# THE FEDERAL MARRIAGE AMENDMENT AND RULE BY JUDGES

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*Marriage: the state or condition of a community consisting of a master, a mistress, and two slaves, making in all, two.*

— Ambrose Bierce[1]

*Marriage is a great institution, but I'm not ready for an institution.*

— Mae West[2]

*I do believe in the sanctity of marriage, I totally do. [But] I was in Vegas and it took over me.*

— Britney Spears[3]

*Goodridge v. Department of Public Health*,[4] the bold Massachusetts decision requiring the state to recognize marriage between persons of the same sex, could well end up enshrining the traditional understanding of marriage in the Massachusetts Constitution, the United States Constitution, or both. The reason is that the public is generally against the reconfiguration of marriage,[5]

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1. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 89 (Bloomsbury 2003) (1911).

2. BrainyQuote.com, Mae West Quotes, http://www.brainyquote.com/quotes/quotes/m/maewest106590.html (last visited Mar. 21, 2004).

3. In a telephone interview with MTV'S *Total Request Live*, quoted in *PEOPLE: Blame it on Vegas, Britney Tells 'TRL,'* ST. PAUL PIONEER PRESS, Jan. 15, 2004, at 5B, *available at* 2004 WL 56300667.

4. 798 N.E.2d 941 (Mass. 2003).

5. A December 10, 2003, CBS News/New York Times poll found 61% opposed to gay marriage, up from 55% in July, and 34% in favor, down from 40%. CBS News, *Opposition to Gay Marriage Grows* (Dec. 21, 2003), *at* http://www.cbsnews.com/stories/2003/12/19/opinion/polls/main589551.shtml. According to a Los Angeles Times poll published April 11, 2004, 72% of Americans oppose homosexual marriage. Elizabeth Mehren, *Stigma Against Gays Fading, Survey Finds*, L.A. TIMES, April 11, 2004, at A1.

all the more so when it comes by way of judicial fiat on the slenderest of margins (4-3). *Goodridge* comes at a time of growing popular resistance to the judicial imposition of value judgments of elites.

In Canada, the Ontario Court of Appeal legalized gay marriage in *Halpern v. Canada*,[6] and the Canadian government elected not to appeal the decision to the Supreme Court of Canada but rather to propose enabling legislation to Parliament. In the United States, the Supreme Court decided in *Lawrence v. Texas*[7] to make sodomy a constitutional right, forbidding the criminalization of private sexual activity between consenting adults. Both these cases were cited favorably by the majority opinion in *Goodridge*.

On May 15, 2002, six Congressmen introduced the Federal Marriage Amendment in the House of Representatives.[8] While most Americans agree that marriage should only be between a man and a woman,[9] it will take repeated supermajorities to add the Federal Marriage Amendment to the United States Constitution: two-thirds of both houses of Congress and three-fourths of the states.[10] The fact that thirty-eight states have recently enacted Defense of Marriage Acts ("DOMAs")[11] puts the prospect of ratification by thirty-eight states

6. 172 O.A.C. 276 (2003).

7. 123 S.Ct. 2472 (2003).

8. Cheryl Wetzstein, *Suit Seen as Step to 'End Marriage;' Group Urges Constitutional Definition*, WASH. TIMES, May 27, 2002, at A3.

9. *See, e.g.*, Alliance for Marriage Homepage, *National Wirthlin Poll Finds that Most Americans Support a Constitutional Amendment to Defend Marriage*, *at* http://www.allianceformarriage.org/site/PageServer?pagename=mac_30304 (last visited May 13, 2003).

10. U.S. CONST. art. V.

11. NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. ANN. § 25-101 (West 2000); ARK. CODE ANN. § 9-11-107 (Michie 2002); CAL. FAM. CODE § 308.5 (West Supp. 2004); COLO. REV. STAT. ANN. § 14-2-104 (West Supp. 2003); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2004); GA. CODE ANN. § 19-3-3.1 (1999); HAW. REV. STAT. § 572-1 (Supp. 1999); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. 5/212-5, 5/231.1 (2002); IND. CODE § 31-11-1-1 (1998); IOWA CODE § 595.2 (2001); KAN. STAT. ANN. § 23-101 (Supp. 2002); KY. REV. STAT. ANN. § 402.040 (Michie 1999); LA. CIV. CODE ANN. art. 89 (West Supp. 2004); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1998); MICH. COMP. LAWS ANN. § 551.1, .271 (West Supp. 2003); MINN. STAT. § 517.03 (2002); MISS. CODE ANN. § 93-1-1 (Supp. 2003); MO. REV. STAT. § 451.022 (Supp. 2002); MONT. CODE ANN. § 40-1-103 (2003); N.C. GEN. STAT. § 51-1.2 (2003); N.D. CENT. CODE § 14-03-01 (Supp. 2003); OHIO REV. CODE § 3101.01 (2004); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25-1-1 (Michie 1999); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004); UTAH CODE ANN. § 30-1-2 (Supp. 2003); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE § 26.04.020 (2002); W. VA. CODE ANN. § 48-2-603 (Michie 2001). The author is indebted to Bill Duncan of Brigham Young University for this catalog of state DOMAs.

within the realm of feasibility. Unfortunately, a two-thirds vote from the U.S. Senate will probably be more difficult to come by.[12]

Although various unsuccessful attempts had been made in the more or less distant past to amend the Constitution to deal with marriage,[13] the Supreme Court in the twentieth century included marriage as one of the fundamental rights guaranteed by the United States Constitution's Due Process Clause.[14] The implicit definition of marriage was always the union of one man and one woman.

Reacting to the *Halpern* and *Lawrence* decisions, and bracing for the adverse ruling to come in *Goodridge*, Senate Majority Leader Bill Frist announced that he was supporting the Federal Marriage Amendment.[15] President Bush, for his part, indicated his support after the *Goodridge* decision,[16] and specifically endorsed the Amendment on February 24, 2004.[17]

What about the argument that this matter is best left to state law? Jonathan Rauch, writing in the *Wall Street Journal*, formulated just such a federalism argument:

> For centuries, since colonial times, family law, including the power to set the terms and conditions of marriage, has been reserved to the states, presumably because this most domestic and intimate sphere is best overseen by institutions that are close to home. . . . Same-sex marriage should not be a federal issue.[18]

It is certainly true that the United States Constitution does not contain the words "marriage" or "family." Nor, in its original version, did it contain the words "slaves" or "slavery."[19] In both instances, challenges to these domestic institutions generated political tensions

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12. *See, e.g.*, Matt Stearns, *Amendment to Ban Gay Marriage Seems Unlikely*, KANSASCITY.COM (Feb. 21, 2004), *at* http://www.kansascity.com/mld/kansascity/8004963.htm?1c.

13. *See* 2 HERMAN V. AMES, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896: PROPOSED AMENDMENTS TO THE CONSTITUTION, 1789 TO 1889, at 190 (1897).

14. *See infra* notes 20-22 and accompanying text.

15. *Connie Chung Tonight: Proposal: Marriage Only Union Between Man and Woman* (CNN television broadcast, June 30, 2003), *available at* 2003 WL 7893696.

16. Alan Bjerga, *Sides Clash over Same-Sex Marriage Ban*, WICHITA EAGLE, Dec. 29, 2003, at 1, *available at* 2003 WL 69736418; Judith Graham, *Debate Intensifies over Same-Sex Unions*, CHI. TRIB., Aug. 2, 2003, at 11.

17. Lee Romney, *Bush Urges Same-Sex Marriage Ban*, L.A. TIMES, Feb. 25, 2004, at A19.

18. Jonathan Rauch, *Leave Gay Marriage to the States*, WALL ST. J., July 27, 2001, at A8.

19. This, of course, changed with the passage of the Thirteenth Amendment after the Civil War. U.S. CONST. amend. XIII, §1.

that some sought to resolve by amending the federal constitution. Whatever the historical analogies, it does seem odd that the rhetoric for "same-sex marriage," which wraps itself in the language of the civil rights movement to extend certain understandings of freedom and equality to homosexuals, should now employ the language of "states' rights" to hold onto whatever judicially-acquired beachheads it has obtained in the states or will be able to obtain in them in the future.

Rauch's claim of exclusive state jurisdiction over the terms and conditions of marriage is false, however. It runs afoul of *Loving v. Virginia*,[20] which said states had no power under the Federal Constitution to prohibit interracial marriage. "Marriage is," according to the Court, "one of the 'basic civil rights of man,' fundamental to our very existence and survival."[21] *Loving* also called marriage "one of the vital personal rights essential to the orderly pursuit of happiness,"[22] thus protecting it from infringement by state law.

In addition to finding the antimiscegenation law a deprivation of liberty without due process, *Loving* found that the law violated the equal protection clause of the Fourteenth Amendment.[23] *Loving* is a favorite case of advocates of same-sex marriage. Just as you should be able to marry the person you love regardless of race, the argument runs, you should be able to marry the person you love regardless of sex or sexual orientation.[24] Of course, if the proponents of this argument are correct in predicting a decision along these lines by the United States Supreme Court, then the right to same-sex marriage will be required by the Federal Constitution, notwithstanding state constitutions or state and federal laws to the contrary. The only way of decisively defeating such an outcome would be by means of a federal constitutional amendment such as the Federal Marriage Amendment.

The claim of exclusive state jurisdiction over the incidents of

20. 388 U.S. 1 (1967).

21. *Id.* at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

22. *Id.*

23. *Id.*

24. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians & Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 284 (1994) (using *Loving's* result to argue by analogy that "[j]ust as interracial couples cannot be made to suffer any legal disadvantage that same-race couples are spared, gay couples cannot be made to suffer any legal disadvantages that heterosexual couples are spared. Lesbians and gay men must be permitted to marry.").

marriage is also contradicted by *Griswold v. Connecticut*,[25] which said that states had no constitutional power to prohibit the use of contraceptives within marriage. It runs afoul of those federal cases that refer to a "fundamental right to marry" and strike down state-imposed conditions on its exercise, such as *Boddie v. Connecticut*[26] and *Zablocki v. Redhail*.[27] *Zablocki* called the right to marry one of "fundamental importance;" a "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[28] While the opinion acknowledged that not all regulation of the incidents of marriage was necessarily subject to "rigorous scrutiny" and that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,"[29] that characterization did not apply to the state-imposed requirement that existing child support obligations be met before a person was allowed to marry, which was declared unconstitutional.[30] Similarly, *Turner v. Safley*[31] invalidated on constitutional grounds a state prohibition on prison inmates marrying.

The Federal Constitution, then, has expanded the circle of those who can legitimately marry under state law (people of opposite races,[32] prisoners,[33] deadbeat dads,[34] those unable to pay courts for a divorce from a previous spouse[35]), while also changing the understanding of what marriage entails (the right to contraception[36] and the unilateral right of the woman to abort[37]). It is at least forty years too late to claim that marriage is exclusively a state matter, or that "the power to set the terms and conditions of marriage . . . has been reserved to the states."[38]

I have been involved in the fight over homosexual "marriage" ever

25. 381 U.S. 479 (1965).
26. 401 U.S. 371 (1971) (striking down a required divorce filing fee for indigents).
27. 434 U.S. 374 (1978) (striking down state requirement that child support obligations be met before an obligee is allowed to marry).
28. *Id.* at 384.
29. *Id.* at 386.
30. *Id.* at 388 (applying strict scrutiny to the Wisconsin statute at issue).
31. 482 U.S. 78 (1987).
32. *See supra* notes 20-22 and accompanying text.
33. *See supra* note 31 and accompanying text.
34. *See supra* notes 27-30 and accompanying text.
35. *See supra* note 26 and accompanying text.
36. *See supra* note 25 and accompanying text.
37. Roe v. Wade, 410 U.S. 113 (1973).
38. Rauch, *supra* note 18.

since the Hawaii case in 1996,[39] when I filed an amicus brief opposing it.[40] In the 1999 Vermont case *Baker v. State*,[41] I filed a Brandeis brief analyzing the social science evidence, mainly on parenting, but also on the alleged historical precedents for same-sex marriage.[42] I was also an expert witness by affidavit in *Halpern v. Canada* in Toronto.[43] Apparently, as the court ruled in the face of my affidavit, I was not very persuasive. In the meantime, I co-authored a piece with Peter Lubin entitled *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage* in the *Catholic University Law Review*,[44] which debunks some of the historical arguments made on behalf of same-sex marriage. More recently, I filed amicus briefs in both *Goodridge v. Department of Public Health*[45] in Massachusetts and the pending New Jersey case, *Lewis v. Harris*.[46]

This gives me an informed perspective to make the following not-exactly courageous judgment: we are now at an interesting crossroads in the debate over the marital status of homosexual unions. Up until now, the fight has been largely conducted at the state level, with homosexual advocacy groups like Lambda Legal Defense Fund and Gay and Lesbian Advocates and Defenders ("GLAD") bringing suit in state courts under state constitutional claims, and the state attorneys general and defenders of monogamous, heterosexual marriage trying to counter the state constitutional claims of liberty and equality. When homosexual marriage made progress in the courts, as in Hawaii and Alaska, supporters of traditional marriage successfully put forward referendums on state constitutional amendments, defining marriage as between a man and a woman, which passed overwhelmingly.[47] At the time of this writing, there was such an amendment pending in Massachusetts which, while reserving the term "marriage" for persons

39. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *rev'd*, 994 P.2d 566 (Haw. 1999).

40. Brief of Amicus Curiae National Association for Research and Therapy of Homosexuality, Inc., *Baehr*, 1996 WL 694235 (No. 91-1394-05), *available at* http://www.Columbia.edu/cu/Augustine/arch/narth.txt.

41. 744 A.2d 864 (Vt. 1999).

42. Brief of Amici Curiae New Journey et al., *Baker* (No. 98-32).

43. 172 O.A.C. 276 (2003).

44. Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271 (1998).

45. 798 N.E.2d 941 (Mass. 2003).

46. *See* Brief of Amicus Curiae Alliance for Marriage in Support of Defendants' Motion to Dismiss the Amended Complaint, Lewis v. Harris (N.J. Super. Ct. 2003) (County No. MER-L-15-03).

47. *See* ALASKA CONST. art. I, § 25; HAW. CONST. art. I, § 23.

of the opposite sex, would grant all the legal incidents of marriage under state law to same-sex couples united in "civil unions."[48] The earliest it could go into effect, however, would be 2006,[49] and the Massachusetts Supreme Judicial Court in *Goodridge* gave the legislature only 180 days to "take such action as it may deem appropriate in the light of this opinion."[50]

As a defensive measure, thirty-eight states and the federal government have enacted Defense of Marriage Acts.[51] The Federal Defense of Marriage Act, enacted in 1996, while proclaiming that marriage for the purposes of federal law would apply only to male-female couples, attempts to establish a sort of Maginot Line: states will not be required under the Full Faith and Credit Clause of the United States Constitution to recognize the homosexual marriage permitted in a sister state, should that state, be it Massachusetts or New Jersey, decide to recognize homosexual marriage.[52]

The Federal Defense of Marriage Act does not prevent any state from willingly instituting or recognizing homosexual marriage. It purports only to permit the *non*-recognition of a sister-state marriage, contrary to the usual principle of "married anywhere, married everywhere."[53] The theory is that homosexual marriage could be contained, cabined or closeted, as it were, in the few relatively liberal states—Hawaii, Vermont—that might choose to adopt it. It has worked so far. But now Massachusetts' highest court has in effect overruled the framers of its state constitution and recognized homosexual marriage. Perhaps New Jersey will do the same next year.

It is increasingly clear that the Maginot Line will not hold. For one thing, homosexual advocacy groups have already announced that couples will flock from the other forty-nine states and the District of

48. On March 29, 2004, the Massachusetts Legislature took up the issue in constitutional convention and advanced a state constitutional amendment that would define marriage as the union of a man and a woman. Rick Klein, *Vote Ties Civil Union to Gay-Marriage Ban*, BOSTON GLOBE, Mar. 30, 2004 at A1.

49. *See* Ethan Jacobs, *Round Two: Marriage Battle Resumes,* BAY WINDOWS, Mar. 11, 2004, at 14 ("But even if [the] amendment gets on the ballot—in 2006 at the earliest—marriage licenses will have been distributed in Massachusetts for more than two years by then.").

50. 798 N.E.2d at 970.

51. *See supra* note 11.

52. Defense of Marriage Act, 28 U.S.C. § 1738C, 1 U.S.C. §7 (2000).

53. *See, e.g.*, Barbara J. Cox, *Same-Sex Marriage & Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1064-65 (1995) (noting the "overwhelming tendency" of states to recognize out-of-state marriages).

Columbia to the first state that recognizes gay marriage, intending to challenge the Defense of Marriage Act on federal constitutional grounds as inconsistent with either the Full Faith and Credit or Equal Protection Clause.[54] After *Romer v. Evans*[55] and *Lawrence v. Texas*,[56] such an effort might plausibly succeed. But the stronger reason that the Defense of Marriage Act is inadequate to protect the definition of marriage is that it assumes, as a practical matter, that American society can long endure two incompatible conceptions of marriage: one, recognized in thirty-eight states and the federal government, which assumes the natural link of marriage to procreation and mother-father parenting, and the other conception, prevalent in a few more liberal jurisdictions, like Massachusetts or New Jersey, in which marriage might be defined as a form of friendship recognized by the police.[57] These are fundamentally incompatible conceptions. Advocates on both sides of this issue are in agreement that attempts at compromise between them, whether in the form of Vermont-style civil unions or in the form of a patchwork quilt of some-jurisdictions-have-one, other-jurisdictions-have-another, is untenable in the long run.[58] Nevertheless, when the Massachusetts Senate requested an advisory opinion of the Supreme Judicial Court as to whether civil unions would satisfy the Court,[59] the answer was a definitive "no."[60] But even had the Court answered differently, marriage-in-all-but-name would still most likely be a step on the road to gay "marriage."

This article argues that recent developments in family law, both in

54. *See, e.g.*, Evan Wolfson, *The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality, in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 171 (Robert Wintemute & Mads Andenæs eds., 2001).

55. 517 U.S. 620 (1996).

56. 123 S. Ct 2472 (2003).

57. The majority opinion in *Goodridge* calls it "the voluntary union of two persons as spouses, to the exclusion of all others." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

58. From quite a different perspective, Akhil Amar predicted in 1996 that "in the long run the nation probably cannot exist half slave and half free on [the question of homosexual marriage]." Akhil Reed Amar, *Race, Religion, Gender, and Interstate Federalism: Some Notes from History,* 16 QUINNIPIAC L. REV. 19, 26 (1996).

59. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004). In response to *Goodridge*, the Massachusetts legislature asked the following question:

> Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?

*Id.*

60. *Id.* at 572.

the United States and abroad, necessitate a national strategy to preserve marriage's central role in the creation and formation of our posterity. Homosexual advocates are prepared to litigate tirelessly to force a new national consensus regarding marriage.[61] Those who disagree strenuously with their stripped-down model of "friendship with sex but without children issuing from the relationship" but who agree with most Americans and the consensus offered by history—spanning time and space and cultural and religious differences—that marriage is uniquely a relationship between the sexes, naturally related to procreation and the upbringing of children, need a democratic response that is just as national in scope. Such a response is the proposed Federal Marriage Amendment. In my opinion, it is now time to shift from a strategy of exclusively state and local recourse against homosexual marriage to a federal constitutional amendment.

Of course, this country has been embroiled in a prolonged, divisive dispute over legal status before. The issue of slavery was eventually resolved by the Civil War and the Thirteenth Amendment. Abraham Lincoln famously insisted that ". . . [t]his government cannot endure, permanently half-*slave* and half-*free*."[62] In the end, only a uniform federal approach could resolve the dispute.

Although both advocates and opponents of homosexual marriage will make states-rights arguments against a proposed Federal Marriage Amendment, I contend that the state-by-state approach to defending marriage will fail. In our national culture, once homosexual marriage is recognized anywhere, there will be enormous pressure to settle for a "least-common denominator" conception of marriage. The protection of a state boundary, even in a state like Utah, will then count for little. We saw something similar with the universal adoption of "no-fault" divorce in the 1970s.[63] Elites in the courts,[64] the bar,[65] the academy,[66] and the media[67] are also bent on undertaking the social

61. *See, e.g.*, Margaret Williams, *From the Executive Director*, *at* http://www.glad.org/About_GLAD/from_the_executive_director.shtml (last visited Mar. 21, 2004) ("Despite great accomplishments, we will not rest on our laurels; GLAD continues to expand its capacity to fight in every corner of New England for the equality we deserve.").

62. Paul M. Angle, *Introduction* to CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 1, 2 (Paul M. Angle ed., 1958).

63. *See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 188-89 (1989).

64. *See infra* notes 72-82 and accompanying text.

65. *See infra* notes 85-87 and accompanying text.

66. *See infra* note 86.

experiment of homosexual "marriage." If they do not ultimately succeed in Massachusetts, given that the decision has yet to be implemented, they will likely succeed in New Jersey. All it takes is a handful of judges who think they know best and that their opinions supersede the rule of law. Once they succeed in one jurisdiction in this country, extensive efforts will be made both through the courts and the media to repeat that success throughout the land. Eventually, the American people will insist on being part of the debate. The proposed Marriage Amendment is the best way to ensure a free and open national discussion regarding the nature of marriage.

Why does it matter? Couldn't proponents of homosexual marriage argue that denying marriage to homosexuals is a matter of invidious discrimination, a rationale that was accepted by the majority in *Goodridge*,[68] or that marriage as a civil institution long ago severed its link to procreation and the raising of children, given the widespread acceptance of contraception, abortion, divorce, in vitro fertilization, and single parenting?[69] I would answer that marriage still matters because children still matter.[70] Children, even test-tube babies, can only come about through the union of male and female. Common sense says that children are best raised by both a mother and a father. Same-sex couplings cannot produce children, nor can they provide children with both a mother and a father. This is a matter of physiology. It is not bigotry or bias to notice it; nor is it bias or bigotry to notice that there is a difference in meaning between reproductive intercourse, the quintessential "fact of life" where procreation is possible, and other sexual encounters.

One could make the claim that barring marriage between persons of the same sex is just as discriminatory as barring marriage between persons of different races. But a man and a woman of different races can beget children and raise them as their father and mother. Persons of the same sex can do neither. If we call history as our witness, which testifies that having and raising children are acts preferably

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67. *See infra* notes 91-92 and accompanying text.

68. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003).

69. *Id.* at 961.

70. For example, Roman law was clear about the nature of marriage and its link to procreation from the very first lines of Justinian's *Digest*: "*Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but it is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing." 1 THE DIGEST OF JUSTINIAN 1.1.1 (Alan Watson ed. & trans., 1985). The same quotation from the jurist Ulpian appears at the beginning of Justinian's *Institutes* 1.2.

within marriage between men and women, then there is every reason to continue disallowing marriage between persons of the same sex. The link to the procreation and education of children is why marriage, uniquely among types of intimate relationships, is given public recognition and freighted with special rights and duties.

The fact that we live in a culture of alluring promiscuity does not negate what even the majority of the U.S. Supreme Court in *Lawrence* called the tradition of "general condemnation of nonprocreative sex."[71] Of course, that court also ruled that reasons of public morality were an insufficient basis for restricting liberty. Could the *Lawrence* logic also apply to the definition of marriage? We must turn to *Lawrence* to assess its impact on homosexual marriage. But before we do so, let us examine the history of *Goodridge* to see how the battle over marriage at the state level has been faring.

When the Massachusetts Supreme Judicial Court released its decision in *Goodridge* on November 18, 2003, perhaps the principal surprise was the narrowness of the majority, 4-3, coupled with the boldness of the holding. Chief Justice Margaret Marshall had written a landmark decision claiming that the reservation of marriage to male-female couples had no rational basis.[72] So much for history!

As an initial matter, it does seem odd that a Constitution written by John Adams in 1780 would be so construed. In 1778, reflecting on the harm that marital infidelity caused, John Adams wrote during his stay in France:

> [T]he foundations of national Morality must be laid in private Families. In vain are Schools, Accademics [sic] and universities instituted, if loose Principles and licentious habits are impressed upon Children in their earliest years. . . . How is it possible that Children can have any just Sense of the sacred Obligations of Morality or Religion if, from their earliest Infancy, they learn that their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers.[73]

These problems, of course, attend adultery and divorce; but they also attend homosexual marriage, at least those that will involve children, since children of homosexual parents must necessarily come from at least one third party.

At the beginning of her opinion declaring homosexual marriage to

71. Lawrence v. Texas, 123 S. Ct. 2472, 2479 (2003).

72. *Goodridge*, 798 N.E.2d at 948.

73. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 21 (2000).

be a state constitutional right, Supreme Judicial Court Chief Justice Margaret H. Marshall notes that there is deep-seated division over "religious, moral, and ethical convictions" regarding marriage and homosexuality—but it turns out that is irrelevant.[74] The court is not following the historical view of marriage and homosexuality, nor the view that "same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors."[75] Marshall says: "Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. 'Our obligation is . . . not to mandate our own moral code.'"[76]

That claim must be tested. For one thing, it turns out the decision has a majority of one, since it was decided 4-3. If this were just a matter of interpreting the Constitution's legal requirements, particularly given the divisive nature of the case, one would have hoped for something closer to unanimity, as happened 50 years ago with *Brown v. Board of Education*.[77]

Marshall found the exclusion from marriage rights for homosexual couples to be "incompatible with the constitutional principles of respect for individual autonomy and equality under law."[78] As a remedy, the court "refined the common-law meaning of marriage . . . in light of evolving constitutional standards."[79] The court stayed its judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."[80]

As Justice Robert J. Cordy points out in his dissent, "only by assuming that 'marriage' includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the 'right' of same-sex couples to 'marry.'"[81] In other words, Marshall had to first envision "marriage" as encompassing homosexual couples before she could conclude that their exclusion violated the "right to marry" or that the exclusion was

74. *Goodridge*, 798 N.E.2d at 948.
75. *Id.*
76. 798 N.E.2d at 948 (quoting *Lawrence*, 123 S. Ct. at 2480 (citations omitted)).
77. 347 U.S. 483 (1954).
78. *Goodridge*, 798 N.E.2d at 949.
79. *Id.* at 969.
80. *Id.* at 970.
81. *Id.* at 984 (Cordy, J., dissenting).

"invidiously discriminatory." This is a case of Lewis Carroll's Queen of Hearts: "Sentence first—verdict afterwards."[82] It turns out that the redefinition of the common-law meaning of marriage was not just the remedy but the basis for the circular conclusion that constitutional rights were violated.

Further, changing the common-law definition of marriage is, by its nature, judicial legislation. It is not in the Commonwealth's Constitution. And so we have it: one unelected judge imposing her values on the commonwealth and the nation.

But not all judges are so presumptuous. A few years ago, at the time of her confirmation hearing, Justice Martha B. Sosman testified:

> No one elected me to anything and no one has asked me to run the Commonwealth from my courtroom. Making the law . . . is not in my job description. Nothing in our constitution, state or federal, gives Martha Sosman or any other judge the power to inflict her own agenda, political or social, on the people of this commonwealth. I not only believe in judicial restraint, I practice what I preach.[83]

True to her words, Sosman dissented in *Goodridge*. In her dissent, she writes:

> [T]he opinion ultimately opines that the Legislature is acting irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure. Placed in a more neutral context, the court would never find any irrationality in such an approach.[84]

Judges, however, are not the only legal figures in this debate. Amicus briefs supporting same-sex marriage were filed by both the Massachusetts Bar Association and the Boston Bar Association, indicating support from the leadership of the organized bar.[85] Furthermore, a number of the top Boston law firms served as counsel

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82. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 108 (Roger Lancelyn Green ed., Oxford Univ. Press 1971) (1941).

83. Dwight G. Duncan, *Judicial Restraint in Massachusetts,* 29 MASS. L. WKLY 11 (2000).

84. *Goodridge*, 798 N.E.2d at 981 (Sosman, J., dissenting).

85. *See* Brief of Amicus Curiae Massachusetts Bar Association, *Goodridge* (SJC No. 08860), *available at* http://www.glad.org/marriage/MBA_Brief.pdf (last visited Mar. 10, 2004), Brief of Amicus Curiae Boston Bar Association Massachusetts Lesbian and Gay Bar Association, *Goodridge* (SJC No. 08860); *available at* http://marriagewatch.org/cases/ma/goodridge/sjc/p_benefits_amicus.pdf (last visited Mar. 10, 2004). Whether the rank-and-file members would agree with this advocacy is another matter entirely.

for amici supporting same-sex marriage,[86] whereas the amicus briefs opposing homosexual marriage, though greater in quantity, and, I would argue, in quality, were typically filed by sole practitioners or small law firms as counsel.[87] This prestige disparity between the law firms filing their respective amicus briefs indicates that the elite of the bar are firmly on one side of this controversial issue.

Also of note is that *Goodridge* was filed in April 2001. One incident from the previous year indicates why GLAD considered Massachusetts an auspicious place to bring suit. Speaking at the annual dinner of the Massachusetts Lesbian & Gay Bar Association in May of 2000 in Cambridge, Chief Justice Suzanne DelVecchio of the Massachusetts Superior Court said:

> Vermont recognizes same-sex couples. And here we are in Massachusetts. Would you please? It's embarrassing. Could we get with the program a little bit? . . . The only way gays and lesbians in this state are going to achieve what has been achieved in Vermont is to stay who you are, apply for the [important] jobs and demand to be seated at the table. . . . Nothing is easy. Do you think getting my hair this color is easy?[88]

The local media, at least the elite media, are in favor as well. The *Boston Globe* has editorialized in favor of same-sex marriage[89] as has the *Harvard Crimson.*[90]

Now that the Supreme Judicial Court has issued its decree, what's next? Basically, the same recourse as was had in Hawaii and Alaska—amending the state constitution. With this difference: Massachusetts' procedure for state constitutional amendment is cumbersome, requiring repeated votes of the legislature and the public. The state constitution could be amended no earlier than 2006. This process could not be completed before the expiration of the 180-day period that the SJC gave the legislature to "to permit [it] to take

86. For a list of briefs amici curiae on the GLAD website, see http://www.glad.org/marriage/goodridge_amici.shtml (last visited Mar, 11, 2004) (listing *amicus* briefs from Foley & Hoag LLP on behalf of nine top scholars in the field of state constitutional law; Palmer & Dodge on behalf of the authors of the most respected and widely used treatise on Massachusetts family law; Bingham & McCutchen LLP on behalf of the Boston Bar Association; Hale & Dorr; Choate Hall & Stewart and Kimball, Brosseau and Michon on behalf of twenty professors of remedies and constitutional litigation).

87. *See* Marriage Watch Homepage, Goodridge Amicus Briefs, *at* http://www.marriagewatch.org/cases/ma/goodridge/goodridgefiles.htm (last visited Mar. 21, 2004).

88. *Hearsay*, 28 MASS. L. WKLY 1372 (2000).

89. Editorial, *For Gay Marriage,* BOSTON GLOBE, July 8, 2003, at A18.

90. Editorial, *Equal Rights Under the Law,* HARVARD CRIMSON, Sept. 15. 2003, at A12.

such action as it may deem appropriate in light of this opinion."[91] That would require another favorable vote during the next legislative session (2005-2006) from the members of the legislature (both houses convened in constitutional convention) on the Marriage Amendment that was first approved on March 29, 2004, as well as approval from the voters by referendum in November, 2006.[92] Incidentally, a previous version of this amendment, which in addition to defining marriage prevented the granting of "benefits exclusive to marriage," was defeated in the summer of 2002 by parliamentary maneuver.[93] The convention was adjourned before a vote could be taken. Arguably the benefits language did not help the amendment the last time around, and would tend to validate the decision by drafters of the Federal Marriage Amendment to deal only with marriage and the judicial imposition of the legal incidents of marriage to other couples and groups, while allowing legislatures to democratically legislate benefits and domestic partnerships. More on that later.[94]

### A. *Lawrence v. Texas*

*Lawrence v. Texas*, decided in the summer of 2003, invalidated state anti-sodomy laws on grounds that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice."[95] In so ruling, the Supreme Court overturned its 1986 decision in *Bowers v. Hardwick*.[96] Most significantly, the Court held that moral disapproval of homosexuality did not constitute a legitimate state interest: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[97] Even Justice O'Connor, who did not join in the substantive due-process overruling of *Bowers*, agreed with the majority on that point.[98]

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91. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003).

92. *See supra* note 49 and accompanying text.

93. Scot Lehigh, *Forces of Fairness Lose by Winning,* BOSTON GLOBE, July 19, 2002, at A15.

94. *See infra* notes 128-30 and accompanying text.

95. 123 S. Ct. 2472, 2478 (2003).

96. 478 U.S. 186 (1986).

97. *Lawrence,* 123 S. Ct. at 2483 (quoting *Bowers,* 478 U.S. at 216 (Stevens, J., dissenting)).

98. *Id.* at 2487 (O'Connor, J., concurring in judgment).

Of course, the majority opinion by Justice Kennedy deliberately eschews its implications for marriage: "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[99] Justice O'Connor in concurrence goes further: "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[100]

In dissent, Justice Scalia begs to differ: "But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."[101] He concludes:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. . . . This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.[102]

The majority opinion in *Lawrence* supports Justice Scalia's contention. Early in the majority opinion, Justice Kennedy writes that because the statutes "seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals," the State or a court should not attempt "to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[103] This sounds remarkably like John Stuart Mill's harm principle, that limitations on a person's liberty are justified only in order to prevent harm to someone.[104] Of course, there is the additional phrase "or abuse of an institution the law protects." There is no authority given for this dicta, and it has the feel of being rigged for the occasion, to reserve for another day the matter of homosexual marriage.

More tellingly, the opinion later magisterially quotes what Scalia

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99. *Id.* at 2484.

100. *Id.* at 2487-88 (O'Connor, J., concurring in judgment).

101. *Id.* at 2496 (Scalia, J., dissenting).

102. *Id.* at 2498.

103. *Id.* at 2478.

104. JOHN STUART MILL, ON LIBERTY 80-81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

calls the "famed sweet-mystery-of-life passage."[105] "At the heart of liberty is the right to define one's own concept of existence, of *meaning*, of the universe, and of the mystery of human life."[106] If states or courts should not attempt "to define the meaning of a relationship" because that interferes with "liberty,"[107] then who is to say what marriage means? Not only can we write our own vows, we can be as creative as we wish. Then the kicker: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[108] "These purposes" refers back to "the most intimate and personal choices a person may make in a lifetime," which in turn refers back to "personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education."[109] As such, Justice Kennedy has implicitly forced the recognition of homosexual marriage.

One remarkable feature of the majority decision in *Lawrence* is its reliance on foreign and international precedent. For example, the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*[110] that laws proscribing sodomy were invalid under the European Convention of Human Rights, is cited to disparage the *Bowers* decision, even though *Bowers* was decided subsequent to *Dudgeon*.[111] Justice Kennedy also noted that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[112]

Justice Scalia is withering in his criticism of this reliance on foreign authority: "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"[113]

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105. *Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting).

106. *Id.* at 2481 (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992)) (emphasis added).

107. *Id.* at 2478.

108. *Id.* at 2482.

109. *Id.* at 2481.

110. 45 Eur. Ct. H.R. (ser. A) (1981).

111. *Lawrence*, 123 S. Ct. at 2481.

112. *Id.* at 2483 (internal citations omitted).

113. *Id.* at 2495 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 n. (2002) (Thomas, J., concurring).

The fact remains that foreign precedent influenced a majority of the U.S. Supreme Court in *Lawrence*. Let us, therefore, look north at how our closest neighbor is dealing with the issue of recognizing homosexual marriage, for *Goodridge* concurred with the Court of Appeal for Ontario in its remedy of "refin[ing] the common-law meaning of marriage."[114]

### B. *Halpern v. Canada*

On June 10, 2003, the Court of Appeal for Ontario, in the case of *Halpern v. Canada,* declared "the existing common law definition of marriage to be invalid to the extent that it refers to 'one man and one woman.'" [115] The Court reformulated "the common law definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others,'" ordered the decision to have immediate effect, and the Clerk of the City of Toronto to issue marriage licenses to the couples.[116]

The Court of Appeal for Ontario, in reaching this dramatic decision, accepted the holding of a lower court, which found that the definition of marriage was discriminatory under section 15(1) of the Canadian Charter of Rights and Freedoms in a manner not justified under section 1 of the Charter.[117] Courts of Appeal in both British Columbia and Quebec have reached similar rulings.[118]

For our purposes, one of the most interesting constitutional arguments, made by the intervenor Association for Marriage and the Family in Ontario (the "Association"), against recognizing homosexual marriage concerned the meaning of the word "marriage" in the Constitution Act, 1867. The Association argued that because the Canadian federal government was given exclusive jurisdiction over "marriage and divorce," it must follow that "as a constitutionally entrenched term, this definition of marriage can be amended only through the formal constitutional amendment procedures."[119] The Ontario Court of Appeal found this argument "without merit" because, among other reasons, "to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's

114. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

115. 172 O.A.C. 276, 308 (2003).

116. *Id.* at 383.

117. *See id.*

118. EGALE Canada Inc. v. Canada, [2003] 13 B.C.L.R.4th 1; Hendricks v. Quebec, [2002] R.J.Q. 2506

119. *Halpern*, 172 O.A.C. at 287.

jurisprudence of progressive constitutional interpretation."[120] The Court continued: "[A Constitution] must . . . be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[121] "In our view," the Court then concluded, 'marriage' does not have a constitutionally fixed meaning. Rather . . . the term 'marriage' . . . has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures."[122]

This is a significant statement, particularly because the manner of "progressive constitutional interpretation" there exemplified is similar to the method employed in *Lawrence*, whose penultimate paragraph reads as follows:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[123]

If constitutional "liberty" did not *historically* entail sodomy, now it does. If marriage in Canada did not *historically* extend to same-sex couples, now it does. Of course, Canada's Constitution Act explicitly mentions "marriage." The United States Constitution nowhere mentions "marriage," and the right to marriage has been teased out of the "Due Process Clause." As such there is a need to define marriage in the United States Constitution if we are serious about preventing judges from employing such "progressive constitutional interpretation" and "evolving paradigms."

### *C. The Federal Marriage Amendment*

On July 12, 2001, a broad coalition of individuals and groups called the Alliance for Marriage, at a press conference in Washington, D.C., announced a proposal to amend the United States

120. *Id.*
121. *Id.* at 288 (quoting Southham Inc. v. Hunter, [1984] S.C.R. 145, 155 (Can.)).
122. *Id.*
123. 123 S. Ct. 2472, 2484 (2003).

Constitution.[124] The proposed Federal Marriage Amendment reads as follows: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or 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."[125] In the face of court challenges, it clarifies the previously uncontested tradition that marriage is a unique, sexually-differentiated institution.

On March 22, 2004, key backers announced a reworded version to clarify that civil unions and domestic partnership benefits would be allowed by the amendment, as long as they were legislatively and democratically enacted, as opposed to mandated by courts.[126] The new text is: "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."[127]

The proposed Amendment's first sentence simply announces that marriage anywhere in the United States consists only of male-female couples. The term "in" can reasonably be interpreted to forbid both validating in-state marriages and recognizing out-of-state marriages. This would prevent any state from introducing same-sex marriage, perhaps by recognizing a Canadian same-sex "marriage." The name and substance of "marriage" is forever reserved to husband and wife alone.

The second sentence seeks to prevent the use of law by courts to force the extension of marriage or its legal incidents to non-marital relationships. It is intended to preclude judicial interpretation or executive implementation of a state or federal constitution that would require marital status or the legal incidents thereof to be conferred upon other pairings. The word "construed" indicates that the intention is to preclude the inferential requirement of the legal incidents of marriage by judicial interpretation of federal or state constitutions.

It is not intended to preclude a state, through its legislature, from

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124. Anuj Gupta, *Constitutional Marriage Proposal*, L.A. TIMES, July 13, 2001, at A18.

125. Alliance for Marriage Homepage, The Federal Marriage Amendment, *at* http://www.allianceformarriage.org/reports/fma/amendment.htm (last visited Mar. 21, 2004).

126. Alan Cooperman, *Same-Sex Marriage Ban Being Retooled: Civil Unions Would Be Up to States*, WASH. POST, Mar. 23, 2004, at A4.

127. *Id.*

democratically enacting civil unions, domestic partnerships or such, so long as it is by a clear enactment from the legislature, rather than from some judicial process of "construing" the constitution. Nor would it prevent the legislature from unbundling legal incidents of marriage and granting them to more generally defined groups. This has already happened, for example, with adoption, which is allowed to single persons in almost all states.[128]

This sentence would have prevented the Vermont Supreme Court from ordering the legislature to grant all the benefits of marriage to same-sex couples, but would not prevent the Vermont Legislature from enacting a civil unions law on its own. While the legal recognition of non-marital sexual acts and relationships undermines the institution of marriage and should be opposed, the actual threat of the imposition of homosexual "marriage" comes from the courts, not the legislatures. The Amendment is thus tailored to the threat at hand, and does not depart from federalism principles. State authority on family law matters is otherwise generally preserved.

As a practical matter, the chances of passing a more comprehensive amendment are minimal. We would risk offending democratic principles. As Professor Robert P. George of Princeton has written, "We should not fear the democratic resolution of the question of marriage. If we lose the people on the question, constitutional law will not save us."[129]

The real question is not whether the federal constitution deals with marriage, but whether the current and historical federal constitutional understanding of marriage can change over time and be subject to the shifting value preferences of judges. Given that the definition of marriage is now an implicit assumption as to the contours of an unenumerated right, there can be no question that it can be changed by judges. Look at *Goodridge*, or what the Canadian court did in *Halpern*. Precedent can be overruled by the same court that established the precedent, as the *Lawrence* case did to *Bowers*. Enactment of the Federal Marriage Amendment would merely make explicit what has been the hitherto implicit understanding of marriage in our constitution to prevent judges from imposing their own values and meanings on marriage.

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128. *See, e.g.*, Jenna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, GOLDEN GATE U. L. REV. 167, 168 n.8 (1997) ("Generally adoption statutes do not explicitly prohibit single parent adoptions . . . .").

129. Robert P. George, *The 28th Amendment*, NAT'L REV., July 23, 2001, at 34.

Furthermore, at the state level, there is a juggernaut on this issue already set in motion. Tension between the federal Defense of Marriage Act and the Full Faith and Credit Clause by no means assures that if one state does recognize same-sex "marriage," other states would not be required by the federal constitution to do likewise. For example, Laurence Tribe, in the latest edition of his Constitutional Law treatise, opines that the Defense of Marriage Act's "grant of discretion for states to ignore the official acts of sister states is of dubious validity."[130] The Full Faith and Credit clause "cannot plausibly be construed to empower Congress to prescribe that states may choose to give *no effect at all* to an entire category of official state Acts."[131] If so, the public is at the mercy of judges in any state who would choose to recognize homosexual marriage. Those who think differently, with the vast consensus of humanity, would effectively be disenfranchised. Willy-nilly, marriage would become simply "friendship recognized by the police."[132]

William F. Buckley, Jr., seems to think that the Federal Marriage Amendment goes too far. In a recent column in *National Review* he writes: "The necessary amendment need go no further, nor should go any further, than to limit the application of the Full Faith and Credit Clause to exclude any requirement to abide by laws or judicial findings authorizing same-sex marriage."[133] But this would allow Massachusetts or New Jersey to implement homosexual marriage by judicial fiat. As I have already noted, we have a national culture that cannot long abide two fundamentally differing conceptions of marriage.

Professor Lynn Wardle has recently written to President Bush that "despite my initial reluctance, I have come to the conclusion that it is prudent, timely, and very important to support the proposed Federal Marriage Amendment," reasoning that

> [w]hile I am reluctant to recommend amending our great Constitution of the United States, especially in an area dealing with family law (and for that reason I have in the past declined to endorse or support the proposed Federal Marriage Amendment), I am now convinced that such an amendment may be the only

130. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1247 n.49 (3d ed. 2000).

131. *Id.*

132. ROBERT LOUIS STEVENSON, VIRGINIBUS PUERISQUE 10 (1896).

133. William F. Buckley, Jr., *The Constitutional Defense*, NAT'L REV. ONLINE (Aug. 11, 2003), *at* www.nationalreview.com/buckley/buckley081103b.asp.

> effective remedy to head off renegade judges who are imposing their personal (pro-same-sex-union) policy preferences in the name of constitutional interpretation, to restrain irresponsible politicians willing to pander to same-sex marriage activists, to reaffirm that the institution of marriage is a critical and indispensable part of the foundation of our Constitution, and to revive public recognition of and respect for the numerous unparalleled contributions that conjugal marriage provides to individuals, families, and society.[134]

We may be encouraged by the memory of how the Equal Rights Amendment, by raising consciousness and commitment throughout the land, largely succeeded in its aim of ending discrimination against women, even if it ultimately failed ratification. Just addressing same-sex marriage cases, when we see the legal train wrecks popping up in various places and the others apparently heading our way, supporters of marriage as it has always been understood cannot be worried too much about the risks of failure to pass a federal constitutional amendment. The question has to be asked: Given the bad court decisions so far and the bad court decisions likely to follow, what do we have to lose?

Finally, a few words about the underreported underside of this debate, which highlights how much is at stake. Sometimes hidden motivations and intentions can tell you much about what is really going on, even if there is no mention of them in lawyers' briefs and published court opinions. In the summer of 2003, Michael Bronski, a homosexual journalist and self-described "queer activist," wondered aloud in a Boston weekly:

> Are we just not the marrying sort? Maybe we should be campaigning for open marriage, or marriage with a tricking-on-the-side option, or the we-just-want-the-economic-benefits-but-have-no-intention-of-actually-being-traditionally-married marriage . . . . Fighting for marriage is like fighting over yesterday's leftovers, rather than coming up with something new and better.[135]

I first became aware of what I will call the "trashing marriage" argument by attending a conference at King's College, London in 1999, listening to a parade of international law professors sympathetic to the legal recognition of same-sex unions, some of whom suggested an approach that would effectively "destroy" marriage. For example, Professor and Dean Rebecca Bailey-Harris of the University of

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134. Letter from Lynn D. Wardle, Professor of Law, Brigham Young University Law School, to George W. Bush, President of the United States (Jan. 8, 2004) (on file with author).

135. Michael Bronski, *Over the Rainbow*, BOSTON PHOENIX, Aug. 1, 2003, at 21.

Bristol, England, provocatively asked, ". . . [I]s it right to deny lesbians and gay men the right, from a position of equality with heterosexuals, to opt for an institution, *however worthless I personally happen to regard it*?"[136] It is of more than passing interest that the published proceedings omitted her personal testimonial.[137]

Obviously moving into a neighborhood and then trashing it does not resonate with the general public, so the more respectable advocates of same-sex marriage publicly disavow such claims. Professor Nicholas Bamforth of Oxford University, though, noted at the London Conference that according to arguments of radical liberation/queer rights advocates, "existing concepts of partnership and marriage could be subverted and radically altered by 'official' recognition of socially controversial interpretations of those concepts—for example, by the law recognizing such institutions as being open to persons of the same sex."[138] Interestingly, though, the published version of his presentation omits this discussion, expressly omitting "gay liberationist or queer theory arguments."[139] Moreover, Bamforth admits that "[a] purely deconstructionist analysis is, by its very nature, unlikely to be of assistance in constructing normative philosophical or constitutional arguments of any sort . . . ."[140] If so, advocating the destruction of marriage is just not helpful to the cause. It does not play well in Peoria. It startles the horses.

Indeed, one of the presenters at the London conference was left out of the published version entirely—Prof. Kendall Thomas of Columbia Law School, who argued passionately against same-sex marriage on the fascinating grounds that non-normative, "non-marital relationships have produced a vibrant queer culture."[141] He argued

136. Rebecca Bailey-Harris, Address at "Legal Recognition of Same-Sex Partnerships: A Conference on National, European and International Law," Centre of European Law, School of Law, King's College, University of London (July 1-3, 1999) (emphasis added) (on file with the Harvard Journal of Law & Public Policy).

137. Rebecca Bailey-Harris, *Same-Sex Partnerships in English Family Law: Will Prejudice and Inaction Survive Into the Millenium?*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 54, at 605, 619 ("But is it correct to deny lesbians and gay men the right, from a position of equality with heterosexuals, to opt for any institution?").

138. Nicholas Bamforth, Address at "Legal Recognition of Same-Sex Partnerships: A Conference on National, European and International Law," Centre of European Law, School of Law, King's College, University of London (July 1-3, 1999) (on file with the Harvard Journal of Law & Public Policy).

139. Nicholas Bamforth, *Same-Sex Partnerships and Arguments of Justice*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 54, at 32, 32-33.

140. *Id.*

141. Dwight G. Duncan, *Same-Sex Marriages: Pleading in the Alternative*, 28 MASS. L. WKLY 841 (1999) (reporting remarks he heard at "Legal Recognition of Same-Sex

that the right to sexual pleasure for all is being undermined by claims for recognition of same-sex marriage and lamented that achieving same-sex marriage would tend to domesticate the gay and lesbian movement.[142]

Nor are such views the idle speculations of academics in London. The *New York Times* reported from Toronto at the end of August, 2003, that "many gays express the fear that [gay marriage] will undermine their notions of who they are. They say they want to maintain the unique aspects of their culture and their place at the edge of social change."[143]

There are significant questions about what recognizing homosexual marriages would accomplish, not just for the relatively small percentage of the relatively small percentage of homosexuals in the population that would choose it, and their children, however acquired, but for marriage and for society at large, which after all depends for its future on the procreation and education of children.

In 1985, Washington Redskins running back John Riggins, when seated next to Justice Sandra Day O'Connor at a Washington Press Club reception, reportedly said to her, "Loosen up, Sandy baby. You're too tight."[144] For those who think that the loosening up of marriage is good for society and its children, homosexual marriage seems perfectly acceptable. For those who believe otherwise, however, there is the Federal Marriage Amendment. It has come to that.

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Partnerships: A Conference on National, European and International Law," Centre of European Law, School of Law, King's College, University of London (July 1-3, 1999)).

142. *Id. See also* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 54 (entirely omitting Professor Thomas's politically incorrect remarks).

143. Clifford Kraus, *Now Free to Marry, Canada's Gays Say, 'Do I?,'* N.Y. TIMES, Aug. 31, 2003, at A1 (quoting gay skeptics of marriage stating, "Personally, I saw marriage as a dumbing down of gay relationships," and wondering aloud, "Will queers now have to live with the heterosexual forms of guilt associated with something called cheating?").

144. Don Oldenburg, *Still a Player*, WASH. POST, Feb. 4, 2002, at C8.