

2004

## Four Arguments against a Marriage Amendment That Even an Opponent of Gay Marriage Should Accept

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### Recommended Citation

Dale Carpenter, Four Arguments against a Marriage Amendment That Even an Opponent of Gay Marriage Should Accept, 2 U. St. Thomas L. J. 71 (2004)

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## ARTICLE

# FOUR ARGUMENTS AGAINST A MARRIAGE AMENDMENT THAT EVEN AN OPPONENT OF GAY MARRIAGE SHOULD ACCEPT

DALE CARPENTER\*

In this article, I argue against a federal constitutional amendment preventing states from recognizing same-sex marriages. As of now, a nationwide policy debate is underway 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 in the states. It should not be cut short by the extraordinary mechanism of a constitutional amendment that would substantially delay or permanently foreclose what may turn out to be a valuable social reform.

Pointing to the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health* extending marriage to same-sex couples in that state,<sup>1</sup> and to the actions of various local officials around the country recognizing gay marriages,<sup>2</sup> proponents of the Federal Marriage Amendment ("FMA") claim 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. Additionally, they 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 disparate state outcomes on the matter.

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1. *Goodridge v. Dept. Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

2. David Austin & Laura Gunderson, *Ties that Bind & Divide: Multnomah County Recognizes Gay Marriage Amid Joy, Protest*, *The Oregonian* A01 (Mar. 4, 2004) (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 J.* A1 (Feb. 21, 2004) (describing Sandoval County, New Mexico Clerk Victoria Dunlap's decision to issue marriage licenses to same-sex couples); Rachel Gordon, *S.F. Defies Law, Marries Gays*, *S.F. Chron.* A1 (Feb. 13, 2004) (describing San Francisco Mayor Gavin Newsom's decision to issue marriage licenses to same-sex couples).

Since the legal complications arising from having different states recognizing different relationships as marriages would be no greater than they have been throughout our history, during which divergent state family policies have been the norm, this argument also fails. The policy debate between the contending sides should continue without one side deploying the trump card of an amendment.

This paper does not make an argument for same-sex marriage on policy grounds.<sup>3</sup> The argument here is directed entirely to whether a constitutional amendment should dispose of the matter. Whether states should recognize same-sex marriages as a matter of internal family policy 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.<sup>4</sup> An opponent of gay marriage may oppose a constitutional amendment because: (1) he believes that federalism—the traditional, decentralized structure of American government—is the best answer to most disputes about public policy; and/or (2) he is confident that his opposition will prevail without the need for a constitutional amendment; and/or (3) although he opposes gay marriage now, 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 I will make here: 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 constitutional 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 expanding individual rights. Fourth, the amendment as proposed is constitutional overkill that reaches well beyond the stated concerns

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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. *Infra* nn. 69-72 and accompanying text.

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.

## I. THE PROPOSED FEDERAL MARRIAGE AMENDMENT

The FMA would, at a minimum, forbid states to recognize same-sex marriages. Two different versions of the amendment have been introduced in Congress. In the House of Representatives, Rep. Marilyn Musgrave (R-Colo.) has introduced H.R. Jt. Res. 56 ("Musgrave version"), which 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.<sup>5</sup>

The Musgrave version of the FMA currently has 127 co-sponsors in the House. In the Senate, Sen. Wayne Allard (R-Colo.) has introduced somewhat different language as Sen. Jt. Res. 40 ("Allard version"), which 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.<sup>6</sup>

The Allard version of the FMA currently has sixteen co-sponsors in the Senate.

The first sentence of the Allard version of the FMA is identical to the first sentence of the Musgrave version. The second sentences are similar, but differ in three substantive respects. First, the Allard version drops the Musgrave version's reference to "state or federal law." Second, the Allard version replaces the Musgrave version's reference to "marital status" with "marriage." Third, the Allard version replaces the Musgrave version's reference to "unmarried couples or groups" with "any union other than the union of a man and a woman." Though in some respects the Allard version appears narrower than the Musgrave version, its practical effect may be nearly as sweeping.<sup>7</sup>

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5. H.R. Jt. Res. 56, 108th Cong., § 1 (May 21, 2003) (as introduced).

6. Sen. Jt. Res. 40, 108th Cong., § 2 (July 7, 2004) (as introduced).

7. *Infra* pt. V.

On July 15, 2004, the Senate rejected an attempt to invoke cloture—cut off debate—to proceed with consideration of the Allard version of the FMA. The vote was 48 in favor of cloture and 50 opposed.<sup>8</sup> Under Senate rules, cloture would have required 60 votes. The FMA likewise fell short in the House of Representatives on September 30, 2004, with 227 members in favor, 186 against, and 20 not voting.<sup>9</sup> Ratification of an amendment under the usual procedure would require a 2/3 vote in the Senate and the House, followed by approval from 3/4 of the states.<sup>10</sup>

## II. 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.

### A. *The Alleged “Threat” from Courts and Local Officials*

Advocates of an amendment claim it is needed to prevent activist state and federal courts, at the request of gay-rights advocates, from imposing same-sex marriage on the country. For example, the Senate Republican Policy Committee, in a policy position paper entitled “The Threat to Marriage From the Courts,” 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.<sup>11</sup>

President George W. Bush used the specter of judicial activism and lawlessness by 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

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8. The two senators who missed the cloture vote, John Kerry (D-Mass.) and John Edwards (D-N.C.), have stated that they oppose a federal amendment banning gay marriages. See e.g. Gebe Martinez, *Gay Marriage Ban Defeated in Senate: Vote Shows Rift in GOP; Supporters Vow to Try Again*, *Houston Chron.* 1 (July 15, 2004). Additionally, a few Republican senators who voted for cloture have indicated opposition to, or serious doubts about the need for, a constitutional amendment. Among these are Sen. Arlen Specter (R-Penn.). See Steve Goldstein, *Will Defeat on Gay Marriage Ban Hurt Santorum?*, *Philadelphia Inquirer* A1 (July 15, 2004).

9. Anne C. Mulkern, *Gay-Marriage Amendment Fails to Win 2/3 House Vote Author Still Claims Victory; Opponents Cite Racist Parallel*, *Denver Post* A2 (Oct. 1, 2004).

10. U.S. Const. art. V.

11. Senate Republican Policy Committee, *Massachusetts Court Expected to Legalize Same-Sex Marriage: The Threat to Marriage from the Courts* 1 (July 29, 2003) (available at [http://rpc.senate.gov/\\_files/CIVILsd090403.pdf](http://rpc.senate.gov/_files/CIVILsd090403.pdf)) (accessed Mar. 4, 2005).

said on February 24, 2004.<sup>12</sup> “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.”<sup>13</sup> Bush also warned of unspecified “serious consequences throughout the country” if a city or state recognized gay marriages even in its own jurisdiction.<sup>14</sup>

Thus, argue proponents of an amendment, the matter will be decided at the national level whether we enact an amendment or not. They claim that either activist courts and local officials will foist same-sex marriage upon an unwilling nation 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. While there is no evidence of a uniform litigation strategy by gay advocates—and indeed some dismay among gay-marriage advocates at the filing of inopportune lawsuits in places like Florida—there has been significant litigation on the issue in the past decade.<sup>15</sup> Filing lawsuits and winning lawsuits are not the same thing, however. Anyone with a printer and enough money for a filing fee can file a lawsuit, of course, and gay-marriage advocates are likely to continue to do so. But winning is a very different matter. At the state level, while gay-marriage advocates may win some battles in state court litigation, they will lose many others.

In any event, as we shall see,<sup>16</sup> state-court activism and disregard of state definitions of marriage by local officials are phenomena the states are 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 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 as Iowans do. At the federal level, as we shall see,<sup>17</sup> 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.

Forty-one states have declared same-sex marriages contrary to their own public policy, barring recognition of same-sex marriages under state

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12. Edwin Chen, *Bush Urges Same-Sex Marriage Ban*, L.A. Times A1 (Feb. 25, 2004).

13. *Id.*

14. *Id.*

15. Most recently, a lawsuit seeking the recognition of same-sex marriages in Connecticut was filed by the same group, Gay & Lesbian Advocates & Defenders, that sponsored the *Goodridge* litigation in Massachusetts. Pl. Verified Comp. at 22, *Kerrigan v. Conn. Dept. Pub. Health*, (Conn. Super. New Haven Jud. Dist. Aug. 25, 2004) (available at [http://www.glad.org/marriage/Kerrigan-Mock\\_complaint.pdf](http://www.glad.org/marriage/Kerrigan-Mock_complaint.pdf)) (accessed Mar. 4, 2004). At the same time, legislators in Connecticut appear poised to grant some form of recognition, rights, and responsibilities to gay couples in 2005. Fred Lucas, *Same-Sex Civil Union Bill Likely: State Legislators Support Expanding Gay Rights*, Danbury News Times (Conn.) (Nov. 14, 2004).

16. *Infra* pt. II(B).

17. *Infra* pt. II(C).

statutes or state constitutions.<sup>18</sup> The 1996 Defense of Marriage Act (“DOMA”) bars recognition of such marriages for federal purposes.<sup>19</sup> It is unlikely courts will impose immediate, nationwide gay marriage contrary to this powerfully expressed legislative and popular will. No court has yet done so.

For the most part state courts can be expected to continue to reject same-sex marriage claims. 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. This paper will now address each of the above points in greater detail.<sup>20</sup>

*B. 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.<sup>21</sup> While gay-marriage advocates succeeded in the Massachusetts litigation, their success has been mixed in other recent marriage cases in state courts around the country.<sup>22</sup> Though it is still early, no other state high court has yet followed the Massachusetts lead.

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.<sup>23</sup> Thus, state courts are accountable to a public that in most jurisdictions still opposes same-sex marriage by fairly large margins. Public opposition was strongly reinforced in 2004 by the passage of state

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18. For a good summary of states’ laws relating to the recognition of gay marriages, including those 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*, <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058> (Nov. 3, 2004).

19. *Defense of Marriage Act*, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7 (2002)).

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

21. See e.g. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. Div. 1974).

22. Gay-marriage advocates have lost in New Jersey, *Lewis v. Harris*, \_\_\_A.2d\_\_\_, 2003 WL 2319114, at \*28 (N.J. Super. L. Div. Nov. 5, 2003), and in Arizona, *Standhart v. Ariz. Sup. Ct. ex rel., County of Maricopa*, 77 P.3d 451, 465 (Ariz. App. Div. 2003), and won in Washington, *Andersen v. King County*, \_\_\_P.3d\_\_\_, 2004 WL 1738447 at \*11 (Wash. Super. Ct. Aug. 4, 2004) and California, *In re Marriage Cases*, Judicial Council Coordination Proceeding No. 4365 (Super. Ct. S.F. County, Cal., Mar. 14, 2005) (available at: <http://www.sftc.org/Docs/Marriage.pdf>). Each of these decisions will likely be considered by higher courts in these states.

23. Senate Republican Policy Committee, *supra* n. 11, at 9, n. 38.

constitutional amendments banning gay marriage in 13 states, by wide margins.<sup>24</sup> This public resistance will likely make most state courts even more reluctant than federal courts to order the recognition of same-sex marriages. Already, in response to the political backlash, gay-marriage advocates are planning to scale back their challenges to state marriage laws.<sup>25</sup>

On the three occasions prior to *Goodridge* that state courts have 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 permit the state legislature to define marriage.<sup>26</sup> 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.<sup>27</sup>

Historically, the states themselves have been entrusted 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. In Massachusetts, the state legislature has begun the state constitutional amendment process to reverse *Goodridge*.<sup>28</sup> There is no reason to believe that the citizens of Massachusetts are incapable of dealing with their own courts if they choose to do so. As noted above, voters in 13 states in 2004 alone amended their state constitutions to ban gay marriages. Doubtless more states will do so in the years to come. 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.

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24. The margins in 2004 ranged from 57%-43% in relatively liberal Oregon to 86%-14% in socially conservative Mississippi. The other states to pass state amendments banning gay marriage in 2004 were Arkansas, Georgia, Kentucky, Louisiana, Michigan, Missouri, Montana, North Dakota, Ohio, Oklahoma, and Utah. The Associated Press, *Voters Pass All 11 Bans on Gay Marriage*, MSNBC News, <http://www.msnbc.msn.com/id/6383353/> (accessed Mar. 29, 2005). Gay-marriage advocates may now file state constitutional challenges to some of these amendments for procedural reasons, for example, because they violate some state constitutional requirements that amendments not be misleading or impermissibly involve more than one "object or purpose." Arthur S. Leonard, *New State Amendments Vulnerable: Legal Challenges, Though, Must Negotiate Polarized Political, Judicial Landscape*, Gay City News (Nov. 4, 2004) (available at [http://www.gaycitynews.com/gcn\\_345/newstateamendments.html](http://www.gaycitynews.com/gcn_345/newstateamendments.html)) (accessed Mar. 4, 2005). Even if such procedural challenges succeed, they will at best delay passage of such amendments since proponents could always propose amendments that comply with any procedural requirements.

25. Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. Times A16 (Nov. 12, 2004) (quoting Matt Foreman, executive director of the National Gay & Lesbian Task Force, as saying: "Our legal strategy is at least ten years ahead of our political and legislative strategy.").

26. Haw. Const. art. I, § 23.

27. *An Act Relating to Civil Unions*, Vt. Pub. Act 91 (Apr. 26, 2000) (codified at Vt. Stat. Ann. tit. 15, §§ 1202-07 (Supp. 2001)).

28. Frank Phillips & Raphael Lewis, *Amendment Would Turn Gay Marriages into Civil Unions: Lawmakers Get Proposal Today*, Boston Globe A1 (Feb. 11, 2004).

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, and thus far, no evidence from Massachusetts to suggest, that the temporary recognition of same-sex marriages in a state presents such a special and immediate danger to the nation that it can only be handled by a federal constitutional amendment.<sup>29</sup>

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 would require additional hypothetical rulings by courts-of-last-resort in the other states requiring their own jurisdictions to recognize such marriages. A pro-gay-marriage ruling in a state court, as in Massachusetts, would likely be based on the state, not 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 challenges in other states by influencing other states' substantive interpretations of their own constitutions?<sup>30</sup> Certainly such a ruling would not bind other states' interpretation of their own state constitutions. Though 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 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 are reversible by democratic processes. Both of these factors will likely make them reluctant, as they historically have been, to impose gay marriage even in their jurisdictions.

The threat of "lawlessness" from 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 have been halted by the officials themselves, by higher state officials, or by state courts. While more than 4,000 same-sex marriages were performed in San Francisco last February,

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29. This is especially true because sister states are unlikely to be required to recognize these out-of-state same-sex marriages. See *infra* pt. II(C)1.

30. This is another fear cited by the Senate Republican Policy Committee. *Supra* n. 11, at 2.

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.<sup>31</sup> A state court also put a stop to the issuance of marriage licenses to same-sex couples by officials in Multnomah County, Oregon.<sup>32</sup> After the brief flurry of actions by local officials recognizing gay marriages in early 2004, they have now stopped.

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. While 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.<sup>33</sup>

### C. *Federal Constitutional Doctrines*

#### 1. *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 jurisdiction to recognize such marriages under the Constitution's Full Faith and Credit Clause ("FFCC"), article IV, section 1.<sup>34</sup> This fear is hypothetical and exaggerated. As a nation, we have already addressed this issue. In 1996, in reaction to litigation for same-sex marriage in Hawaii, Congress passed, and President Clinton signed, DOMA. DOMA defines marriage as the union of one man and one woman for purposes of

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31. *Lockyer v. City and County of S.F.*, 95 P.3d 459 (Cal. 2004).

32. *Li v. State*, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004) (unpublished).

33. See *infra* pt. III.

34. Senate Republican Policy Committee, *supra* n. 11, at 6-7.

federal law, such as entitlement to Social Security benefits and for federal taxation.<sup>35</sup> DOMA also provides that states may refuse to recognize same-sex marriages performed elsewhere.<sup>36</sup> 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 first federal court to examine the matter has upheld DOMA.<sup>37</sup>

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 (like Massachusetts), get married there, and then return to their home state demanding recognition of their union under the FFCC. Alternatively, a gay couple married in Massachusetts might move and demand that their new home state recognize their marriage. By this method, they conjecture, gay marriage would gradually sweep the nation.

However, the FFCC has never been interpreted to mean that every state must recognize every marriage performed in every other state.<sup>38</sup> It is true that, under the place-of-celebration rule, states usually recognize marriages validly 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, like Canada—if that marriage would violate the state's public policy.<sup>39</sup> Under this 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.<sup>40</sup> The Supreme Court has never suggested that this practice is invalid under the FFCC.

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35. See 1 U.S.C. § 7 (2000).

36. 28 U.S.C. § 1738C (2000).

37. *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

38. David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7, 8 (1997).

39. *Id.* at 9-10.

40. See e.g. *Osoinach v. Watkins*, 180 So. 577 (Ala. 1938) (marriage between nephew and widow of uncle); *Petition of Lieberman*, 50 F. Supp. 120 (E.D.N.Y. 1943) (marriage between niece and uncle).

Forty-one states have already declared by statute and/or state constitution that it is their public policy not to recognize same-sex marriages.<sup>41</sup> Even in the other nine states, state policy may be adequately declared on the issue to allow those states to refuse to recognize same-sex marriages. In that sense, DOMA and the forty-one “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 on policy grounds and was the main author of DOMA, has argued that DOMA is more than adequate to prevent the imposition of nationwide same-sex marriage.<sup>42</sup>

Under the traditional understanding of the FFCC and choice-of-law principles, then, it is doubtful state or federal courts would require states to fully recognize same-sex marriages performed elsewhere.<sup>43</sup> 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.

## 2. *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.

### a. *The Due Process Clause*

*Lawrence v. Texas*,<sup>44</sup> the recent Supreme Court decision using the Due Process Clause to strike down Texas’s law criminalizing homosexual sex, has somehow been transformed by the popular press and by FMA supporters into a 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

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41. In Virginia, a state judge recently held that not even same-sex civil unions from Vermont will be recognized by the state. S. Mitra Kalita, *Vt. Same-Sex Unions Null in Va., Judge Says; Case Seen as Test of Parental Rights*, Wash. Post B1 (Aug. 25, 2004).

42. Bob Barr, *Leave Marriage to the States*, Wash. Post A23 (Aug. 21, 2003).

43. It is always possible courts will abandon this long-held view of the FFCC and choice-of-law principles. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965 (1997) (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 completely unsupported by precedent, that abandonment is very unlikely.

44. 539 U.S. 558 (2003).

on private sexual relations between adults in the home.<sup>45</sup> 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.<sup>46</sup> *Lawrence* involved the most private of acts—sexual conduct—in the most private of places—the home; by contrast, marriage is a public institution freighted with public meaning and significance. So far, lower federal courts have adopted a very narrow reading of *Lawrence*.<sup>47</sup>

The Court in *Lawrence* noted explicitly that it was not dealing with a claim for formal state recognition.<sup>48</sup> Especially in light of Justice Scalia's fretting that same-sex marriage may soon be the child of *Lawrence*,<sup>49</sup> these qualifications signal a Court that seems very unlikely even to address the issue in the near future, much less to take the bold step of ordering nationwide same-sex marriage.

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.<sup>50</sup> 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.<sup>51</sup>

#### b. *The Equal Protection Clause*

The Equal Protection Clause hardly seems more promising in the near term for gay-marriage advocates. 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.<sup>52</sup>

*Romer v. Evans*,<sup>53</sup> has, so far, 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 likely motivating force behind

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45. *Id.* at 567.

46. *Id.* at 578.

47. *E.g. Lofton v. Sec. of Dept. of Children and Fam. Servs.*, 358 F.3d 804 (11th Cir. 2004).

48. 539 U.S. at 578.

49. *Id.* at 600 (Scalia, J., dissenting).

50. *Cf. Loving v. Virginia*, 388 U.S. 1, 12 (1966) (invalidating state antimiscegenation law).

51. *Infra* pt. II(C)3.

52. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

53. 517 U.S. 620 (1996).

the law.<sup>54</sup> *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 only to show that the law is rationally related to a legitimate governmental end. That is ordinarily not a difficult task.<sup>55</sup> Thus, there is little reason to believe a court would strike down all state marriage laws or DOMA on equal protection grounds, at least under the present state of those doctrines. Certainly no court has yet done so.

### 3. *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.<sup>56</sup> 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 the recognition of same-sex marriages by the states and federal government, whether under the FFCC or a substantive constitutional doctrine, the entire country would be aroused against it. I cannot think of another time the Court has done that in modern times, with the instructive and chastening exception of *Roe v. Wade*.<sup>57</sup> 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 pro-gay-marriage litigants could find a federal district court somewhere that would 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 litigants could find a panel of an appellate court somewhere that would declare DOMA unconstitutional or hold a state ban

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54. *Id.* at 632.

55. *But see Goodridge*, 798 N.E.2d 941 (striking down exclusion of same-sex couples from marriage under rational basis review).

56. Thomas R. Marshall, *Public Opinion and the Supreme Court* 78-80 (Unwin Hyman 1989); see Mae Kuykendall, *The President, Gay Marriage, and the Constitution*, 13 *Widener L.J.* 799 (2004).

57. 410 U.S. 113 (1973).

on same-sex marriage unconstitutional. Such a ruling would also be of little consequence, however, since it would be reviewed *en banc* and/or by the Supreme Court. 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 an 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.<sup>58</sup>

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 based on fear of a future, hypothetical adverse decision. 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 ten amendments known as the Bill of Rights and the extraordinary post-Civil War period that produced three amendments, we have amended it only fourteen times in more than two centuries. In contrast to the present move to amend the Constitution in anticipation of possible adverse court rulings sometime in the future, the framers believed the amendment process should be reserved "for certain great and extraordinary occasions."<sup>59</sup>

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.

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58. An example of this technical maneuver to avoid consideration of a thorny cultural issue is the Supreme Court's recent decision to reject a non-custodial, 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 Sch. Dist. 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.*" *Id.* at 2308 (emphasis added). This last sentence seems tailor-made for a future case involving a gay-marriage claim.

59. *The Federalist No. 49*, at 314 (James Madison) (Arlington House 1966).

### III. A FEDERAL AMENDMENT INTRUDES ON FEDERALISM

A constitutional amendment would be a radical intrusion on federalism. From the founding of the nation, the design of our federal system has been that the federal government has limited and enumerated powers and that state governments have residual powers. The states have been free to legislate on all matters not reserved for federal authority (such as regulating interstate commerce or waging war). 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, who wrote in *Federalist No. 45* that:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in 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 the 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.<sup>60</sup>

The nation's commitment to federalism is enshrined in the Constitution's enumeration of specific congressional powers in Article I and in the reservation of all other powers to the states in the Tenth Amendment. Specifically, states have traditionally controlled the content of family law, including the definition of marriage, in their own jurisdictions. Within very broad limits, there has never been a national definition of marriage imposed 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.<sup>61</sup> These recent decisions upholding the role of the states have been supported by the Court's most conservative justices, like Chief Justice William Rehnquist and Justices Clarence Thomas and Antonin Scalia.

Federalism is not valuable simply as an abstract tradition. It has a couple of important practical benefits relevant here. First, it allows 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 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 these

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60. *The Federalist No. 45*, at 292 (James Madison) (Arlington House 1966).

61. See e.g. *U.S. v. Lopez*, 514 U.S. 549, 561-64 (1995).

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. These innovations have included allowing women to vote, setting maximum hours for working, adopting minimum wage requirements, and prohibiting child labor.

Repudiating this long history, the FMA—both the Musgrave version and the Allard version—would impose on the states a single, nationwide definition of marriage as the union of one man and one woman. It would prohibit state courts or even state legislatures from authorizing same-sex marriages. The supporters of the FMA freely acknowledge this much. But additionally, 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, these 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 version of the FMA from “construing” the law to grant “the legal incidents” of marriage to the couple.<sup>62</sup> Purporting to “protect” the states from gay marriage, the FMA tramples federalism.

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 non-recognition to recognizing domestic partnerships that grant some benefits to recognizing civil unions that grant all of the benefits of marriage to marriage itself.<sup>63</sup> California, for example, has legislatively recognized domestic partnerships that include almost all of the benefits and protections of marriage.<sup>64</sup> These experiments test whether encouraging stable same-sex unions through some formal legal recognition and support is, on balance, a good or bad thing. Under federalism, 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 divergent policy choices, we leave open the possibil-

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62. For concerns that even the Allard version of the FMA might undermine legislatively created marriage-lite proposals, see pt. V.

63. See e.g. *Goodridge*, 798 N.E.2d 941.

64. The California Secretary of State provides information and registration materials on its website, Cal. Sec. of St., *Domestic Partner Registry*, <http://www.ss.ca.gov/dpregistry/> (accessed Mar. 4, 2005). The domestic partnership program is also available to opposite-sex couples where one partner is 62 years or older.

ity 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 invests relatively little in 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.<sup>65</sup> A proponent of gay marriage living in Mississippi can move to a state with a more hospitable public policy environment, like California or Massachusetts. A nationally imposed definition of marriage, by contrast, forecloses this opt-out choice by erasing individual state differences.

Beyond this 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, 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 on this state power. The Supreme Court decided in *Loving v. Virginia*,<sup>66</sup> for example, that a state antimiscegenation 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

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65. On November 2, 2004, Mississippians voted for a state constitutional amendment to ban gay marriage by 86% to 14%, the largest margin yet in any popular vote on the issue. The Associated Press, *supra* n. 24.

66. 388 U.S. 1 (1966).

exclusive. The decision was thus distinct in substance and spirit from the FMA.<sup>67</sup>

There has been only one congressional limit placed on the ability of a state to define marriage for itself. In the nineteenth century, Congress required Utah and a few other states to relinquish polygamy as a condition for entering the union.<sup>68</sup> Yet in so doing, Congress was exercising its existing constitutional power to admit new states, not claiming some new federal power over the states as the FMA would do. Further, Congress did not attempt to limit existing states' ability to recognize plural marriages. It has not, therefore, imposed a single definition of marriage on all states via the Constitution. The fact that there is only one such very limited congressional attempt to override a state's definition of marriage in more than 200 years of our history 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 definition 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 who dislike the national policy. Second, the federal government, including all three of its branches, have 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 Dick Cheney, publicly disagreeing with President Bush, has argued that states should decide the issue of same-sex marriage for themselves.<sup>69</sup> Many other prominent American conservatives—including Bob Barr,<sup>70</sup> Rep. Chris Cox (R-Calif.),<sup>71</sup> and legal affairs writer Bruce Fein<sup>72</sup>—oppose the FMA on feder-

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67. 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.

68. Pub. L. No. 61-219, § 20, 61 Stat. 557, 569 (1910) (Ariz. Enabling Act); Pub. L. No. 61-219, § 2, 61 Stat. 557, 558 (1910) (N.M. Enabling Act); Pub. L. No. 59-234, § 3, 59 Stat. 267, 269 (1906) (Okla. Enabling Statute); Pub. L. No. 53-176, § 3, 53 Stat. 102, 108 (1894) (Utah Enabling Act).

69. Lisa Stein, *Cheney's Choice*, U.S. News & World Report 14 (Sept. 6, 2004).

70. Barr, *supra* n. 42, at A23 ("Marriage is a quintessential state issue. . . . Make no mistake, I do not support same-sex marriages. But I also am a firm believer that the Constitution is no place for forcing social policies on states, especially in this case, where states must have the latitude to do as their citizens see fit.").

71. Christopher Cox, *The Marriage Amendment Is a Terrible Idea*, Wall St. J. A22 (Sept. 28, 2004) ("For Republicans, who believe in federalism, the FMA is an uncomfortable fit. Restraint in

alism grounds. Under federalism principles, this is not an area where federal policy needs to intrude.

#### IV. 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 "super-democratic" in that it requires two-thirds approval of both houses of Congress and approval from three-fourths of the states.<sup>73</sup> 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. These anti-democratic effects provide even more reasons to be very cautious in adopting constitutional amendments in general, and this one in particular.

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

Second, an amendment would bind 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 based on 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 mark the first time we will have 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.<sup>74</sup>

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the allocation of authority to the national government from the states is fundamental to our Constitution.").

72. Bruce Fein, *Constitutional Rashness*, Wash. Times A14 (Sept. 2, 2003).

73. U.S. Const. art. V.

74. Perhaps the only exception to the rights-affirming constitutional amendment tradition was the Prohibition amendment, ratified in 1919. U.S. Const. amend. XVIII. The nation soon

The FMA would thus be a significant and, as I have argued, 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, or, 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 recently 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.<sup>75</sup>

Of course, in certain areas democratic experimentation should be limited, including 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 these 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 means by which to defend it. As the Senate leaders supporting an amendment have acknowledged, popular opposition to gay marriage is gradually waning.<sup>76</sup> There was a “stronger societal consensus [against same-sex marriage] at the time” Congress passed DOMA than there is today.<sup>77</sup> 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

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regretted that exception and just fourteen years later it became the only amendment to be repealed. *Id.* at amend. XXI, § 1.

75. Fein, *supra* n. 72, at A14.

76. Compare Senate Republican Policy Committee, *supra* n. 11, at 2, n. 7 (citing poll showing opposition to same-sex marriage standing at 68 percent in 1996), with *id.* n. 5 (citing polls showing opposition to same-sex marriage standing at between 53 percent and 62 percent in 2003).

77. *Id.* at 2.

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 tactical considerations lie behind the drive to pass a marriage amendment, the amendment reflects a deeply anti-democratic impulse, a fundamental distrust of normal political processes.

#### V. 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. In my view, 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.

A few words should be devoted to the Allard version of the FMA (“revised amendment”), which has been promoted as a narrower amendment allowing state legislatures to recognize civil unions and domestic partnerships. The revised amendment corrects none of the problems of the Musgrave version upon which it is based. Like the Musgrave version, the revised amendment 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 revised amendment, like the Musgrave version, 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 recog-

dition of same-sex marriages. Normal democratic politics would simply be shut down on this issue.

The revised amendment, like the original Musgrave version, would represent an unprecedented intrusion on the historic power of the states to define marriage. It would also intrude on the historic power of state courts to interpret their own state constitutions. These powers have been basic components of our system of federalism since the founding period. Nothing in the revised amendment eliminates these affronts to federalism.

If the fear prompting the push for an amendment is that judges will require states to recognize same-sex marriages, the revised amendment is an overly broad response to that concern, just as the Musgrave version is. As noted above, the proposed amendment would not only prevent judges from ordering the recognition of same-sex marriages, it would also prevent legislatures and popular majorities from authorizing them. Again, the revised amendment does not cure the overbreadth defect of the original proposal.

Sponsors of the revised amendment claim that it clarifies their intention to allow state legislatures to authorize "civil unions." That, however, is still not clear in the revised amendment, which nowhere actually states that intention. By striking the reference to "federal or state law," the second sentence of the revised amendment seems to leave more room for the statutory recognition of civil unions and domestic partnerships than did its parallel in the original Musgrave version. But the new language by no means solves the problem. This is so for two reasons.

First, the second sentence of the revised amendment 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 domestic partnership law or civil union law that confers marriage-like benefits to 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 revised amendment would prevent courts from correcting the problem by ordering that same-sex couples be given any of "the legal incidents" of marriage. Under the revised amendment, 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. Under either 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.

Second, civil unions, which, like Vermont's law, grant to same-sex couples all of the privileges and rights of marriage under a different name, might still be prohibited altogether by the first sentence of the revised amendment, which strictly limits marriage to opposite-sex couples. Once the revised amendment 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. A state could not maintain its own navy simply by the ruse of calling its fleet of ships an "armada" instead of a "navy."<sup>78</sup> A person could not be convicted of Treason on the testimony of one witness, rather than the constitutionally required two witnesses,<sup>79</sup> simply by calling the same offense "Schmeason." Even some drafters of the FMA have argued that the first sentence of the proposed amendment prohibits both marriage and civil unions identical to marriage.<sup>80</sup> Since the first sentence of the original proposed amendment and the first sentence of the revised amendment are substantively identical, the analysis that it prohibits both marriage and civil unions would still apply. If this analysis is right, the revised amendment does nothing to preserve state legislative power to create civil unions.

While it is not a foregone conclusion that the first sentence of the revised amendment will prohibit the legislative enactment of civil unions, there will certainly be a reasonable constitutional argument that it does. If the purpose of the revised second sentence is to make it clear that legislatures—but not courts or executives—may grant same-sex couples "the legal incidents" of marriage, why not just say so directly rather than by negative implication?

Moreover, this very uncertainty about the constitutionality of civil unions will itself 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, it will have delayed and deformed democratic debate on the issue.

The first sentence of the revised amendment suffers another problem of the original proposal. Almost every other provision in our Constitution contains a state-action requirement. (The only relevant exception is the

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78. The Constitution forbids states to "keep Troops, or Ships of War in time of Peace . . ." U.S. Const. art. I, § 10, cl. 3; see also Alan Cooperman, *Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text*, Wash. Post A1 (Feb. 14, 2001).

79. U.S. Const., art. III, § 3, cl. 1.

80. Cooperman, *supra* n. 78.

Thirteenth Amendment, which forbids slavery.) Yet there is no state-action element in the first sentence of either version 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. It could be interpreted to prohibit religious denominations from recognizing same-sex marriages, as some now do. More likely, it could also be interpreted to prohibit private employers from making benefits available on an equal basis to married employees and employees with same-sex partners.<sup>81</sup>

The application of the FMA to private action is not an inevitable interpretation. But 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, like 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.<sup>82</sup>

## VI. CONCLUSION

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 even 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.

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81. A significant portion of the Fortune 500 companies offer same-sex domestic partnership benefits. Human Rights Campaign Found., *Employers That Offer Domestic Partner Health Benefits*, <http://www.hrc.org/select/WorkLife/DomesticPartnerBenefits>, quick lists (accessed Mar. 4, 2005).

82. Rep. Chris Cox has observed that "the FMA would represent a choice by Congress to vastly expand the reach of the federal courts." Cox, *supra* n. 71.