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Massachusetts Court Expected to Legalize Same-Sex Marriage

The Threat to Marriage from the Courts

Commentators from across the political spectrum agree that the Massachusetts Supreme Judicial Court is likely to rule very soon that same-sex couples have a constitutional right to marry in Massachusetts. Gay marriage activists have filed lawsuits in other States demanding court-imposition of same-sex marriage and have pledged to challenge the federal Defense of Marriage Act and similar laws enacted by 37 States. This paper discusses the background of the issue and the public policy options available to respond to court rulings that advance same-sex marriage.

Introduction and Executive Summary

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. Those activists would score their biggest victory to date if the Massachusetts court decides in *Goodridge v. Massachusetts Dep't of Public Health* that persons of the same sex can marry each other as a matter of state constitutional law. That decision is expected to be released any day. A pro-same-sex marriage ruling surely will spur more lawsuits to force that result on unwilling States — like those cases already pending in New Jersey, Indiana, and Arizona.

The U.S. Supreme Court gave aid and comfort to the activists' court strategy in its recent homosexual sodomy decision, *Lawrence v. Texas*.¹ Although the majority justices claimed that the decision did not formally affect marriage,² that decision could provide support for future court rulings changing the marriage institution. *First*, the Court held that homosexuals, like heterosexuals, have the right to “seek autonomy” in their relationships and cited “personal decisions relating to marriage” as an important area of personal autonomy.³ *Second*, the Court held that whether a majority of the public opposes “a particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice.”⁴ These statements do not *mandate* the recognition of same-sex marriage as a constitutional right, but they could serve as valuable tools for gay marriage activists as they push their cases nationwide.

¹ 539 U.S. ___, 123 S.Ct. 2472 (2003). All citations are to slip opinion available at <http://www.supremecourtus.gov/opinions/02pdf/02-102.pdf>.

² Slip Op. at 18.

³ Slip Op. at 13.

⁴ Slip Op. at 17.

This campaign through the courts runs directly counter to public opinion. A majority of Americans — between 53 percent and 62 percent, depending on the poll — favor preserving marriage as it has been practiced throughout history: the union of a man and a woman.⁵ (The public is evenly divided on the question of whether lesser legal recognitions of same-sex relationships are appropriate.⁶) If marriage is redefined in the foreseeable future, it will not be because of democratic decisions, but because of a few judges who, in response to a carefully crafted activist agenda, take upon themselves the power to do so.

Recognizing an even stronger societal consensus at the time (68 percent opposition to same-sex marriage⁷), Congress overwhelmingly passed the Defense of Marriage Act (“DOMA”) in 1996. The bill passed the Senate 85-14, including the “yes” votes of 62 current Senators.⁸ DOMA did two things. *First*, it recognized the traditional definition of marriage as between one man and one woman for all aspects of federal law. *Second*, it ensured that no State is obligated to accept another State’s non-traditional marriages (or civil unions) by operation of the Constitution’s Full Faith and Credit Clause (art. IV, sec. 1). Thirty-seven States have passed constitutional amendments or statutes commonly known as “state DOMAs” that further protect traditional, heterosexual marriage.⁹

Since federal DOMA was passed, academics and activists alike have crafted a plethora of legal arguments claiming that the federal and state DOMAs are unconstitutional. Insofar as the *Lawrence* decision and the anticipated *Goodridge* result broaden general constitutional principles of substantive due process and equal protection, the possibility of a court declaring federal DOMA unconstitutional and mandating same-sex marriage is more likely today than ever before. Gay marriage activists can be expected to pursue several court strategies:

- Full Faith & Credit Challenges. Same-sex couples will “marry” in Massachusetts and then file lawsuits in other States to force those States to recognize the Massachusetts marriage. They likely will argue that federal DOMA is unconstitutional as an overly broad interpretation of the Full Faith and Credit clause and as inconsistent with principles of equal protection and substantive due process.
- Goodridge Copycat Cases. Activists will file new cases similar to *Goodridge* in other States and demand recognition of same-sex marriage as a constitutional right under state law. The Massachusetts decision will serve as persuasive precedent for other courts interpreting parallel provisions in their state constitutions.

⁵ See Pew Center poll, July 2003 (53% oppose “allowing gays and lesbians to marry legally”); Andres McKenna poll, July 2003 (53% oppose “idea of marriages between homosexuals”); Gallup poll, June 2003 (55% believe “marriages between homosexuals” should not be “recognized by law as valid, with the same rights as traditional marriage”); Time/CNN poll, July 2003 (60% believe “marriages between homosexual men or between homosexual women” should not “be recognized as legal by the law”); WirthlinWorldwide poll, February 2003 (62% agree that “only marriage between a man and a woman should be legally valid and recognized in our country”). All polls on file with RPC; see also *AEI Studies in Public Opinion: Attitudes About Homosexuality* (updated July 11, 2003), available at http://www.aei.org/publications/pubID.14882/pub_detail.asp (hereinafter “AEI Studies”).

⁶ A June 2003 Gallup poll showed 49 percent support for “civil unions” for same-sex couples. See AEI Studies, *supra* note 5.

⁷ See Gallup poll, March 1996 (68% oppose “marriages between homosexuals”), available at AEI Studies.

⁸ Only seven sitting Senators voted against that law: Senators Akaka, Feingold, Feinstein, Inouye, Kennedy, Kerry, and Wyden. Senate Vote #280, 104th Cong., 2nd Sess. (Sept. 10, 1996). Senators Durbin and Schumer voted for DOMA while they were House members. House Vote #316, 104th Cong., 2nd Sess. (July 12, 1996).

⁹ Only Connecticut, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Vermont, Wisconsin, and Wyoming have failed to enact state DOMAs.

- The Supreme Court Strategy. Same-sex couples who have “married” in Massachusetts (or who have civil unions, as some do in Vermont) will apply for federal benefits such as federal employee health insurance, and under federal DOMA those requests will be denied. They may then sue in federal court and argue that the definition of marriage in DOMA (for federal purposes) is unconstitutional as a matter of federal equal protection and substantive due process. Such a case could end up in the Supreme Court.

This proliferation of lawsuits could well produce additional victories for gay marriage advocates.

Additional legislation is unlikely to be effective in stopping attempts to remake marriage through the courts. Some have suggested that Congress should attempt to strip the courts of jurisdiction to review DOMA or that Congress refuse to give welfare monies to States that refuse to protect traditional marriage. These approaches are incomplete solutions to the threat to marriage from the courts, and present their own set of legal and political difficulties. Most importantly, a court that is willing to strike down DOMA may be at least as willing to entertain challenges to other federal legislation aimed at preventing the spread of same-sex marriage.

These lawsuits will continue until Congress and the States adopt a constitutional amendment to protect traditional marriage. Such a constitutional amendment would have to validate DOMA and provide that the Constitution cannot be construed to change the traditional definition of marriage. It could, but need not, deal with the related issues of legal benefits that should be available to same-sex couples.

One proposal with significant and growing support is the Federal Marriage Amendment (“FMA”). Introduced in the House by a bipartisan coalition of Representatives,¹⁰ the FMA reads:

“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.”

This proposed amendment would provide a single definition of marriage in the United States and prevent any federal or state court from imposing any other definition of marriage. At the same time, the FMA would protect the ability of state *legislatures* to create “civil unions” or otherwise grant legal benefits to same-sex couples, while preventing courts from forcing a State to recognize the benefits granted in another State.

The Recent Activity in the Courts

The need to consider a constitutional amendment relating to marriage is driven by the threat that state or federal courts will change the traditional definition of marriage on their own. Congress enacted the Defense of Marriage Act in 1996 after a Hawaii state court mandated recognition of same-sex marriage in that State.¹¹ This issue has reemerged because of the U.S. Supreme Court’s

¹⁰ The original co-sponsors of H.J. Res. 56 include Collin Peterson (D-MN), Mike McIntyre (D-NC), Ralph Hall (D-TX), Marilyn Musgrave (R-CO), Jo Ann Davis (R-VA), and David Vitter (R-LA). As of July 29, 2003, a total of 75 Representatives were cosponsoring the FMA.

¹¹ See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Hawaii amended the state constitution to reverse the appellate court’s decision in 1998.

decision in *Lawrence* and the anticipated Massachusetts decision in *Goodridge*. At the same time, Canada already has begun to legalize same-sex marriage, prompting many American homosexual couples to travel there to be “married” and then return to the United States.¹²

The Goodridge Case: the Massachusetts Court’s Looming Decision

Due any day is a decision from the Massachusetts Supreme Judicial Court in the case of *Goodridge v. Massachusetts Dep’t of Public Health*. In that case, seven same-sex couples sued Massachusetts and argued that they have a constitutional right to receive marriage certificates under the state constitution’s Declaration of Rights, akin to the federal constitution’s Bill of Rights. The trial court ruled that Massachusetts had the right to regulate marriage and that the legislature had a rational basis for restricting the institution to opposite-sex couples, i.e., the encouragement of orderly and healthy procreation.¹³ The trial court further urged the plaintiffs to pursue through the legislature, not the court system, their desire to be married.¹⁴ The plaintiffs quickly appealed this decision to the Massachusetts Supreme Judicial Court.

Most observers expect the Massachusetts high court to reverse the lower court and rule that the Massachusetts constitution mandates recognition of same-sex marriage. The plaintiffs have argued that civil marriage is a fundamental right under the state constitution; that denying civil marriage to same-sex couples violates their right to equal treatment based on sex and sexual orientation; and that the state can offer no justification for excluding these couples from the institution of marriage.¹⁵ Any or all of these arguments could form the basis for the court’s decision.

The arguments put forth in the Massachusetts case rely on state constitutional provisions that, in substance, appear in other state constitutions and in the U.S. Constitution. As such, the gay marriage advocates who created the Massachusetts lawsuit — the plaintiffs’ attorneys are from the nationally-active group known as Gay and Lesbian Advocates & Defenders — will be able to export many of the same arguments to other States. Moreover, under traditional rules of construction, every other court considering like challenges (such as those pending so far in Arizona, New Jersey, and Indiana) likely will look to the Massachusetts court’s reasoning and analysis when interpreting their own States’ constitutions. In other words, the Massachusetts decision will create a persuasive precedent that other courts may well choose to follow.

Lawrence: the U.S. Supreme Court Opens the Door to Same-Sex Marriage

The Supreme Court in *Lawrence* held that persons have a fundamental constitutional right to engage in sodomy. On its face, *Lawrence* does not directly address whether persons of the same sex have a constitutional right to marry. However, those pushing same-sex marriage in the courts gained valuable support for their legal arguments through this decision.

¹² See, e.g., S.J. Komarnitsky, *Canadian Vows: Two Couples Are Among The First to Take Advantage of Same-Sex Marriage Law*, Anchorage Daily News, July 27, 2003; Sheri Venema, *New Borders for Marriage*, The Oregonian, July 7, 2003.

¹³ *Goodridge v. Massachusetts Dep’t of Public Health*, No. 2001-1647-A (Suffolk Cnty. Super. Ct. May 7, 2002), slip op. at 24-25, available at <http://www.marriagewatch.org/cases/ma/goodridge/trial/trialop.pdf>.

¹⁴ *Id.* at 25-26.

¹⁵ See Brief of Plaintiff/Appellants available at http://www.glad.org/GLAD_Cases/Appellants_Brief.pdf.

The Supreme Court’s decision helps the activists advance that agenda in two primary ways. First, the Court stated that “our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and it states that the Constitution demands respect for “the autonomy of the person in making these choices.”¹⁶ The Court then quoted its abortion decision in *Planned Parenthood v. Casey*, when it asserted, “[a]t 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.”¹⁷ In *Lawrence*, the Court then held that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”¹⁸ Gay marriage advocates can be expected to argue that *Lawrence* requires recognition of same-sex marriages because the Court declared that homosexuals are equally entitled to “seek autonomy” for the same “purposes” as heterosexuals.

Second, the *Lawrence* Court held that “the 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.”¹⁹ While many secular, morally neutral reasons exist for opposing same-sex marriage, it is certainly true that the public’s opposition is *in part* related to fundamental moral beliefs about homosexual conduct.²⁰ Yet as the dissenting Justices declared, “[t]his [decision] effectively decrees the end of all morals legislation.”²¹ Gay marriage advocates are likely to argue that opposition to same-sex marriage is, at bottom, an expression only of society’s moral disapproval of homosexual conduct, and then point to the Court’s decision in *Lawrence* as evidence that such reasons are constitutionally illegitimate.

Gay marriage advocates can be expected to argue that the *Lawrence* decision points towards ultimate recognition of same-sex marriage. The majority Justices in *Lawrence* stated that the case “does not involve whether the government must give formal *recognition* to any relationship that homosexual persons seek to enter.”²² It is true that the case does not directly address same-sex marriage, but the reasoning certainly bears on future consideration of that question. As the dissenting Justices wrote, “[t]his 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.”²³

The Next Wave of Lawsuits to Impose Same-Sex Marriage

Gay marriage activists have developed a coordinated, nationwide strategy to force legal recognition of same-sex marriage. The long-time leader of the *Marriage Project* at LAMBDA Legal, Evan Wolfson, has formed “Freedom to Marry,” a legal advocacy firm solely devoted to spreading same-sex marriage throughout the nation, in large part through litigation. Joining that group’s efforts are the Gay & Lesbian Advocate Defenders, the American Civil Liberties Union, LAMBDA Legal, the NOW Legal Defense and Education Fund, Human Rights Watch, and many other activist groups. In Massachusetts, the state bar association also filed a brief in support of the

¹⁶ Slip Op. at 13 (emphasis added).

¹⁷ 505 U.S. 833, 851 (1992).

¹⁸ Slip Op. at 13.

¹⁹ Slip Op. at 17 (quoting and adopting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).

²⁰ Over half the public believes that sexual relations between two adults of the same sex is immoral, and more than 30 percent of the public continues to believe that the conduct should be illegal. See AEI Studies, *supra* note 5.

²¹ Scalia Dissent at 15 (joined by Chief Justice Rehnquist and Justice Thomas).

²² Slip Op. at 18.

²³ Scalia Dissent at 20.

plaintiffs' claim. The gay marriage activists have a zealous leadership, a sincere belief in the justice of their cause, and more than adequate funding to continue to push their claims in the courts. They have a simple goal: the legitimization and constitutionalization of same-sex marriage, and no state or federal DOMA will dissuade them from this effort.

Strategy #1: Exporting Massachusetts Marriages and Challenging DOMA

As soon as the *Goodridge* decision is announced, some same-sex couples will marry in Massachusetts. When gay marriage advocates deem it appropriate strategically, one or more of those couples will seek recognition of a Massachusetts marriage in *another* State. Activists already have made clear that this will be their strategy.²⁴ When these suits are filed, the activists will challenge as unconstitutional States' preexisting right not to recognize other States' marriages under the "public policy" doctrine, federal DOMA, and the state DOMAs passed by 37 States.

The fate of the activists' constitutional challenges is uncertain. It is a well-established principle of law that a marriage valid in the jurisdiction where performed shall be valid in other States. However, it is equally well established that a jurisdiction may *refuse to recognize* a marriage from another State if doing so would conflict with a strong local public policy. In part to ensure that their States' "public policy" on marriage was clear, 37 States have enacted "state DOMAs" that define marriage as between a man and a woman.²⁵ And the public policy doctrine does not *depend* on a clear statement of policy via state DOMAs; it is quite possible that every state court in a State *without* same-sex marriage would conclude that a strong public policy barred recognition of another State's same-sex marriage.²⁶

Congress was aware of the public policy doctrine when it enacted DOMA,²⁷ but determined that the doctrine should be bolstered through federal legislation. This was because the Full Faith and Credit clause of the U.S. Constitution requires States to recognize the "public Acts, Records, and judicial Proceedings of every other State."²⁸ Thus, to remove any doubt about the reach of the Full Faith and Credit clause and any possible conflict with the public policy doctrine, Congress enacted DOMA pursuant to its authority — also under the Full Faith and Credit clause — to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Section 2 of DOMA provides that States are not *required* to recognize "a relationship between persons of the same sex that is treated as a marriage" in another State "or a right or claim arising from such relationship."²⁹

²⁴ See Angela Couloumbis, *All Sides Await a State's Ruling on Gay Marriage*, Philadelphia Inquirer, July 22, 2003 (quoting Harry Knox, program director for activist group "Freedom to Marry" as explaining that "a victory in Massachusetts would prompt couples to go there to marry, then return to their home states and demand that those governments — as well as the federal government — recognize the new marriage licenses"). Indeed, the founder of the largest gay church in the nation, the Fellowship of Metropolitan Community Churches, has pledged to attempt to get his *Canadian* marriage recognized and to challenge federal DOMA. See Mary Ellen Peterson, *Troy Perry to Launch Court Action to Have his Marriage Recognized*, 365Gay.com Newsletter, July 24, 2003, available at <http://www.365gay.com/newscontent/072403perrymarriage.htm>.

²⁵ See statutes and constitutional amendments collected at <http://www.marriagewatch.org/states/doma.htm>.

²⁶ See generally David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7 (1997).

²⁷ See speeches of Senator Barbara Boxer, Diane Feinstein, and Russell Feingold, *Congressional Record*, Sept. 10, 1996, and Judiciary Committee testimony included at S-10112 and S-10118 of the *Congressional Record* on the same day.

²⁸ U.S. Const., art. IV, sec. 1.

²⁹ P.L. 104-199, 110 Stat. 2419 (1996). Some prominent scholars also believe that another State's marriage need not be recognized under the Full Faith and Credit clause because a marriage is not akin to a "public Act, Record, or

As noted above, 37 States have also passed their own DOMAs. The reach of each DOMA varies, but all have the effect of establishing the “public policy” of each State. Four States — Alaska, Hawaii, Nebraska, and Nevada — have enacted state constitutional *amendments* that prevent recognition of same-sex marriages.³⁰ The remaining States passed statutes that made clear the State’s refusal to permit same-sex marriage in those States and the States’ refusal to recognize those marriages (and in some cases, lesser “civil unions”) from other States. No state supreme court has considered whether any of the *statutory* state DOMAs comply with the *State’s* constitution, however. In other words, most of these state DOMAs survive solely at the whim of state supreme courts.

Defenders of traditional marriage and of DOMA have several arguments to respond to gay marriage advocates’ lawsuits, but these arguments are not foolproof. Since same-sex marriage became a national issue in the mid-1990s, proponents and their allies in the legal academy have been working to devise ways to force States to recognize other States’ same-sex marriages. One widely cited article in the *Yale Law Journal* argues that the public policy doctrine is unconstitutional and States do not have the right to refuse to recognize another State’s valid marriage.³¹ Others have argued that if the public policy exception is applied only to exclude same-sex marriages, then the Equal Protection clause may be implicated.³² Although most state DOMAs were passed for the express purpose of ensuring that the public policy of the State was made clear, those laws will face similar challenges. Finally, federal DOMA, often seen as a backup to the state protections, may be challenged either under the theory that Congress lacked the authority to limit the scope of the Full Faith and Credit clause, or that it violates the Equal Protection clause.³³ The Equal Protection argument would be weak under current understandings of the Constitution because only Justice O’Connor adopted such an analysis in *Lawrence*. Whether courts will seek to expand that jurisprudence in light of Justice O’Connor’s concurring opinion in *Lawrence* and the Supreme Court’s earlier decision in *Romer v. Evans*³⁴ remains to be seen.

It is difficult to predict the success of these challenges to federal DOMA, state DOMAs, and the public policy doctrine. Even the Clinton Justice Department opined that DOMA was constitutional. But through careful forum shopping, gay marriage activists can put these arguments before activist judges throughout the country. To rely solely on DOMA ultimately is to trust that *all* judges will uphold that law.

judicial Proceeding” and because forcing recognition is inconsistent with the underlying purpose of the clause. See, for example, David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7 (1997).

³⁰ See <http://www.marriagewatch.org/states/doma.htm>.

³¹ Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 965 (1997).

³² See, e.g., Mark Strasser, *Legally Wed: Same Sex Marriage and the Constitution*, at pp. 138-140 (Cornell Univ. Press 1997); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev 1 (1997).

³³ Harvard Law Professor Lawrence Tribe, for example, made the former argument at the time of DOMA’s consideration in 1996. See Tribe letter made part of *Congressional Record* by Senator Kennedy on June 6, 1996.

³⁴ 517 U.S. 620 (1996) (holding unconstitutional a Colorado state constitutional amendment barring enactment of anti-discrimination laws aimed at benefiting homosexuals).

Strategy #2: Filing Copycat Suits and Reproducing Goodridge

Every state constitution contains the same basic constitutional protections found in the Massachusetts Constitution, including those provisions that the plaintiffs in *Goodridge* argue mandate a right to same-sex marriage. While other States' courts are not bound to follow *Goodridge*, it takes little imagination to recognize that some judges — especially those protected from the wrath of voters — could be tempted to use their power to invent a new constitutional right.

Gay marriage advocates have already filed such lawsuits in Arizona, Indiana, and New Jersey, and more cases can be expected after *Goodridge* is announced. It is impossible to predict how these other state courts will rule. Many can be expected to dismiss these lawsuits as frivolous, but the results are unlikely to be uniform. After all, it was the New Jersey Supreme Court that in 1999 wrote the expansive opinion mandating that the Boy Scouts accept homosexual Scout Leaders.³⁵ For the 46 States that lack a state constitutional amendment barring same-sex marriage, the future of the marital institution currently resides in the state supreme courts, not in the legislatures. If the *Goodridge* case is decided as anticipated, the activists will have a “model case” upon which to rely in those other States' courts.

Strategy #3: Filing Federal Lawsuits Using the Lawrence Decision

Gay marriage advocates have yet another avenue to pursue. Homosexual federal employees surely will include those who marry in Massachusetts post-*Goodridge*. At some point, one of those employees will apply for spousal benefits such as health insurance or pension benefits. Because federal DOMA defines marriage as between a man and a woman for the purposes of all federal laws and regulations, the benefit claim will be denied. Thus, the same-sex “spouse” would have no rights as a “spouse,” even if Massachusetts or another State believed otherwise.

The federal employee and his or her partner will then sue in federal court, arguing that the federal definition of marriage in DOMA is unconstitutional as a matter of federal Equal Protection and Substantive Due Process law. The plaintiffs also may argue that Congress lacks the power to “regulate” the terms of marriage because marriage is conventionally a State matter, citing the Supreme Court's recent federalism jurisprudence as support. Although federal courts should reject such claims and uphold DOMA's definition of marriage for federal purposes, it is well known that some federal jurisdictions are more activist than others. Insofar as advocates will be able to pick their courts — for example, by filing suit in San Francisco subject to review by the famously-liberal Ninth Circuit Court of Appeals — their prospects for success (even if temporary) expand dramatically. Just as with the eventual challenges to DOMA's Full Faith and Credit provision and the efforts to impose same-sex marriage through state courts, judges hold the final power absent any constitutional amendment. And in the case of any federal court challenge such as the one contemplated here, the judges are unelected, lifetime appointees. None of the political constraints that exist with most state court judges will apply.

³⁵ *Boy Scouts of America v. Dale*, 734 A. 2d 1196 (N.J. 1999), *rev'd* 530 U.S. 640 (2000).

The Willingness of the Courts to Take Pro-Same-Sex Marriage Positions

Despite public opposition to same-sex marriage, it is reasonable to expect more than a few judges will accede to the gay marriage activists' court campaign. The legal profession itself is predisposed to support a remaking of marriage. The dissenting Justices in *Lawrence* charged that the Supreme Court itself has become imbued with the "law profession's anti-anti-homosexual culture,"³⁶ and argued that the Court had dismissed mainstream values throughout the nation. Some members of the Supreme Court increasingly rely upon European laws and norms when crafting their opinions, as was apparent in the *Lawrence* decision.³⁷ Although most state court judges do face the ballot in some fashion,³⁸ they still went to the same law schools where professors treat the advancement of homosexual rights as the next logical step in the civil rights movement. They and their young law clerks still read the same legal scholarship that so overwhelmingly advocates recognition of same-sex marriage and labors to craft ways to convince those courts to invent the right thereto. To expect *all* judges to follow popular opinion and strictly to adhere to the Constitution is an act of faith.

Ultimately the Supreme Court will rule on same-sex marriage, but that may not occur until several States and even some federal courts have altered the institution and thousands of couples have gained legal status as a result. Nor should the Supreme Court's intervention be seen as a panacea. The Supreme Court itself has shown that it will show little regard for public opinion when it takes sides in cultural divisions that emerge in society. The Court persists in upholding abortion laws that 60 percent of the public wants tightened.³⁹ In 2002, the Supreme Court held the execution of the mentally retarded was inconsistent with current "standards of decency" even though only 18 of the 38 capital punishment States had acted to ban the practice.⁴⁰ And the Court recently approved the University of Michigan's racial preferences regime, despite the fact that 69 percent of those polled believe that every applicant should be admitted "solely" based on merit.⁴¹ These examples illustrate what should be obvious to any student of the Supreme Court: insofar as the Supreme Court considers public opinion at all, it considers that of the elites to the exclusion of all Americans collectively. And it is the elites who scorn traditional views on sexual orientation and who are most likely to favor same-sex marriage.⁴²

³⁶ Scalia Dissent at 19.

³⁷ Slip Op. at 12; see also, for example, *Atkins v. Virginia* 536 U.S. 304 (2002) (relying on foreign law in evaluating American death penalty jurisprudence).

³⁸ Eighty-seven percent of state court judges face elections of some sort. See *Justice for Hire: Improving Judicial Selection*, at p. 1 (Committee for Economic Development 2002), available at http://www.ced.org/docs/report/report_judicial.pdf.

³⁹ See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down ban on partial birth abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade*); see also January 2003 CBS/NY Times poll showing 60 percent of public wants abortion availability to be tightened, or for abortion to be outlawed altogether, available at <http://www.pollingreport.com/abortion.htm>.

⁴⁰ *Atkins v. Virginia* 536 U.S. 304 (2002).

⁴¹ See June 2003 Gallup poll, available at <http://www.pollingreport.com/race.htm>.

⁴² See polls by Gallup showing that urban, liberal Democrats are most likely to favor same-sex marriage, and polls conducted by National Opinion Research Center showing that wealthy urban white liberal Democrats are least likely to oppose gay sexual relations on moral grounds. See AEI Studies, *supra* note 5.

The Time to Act is Now

When same-sex marriage is legalized in Massachusetts, thousands of homosexual couples from in and out of that Commonwealth will rush to marry. Any later attempts to “react” to the growth of same-sex marriage will then be construed as an effort to deprive those homosexual couples of their legal status. A constitutional amendment to ban same-sex marriage would be taking away a right that has been invented and granted by a court. It is imperative that Congress not allow the institution to spread before Congress acts; otherwise, homosexual couples will rely upon the court edicts and remake their lives accordingly. The legal complications that will ensue, as well as the risk that society will be less willing to confront the question itself when faced with the reality of thousands of same-sex marriages, argue strongly in favor of prompt action to confront this issue.

It is important also to recognize that same-sex marriages in Massachusetts inevitably will impact the legal and social life of other States. Homosexual couples that marry in Massachusetts would have all the benefits of married couples in that Commonwealth. Many will buy property in and out of the State, adopt and rear children, get divorced, incur child support and alimony obligations, and enmesh themselves in the same kinds of legal obligations that most traditionally married couples do. It is inevitable, though, that many of those homosexual couples will move out of Massachusetts and seek to enforce those legal obligations in other States’ courts. For example, it is easy to anticipate issues relating to child support, alimony, and property division at the time of divorce spilling over into other States.

What will the other State’s courts do when asked to adjudicate disputes grounded in Massachusetts same-sex marriages? A complex body of law known as “choice of law” has evolved to address these matters in the context of traditional marriages. Moreover, federal and state statutes have been enacted to regularize the treatment of these kinds of obligations across State lines. In the context of same-sex marriage, where 37 States have indicated their opposition to the institution, judges may refuse to apply these statutes. (Recall that federal DOMA defines “marriage” and “spouse” for purposes of all federal laws and regulations.) But no state court will be able to put its head in the sand for long because the practical legal and human problems will proliferate — problems of children in need of child support payments, of custody disputes for divorced homosexual couples, of homosexual former spouses being denied benefits rightfully theirs under Massachusetts law, and so forth. All the efforts to craft uniform solutions to matters of family law over the past half-century could prove useless in the context of homosexual couples who have left Massachusetts. Nor is it a sufficient response to say that these couples should not leave that Commonwealth, because such a solution would threaten the right to travel among the States as recognized by the Supreme Court.⁴³

Given our integrated national economy and the mobility of the nation’s citizenry, same-sex marriages in Massachusetts will end up affecting the laws and cultures of all other States. As the States struggle to react, the risk of Supreme Court intervention to create a uniform standard (or at the least to permit recognition of out-of-state homosexual unions) will only increase.

⁴³ See *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”).

The Need for a Constitutional Response

The Massachusetts court is expected to break down traditional marriage — to redefine its most historic and natural characteristic and ask society simply to hope that the institution endures. If this is the ruling, it cannot help but remake the social infrastructure of an entire State. The question that Congress must ask is whether it is willing to allow the *courts* to redefine the marital institution based on conclusions of a few judges, or whether the people’s strong preference to preserve traditional marriage should be respected and preserved.

Additional Statutes Will Not Be Enough to Stop the Courts

Constitutional amendments ought to be rare — employed only when no other legislative response will do the job. However, no statutory solution appears to be available to address the current campaign through the courts. Congress already has passed DOMA, but as discussed above, its effectiveness in the face of strenuous challenges in the courts remains to be seen. Some have suggested that Congress pass a “Super DOMA” — a repeat of DOMA coupled with an effort to deprive the federal courts of jurisdiction to review it under article III, section 2 of the Constitution. But such a strategy would not prevent state courts from creating same-sex marriage, and litigants surely would challenge such a dramatic effort by Congress to deny litigants the chance to have their purported fundamental rights (be they due process, equal protection, or otherwise) reviewed in federal court. Similarly, some have suggested that Congress should deny States funds unless they protect marriage through a state DOMA. Such an option would also face constitutional challenges and would have the policy effect of harming many Americans in their greatest time of need. If Congress is to prevent the courts from undoing its work and, once and for all, ensure the preservation of traditional marriage, then it should begin to consider constitutional options.

Principles to Govern the Constitutional Response

Any effort to amend the Constitution should emphasize the following principles:

Federal DOMA must be defended from the courts. DOMA ensures that (a) the traditional man-woman marriage standard governs for all federal law, and (b) States’ right to deny recognition of other States’ untraditional legal relationships remains intact. As discussed above, the *Goodridge* and *Lawrence* developments demonstrate that neither of these provisions is immune from constitutional challenge.

The U.S. Constitution should not be construed to change the traditional definition of marriage. The premise of this paper is that most Americans believe, and it should be United States policy, that no court — from the U.S. Supreme Court down through all federal, state, and territorial courts — should have the power to change the traditional definition of marriage. Neither the original Constitution nor any of its amendments was adopted with such an intention.

States should retain the right to grant some legal benefits to same-sex couples. The Constitution should not limit the ability of States, through their elected representatives or by popular will, to address the question of whether homosexual couples (as couples) should enjoy certain benefits, such as a right to file joint state tax returns, access to medical records, access to pension or other state employment benefits of homosexual partners, inheritance rights, or a variety of other civil benefits.

An Existing Proposal: The Federal Marriage Amendment

There exists at present a vehicle to pursue the above principles, a constitutional amendment proposed in the House called the Federal Marriage Amendment (“FMA”). H.J. Res. 56 provides:

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.

This amendment would create a uniform national definition for “marriage” for purposes of federal and state law, and would prevent any state from creating same-sex marriage. However, the amendment is designed to preserve the ability of state *legislatures* to allocate civil benefits within each State. State *courts* (like Massachusetts) would not be able to create this new right. In addition, no court at any level would be able to rely upon a state or federal constitution to mandate recognition of another State’s distribution of benefits (the “legal incidents of marriage”) to non-traditional couples.

The Federal Marriage Amendment is the only proposed constitutional amendment presently pending before Congress to address the likely ramifications of the *Goodridge* and *Lawrence* decisions. The FMA has bipartisan support in the House, but it also has been criticized from both ends of the political spectrum. Some social conservative groups, such as the Concerned Women for America, oppose the FMA in part because it still permits state legislatures to create civil unions.⁴⁴ In contrast, some legal scholars have questioned whether the text of the FMA *would* in fact permit civil unions.⁴⁵ And some FMA opponents argue that questions relating to marriage should be left to the States altogether, with no federal role.⁴⁶ The Senate should examine these and other questions about the details of this amendment in timely hearings in the Judiciary Committee.

Conclusion

The pace of the gay marriage activists’ campaign through the nation’s courts is uncertain, but it is not at all certain that DOMA or other legislation will stop determined activists and their judicial allies from pursuing this agenda — only a constitutional amendment can do that. The Senate should evaluate the Federal Marriage Amendment seriously and consider whether it, or any other constitutional amendment, is the appropriate response.

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⁴⁴ See <http://www.cwfa.org/articles/1190/CWA/family/index.htm>.

⁴⁵ See, for example, analysis of Professor Eugene Volokh at UCLA Law School at http://volokh.com/2003_07_06_volokh_archive.html-105788463811249190, and debate referenced therein.

⁴⁶ See, for example, <http://www.aclu.org/news/NewsPrint.cfm?ID=12718&c=101>.