that neither the federal constitution nor any state constitution “shall be construed to require that” the “legal incidents” of marriage be given to same-sex couples. Under this language, any legislatively created domestic partnership law or civil union law that confers marriagelike benefits on same-sex couples may be effectively immune from state and federal constitutional scrutiny. For example, a civil union or domestic partnership statute might itself make invidious or irrational distinctions among same-sex couples by giving some same-sex couples more benefits than others or by shutting some same-sex couples out of the statute altogether. Or a civil union statute or domestic partnership law might impose procedural burdens on same-sex couples that violate due process guarantees dealing, for example, with rights to notice and a fair hearing.

In the case of such a constitutional infirmity, the Senate version might be interpreted to prevent courts from correcting the problem by ordering that same-sex couples be given any of “the legal incidents” of marriage. Under the Senate version, legislatively created civil unions or domestic partnerships might thus be effectively immune from state or federal constitutional scrutiny seeking to remedy their unconstitutionality by conferring any additional benefits on same-sex couples or by including more same-sex couples within the coverage of the statute. Thus, under either the Senate or the Musgrave version, the FMA would effectively be an amendment to the Fifth Amendment’s Due Process Clause and the Fourteenth Amendment’s Equal Protection and Due Process Clauses.

Conclusion

When Congress last considered the FMA in 2004, it might have seemed that the country faced an emergent threat of immediate judicial action to invalidate the marriage laws of all 50

states. The previous summer, the Supreme Court had decided *Lawrence v. Texas*, which contained sweeping language about the rights and dignity of homosexuals. The previous fall, the highest court of Massachusetts had ordered that state to start recognizing the first gay marriages in the country. Local officials in four different states had defied state law to perform same-sex marriages. Thousands of gay couples in San Francisco lined up to get “married” under the order of the city’s mayor. The issue of gay marriage dominated the headlines of newspapers and the talk shows of television and radio. It might have seemed to some that a dam was about to break, flooding the country with gay marriages and wreaking havoc on the laws and traditions of a country overwhelmingly opposed to the practice.

We now know, with two years’ hindsight, that those fears were greatly exaggerated. *Lawrence* has not opened any floodgates to gay marriage. *Goodridge* has been accepted by a smattering of state trial courts but has been rejected by even more. Local officials acting contrary to state law have been brought to heel by their own states, as they always have been. Forty-five states, 18 of them by state constitutional amendment, have erected high barriers to the recognition of same-sex marriages. DOMA remains the law, and no gay marriage has been transported from Massachusetts or any foreign country to any state that does not want it. What should have been obvious even in 2004—that same-sex marriage would face a long uphill climb—is patently clear today. With every passing day, the impending doom prophesied by FMA supporters seems more far-fetched. There is no pressing urgency to deal with the issue through the heavy artillery of a federal constitutional amendment.

In sum, a federal amendment banning same-sex marriage is not a response to any problem we currently have. The solemn task of amending the nation’s fundamental law should be reserved for actual problems. Never before in the history of the country have we amended the Constitution in response to a threatened (or actual) state court decision. Never before have we amended the Constitution to preempt an

anticipated federal court ruling. Never before have we adopted a constitutional amendment to limit the states' ability to control their own family law. Never before have we dictated to states what their own state laws and state constitutions mean. Never before have we amended the Constitution to restrict the ability of the democratic process to expand individual rights. This is no time to start.

Notes

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1. See *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003).

2. David Aucton and Laura Gunderson, "Ties That Bind and Divide: Multnomah County Recognizes Gay Marriage amid Joy, Protest," *Oregonian*, March 4, 2004, p. A1 (describing Multnomah County, Oregon, chairwoman Diane Linn's decision to issue marriage licenses to same-sex couples); Joshua Akers, "AG Says 68 Licenses Are Illegal," *Albuquerque Journal*, February 21, 2004, p. A1 (describing Sandoval County, New Mexico, clerk Victoria Dunlap's decision to issue marriage licenses to same-sex couples); and Rachel Gordon, "S.F. Defies Law; Marries Gays," *San Francisco Chronicle*, February 13, 2004, p. A1 (describing San Francisco mayor Gavin Newsom's decision to issue marriage licenses to same-sex couples).

3. I should acknowledge here that I support same-sex marriage as a policy matter.

4. Many conservatives who oppose same-sex marriage also oppose a constitutional amendment banning it. See p. 12.

5. The two senators who missed the cloture vote, John Kerry (D-MA) and John Edwards (D-NC), opposed a federal amendment banning gay marriages. See, e.g., Gebe Martinez, "Gay Marriage Ban Defeated in Senate: Vote Shows Shift in GOP," *Houston Chronicle*, July 15, 2004, p. 1. In addition, a few Republican senators who voted for cloture have indicated opposition to, or serious doubts about the need for, a constitutional amendment. Among them is Sen. Arlen Specter (R-PA). See Steve Goldstein, "Will Defeat on Gay-Marriage Ban Hurt Santorum?" *Philadelphia Inquirer*, July 15, 2004, p. A1.

6. Anne C. Mulkin, "Gay-Marriage Amendment

Fails to Win 2/3 House Vote; Author Still Claims Victory; Opponents Cite Racist Parallel," *Denver Post*, October 1, 2004, p. A2.

7. See U.S. Constitution, Art. V.

8. Senate Republican Policy Committee, "The Threat to Marriage from the Courts," July 29, 2003, http://rpc.senate.gov/_files/civilsd090403.pdf. The Senate Republican Policy Committee has continued to warn about court activism, despite the fact that court-ordered recognition of gay marriage has occurred in only 1 of the 50 states. Senate Republican Policy Committee, "Why a Marriage Amendment Is Necessary," March 28, 2006, http://rpc.senate.gov/_files/Mar2806MarriageAmendSD.pdf.

9. Quoted in Edwin Chen, "Bush Urges Same-Sex Marriage Ban," *Los Angeles Times*, February 25, 2004, p. A1.

10. For a good summary of marriage law in the states relating to the recognition of gay marriages, including the states that have passed "little DOMA" laws and have passed or are considering state constitutional amendments, see Kavan Peterson, "50-State Rundown on Gay Marriage Laws," September 8, 2004, <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058>.

11. Defense of Marriage Act § 3(a), Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2002)).

12. For example, the Gay and Lesbian Advocates and Defenders, which sponsored the Massachusetts litigation, filed suit seeking the recognition of same-sex marriages in neighboring Connecticut. Danela Altimari, "Suit Paints Same-Sex Marriage as Ordinary," *Hartford Courant*, September 7, 2004, p. A1.

13. I will not address here my personal view of the merits of the constitutional arguments for same-sex marriage, but only the likelihood that such arguments will be persuasive to courts of final resort in the near future.

14. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974).

15. Advocates of same-sex marriage have lost in the following state court decisions: *Lewis v. Harris*, No. MCR-L-15_03, 2003 WL 23191114, at *28 (N.J. Super. Ct., Nov. 5, 2003), *aff'd* by 875 A.2d 259 (N.J. Super. A.D. 2005); *Standhart v. Super. Ct. ex rel., City of Maricopa*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003); *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. 2004); *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (N.Y. Sup. 2005), *aff'd* by 2006 WL 346463 (N.Y. A.D.

- 2006); *Hernandez v. Robles*, 805 N.Y.S.2d 354 (N.Y. A.D. 2005); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); and *Samuels v. N.Y. State Department of Health*, 2006 WL 346465 (N.Y. A.D. 2006).
- Advocates of same-sex marriage have won in the following trial court decisions: *Anderson v. King City*, 2004 WL 1738447 (Wash. Super Ct. 2004); *California Marriage Cases*, 2005 WL 583129 (Cal. Super.); and *Deane v. Conoway*, 2006 WL 148145 (Md. Cir. Ct.). Each of these decisions is under review by higher courts in the respective states.
16. Senate Republican Policy Committee, “The Threat to Marriage from the Courts,” p. 9, n. 38.
17. Hawaii Const. art. I, § 23.
18. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at Vt. Stat. Ann. tit. 15, §§ 1202–07 (Supp. 2001)).
19. See Frank Phillips and Raphael Lewis, “Amendment Would Turn Gay Marriages into Unions,” *Boston Globe*, February 11, 2004, p. A1.
20. That is especially true because sister states are unlikely to be required to recognize such out-of-state same-sex marriages.
21. This is another fear cited by the Senate Republican Policy Committee, “The Threat to Marriage from the Courts,” p. 2.
22. *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004).
23. *Li v. State*, 2004 WL 1258167 (Or. Cir.).
24. Senate Republican Policy Committee, “Why a Marriage Amendment Is Necessary,” p. 12.
25. Senate Republican Policy Committee, “The Threat to Marriage from the Courts,” pp. 6–7.
26. See 1 U.S.C. § 7 (2002).
27. See 28 U.S.C. § 1738C.
28. *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); and *In re Kandou*, 2004 WL 1854112 (Bankr. W.D. Wash.).
29. If the FFCC challenge is to occur, it will not come from Massachusetts. Earlier this year the Massachusetts Supreme Judicial Court held that same-sex couples from out of state could not come to Massachusetts to be married if their home state would not recognize their marriage as valid. *Cote-Whitacre v. Department of Public Health*, 446 Mass. 844 N.E.2d 623 (Mass.; Mar. 30, 2006).
30. David P. Currie, “Full Faith and Credit to Marriages,” *Green Bag* 1, no. 2 (1997): 7, 8.
31. *Ibid.*, pp. 9–10.
32. See, e.g., *Osoinach v. Watkins*, 180 So. 577 (Ala. 1938) (marriage between nephew and widow of uncle); and *Petition of Lieberman*, 50 F. Supp. 120 (E.D.N.Y. 1943) (marriage between niece and uncle).
33. In Virginia, state courts have held that same-sex civil unions from Vermont will not be recognized in the state. S. Mitra Kalita, “Vt. Same-Sex Unions Null in Va., Judge Says: Case Seen as Test of Parental Rights,” *Washington Post*, August 21, 2003, p. B1.
34. Bob Barr, “Leave Marriage to the States,” *Washington Post*, August 21, 2003, p. A23.
35. It is always possible that courts will abandon this long-held view of the FFCC and choice-of-law principles. Larry Kramer, “Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception,” *Yale Law Journal* 106 (1997): 1965 (arguing that states do not have the right to refuse to recognize valid marriages performed in other states). Anything is possible. Yet the traditional view is so entrenched, and the revisionist argument so unsupported by precedent, that abandonment is very unlikely.
36. *Wilson*, 354 F. Supp. 2d 1298 (upholding federal and state DOMA laws against claim of gay couple married in Massachusetts that Florida was required to recognize their marriage).
37. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).
38. *Ibid.* at 2478.
39. *Ibid.* at 2484.
40. *Ibid.* at 2996 (Scalia, J., dissenting).
41. *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), *reh’g en banc den’d*, 377 F.3d 1275 (2004).
42. *Cf. Loving v. Virginia*, 380 U.S. 1, 12 (1967) (invalidating state anti-miscegenation law).
43. *Lawrence* at 2487–88 (O’Connor, J., concurring).
44. 517 U.S. 620 (1996).
45. *Ibid.* at 632.
46. See Thomas R. Marshall, *Public Opinion and the Supreme Court* (New York: Unwin Hyman, 1989), pp. 78–80; and Mae Kuykendall, “The President,

Gay Marriage, and the Constitution,” *Widener Law Journal* 13, 2004: 799.

47. 410 U.S. 113 (1973).

48. An example of this technical maneuver to avoid consideration of a thorny cultural issue is the Supreme Court’s recent decision to reject a noncustodial atheist father’s claim that it is unconstitutional for public schools to lead children in reciting the phrase “under God” in the Pledge of Allegiance. *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004) (dismissing claim on the ground that the father lacked standing). Justice Stevens’s majority opinion declared, “The command to guard zealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence *when matters of great national significance are at stake.*” Emphasis added. This quote seems tailor-made to justify Supreme Court abstention should the gay-marriage issue even reach it in the near future.

49. James Madison, *Federalist* no. 49, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, Signet Classics, 1961), p. 311.

50. James Madison, *Federalist* no. 45, in *The Federalist Papers*, p. 289.

51. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561–64 (1995).

52. The California secretary of state provides information and registration materials on its website at <http://www.ss.ca.gov/dpregistry/>. The domestic partnership program is also available to opposite-sex couples if one partner is 62 years or older.

53. Public Acts 2005, No. 05-10 (Connecticut).

54. *Loving*, 380 U.S. 1.

55. The Supreme Court also acted to expand, but not to constrict, marriage in the states by invalidating state laws that prohibited inmates from marrying (*Turner v. Safley*, 482 U.S. 78, 97–99 (1987)) and denied marriage to parents in arrears on their child-support obligations (*Zablocki v. Redhail*, 434 U.S. 374, 386–90 (1978)). These cases, like *Loving*, are limited intrusions on state marriage restrictions. By contrast, the FMA is expansive, imposing a single definition on all states.

56. Lisa Stein, “Cheney’s Choice,” *U.S. News & World Report*, September 6, 2004, p. 14.

57. Barr, p. A23 (“Marriage is a quintessential state issue. . . . Make no mistake, I do not support same-sex marriages. But I am also a firm believer that the Constitution is no place for forcing social policies on the states, especially in this case, where states

must have latitude to do as their citizens see fit.”).

58. Christopher Cox, “The Marriage Amendment Is a Terrible Idea,” *Wall Street Journal*, September 28, 2004, p. A22 (“For Republicans, who believe in federalism, the FMA is an uncomfortable fit. Restraint in the allocation of authority to the national government from the states is fundamental to our Constitution.”).

59. Bruce Fein, “Constitutional Rashness,” *Washington Times*, September 2, 2003, p. A14.

60. See Larry A. Ribstein, “A Standard Form Approach to Same Sex Marriage,” <http://home.law.uicu.edu/~ribstein/marriage.pdf> (“States should be allowed to experiment with alternative domestic relationship laws, including laws that bar same sex marriage and marriage-like relationships. Before such experimentation has been done, we risk blindly either foreclosing beneficial progress in human relationships, or endorsing a risky future with unknown consequences.”).

61. Perhaps the only exception to this rights-affirming constitutional tradition was the Eighteenth Amendment, the Prohibition amendment, ratified in 1919. The nation soon regretted that exception and just 14 years later it became the only amendment to be repealed; it was repealed by the Twenty-First Amendment.

62. Fein, p. A14.

63. Compare Senate Republican Policy Committee, “The Threat to Marriage from the Courts,” p. 2, n. 6 (citing poll showing opposition to same-sex marriage standing at 68 percent in 1996), and *ibid.*, n. 5 (citing polls showing opposition to same-sex marriage standing at between 53 percent and 62 percent in 2003).

64. *Ibid.*, p. 2.

65. The Constitution forbids states to “keep Troops, or Ships of War in time of Peace. . . .” U.S. Const. art I, sec. 10, cl. 3; see also Alan Cooperman, “Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text,” *Washington Post*, February 14, 2004, p. A1. Professors Robert P. George of Princeton and Gerard Bradley of Notre Dame Law School, proponents of the FMA, have made this analogy to argue that the first sentence of the FMA would preclude the legislative or judicial creation of a civil union equivalent to marriage. Ramesh Ponnuru, “Times vs. Sullivan,” *National Review Online*, February 9, 2004.

66. See Cooperman.

67. Senate Republican Policy Committee, “Why a Marriage Amendment Is Necessary,” p. 15.

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