The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law

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THE PROPOSED FEDERAL MARRIAGE AMENDMENT AND THE RISKS TO FEDERALISM IN FAMILY LAW

LYNN D. WARDLE*

I. INTRODUCTION: "OUR FEDERALISM"

One of the most important but often overlooked influences on American family law is what the Supreme Court quaintly calls "Our Federalism." The content and structure of family law in the United States have been profoundly shaped by the fact that the "regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states," as the Supreme Court put it thirty years ago. The doctrine of federalism in family law is one of the oldest surviving original doctrines of constitutional law in American legal history. That is both arguably a strength and a weakness. It is a strength because it is so well-established and long-recognized that it has been a source of some stability in intergovernmental responsibility boundaries, and of decentralization resulting in doctrinal di-


1. The term "Our Federalism" has been used by the Supreme Court in a variety of contexts to reflect a principle of constitutionally required and comity-inspired deference by the national government to the States. Justice Black gave one classic application (in abstention) and explanation of it as

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."


versity. However, it is a weakness because it reflects the regional situation of a day long past and it has been an impediment to various efforts to achieve national uniformity in family law, including post-modern aspirations for uniformity on issues deemed critical for coherent deconstructionism. Thus, it is not surprising that there have been a number of cases in recent years in which application of, or disregard for, the doctrine of federalism in family law has produced significant controversy.\(^3\)

The latest controversy, just beginning to boil, concerns efforts to legalize same-sex “marriage.” Many proponents of same-sex marriage have aggressively invoked several provisions of the U.S. Constitution and asserted that the states are required to legalize or to recognize same-sex marriage or quasi-marital unions. Thus, for example, it has been asserted that the Full Faith and Credit Clause will—or does—compel states to recognize same-sex marriages, civil unions, and domestic partnerships that are entered into in other states where they are lawfully formed\(^4\) (and that state and federal laws directing otherwise are unconstitutional);\(^5\) that the Equal Protection

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3. For example, application of the doctrine of federalism to invalidate a provision of the federal Violence Against Women Act, which created a federal cause of action for victims of rape and other gender violence, caused a great deal of commotion. See U.S. v. Morrison, 529 U.S. 598 (2000).

4. In addition to these relatively plausible claims, some advocates of constitutionally requiring same-sex marriage have urged that it is required by the Free Speech (Expression) Clause, Establishment Clause, and even the Free Exercise Clause. David B. Cruz, “Just Don’t Call it Marriage”: The First Amendment and Marriage as an Expressive Resource, 74 S. Cal. L. Rev. 925 (2001); Mark Strasser, Toleration, Approval, and the Right to Marry: On Constitutional Limitations and Preferential Treatment, 35 Loy. L.A. L. Rev. 65, 78 (2001) (arguing that an “endorsement test should preclude the state from denying individuals the right to marry because it wants to tell those individuals that they are outsiders who are not full members of the community”); Mark Strasser, Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees, 33 Loy. U. Chi. L.J. 597, 629 (2002) (arguing that “for some couples, [same-sex] unions must be recognized because of the Free Exercise guarantees of the Federal Constitution”); see also James M. Donovan, DOMA: An Unconstitutional Establishment of Fundamentalist Christianity, 4 Mich. J. Gender & L. 335 (1997); but see Richard S. Myers, Same-Sex “Marriage” and the Public Policy Doctrine, 32 Creighton L. Rev. 45 (1998) (arguing that claims that limit marriage to heterosexual couples violates Equal Protection are unfounded). See infra Part V.C.

5. Lewis A. Silverman, Vermont Civil Unions, Full Faith and Credit, and Marital Status, 89 Ky. L.J. 1075 (2000-01) (arguing that under most circumstances civil unions performed in Vermont must be recognized in other states under principles of full faith and credit); Thomas M. Keane, Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages, 47 Stan. L. Rev. 499 (1995) (arguing that full faith and credit, fundamental interest in marriage, and right to travel all support recognition of same-sex marriages); Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965 (1997) (arguing that the traditional “public policy” exception to marriage recognition is an unconstitutional violation of the Full Faith and Credit Clause and that, therefore, same-sex marriages must be recognized by sister states in many circumstances); Mark Strasser, The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel, 52 Rutgers L. Rev. 553 (2000) (arguing that a state’s refusal to recognize same-sex marriages violates the fundamental right to travel under the Privileges and Immunities Clause); Roderick T. Chen & Alexandra K. Glazer, Can Same-Sex Partners Consent to Organ Donation?, 29 Am. J.L. & Med. 31, 42 (2003) (noting the strong support for the argument that domestic partnerships should be given recognition under full faith and credit).
Clause of the Fourteenth Amendment requires states to treat same-sex unions the same as heterosexual unions for purpose of access to marriage status and benefits; and that the Due Process Clause of the Fourteenth Amendment requires states to allow the celebration of same-sex "marriages."

Some opponents of same-sex marriage have introduced in Congress a proposed Federal Marriage Amendment (hereinafter "Amendment" or "FMA"). This amendment would constitutionally define marriage as the union of a man and a woman only, would strip the national and state governments of the power to legalize same-sex "marriage," and would strip federal and state courts of the power to create or extend legal status and benefits to same-sex civil unions or domestic partnerships, but would leave state legislatures with the power to create civil unions, domestic partnerships, or extend some government benefits to same-sex couples.

What both the advocates of same-sex marriage and the supporters of the FMA appear to have in common is their desire to decide the same-sex marriage issue at the national level, and to override, circumvent, or modify the doctrine of federalism in family law. Advocates of gay marriage do so on the ground that the merits and substantive principles for same-sex marriage are so important that they must be established at the national level, must override federalism in family law, and that gay and lesbian couples who marry or enter into lawful "civil unions" in one state must not be denied the status and benefits associated with that union if they move to other states. They ordinarily manifest little respect for the doctrine of federalism in family law, but when the issue of the Federal Marriage Amendment is raised, they raise federalism objections. On the other hand, supporters of the Federal Marriage Amendment also argue that the issue of the definition of marriage is foundational, important to the survival of the nation, that it should be preserved as matter of constitutional law, and to the extent that federalism in family law would be reduced—as to the ability of any state to define marriage as including gay or lesbian couples—it is an acceptable


7. Veronica C. Abreu, Student Author, The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional under the Fifth Amendment’s Due Process Clause, 44 B.C. L. Rev. 177, 204 (2002) (arguing that the Supreme Court’s due process jurisprudence "can accommodate same-sex marriage as a fundamental right"); but see Dean v. Dist. of Columbia, 653 A.2d 307, 311 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) (finding that there is no due process fundamental right to same-sex marriage). The "due process" ruling in Lawrence v. Texas, 559 U.S. 558 (2003), probably will be invoked by advocates of same-sex marriage. See infra nn. 114-19 and accompanying text.

8. See infra nn. 78-83 and accompanying text.
cost. They usually support federalism and state control of family law issues, but when the Federal Marriage Amendment is mentioned, they assert that federalism in family law is already a dead letter, that liberal federal and state court judges already frequently disregard the doctrine, and that judicial activists are on the verge of judicially imposing same-sex marriage on the states despite the doctrine of family federalism. Thus, they argue that a minor reduction of federalism in family law is necessary to save and reinvigorate the core, underlying federalism principle. 9

For students of family law as well as of federalism this is a very significant issue. Apart from the merits of the substantive issue—whether same-sex "marriage" should be legalized or absolutely banned in the United States—the question about the scope and survival of the doctrine of federalism in family law may have very far reaching consequences for both family law and structural constitutionalism in the United States.

In this paper, I explore this narrow, structural, constitutional issue concerning federalism in family law and the proposed Federal Marriage Amendment. One's analysis certainly may be influenced by prior thinking and writing about federalism and/or same-sex marriage, and I have written extensively and supportively about federalism in family law. 10 However, the principle of federalism in family law is particularly difficult to pigeonhole into convenient ideological categories, and application of that principle to the debate over the proposed Federal Marriage Amendment is very complex and controversial. For example, conservative opposition to the proposed Federal Marriage Amendment because it does not go far enough to outlaw all same-sex unions seems to be just as vigorous as conservative support for it because it would abolish same-sex marriage. 11 Both advocates and opponents of same-sex marriage have criticized the proposed Fed-

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9. See infra nn. 125-30 and accompanying text.
11. See infra pt. II.E.
eral Marriage Amendment for its abandonment of federalism principles,\textsuperscript{12} while supporters of the proposed amendment argue that it is the last, best hope to rescue some form of family law federalism from judicial activism.\textsuperscript{13}

In June 2003, I presented a paper at the International Society of Family Law North American Regional Conference in Eugene, Oregon, in which I explained why I did not support the proposed Federal Marriage Amendment, primarily because of my concerns about preserving federalism in family law.\textsuperscript{14} In this article, I explain why I do support the proposed Federal Marriage Amendment, primarily for exactly the same reason that fifteen months ago I opposed it—because of my concerns about preserving federalism in family law. The events of the past fifteen months have convinced me that federalism in family law is in much greater jeopardy from the legal arguments, positions, and tactics asserted by advocates of legalizing same-sex marriage than from the Federal Marriage Amendment; that one way or another federalism in family law is going to be altered; and that the Federal Marriage Amendment will preserve much more fully and faithfully the constitutional principle of federalism in family law.

Part II of this article describes the proposed Federal Marriage Amendment, reviews the history of it, and summarizes the arguments that have thus far been made for and against its adoption, emphasizing especially those that relate to federalism in family law. I assess the strengths and weaknesses of the proposed Federal Marriage Amendment and show how crucial the vitality of the doctrine of federalism in family law may be to determining whether the Federal Marriage Amendment should be supported.

Part III of this article briefly describes the constitutional history of the origins of the doctrine of federalism in family law. Federalism in family law was understood and universally accepted because there were no perceived substantial threats to the family or to the institution of marriage in 1787. To address threats to and abuses of highly valued rights and relations, the Founders identified those rights and relations for fundamental protection in the Constitution or Bill of Rights, and empowered the national government to provide national protection. Thus, the FMA would appear to fit into the overall federalist structure of the Constitution.

In Part IV, the extent to which federalism in family law survives as a viable operative constitutional doctrine—rather than a mere label invoked or applied for convenience or effect—is considered. The erosion of the doctrine of federalism in family law in judicial decisions and increasing congressional legislation is reviewed. Also, because the validity of, especially, the federal and state Defense of Marriage Acts (hereinafter “DOMAs”) is

\textsuperscript{12} See infra pt. II.E.
\textsuperscript{13} See infra pt. II.D.
\textsuperscript{14} Lynn D. Wardle, Address, Federalism in Family Law and the Proposed Federal Marriage Amendment (Eugene, Or., June 27, 2003) (copy in author's possession).
briefly noted, as that is directly relevant to the necessity for adoption of the proposed Federal Marriage Amendment.

In Part V, the lessons from the constitutional origins of federalism in family law are applied to the controversy over the proposed Federal Marriage Amendment. Those lessons are considered in light of recent developments in the legalization of same-sex marriage, the apparent waning of judicial respect for federalism in family law, and Supreme Court decisions that already have constitutionalized some aspects of marriage regulation by imposing limits on how the states may define and regulate marriage.

Finally, in Part VI, this article concludes by asserting that the doctrine of federalism in family law should be preserved and strengthened, and that the proposed Federal Marriage Amendment will do that, and that to adopt the FMA poses less threat to federalism in family law than to not adopt it. If the FMA is not adopted, federalism in family law will become extinct, buried by the national imposition of same-sex marriage on the states by aggressive extension of various constitutional doctrines.

II. THE PROPOSED FEDERAL MARRIAGE AMENDMENT

A. Text and a Short History of the Proposed Federal Marriage Amendment

The Federal Marriage Amendment was introduced in the House of Representatives on May 15, 2002, as H.R. Jt. Res. 93,15 and was reintroduced May 21, 2003 as H.R. Jt. Res. 56.16 The full text of the proposed Federal Marriage Amendment is just two sentences:

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.17

The FMA was sponsored by six House members, three Democrats and three Republicans, when it was introduced initially in the 107th Congress,


and when it was reintroduced again in 2003. It was expected to be reintroduced
in the 108th Congress, with more than twenty co-sponsors, but there
reportedly was strong cloakroom opposition, and only six House co-spon-
sors (again, three from each major political party) initially signed up as co-
sponsors with Rep. Marilyn Musgrave (R-Colo.) for H.R. Jt. Res. 56 when
it was introduced May 21, 2003. However, after the decision of the U.S.
Supreme Court in Lawrence v. Texas, holding that laws prohibiting sod-
omy are unconstitutional and irrational; the Massachusetts Supreme Judicial
Court decisions in Goodridge v. Dept. of Public Health, declaring the
Massachusetts marriage law allowing only male-female marriages unconstitu-
tionally irrational, and in Opinions of the Justices to the Senate, declar-
ing that civil unions or any other kind of domestic union other than full,
same-sex marriage violates the Massachusetts Constitution, President
Bush’s State of the Union declaration of support for a federal marriage
amendment, other judicial rulings favoring and promoting same-sex un-
ions, and the massive outbreak of lawlessness in the issuances of marriage
licenses to same-sex couples by rogue politicians in several states, support
for the Federal Marriage Amendment soared. As of October 9, 2004 there
were 131 House member co-sponsors for H.R. Jt. Res. 56.

Also after the Lawrence and Goodridge decisions a Senate version of
the Federal Marriage Amendment, Sen. Jt. Res. 26, with identical text, was
introduced by Senator Allard (R-Colo.) on November 23, 2003; as of Sep-
tember 22, 2004, it had ten co-sponsors. On March 22, 2004, an alterna-

19. See Alliance for Marriage, supra n. 17. The original sponsor, Ronnie Shows of Missis-
issippi, was not re-elected in 2002. According to Matt Daniels, head of the Alliance for Marriage, the organization that is promoting the FMA, “the delay in reintroduction was caused by my com-
mitment that we once again stick to a strategy of bi-partisan sponsorship for the FMA,” and because House Democratic leaders have used coercive tactics to intimidate and prevent Democrats from co-sponsoring. E-mail from Matt Daniels, Pres., Alliance for Marriage, to Lynn Wardle (May 21, 2003) (copy in author’s possession).
25. See infra nn. 273-83 and accompanying text.
26. See infra nn. 284-88 and accompanying text.
29. Id. select Cosponsors.
tive version of the FMA, Sen. Jt. Res. 30, was introduced by Sen. Allard with sixteen other co-sponsors. A slightly modified version of it was reintroduced as Sen. Jt. Res. 40 on July 7, 2004 with a total of nineteen co-sponsors. While identical in purpose and similar in language to the Musgrave FMA, the new Allard amendment provides:

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.

Congress has not ignored the proposed Federal Marriage Amendment. On May 13, 2004, hearings were held in the House of Representatives Subcommittee on the Constitution of the Judiciary Committee on H.R. Jt. Res. 56. The United States Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Property Rights, held a one-day hearing on March 3, 2004, on the subject “Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?” Earlier, even before Sen. Jt. Res. 26 was introduced in the Senate, on September 4, 2003, the same subcommittee held hearings on the subject of “What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?” at which Professor Dale Carpenter, one of the distinguished panelists today, was a principal witness. Columnist Maggie Gallagher, one of the distinguished participants in this symposium, was one of the primary witnesses at the March 3, 2004 hearings that considered the potential need for an amendment in light of the Goodridge decision legalizing same-sex marriage.

Three weeks later, on March 23, 2004, the full Senate Judiciary Committee

held hearings on Sen. Jt. Res. 26, at which a distinguished member of the University of St. Thomas School of Law, Professor Teresa Collett, was a principal witness testifying in favor of the proposed amendment.\(^{37}\) And three months later, on June 22, 2004, the whole Senate Judiciary Committee held yet another related hearing on “Preserving Traditional Marriage: A View from the States.”\(^{38}\) Just one week after Sen. Jt. Res. 40 was introduced, on July 14, 2004, it came for a record vote in the full Senate on a motion to invoke cloture.\(^{39}\)

Since very few proposed constitutional amendments reach the floor of either chamber, to have a vote just eight months after the proposed amendment was introduced in the Senate is significant. It indicates at least three things: (1) that the leadership of the majority party in the Senate thinks it is politically important to be seen as supporting the FMA, (2) that the leadership of the majority party in the Senate thinks that it will be helpful politically to have a record vote in an election year so that persons who voted for and against the FMA can be held accountable in the November election, and (3) the President, who is the national political leader of the party that controls the Senate, does not object to having the issue raised in a presidential election year. The Senate vote was 48 - 50 - 2 (Sens. Kerry and Edwards did not vote).\(^{40}\)


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41. Marriage in the United States shall consist solely 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.


the proposed amendment and 186 opposing it;\textsuperscript{43} this represented over 55% of the vote for the amendment; but far less than the 2/3 of the vote is required for passage of a proposed amendment,\textsuperscript{44} so the proposal failed.

B. Initial Support for and Opposition to the Federal Marriage Amendment

Support for the FMA among conservative and moderate intellectual leaders is quite impressive, especially given the short amount of time the proposal has been around. The amendment was reportedly “coauthored by, among others, Harvard Law School Professor Mary Ann Glendon and Princeton political theorist Robert George.”\textsuperscript{45} Among the influential leaders who have publicly endorsed the FMA are former Judge Robert Bork,\textsuperscript{46} Robert George,\textsuperscript{47} Hadley Arkes,\textsuperscript{48} Stanley Kurtz,\textsuperscript{49} Maggie Gallagher (implicitly),\textsuperscript{50} and Francis Cardinal George, the Roman Catholic Archbishop of Chicago.\textsuperscript{51} Numerous other well-known conservative intellectuals and leaders serve on the Board of Advisors of the Alliance for Marriage, the organization promoting the FMA.\textsuperscript{52} In late June 2003, when the United States Supreme Court declared laws prohibiting sodomy to be unconstitutional in a very broadly-written opinion in \textit{Lawrence v. Texas},\textsuperscript{53} U.S. Senate Majority Leader Bill Frist, who had not previously supported the proposed amendment and 186 opposing it;\textsuperscript{43} this represented over 55% of the vote for the amendment; but far less than the 2/3 of the vote is required for passage of a proposed amendment,\textsuperscript{44} so the proposal failed.

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Federal Marriage Amendment, declared his support for it.\textsuperscript{54} In his State of the Union message in January 2004, President George W. Bush expressed his support for passage of a federal marriage amendment, but he did not recommend any particular language or endorse specifically the Federal Marriage Amendment then pending in Congress.\textsuperscript{55}

The American public appears to be generally sympathetic to the idea of and core principle of the FMA; a national opinion survey of one thousand Americans by Wirthlin Worldwide, released by the Alliance for Marriage on March 4, 2003, reported that 62 percent of Americans agree that “marriage is the union of a man and a woman,” and that 57 percent of those surveyed, including 63 percent of Hispanics, and 62 percent of African-Americans, favor a constitutional amendment to protect marriage.\textsuperscript{56} While many conservative organizations have expressed support for the FMA,\textsuperscript{57} the cultural and ideological breadth of the support of the FMA is impressive. Political sponsorship of the FMA has been bi-partisan and multicultural from the beginning.\textsuperscript{58} When the amendment was introduced, Walter Fauntroy, a colleague of Rev. Martin Luther King, Jr., organizer of the 1964 March on Washington for Dr. King, and supporter of the FMA, declared in a press release: “We represent several of the largest African-American denominations in the United States. We represent millions of Latinos and Asian-Americans. We represent Jews, Christians and Muslims from every ethnic background.”\textsuperscript{59} Even some leading liberal politicians have expressed opposition to same-sex marriage (though that may not translate into support of the Federal Marriage Amendment).\textsuperscript{60}


\textsuperscript{58} See Alliance for Marriage, supra n. 17; Kurtz, supra n. 18.

\textsuperscript{59} See Alliance for Marriage, supra n. 15; see also Alliance for Marriage, supra n. 52 (Note the religious and ethnic diversity reflected in the membership of the Alliance for Marriage Board of Advisors.).

\textsuperscript{60} Georgia Log Cabin Republicans, Log Cabin Challenges Frist [R-TN] on Anti-gay Constitutional Amendment, http://www.lcrga.com/archive/200306301204.shtml (June 30, 2003) (“We have a tremendous amount of work to do with both Republicans and Democrats on the issue of respecting and recognizing our families. Former President Bill Clinton signed the Defense of Marriage Act with the overwhelming support of Democrats and Republicans, and even liberal icons like Senator Ted Kennedy (D-MA) and Senator Hillary Rodham Clinton (D-NY) oppose gay marriage[,]” said LCR Director of Public Affairs Mark Mead.”).
On the other hand, early opposition to the FMA is not insignificant either. Among the opponents to the amendment are some other significant conservative intellectual and political leaders, including Robert Knight, Professor Charles Rice, Jonathan Rauch, and Andrew Sullivan. Vice-President Richard Cheney, Sen. John McCain, and Sen. Orrin Hatch also reportedly have expressed their opposition to or hesitancy about the FMA. Conservative organizations such as the Family Research Council, Concerned Women for America, and the American Family Association also oppose the FMA. The leaders of both the American Bar Association’s Family Law Section, Sharon Corbitt, and the predominantly black National Bar Association’s Family Law Section, Ernie Z. Carter, expressed their opposition to the FMA. Likewise, Democratic Party leaders in the U.S. House of Representatives reportedly have worked vigorously to prevent

61. Politically, conservatives are split (between those giving priority to protecting marriage supporting the FMA and those favoring federalism opposing it) while liberals are apparently united (those favoring same-sex marriage opposing the FMA on that ground, and those favoring federalization of family law have so far been quiet or deferred to the substantive position).


65. See Kurtz, Point of No Return, supra n. 49 (citing Sullivan’s arguments that there is no real threat of judicial nationalization of same-sex marriage); Kurtz, The Right Balance, supra n. 49 (suggesting Sullivan opposes the FMA). While neither prominent nor influential, the author also expressed his reticence to support the FMA. See Wardle, supra n. 14.

66. Cheney, in the 2000 vice-presidential debate, said, “I think different states are likely to come to different conclusions, and that’s appropriate. I don’t think there should necessarily be a federal policy in this area.” Equal Families, National Leaders Say "No" to the Federal Marriage Amendment ¶ 2, http://www.equalfamilies.com/national_leaders.htm (accessed Feb. 18, 2005). Sen. Hatch is quoted as writing in a letter to a constituent on January 2, 2003: “[T]he definition of marriage, as with virtually all family law issues, traditionally falls under the prerogative of the States under the historic norm of federalism. This proposed constitutional amendment turns this understanding on its head by federalizing the marriage definition.” Id. at ¶ 4. However, at a hearing about the need for a constitutional amendment, Sen. Hatch explicitly stated that he fully supports the FMA, although he also added that “other approaches may be necessary.” On July 13, 2004, Senator McCain issued a statement regarding the FMA in which he stated that constitutional amendments concerning the definition of marriage are best left to state constitutions and that a federal constitutional amendment would usurp “from the states a fundamental authority they have always possessed, and imposes a federal remedy for a problem that most states do not believe confronts them, and which they feel capable of resolving should it confront them, again according to local standards and customs.” John McCain, Statement on the Federal Marriage Amendment ¶ 5, http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1296 (July 13, 2004).


68. Cahill, supra n. 15.
Democrats serving in Congress from supporting the FMA. Obviously, most liberal and gay organizations oppose the Federal Marriage Amendment.

C. What the Federal Marriage Amendment Would Do and Would Not Do

The Federal Marriage Amendment would have at least six significant legal effects. First, sentence one establishes a substantive definition of marriage by providing that only male-female unions shall constitute marriage in the United States. The word “only” is a key term because it clearly limits marriage in America to “the union of a man and a woman” and clearly excludes all same-gender unions. The drafters’ choice of “[m]arriage . . . shall consist of” is meant to define marriage for both regulation and recognition purposes—to bar interjurisdictional recognition of foreign same-sex marriages in the United States, as well as to prohibit the contracting of same-sex marriage in any State of the Union. It is meant to establish as clearly and solidly as possible, in constitutional concrete, a national, uniform definition of one dimension of marriage providing that only male-female unions are marriages in America.

Second, sentence one of the FMA defines one element of marriage as a matter of federal constitutional text. This “federalizes” at least part of the legal definition—and perhaps more broadly the general regulation—of marriage. Historically, it has been said that the direct definition and regulation of marriage has been a matter reserved to the “virtually exclusive province

69. E-mail, supra n. 19.


72. George, supra n. 47, at 34; Alliance for Marriage, supra n. 71.
of the states," but federal law indirectly influences the definition of marriage. For example, Congress can and does define what it means by "marriage" when that term is used in federal laws—such as in income tax laws, social security laws, welfare benefits, military survivor laws, immigration laws, etc.—but even for federal law purposes Congress generally just incorporates the definition of marriage used in the relevant state. However, sometimes Congress or federal agencies specifically define the term "marriage" for purpose of a particular federal program, statute, or rule in a particular way that is not entirely consistent with state definitions of marriage. For example, marriages between U.S. citizens and foreigners are not considered for purposes of family preference in immigration law unless the parties have complied with federal requirements in addition to state laws. Likewise, for tax purposes, end-of-year marriage dissolutions followed by immediate remarriage are not considered as valid divorces. In those in-


74. See e.g. U.S. v. Yazell, 382 U.S. 341, 352-53 (1966) (federal courts do not override state family law but borrow unless clear congressional order); Yiotchos v. Yiotchos, 376 U.S. 306, 309 (1964) ("[I]n applying the federal standard we shall be guided by state law insofar as the property interests of the widow created by state law are concerned."); DeSylva v. Ballentine, 351 U.S. 570, 580-81 (1956) (especially in family law, federal courts "draw on the ready-made body of state law to define [words such as] children."); Sullivan v. Commr., 256 F.2d 664 (4th Cir. 1958) (holding that issue of marital status for purposes of right to file a joint tax return must be determined according to the law of the state in which the decree was issued); Boyter v. Commr., 74 T.C. 989, 1001 (1980) (holding that Maryland law controlled marital status of husband and wife who entered into a year-end divorce for tax purposes and that since Maryland law refused to recognize the divorce, it would not be recognized for federal tax purposes); see also Daniel I. Lathrope, State-Defined Marital Status: Its Future as an Operative Tax Factor, 17 U. Cal. Davis L. Rev. 257, 260-61 (1983) (noting that federal tax law generally "defers to local law determinations of marital status, recognizing the substantial interests and expertise of the states in domestic relations matters" and that "if taxpayers are considered married under state law, they will be considered married for federal income tax purposes"); see generally Wardle, supra n. 73.

75. See 8 U.S.C. § 1101(a)(35) (2000) (for purposes of immigration law, the terms "spouse," "wife," or "husband" do not apply to unconsummated marriages performed where the parties were not in each other's physical presence at the time of the ceremony); 8 U.S.C. § 1325(c) (2000) ("Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both."); 8 U.S.C. § 1186(a) (2000) (conditional permanent resident status for certain spouses; improper marriages [even if valid by state law]); 8 U.S.C. § 1154(g) (2000) (two year residence outside of United States required before entitled to preference or immediate relative status for immigration); see also Lutwak v. U.S., 344 U.S. 604 (1953) (conviction for INS marriage fraud, even though marriages apparently valid under foreign law); Aguila-Cisneros v. I.N.S., 5 Fed. Appx. 415 (6th Cir. 2001) (unpublished) (upholding two-year delay after marriage rule); U.S. v. Chowdhury, 169 F.3d 402 (6th Cir. 1999) (affirming conviction for marriage fraud for immigration purposes); Manevani v. I.N.S., 736 F.Supp. 1367 (W.D.N.C. 1990) (§ 1154 two-year delay violates Fifth Amendment).

76. See 26 U.S.C. § 21(e) (stating that individuals will not be considered married under certain circumstances for purposes of the child care tax credit); Boyter, 74 T.C. at 994 ("It has consistently been held that for Federal income tax purposes, the determination of the marital status of the parties must be made in accordance with the law of the State of their domicile.") (citations
stances, Congress is not directly regulating domestic relations—marriage—but is only controlling federal laws and programs such as immigration, tax, welfare, etc. Thus, it is possible that a couple may be legally married under, and for all purposes of, state law, but still not be deemed married for purposes of federal immigration or tax law, etc.\textsuperscript{77} The proposed FMA would change this by making the dual-gender element of the definition of marriage a matter of federal law.

Third, sentence one of the proposed FMA also constitutionalizes at least part of the definition of marriage. That would constitute a major change in constitutional law because no other provision of the Constitution speaks directly to an issue of family law, and the Supreme Court has only infrequently decided cases concerning constitutional dimensions of the right to marry.\textsuperscript{78} Under sentence one, the definition of marriage as only a male-female union would assume very clear and explicit “constitutional civil right” status, like other specific constitutional guarantees (speech, press, religion, etc.).

Fourth, sentence two of the original FMA clearly prohibited all judges and any other legal interpreters, possibly agency officials, for instance, from “constru[ing]” any of four different sources of law: (1) the U.S. Constitution, (2) any state constitution, (3) federal law, and (4) state law—“to require” either of two legal effects—“that (1) marital status or (2) the legal incidents thereof be conferred upon unmarried couples or groups.”\textsuperscript{79} Sen. Jt. Res. 40, the latest revision of the FMA by Sen. Allard, which the full Senate considered and voted on, deletes reference to nonconstitutional federal law and state law, so it prohibits construing only two sources of law, federal or state constitutional law, to require the two effects mentioned.\textsuperscript{80} Thus, sentence two is primarily addressed to judges—who do most of the “constru[ing]” of federal and state constitutional provisions and laws.\textsuperscript{81} It pro-

\textsuperscript{77} See e.g. Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), aff’d, 673 F.2d 1036 (9th Cir. 1982) (holding that state law generally applies for purposes of determining marital status in immigration law unless the state law offends the policy of the federal legislation); U.S. v. Yazell, 382 U.S. 341 (1966).

\textsuperscript{78} See generally Lynn D. Wardle, Loving v. Virginia and the Constitutional Right to Marry, 1790-1990, 41 How. L.J. 289 (1998) (noting that the Court has addressed marriage issues in dozens of cases in the two centuries from 1790-1990, but only decided constitutional marriage issues four times, beginning with Loving).

\textsuperscript{79} H.R. Jt. Res. 56, 108th Cong. at § 1.


\textsuperscript{81} Alliance for Marriage, supra n. 71 (“[T]he weakening of the legal status of marriage in America at the hands of the courts has already begun. This process represents nothing less than a profound social revolution—advancing apart from the democratic process and against the will of the American people.”); Rice, supra n. 63, at 108-109 (quoting Robert Bork) (“The second sentence expresses the main thrust of the amendment. It recognizes that liberal activist courts are the real problem.”); Kurtz, The Right Balance, supra n. 49 (“The major gay rights organizations have vowed to litigate everything—DOMA, civil unions, recently passed marriage amendments. We
hibits a particular line of interpretation or construction by judges that would extend marital status or marital benefits to nonmarital couples or groups. It applies to all judges and officials of all levels of government in the United States—of the federal, state, and local governments. The primary effect of this is to prevent federal judges from ordering the creation or extension of quasi-marital status—such as same-sex domestic partnership or civil unions—or marital benefits—such as preference in custody and adoption, marital testimonial privilege, property interests, claims for support, etc.—to heterosexual or same-sex couples.  

If enacted, the Federal Marriage Amendment would be an additional separation of powers provision, reinforcing the line between the judicial branch and the legislative branch, and between the judicial process and the constitution amending processes.

Fifth, the Federal Marriage Amendment clearly preserves the authority of legislatures, state and federal, to enact laws providing "that (1) marital status or (2) the legal incidents thereof be conferred upon unmarried couples or groups." Thus, it does not prohibit the creation of another legal status equivalent to marriage—called, perhaps, "Civil Unions" or "Domestic Partnerships" or "Reciprocal Beneficiaries"—nor does it prohibit the extension of the same benefits given married couples to such alternative quasi-marital unions, or the extension of any particular marital benefits and "incidents" to any heterosexual or same-sex nonmarital couples—so long as it is done by the legislature.

Sixth, the Federal Marriage Amendment is intended to "ha[ve] no impact at all on benefits offered by private businesses and corporations." It "would not prevent businesses from offering employment benefits to

should take them at their word. They will throw in the constitutional kitchen sink. To the extent possible, they will select federal or state courts that are sympathetic to their cause, and it only takes one or two courts to throw everything up in the air." (quoting David Coolidge); see also infra nn. 96-102 and accompanying text.

82. See George, supra n. 47, at 34 ("If state and federal judges remain free to manufacture marriage law as they please, the prestige of liberal sexual ideology in the law schools and other elite sectors of our society will eventually overwhelm conventional democratic defenses. The only sure means of preserving the institution of marriage for future generations of Americans is a federal constitutional amendment protecting marriage as the union of a man and a woman."); Alliance for Marriage, Legal Impact of the Federal Marriage Amendment, http://www.allianceformarriage.org/reports/fma/colorchart.cfm (accessed May 19, 2003) (The FMA would prohibit judicial redefinition of marriage, legalization of domestic partnership or civil unions, [or] extension of marriage benefits to unmarried partners.).

83. See Alliance for Marriage, supra n. 82 ("The FMA . . . would not prevent businesses from offering employment benefits to nonmarital partners. It would bar state legislatures from redefining marriage, but would not prevent state legislatures from legalizing domestic partnership or civil unions, extending marriage benefits to unmarried partners, or stop businesses from offering employment benefits to nonmarital partners."); Rice, supra n. 63, at 109 ("This Amendment would write into the Constitution an implicit guarantee that a state legislature could give all the incidents of marriage to a union between a man and woman, two men, two women, a man and a dog, or whatever, as long as they do not call it 'marriage.'"); see also George, supra n. 47; Bork, supra n. 46; Kurtz, The Right Balance, supra n. 49.

84. See Alliance for Marriage, supra n. 17. See also Alliance for Marriage, supra n. 82.
nonmarital partners. It . . . would not . . . stop businesses from offering employment benefits to nonmarital partners."85

D. Rationales for and Defenses of the Federal Marriage Amendment

To date, ten discrete rationales for and defenses (responses to criticisms) of the proposed Federal Marriage Amendment have been offered. First are very deep concerns about the threat to the integrity of the institution of marriage posed by proposals to legalize same-sex marriage. As Robert George has written: "Everybody knows that marriage is in trouble. . . . Still, there is something unique in the threat posed by the movement for ‘same-sex marriage.’"86 Same-sex marriage poses a critical threat to marriage because of the tremendous transformative effect legalization of same-sex marriage would have upon the institution of marriage and upon society.

At the core of the traditional understanding of marriage in our society is a principled commitment to monogamy and fidelity. Marriage, as embodied in our customs, laws, and public policies, is intelligible and defensible as a one-flesh union whose character and value give a man and a woman moral reasons (going beyond mere subjective preferences or sentimental motivations) to pledge sexual exclusivity, fidelity, and permanence of commitment. . . . [Legalizing same-sex marriage] will deny that there are such moral reasons. Any such argument would have to treat marriage as a purely private matter designed solely to satisfy the desires of the ‘married’ parties.87

They fear that legalizing same-sex marriage, unlike changing the age of marriage or degrees of consanguinity forbidden or liberalizing grounds for divorce, “would in effect abolish the institution, by collapsing the moral principles at its foundation.”88 Thus, supporters of the Federal Marriage Amendment believe that “[t]he only sure means of preserving the institution of marriage for future generations of Americans is a federal constitutional amendment protecting marriage as the union of a man and a woman.”89

Second, some supporters of the proposed Federal Marriage Amendment argue that the Founders of the Constitution assumed that only male-female couples could marry, and that assumption about pre-political relations was part of the foundation upon which the Constitution was built.

85. Id.; see also George, supra n. 47, at 34.
86. George, supra n. 47, at 32; Kathryn Jean Lopez, Looking for Love in All the Wrong Ways ¶ 11, http://www.nationalreview.com/nr_comment/nr_comment073001a.shtml (July 30, 2001) (“It’s definitely time for Americans, in some public way, to embrace marriage, rather than downplay it and devalue it. (Think what you will of the proposed Federal Marriage Amendment, it is a clear statement in support of a hurting institution, on the verge of endangerment.”).
87. George, supra n. 47, at 32.
88. Id.
89. Id. at 34.
Thus, Stanley Kurtz has argued that: "[T]he Founders did indeed presuppose heterosexual marriage, and our country’s unity depends upon holding fast to a single basic definition of marriage. That is why the Federal Marriage Amendment’s definition of marriage makes sense." He asserts that the Founders simply took male-female marriage for granted as the social foundation for the Constitution. Robert George agrees. He asserts:

At the time the U.S. Constitution was adopted, it was taken for granted that marriage is the union of a man and a woman ordered to the rearing of children in circumstances conducive to moral uprightness. . . . There was no need at the time for marriage to be expressly defined or protected by federal law or the Constitution. Consequently, the word “marriage” does not appear in the Constitution (nor, for that matter does the word “family”). Our forefathers shared the consensus of humanity, which viewed marriage as a union between sexually complementary persons—that is, persons of opposite sexes.

As the Alliance for Marriage puts it: "The institution of marriage is so central to the well being of both children and our society that it was, until recently, difficult to imagine that marriage itself would need explicit constitutional protection. . . . [O]ur country’s time-honored understanding [is] that marriage is—in its very essence—the union of male and female . . . ." Thus, supporters of the FMA see a critical need to constitutionalize the core foundation of constitutional society. As Matt Daniels, head of the Alliance for Marriage says: "We have to have some sort of common currency." Professor Hadley Arkes argues: "[W]e are seeking to establish, in the fundamental law, the essential meaning of marriage as the union only of a man and a woman."

Third, the proposed Federal Marriage Amendment reflects very deep concerns about, and a very strong desire to restrict, judicial activism in the form of judicial redefinition of marriage or judicial recognition of same-sex marriage or same-sex domestic partnership from other jurisdictions. For example, Robert George succinctly argues:

It is noteworthy that proponents of same-sex marriage have sought to change public policy through judicial decree. Where they have won, they have won through the courts. Where the issue has been settled in the court of public opinion, they have lost. The lesson is clear: If the institution of marriage is to be

90. Kurtz, Middle Ground, supra n. 49.
92. George, supra n. 47, at 32.
93. See Alliance for Marriage, supra n. 71.
94. Cahill, supra n. 15.
preserved, a campaign to settle the issue democratically at the na­
tional level must be mounted—and quickly.96

Likewise, Robert Bork has asserted:

[Gay] activists have concentrated their efforts on courts, knowing
that judges have pushed, and continue to push, the culture to the
left . . . . Many court watchers believe that within five to 10 years
the U.S. Supreme Court will hold that there is a constitutional
right to homosexual marriage, just as that court invented a right to
abortion.97

As Stanley Kurtz puts it: “[T]here is already a national culture war
over the issue of gay marriage. The Federal Marriage Amendment did not
start this war. Judicial arrogance in Vermont did that.”98 David Coolidge,
Director of the Marriage Law Project at the Catholic University of
America’s Columbus Law School warned:

The major gay rights organizations have vowed to litigate every­
thing—DOMA, civil unions, recently passed marriage amend­
ments. We should take them at their word. They will throw in the
cookstional kitchen sink. To the extent possible, they will select
federal or state courts that are sympathetic to their cause, and it
only takes one or two courts to throw everything up in the air.99

Professor Hadley Arkes argues that “Many . . . judges have shown a
breathtaking willingness to assume for themselves the power to remodel the
very matrix of our laws on the beginning and ending of life, on marriage
and the family and the meaning of sexuality itself,”100 and that gay activists
are asking federal courts to impose a national rule regarding same-sex mar­
riage. If courts do that it would “amount to a federal revision of the laws on
marriage—as surely as any change brought about in a constitutional amend­
ment.”101 Because of rampant judicial activism, judges have imposed their
personal policy preferences in the guise of interpreting the Constitution, and
some have shown a willingness to force states to legalize same-sex mar­
rriage or an equivalent domestic partnership or civil union status.102

Fourth, some supporters of the proposed Federal Marriage Amendment
see the Full Faith and Credit Clause as the vehicle through which courts

96. George, supra n. 47, at 32.
97. Bork, supra n. 46; see also George, supra n. 47, at 34 (noting Evan Wolfson’s prediction
of same-sex marriage within five years).
98. Kurtz, Point of No Return, supra n. 49. See also Stanley Kurtz, Oh, Canada! ¶ 14, http://
www.nationalreview.com/script/printpage.asp?ref=/Kurtz/kurtz061303.asp (June 13,
2003) (“American judges are usurping the role of legislators and imposing their views on the public.”).
100. Arkes, supra n. 48, at ¶ 7.
101. Id. at ¶ 1.
102. Id. at 34 (“If state and federal judges remain free to manufacture marriage law as they
please, the prestige of liberal sexual ideology in the law schools and other elite sectors of our
society will eventually overwhelm conventional democratic defenses.”).
will nationally legalize same-sex marriage. As shown in Hawaii, Alaska, Vermont, and Massachusetts, "[t]he strategy [has been] to get some state supreme court to recognize same-sex marriage. Other states would then be compelled to recognize these 'marriages,' because of the constitutional requirement that states extend 'Full Faith and Credit' to one another's 'public Acts, Records, and judicial Proceedings.'" The fact that 85 percent of all civil unions that have been registered in Vermont involve out-of-state parties, and that nearly 90 percent of all new civil union registrations involve out-of-state gay or lesbian couples, underscores the potential risk of exporting same-sex marriage or civil unions from a single state to all other states. It is asserted that a patchwork approach to interjurisdictional validity of same-sex unions will never be tolerated by the courts. As Stanley Kurtz put it:

There is every reason to fear that a legal mandate for gay marriage in but a single state will quickly result in the imposition of gay marriage on the nation as a whole. A federal amendment defining marriage as a union of a man and a woman is the only way to prevent this.

Fifth, there is concern that, because of the vigorous challenges, the federal and various state DOMAs will be invalidated by some state or federal judges and the Full Faith and Credit Clause interpreted to force states to

103. Alliance for Marriage, supra n. 71, at ¶ 11. "First, the federal Defense of Marriage Act (DOMA) cannot prevent state courts from subverting democracy and undermining marriage at the state level in states such as Vermont and Massachusetts. Second, there are very good reasons to believe that both state marriage laws and the federal Defense of Marriage Act will not survive if challenged in court." Id. at ¶¶ 9-10. The Full Faith and Credit Clause "has the potential to override DOMA and force states that don't recognize gay marriage to accept marriages celebrated in states that do." Kurtz, The Right Balance, supra n. 49, at ¶ 6.

104. George, supra n. 47, at ¶ 9.


106. Kurtz, The Right Balance, supra n. 49, at ¶¶ 1, 16 ("[A] patchwork solution—gay marriage legalized in some states but forbidden in others—is next to impossible. . . . [A] state-by-state patchwork of radically distinct marriage practices is unprecedented, untenable, and profoundly anti-federalist."); Arkes, supra n. 95 ("It is illusory to think that the gay activists would settle for that arrangement[, a checkerboard policy in which gay marriages were not recognized in some states."); Kurtz, Oh, Canada!, supra n. 98, at ¶ 10 ("[A] patchwork solution for marriage laws will be impossible to sustain.").

107. Kurtz, The Right Balance, supra n. 49, at ¶ 3. See also Kurtz, Oh, Canada!, supra n. 98. "Passage of the Federal Marriage Amendment . . . is the only way to take marriage out of the hands of the courts and put it back into the hands of the people." Id. at ¶ 15.
recognize same-sex marriages or civil unions from other states.\footnote{Kurtz, Before the Big One, supra n. 49, at ¶ 5 (“Once Massachusetts legalizes gay marriage, it will be a domestic culture-war story like no other. Gay couples will flood into Massachusetts from around the country to get married. Returning to their homes, these gay couples will initiate a series of lawsuits attempting to force recognition of their marriages onto their respective states. The suits will rest on constitutional grounds of equal protection, full faith and credit — and any other grounds the plaintiffs can think of. There will also be legal challenges to the federal Defense of Marriage Act. The airwaves will be filled with sympathetic stories about married gay couples who can’t get their unions recognized in their own homes.”); Arkes, supra n. 48, at ¶ 2 (arguing that if a state refuses to recognize a sister-state gay marriage under a DOMA, federal judges will disregard federalism and strike down federal or state DOMAs).} For example, Judge Bork complains:

Activists are already trying to nationalize same-sex unions: Same-sex couples will travel to any state that allows them to marry or have civil unions, relying on the constitutional requirement that states give full faith and credit to the judgments of other states to validate their status in their home states. They will attack the constitutionality of the federal Defense of Marriage Act [DOMA], which seeks to block this.\footnote{Robert Bork, Stop Courts from Imposing Gay Marriage, Wall St. J. A14 (Aug. 7, 2001).}

Professor George agrees:

[Gay] activists are putting forward a number of theories to persuade judges to declare the Defense of Marriage Act, and the state acts, unconstitutional. They may well succeed. [Just as the Colorado Constitutional amendment forbidding ‘gay rights’ laws was declared in Romer to be based on unconstitutional “animus” toward homosexuals,] “[t]he Defense of Marriage Act could surely be characterized the same way by socially liberal federal judges.”\footnote{George, supra n. 47, at ¶ 15; accord Arkes, supra n. 48, at ¶¶ 1-2; Alliance for Marriage, supra n. 71, at ¶¶ 10-11.}

Moreover, the section of the Federal DOMA that allows states to decline to recognize same-sex marriage might be invalidated by a court jealous of having the “final word” on interpretation of the Constitution.\footnote{Alliance for Marriage, supra n. 71, at ¶ 11.}

Thus, we are urged to follow the example of the drafters of the Civil War Amendments who passed the Thirteenth, Fourteenth, and Fifteenth Amend-

\footnote{Id.Indeed, although the federal courts may uphold the federal Defense of Marriage Act insofar as it applies to federal law, they will almost certainly invalidate the section of the act that purports to bar interstate transmission of same-sex “marriage.” This is because the section of the Federal Defense of Marriage Act that applies to the states will be treated as an effort by Congress to offer an authoritative interpretation of the Full Faith and Credit Clause as applied to same-sex marriages. But the modern Supreme Court has repeatedly held that acts of Congress which are premised upon a purportedly authoritative interpretation of a constitutional text will be invalidated. This is because, under the established doctrine of Judicial Supremacy in matters of constitutional interpretation, only the Court can offer an authoritative interpretation of the Constitution. For example, the Religious Freedom Restoration Act was struck down by the Supreme Court on the grounds that it purported to offer an authoritative interpretation of the Free Exercise Clause.}
ments to take slavery issues out of the hands of judges who had given the country Dred Scott v. Sandford,\textsuperscript{112} and to even remove the issue from the reach of legislative majorities and politicians.\textsuperscript{113}

Sixth, concern that judicial activists will impose same-sex marriage by judicial fiat is a major motivation. Federal Marriage Amendment supporters are wary of state court judicial activists—especially in states with restrictive, anti-populist constitutional amendment procedures, like Massachusetts and Vermont—interpreting state constitutional provisions so as to judicially impose same-sex marriage or its equivalent. Some supporters of the proposed Federal Marriage Amendment see the Fourteenth Amendment’s Equal Protection Clause or Due Process Clause as the likely vehicle for judicial rulings compelling the legalization of same-sex marriage.\textsuperscript{114} Stanley Kurtz presciently predicted a year before it occurred: “In just a few months, the Supreme Judicial Court of Massachusetts is likely to legalize gay marriage [in Goodridge v. Dept. of Health], thus setting off a titanic national struggle.”\textsuperscript{115} That has led to efforts to export same-sex marriage to all other states. When the Ontario Court of Appeals ordered the government to immediately issue marriage licenses to same-sex couples, in June 2003, gay and lesbian couples from the United States began going to Ontario to become “legally married” there; within two weeks of the decision same-sex couples from a dozen states, as far away as California, had traveled to Toronto to be married.\textsuperscript{116} It has been conservatively estimated that of the 6,000 foreign same-sex couples to marry in Canada—40 percent of the 14,000 total same-sex marriages there—over 1,000 were American gay and lesbian couples.\textsuperscript{117} The same phenomenon will occur when the first

\textsuperscript{112} 60 U.S. 393 (1856).
\textsuperscript{113} See Arkes, supra n. 48, at ¶ 6.
\textsuperscript{114} Bork, supra n. 46; see also Robert H. Bork, The Judge’s Role in Law and Culture, 1 Ave Maria L. Rev. 19, 23 (Spring 2003) (“The argument for a federal right to same-sex marriage will probably rely upon the Equal Protection Clause and will analogize the status of homosexuals to that of blacks prior to Brown v. Board of Education or, more pertinently, to Loving v. Virginia.”). The June 26, 2003, decision of the U.S. Supreme Court in Lawrence v. Texas increases these concerns. 539 U.S. 558; see infra nn. 203-15, 304 and accompanying text.
\textsuperscript{115} Kurtz, Before the Big One, supra n. 49, at ¶ 5, see also Alliance for Marriage, supra n. 69.
\textsuperscript{116} Clifford Krauss, A Few Gay Americans Tie the Knot in Canada, N.Y. Times A2 (June 28, 2003). “Gay and lesbian couples, some from as far away as California and Britain, are coming to Toronto to marry.” Id. “So far, same-sex couples from 12 states have obtained marriage licenses in Toronto since it became legal for them to do so June 10. A handful of other American gay and lesbian couples have secured licenses in Ottawa and Windsor.” Id. at ¶ 9.
\textsuperscript{117} Alan Bayless, Chicago Gay Couple Ties the Knot in Canada, Chi. Sun-Times 4 (Jan. 14, 2004) (383 American couples married in BC; numbers not available for Ontario); Canadian Press Newswire & Steven Fairbairn, American Same-Sex Couples Exchange Wedding Vows in Toronto ¶ 25 (Feb. 14, 2004) (available at LEXIS, ALLNWS library, CURNWS) (14,700 gays and lesbians married in Toronto from July 2003 through year’s end, of whom 6,800 were non-Canadians); Sarah Robertson, Journeys; Mining the Gold in Gay Nuptials, N.Y. Times Fl (Dec. 19, 2003) (“The number of couples from the United States who have gone to Canada to get married is still relatively small—356 in Toronto (through Dec. 16) and 729 in British Columbia (through the end
American state without an anti-evasive marriage provision legalizes same-sex marriages (as occurred in Vermont with out-of-state couples registering civil unions there). Litigation over recognition of those same-sex marriages in other American states is inevitable.

Seventh, supporters also see the proposed Federal Marriage Amendment as necessary to preserve popular sovereignty and democratic self-government in matters of marriage regulation from judicial "platonic guardians." A constitutional amendment is deemed necessary to save democratic processes from judicial elitists who will impose their own private preference for gay marriage upon the people by anti-democratic judicial interpretation. "[T]he weakening of the legal status of marriage in America at the hands of the courts has already begun. This process represents nothing less than a profound social revolution—advancing apart from the democratic process and against the will of the American people." As Robert George put it:

If state and federal judges remain free to manufacture marriage law as they please, the prestige of liberal sexual ideology in the law schools and other elite sectors of our society will eventually overwhelm conventional democratic defenses. The only sure means of preserving the institution of marriage for future generations of Americans is a federal constitutional amendment protecting marriage as the union of a man and a woman.

Robert Bork agrees. "If courts are prevented from ordering same-sex marriage or its equivalent, the question of arrangements less than marriage..."
is left where it should be, to the determination of the people through the
democratic process.\textsuperscript{123} Stanley Kurtz writes:

The Federal Marriage Amendment not only guards against the na-
tionalization of gay marriage by judicial fiat, it also guards
against a state judiciary that has cast all democratic restraint to the
wind and has taken the right to define and regulate marriage out
of the hands of the people. Having broken faith with the principles
of democracy, the nation's judiciary has left the public with
little recourse. The decision in Vermont is exhibit A of that
problem.\textsuperscript{124}

Eighth, some supporters of the proposed Federal Marriage Amendment
assert that the doctrine of federalism in family law, for all practical pur-
poses, already is dead or nearly dead due to judicial activism, and that the
FMA is the last, best way to preserve the core principle. Judge Bork ar-
gues: "One way or another, federalism is going to be overridden."\textsuperscript{125} More-
over, federalism arguments against the FMA are irrelevant because "[a]
constitutional ruling by the Supreme Court in favor of same-sex marriage
would itself override federalism."\textsuperscript{126} The FMA is necessary to preserve the
core principle of federalism before it is entirely destroyed by judicial activ-
ism, and family federalism purists who quibble against the FMA will cause
another lost opportunity if they do not support the FMA.\textsuperscript{127}

Supporters of the proposed Federal Marriage Amendment insist that
the amendment preserves the core principle of federalism in family law.\textsuperscript{128}
They argue that "federalism is actually a careful balancing of national unity
with state diversity. [F]ederalism has always demanded national common-
ality in the fundamental definition of marriage."\textsuperscript{129} They view the FMA as
a "middle road" approach to federalism, confirming the critical definition of
marriage as male-female, but the "detailing of benefits" is left to the state
legislatures, who retain the latitude to decide whether to create same-sex
civil unions, or to extend benefits to gay and other nonmarital couples.\textsuperscript{130}

Ninth, some advocates of the proposed Federal Marriage Amendment
also reject what they call "false federalism, that begins from the premise
that we leave the decision to the states because there is no truth to declare,

\textsuperscript{123} Bork, supra n. 46, at ¶ 9.
\textsuperscript{124} Kurtz, Point of No Return, supra n. 49, at ¶¶ 17-18.
\textsuperscript{125} Bork, supra n. 46, at ¶ 12.
\textsuperscript{126} Bork, supra n. 46, at ¶ 11.
\textsuperscript{127} See Kurtz, Middle Ground, supra n. 49; Bork, supra n. 46.
\textsuperscript{128} George, supra n. 47, at ¶ 24.
\textsuperscript{129} Kurtz, Point of No Return, supra n. 49, at ¶ 14.
\textsuperscript{130} See Kurtz, The Right Balance, supra n. 49; Alliance for Marriage, supra n. 71, at ¶ 16
("[T]he amendment does not depart from principles of federalism under which family law is, for
the most part, a state matter. The traditional autonomy of state legislatures on family law matters
is preserved.").
no sense of right and wrong that finally commands our judgment." 131 They argue that: "[A] state-by-state patchwork of radically distinct marriage practices is unprecedented, untenable, and profoundly anti-federalist." 132 The purpose of constitutional amendments is to establish basic truths in constitutional concrete, "to secure something of substance, beyond the shifts and vagaries of local politics." 133

Tenth, supporters of the proposed Federal Marriage Amendment defend the failure to preclude state legislation legalizing same-sex domestic partnerships, civil unions, or marital benefits as the price of preserving federalism in family law. "The Founders created a system that allowed the people to pass laws that the Founders themselves may or may not have approved. That is democracy." 134 Thus, while they would bar and abolish same-sex marriage in the United States, they would tolerate and permit state legislatures to legalize same-sex domestic partnership, civil union, or benefit programs.

Advocates of the proposed Federal Marriage Amendment argue that the language of the amendment goes as far as is practical in banning same-sex marriage. It takes the strongest position possible that is politically feasible. Thus, they argue that to try further to ban same-sex civil unions or domestic partnerships would overreach. 135

E. General Criticisms of the Federal Marriage Amendment

Opponents and critics of the Federal Marriage Amendment have asserted at least nine arguments criticizing the proposal. These criticisms dispute the substantive prohibition of same-sex marriage, oppose the structural diminution of federalism in family law, and challenge the proposal's pragmatic political prospects.

First, the widest and most vigorous reason for opposition to the Federal Marriage Amendment probably is substantive—because it would prevent the legalization of same-sex marriage in the United States of America. While gays are a relatively small minority, they are very active and vocal, have many supporters in the academy and professionals, 136 and same-sex

131. Arkes, supra n. 95, at ¶ 9. However, as noted infra in Parts III & IV, there are many profound reasons for federalism other than the straw man of relativism's premise that there is no truth.
133. Arkes, supra n. 95, at ¶ 6.
135. George, supra n. 45, at ¶ 24 (it would offend some conservatives and democratic principles to limit state legislative authority to decide such issues); Bork, supra n. 46, at ¶ 10 ("To try to prevent legislatures from enacting permission for civil unions by constitutional amendment would be to reach too far.").
marriage is a popular notion in some segments of the population. Thus, Andrew Sullivan argues that legalizing same-sex marriage will increase the number of stable, monogamous gay unions, and "its stabilizing ripples [will] spread[] through both the [gay] subculture and the wider society." Gay conservative columnist Jonathan Rauch likewise argues that same-sex marriage "will have many of the same domesticating and healthful effects on homosexuals as on heterosexuals," and "will give stability and care and comfort to millions of homosexuals at little or no cost to anyone else." Thus, Sullivan and Rauch and other gay marriage proponents oppose the FMA because they believe that it embodies bad marriage policy.

Second, some conservative critics argue that the proposed Federal Marriage Amendment does not go far enough because it only bans formal same-sex marriage but it does not ban de facto equivalents such as civil unions and extension of marital benefits to same-sex couples. Robert Knight opposes "[a]nything short of an amendment protecting marriage and its benefits from tampering," and argues that, just as "[t]he authors of the 13th Amendment added the phrase 'involuntary servitude' to the ban on slavery, lest anyone get ideas about practicing slaveholding in all but

137. For example, recent polls in Massachusetts and New Hampshire purport to show that at least 50% of the residents surveyed favored legalizing same-sex marriage. See ACLU, State Public Opinion from States on Civil Marriage and Other Recognition of Same-Sex Relationships, "New Hampshire," http://www.aclu.org/getequlf/fm/section78/8B4Summary.pdf (accessed Mar. 29, 2005); Frank Philipps, Support for Gay Marriage, Boston Globe (Apr. 8, 2003) (Massachusetts residents favor legal recognition of gay marriage 50%-44%); but see Mass News, Globe Ombudsman Admits 'Poll' on Gay Marriage Was 'Problematic', http://www.massnews.com/2003_Editions/4_April/041103_mn_globe_admits_poll_problematic.shtml (Apr. 11, 2003) (Boston Globe ombudsman admitted that poll question whether same-sex marriage should be "legally sanctioned" was confusing because "sanctioned" can mean either "punished" or "allowed").


139. Rauch, Give Federalism a Chance, supra n. 64, at ¶ 2, 8.


The denial of marriage rights to gay people is, in my view, immoral, inequitable, unjust, and unfair. Under the current definition of marriage—it doesn’t have to produce children, it doesn’t have to be entered into for life, adultery doesn’t invalidate it, child abuse doesn’t invalidate it, it can be denied no-one who’s straight—the exclusion of responsible, caring, committed, adult gay couples is an outrage. Given who else is constitutionally allowed to marry—convicts, dead-beat dads, multiple divorcees, teenagers, illegal aliens—the exception carved out for gay people is simply irrational. It certainly seems to me to be an odd priority if your concern is maintaining the institution of marriage itself. If that were really the issue, conservatives would be pressing right now for a federal amendment to restrict divorce, or to withhold marriage rights from people already divorced more than once, or to child-abusers or wife-beaters or dead-beat dads or moms. But they choose to pick on the mere hundreds of gay and lesbian couples just trying to live a stable and fulfilling life under the law. I want to know how sensible conservatives can justify these double standards.

Id.

141. Knight, It’s a Sin, supra n. 62, at ¶ 14 (emphasis added).
name,"  so also the FMA should not only ban same-sex marriage but should provide that "there is no 'right' to create counterfeit marriage by other means, whether through a legislature or a court decision."  He argues that the Federal Marriage Amendment

may be well intentioned, but it allows for legislatures to enact the rest of the homosexual agenda right up to civil unions and other forms of counterfeit marriage. As written, the amendment will give politicians cover while they promote homosexuality by other means. . . . Marriage is too important to be defended in name only.  

Professor Emeritus Charles Rice agrees, in principle.  He argues that "[t]he campaign to adopt such an amendment would be morally corruptive because it would implicitly legitimize gay marriage by the incoherent contention that somehow gay marriage is acceptable if voted by a legislature under a different label but not if voted by a court under any label."  

The narrowness of the FMA is a source of much conservative criticism. If functional same-sex marriages—marriages in substance but with a different label such as "civil union" or "domestic partnership"—will do as or nearly as much actual harm to society and families as formal same-sex marriages, the abolition of only formal same-sex marriages in sentence one of the proposed Amendment is a legitimate concern. Likewise, if legalizing such unions will do irreparable damage to society and its members even if that is accomplished by legislation or executive agency decision, an abolition of all such relationships in law—like the abolition of slavery—might be preferable to the restriction on judicial legalization of such unions provided by sentence two of the Federal Marriage Amendment. Also, the FMA mandates only one element—gender—of the definition of marriage. It leaves federal and state judges free to legalize consanguinous unions and polygamy, for example.

The problem of the erosion of federalism in family law and activist judicial decisions imposing their preferred "liberal" values mandating preference for "alternative" family relations upon states and communities by judicial decree is not limited to the definition of marriage. Federalism in family law was intended to preserve the authority of the state to regulate all areas of family relations, not just marriage. Thus, by singling out heterosexual marriage for special protection from activist federal courts, and leaving unprotected from those same activist judges any meaningful

142. Id. at ¶ 10.
143. Id.
144. Knight, No Room for Compromise, supra n. 62, at ¶ 7.
145. Rice, supra n. 63, at 110 ("[I]t would be imprudent, if not reckless, to anticipate that problem by offering an amendment that would confirm the constitutional validity of same-sex 'marriage' any time a legislature so votes as long as it calls it by a different name.").
146. Id.
federalism—as supporters of the FMA see it—and leaving exposed to continuing judicial interference state regulation of the great bulk and balance of family law—including, without limitation, nonmarital cohabitation, adoption, paternity, parentage presumptions, the regulation of economic and noneconomic dimensions of ongoing spousal relations, the regulation of economic and noneconomic dimensions of ongoing parent-child relations, child abuse, neglect, and dependency, domestic violence, separation, divorce, property division, alimony, child custody and visitation, and child support—critics fear the proposed Federal Marriage Amendment might concede those issues to federal control and thereby distort federalism in family law.

Third, many opponents of the Federal Marriage Amendment argue that the Federal Marriage Amendment "is a broadside against federalism, and that states should be allowed to go their own ways."147 Professor Rice argues: "The definition and regulation of marriage, under the original Constitution, was and remains a matter for determination by the states. It ought to remain there."148 Leaders of two prominent national bar association family law groups also oppose the Federal Marriage Amendment because it violates the doctrine of federalism in family law. Sharon Corbitt, the head of the American Bar Association’s Family Law Section, expressed opposition to the FMA because it would provide a national solution for a matter that best should be dealt with at the state level. Ms. Corbitt compared the FMA to creating national child support guidelines, which "would not be appropriate, because per capita incomes vary from state to state . . . . For the same reasons, [a Federal Marriage Amendment is inappropriate because] social mores [also] vary."149 Likewise, Ernie Z. Carter, the leader of the predominantly Black National Bar Association’s Family Law Section, expressed the same concern: "I am of the opinion that the federal government does not need to be so intrinsically involved in the personal lives of people."150

While it is clear that a large majority of the American people oppose legalization of same-sex unions,151 a significant minority of activist judges

147. Rauch, Getting It Right, supra n. 64, at ¶ 1. "I suggested that the problem of activist federal judges foisting one state’s gay marriages on the whole country is easily remedied with a narrower constitutional amendment barring them from doing just that." Id. "I favor a federalist approach that lets some state experiment with same-sex marriage when it feels the time and circumstances are right." Rauch, Give Federalism a Chance, supra n. 64, ¶ 8.

148. Rice, supra n. 63, at 109. "[T]he states' rights solution is inappropriate for abortion but appropriate for marriage" because prior to Roe v. Wade, 410 U.S. 113 (1973), protection of the right to life was already a matter of federal constitutional law under the Fourteenth Amendment, but regulation of marriage has always been a matter of state law. Id.

149. Cahill, supra n. 15, at ¶ 13.

150. Id.

151. When asked, "[w]ould you favor or oppose a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples?" 49% of the respondents answered "yes" and 49% answered "no." Frank Newport, Six in 10 Americans Agree that Gay Sex Should Be Legal fig. 8, http://www.gallup.com/poll; search Frank Newport (June 27,
desire to force the states to accept same-sex marriage or marriage-like unions. Many people will likely agree that the substantive values that underlie the Federal Marriage Amendment—opposition to legalization of same-sex marriage or quasi-marital civil unions or domestic partnerships—are sound and reasonable and represent the best interests and traditions of family law, but some are concerned that the Federal Marriage Amendment may erode federalism in family law. The remedy of establishing a federal constitutional rule prohibiting state judges to interpret state law to create domestic partnerships or same-sex unions would alter our traditional federalism and could invite further inroads toward federalizing domestic relations.

Fourth, as to the argument that the constitutionality of the federal and state DOMAs will be challenged in the courts, opponents of the FMA argue that everything is challenged in court, so that is not a good justification for panicking and minimizing federalism in family law. Thus, Jonathan Rauch expresses confidence “that the courts will uphold the act; I just can’t see this or any foreseeable Supreme Court imposing gay marriage nationally by fiat.”

Fifth, as to the argument that activist state courts will thwart the democratic processes and will try to judicially impose same-sex marriage or domestic partnership upon the states, opponents of the FMA argue that federalism requires that we leave it to the people of each state to work it out for themselves. If state courts defy the will of the people, it is for them to correct the problem, not for the federal government to do so.

Sixth, some opponents of the FMA argue that it is too early for such a drastic step. Professor Rice argues that we should “consider the proposal of an unequivocal definition of marriage, binding all government units, only if

2003). When asked, “[d]o you think marriages between homosexuals should or should not be recognized by the law as valid, with the same rights as traditional marriages?” the number answering “no” jumps to 62%. Longitudinal U.S. Public Opinion Polls, Same-Sex Marriage & Civil Unions ¶ 6, http://www.religioustolerance.org/hom_poll5.htm (accessed Mar. 29, 2005). When asked “[d]o you think homosexual relations between consenting adults should or should not be legal?” 37% of Americans still think homosexual sodomy should be illegal. Frank Newport, Six in 10 Americans Agree that Gay Sex Should Be Legal fig. 1. To the question, “[d]o you feel that homosexuality should be considered an acceptable alternative lifestyle or not?,” 43% responded that they felt it was “not acceptable” while 53% responded that it was “acceptable.” Id. at fig. 6.


154. Rauch, Give Federalism a Chance, supra n. 64, at ¶ 9.

155. See Rauch, Getting It Right, supra n. 64, at ¶ 4.
the Supreme Court throws down the gauntlet by ruling unconstitutional a state’s man-woman definition of marriage.”156 Some suggest other alternatives, such as “removal of the Court’s appellate jurisdiction over such cases, under Art. III, Sec. 2 of the Constitution,” a la Ex parte McCardle.157

Seventh, the text of the Federal Marriage Amendment literally only bans one judicial remedy—requiring the extension of marital status or the legal incidents thereof to unmarried couples or groups. This could be narrowly construed. Creative opponents of the Federal Marriage Amendment might obtain the same result by other means (different remedies) if the Federal Marriage Amendment were enacted. While this would clearly contradict the purpose and policy of the FMA, the language of the FMA might not prohibit it. Thus, the Federal Marriage Amendment might not accomplish its goal because it might not effectively stop judges from declaring unconstitutional or from enjoining enforcement of laws that extend marital status or benefits only to male-female couples.

Eighth, by providing a federal constitutional limitation on the definition of marriage, effectively a constitutional negative on same-sex marriage, the Federal Marriage Amendment may open the door to even more, and possibly more intrusive, federal court, as well as state judicial, interpretation of the definition of marriage. Thus, the Federal Marriage Amendment has the potential to backfire. By federalizing at least part of marriage law, by making at least part of the definition of marriage a matter of U.S. constitutional interpretation, the Federal Marriage Amendment puts the ultimate resolution of critical marriage issues into the hands of the very persons—judges—who are least likely to be sympathetic to or respectful of the values of traditional marriage or respect for the groups that support it and against whom the proposed Amendment is directed. When federal judges have assumed responsibility to set policy on family issues (abortion, unwed fathers, adoption, etc.), they have tended to mandate policies that prefer individual lifestyle choices over family relations and responsibilities.158 This track record is not very appealing.

Ninth, it may be unrealistic to think that two-thirds of both houses of Congress and three-fourths of the states would support the Federal Marriage Amendment—for at least some time. The fact that less than a simple majority of the Republican-controlled Senate voted for Sen. Jr. Res. 40 in the summer of 2004, an election year,159 shows that a great deal of work remains to be done before the FMA is a serious contender for passage and ratification. Cynics and opponents interpret this as not an auspicious beginning, and say it does not bode well for the political future of the Federal

156. Rice, supra n. 63, at 110.
157. Rice, supra n. 63, at 110, n. 124 (citing Ex parte McCardle, 74 U.S. 506 (1868)).
158. See infra Part V.A.
159. See supra n. 31 and accompanying text.
Marriage Amendment, but it was just the initial engagement in a very long political battle.

Part of the appeal of the Federal Marriage Amendment for some may be that it seems to be a one-shot-ends-the-war solution, but that is illusory. It may seem more appealing to try to win it all in one fell swoop than to toil away state-by-state, winning sometimes but losing sometimes. However, even the amendment must eventually be endorsed state-by-state, so a very long, laborious process involving extensive state-by-state work is inevitable.

One thing that some of the criticisms of the FMA indicate is that the wording of the original FMA may need to be refined. The language may need to be recast. Disagreements over expression and language may need to be resolved. The form and wording may continue to evolve and improve. Regardless of the particular wording or version, the gist of the FMA is that marriage is defined as a conjugal union exclusively, that the courts may not compel the extension of marital status or of marital incidents, benefits, duties, rights, and privileges that constitute the corpus of legal marriage to other kinds of domestic unions, but that legislatures may resolve questions about whether and if so what other status and/or what benefits may be extended to nonmarital relationships.

F. The Core Federalism Controversy Over the Federal Marriage Amendment

Federalism is a major issue in the controversy over the Federal Marriage Amendment in at least five different ways. First, it is clear that the proposed Federal Marriage Amendment would strip states—as well as the federal government—of the ability to legalize same-sex marriage. Whether this is wise or not as a matter of reducing state and federal government powers is one controversy. Second, as a matter of uniform federal constitutional law, it would limit the ability of state courts to create or recognize alternative domestic relations status for same-sex couples, such as civil unions or domestic partnership. Only state legislatures could clearly do so. Whether this is wise or not as a matter of allocation of state and federal government powers is a matter of controversy. Third, as a matter of uniform federal constitutional law, the FMA would limit the ability of state courts to extend particular benefits of incidents of marriage to nonmarital homosexual or heterosexual couples, such as marital testimonial privileges, custody, adoption, support, and property division. Only state legislatures could clearly do

160. For starters, as Professor Andrew Koppelman notes, the grammar of the original versions (“or” instead of “nor”) is poor.

161. While it is unlikely that legal analysis will persuade many, if any, people regarding the substantive merits of the amendment (whether it goes too far, or not far enough, or just far enough in prohibiting same-sex marriage), certainly family law scholars and lawyers in general should be interested in and open-minded about the federalism issue.
so. Whether this is wise or not as a matter of reallocation of government authority also is a matter of controversy.

Fourth, the justifiable cost of preserving federalism in family law also is a basic underlying issue. Liberal judges consider the cost too high when states enact or maintain family policies that infringe upon preferred, personal policy preferences and individual rights; conservative supporters of the FMA consider the cost too high when states, federal judges, or other authorities threaten to legalize same-sex marriage or when state judges mandate legalization of marriage-equivalent same-sex civil unions or extension of marital benefits. Consistent supporters of the doctrine of federalism in family law find themselves unpopular both with liberals (who support liberal federal policies and judicial rulings overriding state family laws) and now, perhaps surprisingly, with conservatives who support the FMA.

Underlying most of the foregoing federalism issues is the question of the extent to which the doctrine of federalism in family law is still a valid, viable, and significant constitutional doctrine. That is the fifth federalism issue. Supporters of the Federal Marriage Amendment believe that federalism in family law is a toothless old pussy cat, which courts, especially federal courts, disregard at will, and use only occasionally as window dressing, for rhetorical purposes.162

Thus, the vitality and viability of federalism in family law is a crucial key to the proposed Federal Marriage Amendment. The validity of federalism in family law is not certain anymore.163 It is involved in a contest between federalism and deference to historic state sovereignty in family law versus substantive due process and Lochnerism—social engineering by the federal judiciary. Whether federalism in family law is vindicated and reaffirmed as a potent and substantial protection for state family policies or disregarded and reduced to little more than mere rhetoric will determine whether many conservatives and mainstream Americans will, or should, support the proposed Federal Marriage Amendment.164

III. THE ORIGINS OF FEDERALISM IN FAMILY LAW

The answers to the federalism issues regarding the proposed Federal Marriage Amendment turn to a great extent upon whether the doctrine of federalism in family law is historically valid and currently respected. Thus, this Part analyzes the origins, developmental history, historic validity and current viability, of the doctrine of federalism in family law.

"From the earliest days of the Republic . . . family law has unquestionably belonged to the states."165 Federalism in family law was a core reason

162. See supra nn. 125-30 and accompanying text.
163. See infra Part V.A.
164. Id.
for, a basic subject of, and a prime example of the Founders commitment to federalism. The Founders of the American Constitution were deeply suspicious of the concentration of governmental power.\textsuperscript{166} In fact, "the great principle of the revolution was limited government."\textsuperscript{167} Because of the abuses they had experienced under the hands of King George's strong central government, they were determined to spread and separate government authority in the United States of America.\textsuperscript{168} The states were also jealous of their governmental authority; indeed, the strong reluctance of the states to relinquish their sovereignty was the primary reason for what Madison called the "radical infirmity" of the Articles of Confederation,\textsuperscript{169} which precipitated the convening of the Constitutional Convention.\textsuperscript{170}

\begin{footnotes}
\item[166.] The Federalist No. 47, at 301 (James Madison) (Arlington House 1966) ("The accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many..., may justly be pronounced the very definition of tyranny."); The Federalist No. 51, at 323 (James Madison) ("In a single republic, all the power surrendered by the people, is submitted to..., a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments..., Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."); Martin H. Redish \\& Elizabeth J. Ciser, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 Duke L.J. 449, 450-51 (1991) ("The body of the Constitution—the document to which the Framers devoted so much time and energy at the Convention in Philadelphia—contained precious few direct references to the protection of individual rights. [Instead,] the Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power. Almost every aspect of their ingenious political structure was in some way related to their implicit assumption that, simply put, "power corrupts." ").
\item[168.] "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." The Declaration of Independence [II 2] (1776); see also Marci A. Hamilton, "Separation": From Epithet to Constitutional Norm, 88 Va. L. Rev. 1433, 1450 (2002) ("The constitutional structure adopted at the Constitutional Convention rested on a deep distrust of every entity holding power. Discussion revolved around [not just] how to organize a national government and designate national leaders but to place them in positions where they would be deterred from abusing the new powers given them. Power had to be given, but it made the Framers nervous, having witnessed the serial abuses of power by King George III, the English Parliament, the state executives, the state legislatures, and even the people. They limited power, they enumerated power, and they separated power."); see also Aaron J. O'Brien, States' Repeal: A Proposed Constitutional Amendment to Reinigivator Federalism, 44 Clev. St. L. Rev. 547, 551-52 (1996) (The colonists first complaint "was the extensive control over the individual colonies by England's central government" and consequently that "after their shocking victory over the Mother Country, the colonists established an American government with essentially no central power.").
\item[169.] James Madison, A Sketch Never Finished nor Applied, in Notes of Debates in the Federal Convention of 1787 Reported By James Madison 3, 7 (Ohio U. Press 1966) (This was Madison's Preface to his Notes of the Philadelphia deliberations).
\item[170.] The resolution passed by Congress that convened the Philadelphia Convention read: Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations
The purpose of the convention was to create a stronger national government, to reduce the power of the states in order to strengthen the national government, but not to eliminate the states. As Madison put it in the Federalist Papers, the new constitutional government was to be part national and part federal.  

One of the purposes of giving the national government more power was to enable it to protect basic rights of the American citizens against abuses by, inter alia, the states. In 1787 marriage was not threatened or abused by government, so it is not surprising that the Constitution and the Bill of Rights make no reference to marriage. Those documents protect the vulnerable valued institutions and rights that were threatened and which had been abused by the states and the British government in recent history—press, speech, religion, assembly, jury trial, quartering troops, etc. Today there is little threat of forcible quartering troops in private homes, but the institution of conjugal marriage is threatened. It makes as much sense to adopt constitutional protection for marriage today as it did in 1787 to adopt constitutional protection for speech, private residences, jury trials, etc.

It seems never to have occurred to any of the delegates to the Constitutional Convention of 1787 that the national government should or would have the power to directly regulate family relations. It is clear that they believed that they were forming a government that would have power over national interests, primarily in external matters—foreign relations and defense—and internal matters concerning national economic and military—quelling rebellions—concerns. The regulation of family matters was never discussed in the Philadelphia convention. However, there was common consensus that under the Constitution the States would retain plenary governmental authority to regulate matters of local concern—which include family law. Likewise, in the ratification debates in the various states, the issue of the extent of state sovereignty that would remain under the Constitution was a major source of controversy and debate. Again, there is little discussion of family law, but there are clear indications that the participants

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171. The Federalist No. 51, at 323 (James Madison) ("In a single republic, all the power surrendered by the people is submitted to... a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments... . Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.")
in these debates fully understood and universally agreed that the regulation of family relations would remain a matter of state control.\footnote{172}

The text of the Tenth Amendment explicitly embodies the federalism principle: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\footnote{173} Thus, federalism is an express constitutional principle underlying the 1787 charter and incorporated explicitly in the Bill

\footnote{172. Forrest McDonald writes: Broadly speaking, the powers that the states retained fell under the rubric 'internal police,' or simply the police power: the states had the powers of the polis. These included not only the definition and punishment of crimes and the administration of justice but also all matters concerning the health, manners, morals, safety, and welfare of the citizenry. Despite the assertion of some anti-Federalists, the states retained the police powers exclusively. These powers were nearly unlimited. Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 288 (U. Press of Kan. 1985).

On June 28, 1788 at the New York ratification convention Hamilton addressed concerns over the Supremacy Clause declaring that it means no more than this—that the Constitution, and laws made in pursuance thereof, cannot be controlled or defeated by any other law. The acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government.... [B]ut the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding. In the same manner the states have certain independent powers, in which their laws are supreme; for example, in making and executing laws concerning the punishment of certain crimes, such as murder, theft, etc.}
of Rights, and family law is the prime example of the areas "reserved to the States" for regulation.¹⁷⁴

Political writers read by the Founders also supported the local regulation of matters such as family relations.¹⁷⁵ In the prevailing political theory, the family was one of the "pillars of republican virtue,"¹⁷⁶ and it not only needed to be nurtured, but also protected from the tyranny of the central government.

Early Americans believed that each of us must be taught virtue in our local communities. Because they understood the bases of virtue to be primarily moral rather than political, early Americans believed that the state should promote other institutions, especially the public worship and private instruction of religion, in which virtue would be directly inculcated. In addition to promoting religion, people generally believed the main task of government was to foster and protect the multitude of associations in which proper character was formed.¹⁷⁷

The writings of the Founders themselves confirmed this view of the role of state and family. Thomas Jefferson viewed the States as "the most competent administrations for our domestic concerns & the surest bulwarks against antirepublican tendencies."¹⁷⁸ John Adams observed:

The foundation of national Morality must be laid in private Families . . . . 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 their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers?¹⁷⁹

Likewise,

George Mason argued that republican government was based on an affection 'for altars and firesides.' Only good men could be

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¹⁷⁴. See Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1466 (1987) ("The language of the Tenth Amendment simply distilled the underlying structural logic of the original Constitution: Wherever authorized by its own state constitution, a state government can enact any law not inconsistent with the federal Constitution and constitutional federal laws.").

¹⁷⁵. "Edmund Burke noted that 'to be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affection.'" Raoul Berger, Federalism: The Founders Design 55 (U. of Okla. Press 1987) (citing Edmund Burke, Reflections on the Revolution in France 195 (Harvard Classics 1909)).


free; men learned how to be good in a variety of local institutions—by the firesides as well as at the altar . . . . Individuals learned virtue in their families, churches, and schools.¹⁸⁰

Federalism in family law supported the cultivation of virtue in local communities, and virtue was the indispensable substructure upon which rested the superstructure of freedom and liberty under law. Thus, marriage has been a critical constitutional foundational unit since the founding. As historian Nancy Cott has written about the importance of marriage in the founding era. "In the beginning of the United States, the founders had a political theory of marriage. So deeply embedded in political assumptions that it was rarely voiced as a theory, it was all the more important. It occupied the place where political theory overlapped with common sense."¹⁸¹ It remains so today.

IV. THE APPARENT WANING OF FEDERALISM IN FAMILY LAW

While the echoes of family law federalism in many Supreme Court decisions are loud and clear, at the same time there have been numerous decisions by the Court that have had the direct or indirect effect of "federalizing"—in some cases "constitutionalizing"—family laws. There also has been a steady increase for decades in congressional and executive expansion of federal law regulating family relations.¹⁸² As one Michigan family lawyer wrote: "We are inundated with federal laws that on a day-to-day basis affect our practice of family law."¹⁸³ The volume of federal law that impacts on the practice of family law in the states is becoming so massive, he suggests, "that someday we may have a specialty where lawyers will limit their practice to the federal aspects of family law."¹⁸⁴

Thus, it is no wonder that Professor Dailey writes:

Until most recently, the principle of federalism and the law of domestic relations appeared to be following the same well-worn path in the direction of an all-embracing nationalism. In both fields, the traditional virtues of state sovereignty had been displaced, if not banished altogether, by an increasingly powerful ideal of national supremacy.¹⁸⁵

¹⁸⁴. Id.
¹⁸⁵. Dailey, supra n. 165, at 1788.
James Buchanan concurs: "[I]n the 20th century, constitutional guarantees against federal encroachment on the authority of states were undermined by executive, legislative, and judicial departures from established principles. At the century’s end, therefore, the status quo is clearly on the [centralized unitary polity] side of the spectrum."  

A. The Federalization of Family Law by Judicial Interpretation

Professor Jill Elaine Hasday has observed: "[I]t is . . . striking how often the Court’s constitutional decisions have established uniform family law policies for the nation, the Justices’ professed commitment to exclusive localism notwithstanding."  

Susan Kuo suggests: "Over the course of the twentieth century . . . the Court shed its earlier reluctance and began to assume a greater supervisory role . . . . Significant transformations in American family life likely convinced the Court to become more active in constructing family law rules."  

However, Justice Potter Stewart once noted that "[i]ssues involving the family . . . are among the most difficult that courts have to face, involving as they often do serious problems of policy disguised as questions of constitutional law."  

Likewise, Professor Robert F. Nagle has analyzed the role of the Court in the weakening of federalism and has suggested an institutional blind spot.

"[T]he current focus on the Supreme Court as protector of states is a sign, not of resurgent state power, but of a depleted political imagination . . . . [F]ederal judges do not and cannot appreciate a robust federalism. Indeed, in many ways the court’s place in our governmental structure and, even more importantly, its intellectual and professional dispositions disqualify the justices from any significant part in nurturing a strong form of federalism.

The constitutionalization of family law began in 1923, when the Supreme Court was at the apex of using "substantive due process" to strike down economic regulations that restricted rights of property owners. The


188. Susan S. Kuo, A Little Privacy, Please: Should We Punish Parents for Teenage Sex? 89 Ky. L.J. 135, 168 n. 149 (2000-01); see also Eva R. Rubin, The Supreme Court and the American Family 11-26, 183-199 (Greenwood Press 1986) (describing transformation of the model of family relations expressed in or underlying Supreme Court decisions in the nineteenth and twentieth centuries, and applauding the Court for changing to adopt a model accepting alternative family styles, structures, roles, and practices).


Court also declared that the term "liberty" included the right to establish and exercise family relationships. In *Meyer v. Nebraska*, the Court reviewed the conviction of a private parochial school teacher for violating a Nebraska law that prohibited teaching any foreign language to children under sixteen years old. The Court viewed the law as interfering with the right of parents to rear and educate their children as they saw fit, and they determined that parental right was a fundamental "liberty" specially protected by the Fourteenth Amendment. As Justice McReynolds, the author of the Court's opinion, put it:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges *long recognized at common law as essential to the orderly pursuit of happiness by free men*.  

This original example of the constitutionalization of family law by judicial interpretation was soon followed by many others. Since 1923, the

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191. 262 U.S. 390 (1923).
192. Id. at 399 (emphasis added).
Supreme Court has rendered scores of decisions invalidating laws directly or indirectly regulating family relations as violative of the U.S. Constitution, and many times that number of lower court cases have been decided in which family laws or policies have been challenged as violating some constitutional rule, doctrine, or principle incorporating or protecting a family law policy.\textsuperscript{194} Since the Constitution is the supreme law of the land, these decisions effectively have established constitutional boundaries for the regulation of family relations by all the states and the federal government. These judicial decisions undeniably have "nationalized" some standards for the state regulation of domestic relations and have mandated the imposition of certain values in state family law policies.\textsuperscript{195}

The tempo and incidence of Supreme Court decisions "nationalizing" and "constitutionalizing" family law has increased in recent decades. The first Supreme Court case to mention marriage or child-rearing as a constitutional right was decided in 1923. For the next forty years, the Supreme Court rarely decided more than two constitutional cases dealing with family law issues in any given term or year. For example, from 1945-1964, the Court averaged fewer than two family law decisions per term. During the activist years from 1965-1984, however, the Supreme Court rendered written opinions in as many as twelve family law cases in a given year or term of Court, and averaged more than 5.5 family law decisions per term. Since then, the number of family law cases heard by the Court has averaged about 3-4 decisions per year. This represents a significant "constitutionalization" of family law by judicial decision.\textsuperscript{196}

The paradigmatic example of the federalization and constitutionalization of an area of domestic relations by the federal judiciary is \textit{Roe v. Wade},\textsuperscript{197} and the thirty-plus Supreme Court abortion decisions rendered in the past three decades. While abortion can be characterized in many ways, it undeniably is a family law subject inasmuch as it addresses fundamental family relations questions. Such questions include: whether an unborn child is a "child," for purposes of legal protection; whether abortion is a form of "child abuse;" the nature and extent of parent-child relations between the mother and the prenatal child; the nature, extent and due process

\textsuperscript{194} Lynn D. Wardle, \textit{The Constitutionalization of Family Law}, 63 Revista del Colegio de Abogados de Puerto Rico, 70, 76 (Jul.-Sept. 2002). The ABA Family Law Section magazine, \textit{Family Advocate} provides a partial list noting 53 major Supreme Court decisions reflecting federalization of, or federal interest in, family law. \textit{Supreme Court Cases}, 23 Fam. Advac. 15, 15-17 (Spring 2001).

\textsuperscript{195} Wardle, supra n. 194, at 76.

\textsuperscript{196} Id.

\textsuperscript{197} 410 U.S. 113 (1973).
protections of the paternal interest of the father of the prenatal child; the balance of rights and responsibilities between husband and wife, or pregnant woman and boyfriend, regarding the decision to terminate the life of a jointly-conceived child; the extent of parental interests in the abortion decision of a pregnant minor, etc. Even members of the Court could not foresee in 1973 how totally overwhelming the judicially-created abortion doctrine would become, and how completely state abortion regulations would be monitored and controlled by the federal judiciary. For example, concurring in twin decisions *Roe* and its companion case, *Doe v. Bolton*, Chief Justice Burger justified his vote to declare the Texas abortion law and Georgia's Model Penal Code-based abortions regulations unconstitutional with the reassuring statement: "I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices." For thirteen years thereafter he gamely tried to put the best face on the increasingly extreme judicial extensions of the abortion privacy doctrine. Finally, in 1986, in the last abortion case he considered before retiring, Chief Justice Burger conceded that he had grossly underestimated the expansiveness of the abortion doctrine he had endorsed in *Roe*. In *Thornburgh v. American College of Obstetricians and Gynecologists*, he expressed his angry frustration in a dissenting opinion in which he concluded that if the holding in that and other Supreme Court abortion decisions "really mean what they seem to say, I agree we should reexamine *Roe*." The recent decision of the Supreme Court in *Lawrence v. Texas* does not directly deal with federalism in family law, but it is relevant to both the federalism and same-sex marriage issues. In *Lawrence*, the Court by a 6-3 vote held that a Texas sodomy statute that criminally prohibited homosexual—but not heterosexual—sodomy violated an unwritten constitutional liberty of consenting adults to engage in private sexual relationships. The majority opinion was careful to note that the issue before the Court in *Lawrence* did not involve marriage and the concurring opinion of Justice O'Connor in dicta clearly indicated her view that the state had legal justification for limiting marriage to male-female couples. However, to the hints of the majority that the marriage issue could be viewed

199. Id. at 208 (Burger, C.J., concurring).
200. See Maher v. Roe, 432 U.S. 464, 481 (1977) (Burger, C.J., concurring) ("The Court's holdings in *Roe*... and *Doe*... simply require that a State not create an absolute barrier to a woman's decision to have an abortion.").
202. Id. at 785 (Burger, C.J., dissenting).
203. 539 U.S. 558.
204. Id. at 578 ("The present case does not involve minors... It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").
205. Id. at 579-85 (O'Connor, J., concurring).
differently, the dissenting opinion of Justice Scalia bluntly warned: "Do not believe it." He noted that the rationale of the majority 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. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct . . . and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution." Thus, the doctrinal impact of Lawrence on claims seeking the judicial legalization of same-sex marriage is uncertain. However, it is telling that Lawrence was the first and most frequently cited Supreme Court decision mentioned in the Goodridge opinion of the Massachusetts Supreme Judicial Court mandating legalization of same-sex marriage.

The impact of the Lawrence decision can be evaluated in terms of the substantive policy result, the constitutional analysis, and the institutional impact. The policy result of the Lawrence case—that noncommercial homosexual relations in private by consenting adults should not be criminally proscribed—is certainly defensible; reasonable people have, can, and do disagree on the issue, and there are reasonable arguments on both sides of the issue, despite Justice Kennedy's breast-thumping insistence that there is no rational basis for disagreement with him on the issue; reasonable legislators in most states have adopted the same policy position the Court took, while legislators in more than one-quarter of the states maintained policies outlawing homosexual sex. Both dissenters acknowledged that the policy position of the majority is reasonable; Justice Scalia noted that legislators could reasonably choose either to decriminalize or prohibit homosexual sodomy, and Justice Thomas suggested that he thought the Texas law was "uncommonly silly." Thus, the policy result in Lawrence was not unreasonable.

[Lawrence] does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. 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.

Id. at 585.
206. Id. at 604 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).
207. Id. at 604-05.
209. Lawrence, 539 U.S. at 603-04 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).
210. Id. at 605 (Thomas, J., dissenting).
The legal analysis of the Court in Lawrence is much more troubling. The Court resorted to substantive due process, a source of immense controversy for decades, which the Court at one point, not too long ago, repudiated as an illegitimate constitutional methodology, and which the Court has tried to cabin with historical tests. Since there is nothing in the text, history, or structure of the Constitution or deeply rooted in the traditions of the American people, the Lawrence decision is very questionable as a matter of legal analysis. The embarassing "historical" analysis of Justice Kennedy's majority opinion turns on the remarkably weak—and inaccurate—suggestion that because most laws for centuries have prohibited all forms of sodomy—both homosexual and heterosexual—the proscription of homosexual sodomy is a modern invention. The flaw of that conclusion can be demonstrated by simply opening the Bible, including the legal books of the Old Testament, which clearly condemn, prohibit, and impose severe punishment for homosexual sodomy only! The rejection of "moral disapproval" as a basis for legislation is simply incoherent; as the dissent notes, citing Justice White's opinion in Bowers v. Hardwick, many laws are based first and primarily upon social (moral) disapproval and if that is the basis for striking down laws, the Courts will be busy, indeed. The majority opinion in Lawrence reeks of the inebriated indulgence of the majority and concurring justices in the illegitimate practice of imposing their personal policy preference under the guise of interpreting the Constitution. While the majority and concurring opinions in Lawrence patched together dicta taken from a number of prior cases to create a flimsy and transparent cloak for their result, this is not the first time the Court has stretched and strained its intoxicating power of judicial review by Lochner-izing.  

213. Leviticus 18:22 (King James) ("Thou shalt not lie with mankind, as with womankind: it is abomination."); Leviticus 20:13 (King James) ("If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."); Deuteronomy 23:17 (King James) ("There shall be no whore of the daughters of Israel, nor a sodomite of the sons of Israel."); 2 Kings 23:7 (King James) ("And he brake down the houses of the sodomites."); see also Romans 1:24-47 ("Wherefore God also gave them up unto vile affections through the lusts of their own hearts, to dishonour their own bodies between themselves: . . . For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another, men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet."); Timothy 1:9-10 (King James) ("Knowing this, that the law is not made for a righteous man, but for the lawless and disobedient, for the ungodly and for sinners, for unholy and profane, for murderers of fathers and murderers of mothers, for manslayers, for whoremongers, for them that defile themselves with mankind."). These are just a few examples of condemnatory references to homosexual practices in the Old and New Testaments.  
214. Lawrence, 539 U.S. at 590 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (citing Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).  
However, the institutional implications of Lawrence are the most radical and ominous dimensions of the decision. As a matter of the trust (and trustworthiness) of the judiciary, as a matter of the integrity of the process of judicial review, as a matter of the separation of judicial from legislative powers, and as a matter of federal court respect for the legislative powers of the States, the Lawrence decision is a major train wreck. The Court simply disenfranchised, yet again, the citizens—in Texas and effectively in a dozen other states—and by implication citizens in all states—who believed in, and as citizens, voters, and representatives had supported and worked through the democratic process to maintain the historic policy that homosexual relations are illegal. Once again, as it has in dozens of other cases in the past forty years dealing with abortion, pornography, school prayer, religious rights, contraception, and other sexual issues, the Court told social conservatives that their votes do not count, that their voices do not matter, that they are disenfranchised, that democracy does not include them, and that they are not fully citizens any more than Dred Scott was. The Court has repeatedly told social conservatives that if they participate in American democracy and actually succeed in maintaining or establishing traditional moral values in law, the Supreme Court will not allow those laws to stand if they offend the modern sensibilities or policy preferences of a majority of the justices. While criminal sex codes like the Texas law involved in Lawrence are not usually included in descriptions of family law, the regulation of sexual behavior is closely related to what marriage laws and some related family laws—such as adultery, incest, bigamy, and age-of-consent laws—are about. By overriding on such flimsy constitutional grounds the Texas sodomy law which was similar to the criminal laws against homosexual behavior that all of the States had at the time the Constitution was written and all the States had at the time the Fourteenth Amendment was adopted, the Court decision conveys a disrespect for the principle of federalism that bodes ominously for Americans who care about the viability of federalism in family law.

B. The Federalization of Family Law by Congressional Legislation

The federalization of family law by congressional legislation is not new. More than twenty years ago, Professor Kenneth R. Redden wrote: "For two centuries American lawyers could safely rely on state law alone in their advice to clients on a domestic relations matter. This is no longer possible since a vast new body of federal law (judicial, legislative and administrative) has just been created in the last two decades."216 Noting the "breadth and depth" of federal laws he devoted more than 400 pages and

fifteen chapters to describing and categorizing "the complex area of federal regulation of family law," as it existed at the beginning of the 1980s.217

Concerns about federalization of family law seem to be increasing. In 1999, the editors of the Journal of the American Academy of Matrimonial Lawyers devoted an entire issue to the topic of "The Federalization of Family Law,"218 and in 2001, an issue of the ABA Family Law Section's Family Advocate also was devoted to federal laws regulating family practice.219 The articles in these practitioner-oriented journals include discussions of federal regulation of child support,220 health issues,221 QDROs,222 child-snatching,223 child abuse or neglect,224 child custody and visitation,225 the potential impact of RICO on divorce law,226 the potential impact of the ADA on family law,227 the ICWA,228 the Soldier's and Sailor's Civil Relief Act,229 tax issues pertaining to divorce,230 bankruptcy issues pertaining to

217. Id.


222. Gary Shulhulm, QDROs -The Ticking Bomb, 23 Fam. Advoc. 26 (Spring 2001) ("QDRO" means "Qualified Domestic Relations Order.").


228. Chelia D. Corbine & Wendy Helgemo, When the Family is Native American, 23 Fam. Advoc. 45 (Spring 2001) ("ICWA" means "Indian Child Welfare Act.").


divorce, domestic violence, a listing of federal statutes relating to family law issues, and an annotated bibliography of articles dealing with federal law governing family law issues.

Professor Linda Elrod, the editor of the American Bar Association's Family Law Section scholarly journal, has stated:

During the last thirty years, federal legislation has affected nearly every area of family law: establishing and enforcing child support; child custody jurisdiction; abortion, childbirth, and family planning; foster care and adoption; bankruptcy; health insurance for dependents; pensions; recognition of marriages; family violence; tax; family leave policies; and parental rights.

Some of this has come through welfare legislation and, recently, domestic violence laws. Thus, "the number and variety of federal interventions in what until recently were generally considered local matters has increased at an accelerating rate." State regulation of family law is surfeited with "federal legislation with their alphabetical jungle from ADA [Americans with Disabilities Act], ICARA [International Child Abduction Remedies Act], UCCJA [Uniform Child Custody Jurisdiction Act] [sic] to IPKCA [International Parental Kidnapping Crime Act], PRWORA [Professional Responsibility and Work Opportunity Reconciliation Act], VAWA [Violence Against Women Act], and USFSP [Uniformed Services Former


237. See generally William G. Bassler, The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources, 48 Rutgers L. Rev. 1139, 1142 (1996) (concluding that "by federalizing an area of law that state courts are more capable of adjudicating, Congress has seriously misallocated federal judicial resources"); Michelle W. Easterling, For Better or Worse: The Federalization of Domestic Violence, 98 W. Va. L. Rev. 933, 953 (1996) ("A better method . . . would be to encourage the states to create laws to combat domestic abuse.").

238. Banfield, supra n. 167, at 1.
Spouses Protection Act.

More recently we have family-impacting amendments regulating veterans benefits, unemployment compensation, Social Security, bankruptcy, pensions, housing, immigration. Thus, Congress as well as the federal courts have contributed to the erosion of federalism in family law.

C. DOMA and Federalism in Family Law

One of the most interesting forays of the federal government into a matter of family law is the federal DOMA, which provides that states may choose for themselves whether to recognize same-sex marriages from other states, and defines “marriage” for the purpose of federal law as only the union of a man and a woman. The latter provision is relevant to the family federalism debate because, somewhat ironically, that “conservative” federal provision defines marriage as male-female for purpose of federal law, rather than incorporating or deferring to state definitions of marriage, and critics have asserted that it violates the principle of federalism in family law. Because the sustainability of DOMA is crucial to the arguments over the proposed Federal Marriage Amendment, it merits brief analysis here.

Professor Libby Adler described the intricacy of DOMA when she noted:

DOMA presents a complicated blend of an exception to, and a reaffirmation of, the [federalism in family law] rule. It presents an exception to the usual view that the law of marriage belongs to the states just by being a federal law. This is DOMA-the-exception. At the same time, DOMA affirms the rule by reasserting state control over the law of marriage . . . [and] no pesky federal constitutional requirement will require states to recognize a same-

239. Robbins, supra n. 183, at 4 (The UCCIA is not federal law, but a uniform state law. However, the federal IPKPA based on the UCCIA is federal law.).

240. Libby S. Adler, Federalism and Family, 8 Colum. J. Gender & L. 197, 213 n. 57 (citing federal statutes).


243. See e.g. Stanley E. Cox, DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law, 32 Creighton L. Rev. 1063, 1075 (1999) (arguing that DOMA unconstitutionally infringes upon state sovereignty); Scott Ruskay-Kidd, The Defense of Marriage Act and the Overextension of Congressional Authority, 97 Colum. L. Rev. 1435 (1997) (arguing that the definition of marriage for federal law must be ascertained by state law); Mark Strasser, Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma, 9 Wm. & Mary Bill Rights J. 1, 17 (2000) (Congress exceeded its constitutional powers and violated federalism in enacting DOMA) [hereinafter Strasser, Mission Impossible]; Mark Strasser, DOMA and the Two Faces of Federalism, 32 Creighton L. Rev. 457, 469 (1998) (“DOMA has been championed as an example of federalism at work. However, DOMA is hardly that . . . . DOMA does the exact opposite.”) [hereinafter Strasser, DOMA]; Toussaint, supra n. 6 (asserting that DOMA is an attempt to regulate morality, which assumes a police power that the federal government does not have).

244. See supra, nn. 108-11 and accompanying text.
sex marriage . . . . [Thus,] DOMA—the-exception affirms the rule.\textsuperscript{245}

The definition of marriage for federal law in DOMA simply clarifies that the terms “marriage” and “spouse,” when used in federal laws, do not include same-sex unions. It defines what those marriage terms mean when used in federal law only. That is a routine legislative function. DOMA does not impose its federal definition of marriage upon any state or state law, nor does it bar any state from choosing to legalize same-sex marriage, if it chooses. Rather, it only provides that if a state chooses to legalize same-sex marriage within its own jurisdiction, that will not force the federal government to use that radical definition of marriage in federal programs and laws. That is a straightforward application of federalism, preserving the state regulation of domestic relations for its purposes, and preserving the federal regulation of federal programs and policies in conformity with congressional policy.

The terms “marriage” and “spouse” are, and for centuries have been, used and defined in many federal laws. It is centuries too late now to say that it violates federalism in family law for Congress to define terms of familial relations. DOMA’s definition of marriage as the union of a man and a woman is an accurate reflection of more than two hundred years of federal policy and congressional intent. All existing federal laws that refer to marriage and marital partners were passed when same-sex marriages were unknown, and many were passed when homosexual relations were criminally prohibited by all the states and punished in federal law as well. Thus, it is beyond reasonable dispute that Congress has never actually intended to include same-sex unions when it used the terms “marriage” and “spouses.” DOMA embodies quite accurately the actual historical intent and expectation of Congress and federal law generally that when these marriage terms are used in federal laws, same-sex couples were not intended to be included.\textsuperscript{246}

Of course, DOMA does not prevent Congress from later changing its mind and treating same-sex unions as marriages if it so desires. For purposes of specific legislation, such as tax, employment benefits, housing, etc., Congress may define the terms of “marriage” and “spouse” to include same-sex couples, if it chooses. DOMA merely states the baseline, the default rule, that applies in the absence of countervailing specific congressional intent.

Thus, DOMA is really a neutrality act, designed to prevent the misuse of federal law to force same-sex marriage upon the states without their own consent, or upon federal laws and programs without Congress’ consent. DOMA protects our federalism, the structure of our liberties, against those

\textsuperscript{245} Adler, supra n. 240, at 209.
\textsuperscript{246} See supra nn. 86-93 and accompanying text.
who would manipulate federal laws to force same-sex marriage upon the people of the states and the people of the United States without the approval of their elected representatives in Congress.\(^\text{247}\)

The problem with DOMA is that it is very unpopular with academics who have significant influence with the judicial branch. Many law review articles and essays have been written asserting that DOMA is unconstitutional. While the better reasoned analysis—from both liberals and conservatives—maintains that DOMA is constitutional,\(^\text{248}\) DOMA clearly is vulnerable until the U.S. Supreme Court upholds its provisions. If DOMA were invalidated in any significant part, the basis for protection of federalism in family law would be gravely impaired.

V. HOW WOULD PASSAGE OF THE FEDERAL MARRIAGE AMENDMENT AFFECT FEDERALISM IN FAMILY LAW?

Recent developments have significantly altered the equation with regard to the potential effect of passage of the Federal Marriage Amendment upon federalism.

A. Recent Developments Suggesting the Need for the Federal Marriage Amendment

On November 18, 2003, the Massachusetts Supreme Judicial Court, by a vote of 4-3, ruled that as a matter of Massachusetts state constitutional law marriage cannot be limited to male-female couples, and that the state must allow same-sex couples to marry. The court stayed its ruling in *Goodridge v. Dept. of Public Health*,\(^\text{249}\) for 180 days to allow the legislature to address the matter. The Massachusetts Senate leadership proposed a bill to create Vermont-style “civil unions” with all of the legal status, rights, and benefits of marriage for same-sex couples, but without the label of “mar-


riage." Then the Senate filed a special proceeding with the Massachusetts Supreme Judicial Court seeking an advisory opinion (allowed under a unique provision of the Massachusetts Constitution) on whether that "civil union" scheme would satisfy the requirements of the Goodridge ruling. On February 3, 2004, in Opinions of the Justices to the Senate, again by a 4-3 vote, the Justices ruled that creating civil unions for same-sex couples, but forbidding them to marry, "violates the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights . . . . The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples."

Following the rejection by the court of civil unions, the Massachusetts legislature, on March 29, 2004, passed a proposed constitutional amendment that, if reconfirmed and ratified, would ban gay marriages but recognize civil unions. House 3190, as amended, declares as constitutional law that "only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth," but also provides that "[t]wo persons of the same sex shall have the right to form a civil union." However, the Massachusetts procedure for amending the state constitution is very long, cumbersome, difficult, slow, and anti-democratic. Before this amendment becomes effective, it must be reconfirmed by the next Massachusetts legislature, at the earliest 2005, and then it must be ratified by the

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251. 802 N.E.2d 566.

252. Id. at 572.


The unified purpose of this Article is both to define the institution of civil marriage and to establish civil unions to provide same-sex persons with entirely the same benefits, protections, rights, privileges and obligations as are afforded to married persons, while recognizing that under present federal law benefits same-sex persons in civil unions will be denied federal benefits available to married persons.

It being the public policy of this Commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth. Two persons of the same sex shall have the right to form a civil union if they otherwise meet the requirements set forth by law for marriage. Civil unions for same sex persons are established by the Article and shall provide entirely the same benefits, protections, rights, privileges and obligations that are afforded to persons married under the law of the commonwealth. All laws applicable to marriage shall also apply to civil unions.

This Article is self-executing, but the general court may enact laws not inconsistent with anything herein contained to carry out the purpose of this Article.
people at the next general election, which would be in November 2006, at the earliest.255

On Monday, May 17, 2004, the 180-day stay in Massachusetts expired,256 and same-sex couples began to get marriage licenses in Massachusetts by the hundreds.257 In Cambridge alone 220 marriage licenses were granted to same-sex couples,258 and it has been estimated that 2,500 marriage licenses were issued to same-sex couples in Massachusetts in the first week of legal same-sex marriages in May.259

However, a 90-year-old anti-marriage-evasion statute in Massachusetts forbids the celebration or validity of marriages involving citizens of other states that are forbidden in those states. It provides: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void."260 Any such marriages that are contracted in Massachusetts are "null and void" as a matter of Massachusetts law.261 The Governor of Massachusetts ordered city clerks who issue marriage licenses to determine if couples seeking to marry are non-residents and has ordered clerks not to issue marriage licenses to non-resident same-sex couples.262 A Massachusetts trial court rejected a challenge to this law filed by advocates of same-sex marriage.263

255. Mass. Const. art. XLVIII, part I.
256. Governor Romney wanted to ask the state supreme court to stay its order until after the amendment is voted upon, but the Democrat state attorney general, a blatant supporter of same-sex unions, refused to do so. Several state legislators have filed suit in the state courts, and a pro-family organization has filed suit in federal court to block Goodridge from taking effect.
257. See Alan Cooperman & Jonathan Finer, Gay Couples Marry in Massachusetts, Wash. Post A1 (May 18, 2004) ("More than 600 gay couples rushed to town halls and courthouses across Massachusetts on Monday and emerged to cheering crowds, live bands and rice-throwing relatives as the state became the first in the nation to allow same-sex marriages. . . . 227 [gay] couples had filed papers [to marry] in Cambridge, 154 in Provincetown, 113 in Northampton, 99 in Boston, 65 in Worcester, 37 in Somerville, and scores more elsewhere. Some also dashed to court to obtain waivers of the three-day waiting period for a marriage license. . . . Provincetown and Worcester reported the most same-sex weddings—about 30 each—and Cambridge had 22."); Jonathan Finer, Marriage License Is Just a Start, Wash. Post A3 (May 19, 2004) (Cambridge City Clerk processed 220 applications for marriage licenses on Monday, more than any other city, but turned away two nonresidents who said they did not intend to move to Massachusetts); Cheryl Wetzstein, Homosexuals 'Marry' in Massachusetts, Wash. Times A1 (May 18, 2004).
258. Cooperman & Finer, supra n. 257, at A3.
259. Christine MacDonald & Bill Dedman, About 2,500 Gay Couples Sought Licenses in 1st Week, Boston Globe A1 (June 17, 2004); see generally infra nn. 262-69 and accompanying text.
261. Id.
263. Jonathan Finer, Marriage License Is Just a Start, supra n. 257; Dan Ring, Court Bars Nuptials for Out-of-State Gays, The Republican (Springfield, Mass.) A6 (Aug. 19, 2004) ("A judge yesterday approved Gov. W. Mitt Romney's use of a nearly century-old law to ban out-of-state gay couples from marrying in Massachusetts, saying the Romney administration is treating
Massachusetts is not the only state where activist judges have attempted to judicially mandate same-sex marriage or civil unions. Goodridge was preceded by decisions of the state supreme courts of Hawaii\(^{264}\) and of Vermont,\(^{265}\) and by a trial court decision in Alaska all favoring legalization of same-sex marriage or civil unions. A short time after the Goodridge decision, a state trial court in Oregon ordered the legalization of same-sex civil unions or marriage,\(^{266}\) and two trial courts in Washington state held the state DOMA to be unconstitutional.\(^ {267}\) In early 2005 a trial court in New York ordered the legalization of same-sex marriage.\(^ {268}\) Likewise, a federal judge in Nebraska ruled that the state constitutional amendment barring same-sex marriage or civil unions appears to violate the federal constitutional prohibition of bills of attainder.\(^ {269}\)

Elsewhere, many gay couples and supporters of same-sex marriage have not been content to wait for change to come through the processes of legislative or judicial redefinition of marriage. Over 4,000 marriage licenses were issued to same-sex couples in California alone,\(^ {270}\) before the state supreme court finally ordered a halt and, six months later, nullified the marriages.\(^ {271}\) In Oregon it was reported that approximately 3,000 same-sex couples obtained marriage licenses in Multnomah County (the Portland area) before a state court ordered county officials to stop issuing the licenses to same-sex couples.\(^ {272}\) Public officials in New Paltz, New

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270. Suzanne Herel, Rona March, & Ilene Lelchuk, Numbers Put Face on a Phenomenon: Most Who Married Are Middle-Aged, Have College Degrees, S.F. Chron. ¶¶ 1-2 (Mar. 18, 2004) (available at http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/03/18/MNGTB5MUO11.DTL) ("There were doctors, lawyers and—yes—even an Indian ‘tribal chairwoman.’ The 4,037 same-sex couples who obtained marriage licenses in San Francisco hail from 46 states and eight other countries, are highly educated, range in age from 18 to 83 but generally are middle-aged, and represent hundreds of occupations.").
271. Lockyer v. City & County of S.F., 33 Cal. 4th 1055 (Cal. 2004) (Mayor Newsom’s action was ultra vires and improper, and that marriages of same-sex couples performed under those licenses were null and void).
272. Chanen, supra n. 253; News24.com, Judge Halts Gay Marriages ¶ 2, http://www.news24.com/News24World/News/0,61192,2-10-1462_1515383,00.html (Apr. 21, 2004) ("About three thousand licenses were issued to same-sex couples, she [Multnomah County commission chairper-
York, and Sandoval County, New Mexico also issued several dozen marriage licenses to same-sex couples before being stopped.

B. The Supreme Court Has Already Imposed Some Constitutional Boundaries on State Definition and Regulation of Marriage.

It is significant that the Supreme Court of the United States has invalidated state laws regulating marriage four times in the past 37 years. In one sense it might be said that those decisions "defined" marriage as a matter of federal constitutional law, although the Court did not purport to define marriage, but instead was interpreting provisions of the Constitution protecting individual rights or specific guarantees mentioned in or derived from the Fourteenth Amendment, which conflicted with the state marriage laws. The Court imposed in each case some constitutional boundaries on the state definition or regulation of marriage. Those decisions establish that "the right to marry" includes an unwritten, fundamental constitutional interest, and that some laws that interfere with persons getting married in some
circumstances will not be upheld unless significantly related to very important state interests (under not-quite-but-almost-strict-scrutiny). Some scholars and judges have read those decisions quite broadly, although the Supreme Court itself has not become particularly "activist" in expanding the "right to marry" doctrine.

The leading example is Loving v. Virginia. In that case the Court held, notwithstanding federalism in family law and deference to the states in marriage regulation, that laws defining marriage so as to forbid blacks and whites from intermarrying were unconstitutional, both as a matter of equal protection doctrine and as a matter of the due-process-protected constitutional right to marry. Likewise, in Zablocki v. Redhail, the Court held that marriage rules barring "deadbeat dads" who had failed to pay child-support obligations could not be delayed in marrying until they showed that they would pay the child support owing. In Boddie v. Connecticut divorce filings fees that were not waived for indigent persons were invalidated because they interfered with the constitutionally protected marriage interest. And in Turner v. Safley, the Court held that even state prison regulations that denied incarcerated prisoners the right to marry without a precise and directly applicable legitimate penalogical or security justification violated the Constitution. In all four cases, the Court used the Constitution to override state marriage regulations. Thus, federalism in family law does not preclude some constitutional protection for, or limits upon, some aspects of marriage.

276. See e.g. Amy Doherty, Constitutional Methodology and Same-Sex Marriage, 11 J. Contemp. Leg. Issues 110, 112 (2000) (concluding that if "prisoners, bad parents, and interracial couples have a fundamental right to get married that the State cannot restrict arbitrarily or for illegitimate motives . . . it would seem to follow that a same-sex couple has a right to get married that the State cannot restrict for any but compelling reasons); Keith E. Sealing, Polygamists out of the Closet: Statutory and State Constitutional Prohibitions against Polygamy Are Unconstitutional under the Free Exercise Clause, 17 Ga. St. L. Rev. 691, 753-57 (2001) (arguing that the right to marry, combined with free exercise rights, creates a hybrid right under Smith for polygamous marriages); see also Christine McNiece Metteer, Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity without Resorting to State Incest Statutes, 10 Kan. J.L. & Pub. Policy 262, 265-72 (2000) (concluding that the fundamental right to marry encompasses certain marriages currently banned for reasons of relation by affinity).

277. Wardle, supra n. 78, at 336-46; see generally, Donald L. Beschle, Defining the Scope of the Constitutional Right to Marry: More than Tradition, Less than Unlimited Autonomy, 70 Notre Dame L. Rev. 39, 40 (1994) (stating that "most courts lean toward the narrow view . . . while most commentators seem to favor the broader view").

278. 388 U.S. 1.
279. Id. at 12.
280. 434 U.S. at 390-91.
281. 401 U.S. at 386.
282. 482 U.S. at 81.
283. See generally Wardle, supra n. 78 (the Court has addressed marriage issues in dozens of cases since 1790, but has only decided constitutional marriage issues four times, beginning with Loving).
Loving could be criticized on the same federalism in family law grounds that have been raised by opponents to the FMA. But nearly 40 years later, it is clear that Loving had no significant effect upon federalism in family law. So the FMA proposes to do by constitutional amendment no more than what the Supreme Court has been doing by judicial interpretation for decades.

C. Nine Existing Constitutional Threats to Federalism in Family Law.

The doctrine of federalism in family law is in jeopardy from at least nine constitutional and related claims, arguments, and positions that are currently and aggressively pursued by advocates of same-sex marriage in the United States and being pressed by judges who favor them. Acceptance of any of these legal positions will have a profound, detrimental effect upon the viability of the federalism doctrine. Taken together, these legal claims already have significantly weakened and now seriously threaten the very survival of federalism in family law in American legal doctrine. Federalism in family law will not survive these powerful, growing doctrinal influences intact unless some strong, corrective legal response at the level of constitutional law is made. These nine threatening claims are summarized below.

First, equal protection claims are seeking to constitutionally mandate same-sex marriage or marriage-equivalent same-sex unions threaten federalism in family law. Such equality claims based on federal and state equal protection clauses and state cognate clauses like the "common benefits" clause have already been accepted by courts in Hawaii, Alaska, Vermont, Massachusetts, Oregon, Washington, and by individual dissenting or concurring justices or judges in Washington, D.C. and New York. These claims assert that it is a denial of equal protection of the laws to refuse to allow same-sex couples to marry or to enjoy all of the rights and benefits of marriage in some other domestic union. If this position prevails, all states will have to legalize same-sex marital unions because the Fourteenth Amendment applies to all states.

Second, due process claims seeking to constitutionally mandate same-sex marriage or marriage-equivalent same-sex unions threaten federalism in family law. These claims assert that it is a denial of due process of law to refuse to allow same-sex couples to marry or to enjoy all of the rights and

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284. Baehr, 852 P.2d 44.
287. Goodridge, 798 N.E.2d 941; Opinions of the Justices to the Senate, 802 N.E.2d 565.
290. Dean, 653 A.2d at 333-61 (Ferren, J., dissenting).
benefits of marriage in some other domestic union. Courts in Alaska,\textsuperscript{292} Oregon,\textsuperscript{293} and Washington\textsuperscript{294} have already embraced this argument. If this position prevails, all states will have to legalize same-sex unions because the Fourteenth Amendment applies to all states.

Third, full faith and credit claims seeking to constitutionally mandate that all states recognize and accept the importation of same-sex marriage or marriage-equivalent same-sex unions threaten federalism in family law. These claims assert that it is a denial of full faith and credit\textsuperscript{295} for any state to refuse to recognize same-sex marriages and marriage judgments from other states. Courts in New York,\textsuperscript{296} Iowa,\textsuperscript{297} and Washington\textsuperscript{298} have accepted this argument. If this position prevails, all states will have to accept the importation of same-sex marriages because the Full Faith and Credit Clause applies to all states.

Fourth, gay advocates asserting bill of attainder claims seek to constitutionally mandate same-sex marriage or marriage-equivalent same-sex unions and that threatens federalism in family law.\textsuperscript{299} These claims assert that it is a bill of attainder to refuse to allow same-sex couples to marry or to enjoy all of the rights and benefits of marriage in some other domestic union. If this position prevails, all states will have to legalize same-sex marital unions because the Bill of Attainder Clause is part of the Constitution and applies to all states.\textsuperscript{300}

Fifth, establishment of religion claims seeking to constitutionally mandate same-sex marriage or marriage-equivalent same-sex unions threaten federalism in family law. These claims assert that it is an establishment of religion to allow only male-female couples to marry or to enjoy all of the rights and benefits of marriage in some other domestic union. For example, [p]rofessor [William N.] Eskridge [has] argued that several constitutional doctrines are violated when the religious aspect of marriage dictates the legal policy of who has access to the marital institution. He suggested that First Amendment restrictions

\textsuperscript{292} Brause, 1998 WL 88743.
\textsuperscript{293} Li, 2004 WL 1258167.
\textsuperscript{294} Andersen, 2004 WL 1738447.
\textsuperscript{295} U.S. Const. art. IV, § 1.
\textsuperscript{296} Raum, 252 A.D.2d 369.
\textsuperscript{298} See supra, n. 289.
\textsuperscript{300} U.S. Const. art. I, § 10, cl. 1.
against the establishment of religion prohibit the use of religious beliefs as a justification for prohibiting same-sex marriages.\(^{301}\)

If this position prevails, all states will have to legalize same-sex marital unions because the First Amendment applies to all states.

Sixth, free exercise of religion claims seeking to constitutionally mandate same-sex marriage or marriage-equivalent same-sex unions threaten federalism in family law. These claims assert that it is a denial of freedom of religion to refuse to allow same-sex couples to marry or to enjoy all of the rights and benefits of marriage in some other domestic union. One activist law professor has argued:

The Court has made quite clear that the ‘Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.’ Even if the religious sentiments of some would be offended by recognizing civil unions or same-sex marriages, that alone would not suffice to justify the state’s refusal to recognize such unions.\(^{302}\)

Constitutional religion claims have been asserted by parties seeking judicial legalization of same-sex marriage in several cases.\(^{303}\) If this position prevails, all states will have to legalize same-sex marital unions because the First Amendment applies to all states.

Seventh, privileges and immunities claims seeking to constitutionally mandate same-sex marriage or marriage-equivalent same-sex unions threaten federalism in family law. These claims assert that it is a violation of privileges and immunities to reserve only for male-female couples the legal status of marriage and all of the rights and benefits of marriage. Such claims have been recently accepted by two courts in Washington.\(^{304}\) If this position prevails, all states will have to legalize same-sex marital unions because the Fourteenth Amendment applies to all states.

Eighth, distortion of rational basis analysis, such as by invoking the “mystery” of life and the universe,\(^{305}\) and conclusorily insisting that preserving the institution of conjugal marriage as it has been known for millennia is simply irrational, has the potential to mandate legalizing same-sex


\(^{302}\) Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 Loy. U. Chi. L.J. 597, 606 (2002); see also Friedes, supra n. 301, at 537-38; Cruz, supra n. 4, at 948.


\(^{304}\) Anderson, 2004 WL 1738447 at **3, 11-12; Castle, 2004 WL 1985215 at *16.

\(^{305}\) Lawrence, 539 U.S. at 574 (quoting Casey, 505 U.S. at 851).
Same-sex marriage advocates have long asserted that it is simply irrational to deny gay and lesbian couples to marry.\textsuperscript{306} Indeed, that was the precise legal justification given by the Massachusetts Supreme Judicial Court for mandating the legalization of same-sex marriage in that state.\textsuperscript{307} If that position is accepted by federal courts, all states will be required to legalize same-sex marriage because all states are prohibited by the due process clause of the Constitution from enacting irrational or arbitrary laws.

Ninth, lawless behavior by gay and lesbian activists and supportive politicians has been increasing in the past year as persons demanding the legalization of same-sex marriage have opted to take the law into their own hands, to bypass the democratic system, and to coerce other lawmakers and citizens into acquiescing in the legalization of same-sex marriage. For example, the lawlessness of Mayor Gavin Newsom in San Francisco, county officials in Multnomah County, Oregon, other mayors and public officials, and thousands of gays and lesbians has been noted.\textsuperscript{308} This kind of lawlessness by public officials and tens of thousands of citizens claiming a higher mandate than constitutional and democratic processes strikes at the very core of the Constitution which is founded upon respect for and submission to the rule of law. Such lawless behavior presents a serious threat to constitutional democracy, self-government, and thereby to federalism in family law, which means nothing if public officials are not obliged to follow the laws or if they can be intimidated, coerced, or corruptly persuaded to ignore the laws.

Additionally, various nonconstitutional legal doctrines also have been asserted by advocates of same-sex marriage seeking to persuade judges to mandate same-sex marriage or marriage-equivalent same-sex unions that threaten federalism in family law. For example, many legal writers have asserted that ordinary conflict of laws doctrines (apart from full faith and credit) require states to recognize sister-state same-sex marriages or civil unions. These claims have been accepted by several courts already.\textsuperscript{309} Likewise, many advocates of same-sex marriage have argued that marriage statutes in various states must be construed to permit same-sex couples to marry.\textsuperscript{310} If these positions prevail, at least some states will be judicially compelled to legalize same-sex marital unions by means which individually and in concert with other doctrines, such as Full Faith and Credit claims, have serious implications for federalism in family law.


\textsuperscript{307} \textit{Goodridge}, 798 N.E.2d at 960-61.

\textsuperscript{308} See supra nn. 270-74 and accompanying text.


\textsuperscript{310} See \textit{Goodridge}, 798 N.E.2d at 969; \textit{Baker}, 744 A.2d at 886; \textit{Baehr}, 852 P.2d at 67.
VI. CONCLUSION: YES ON THE FEDERAL MARRIAGE AMENDMENT – TO BRING A RENAISSANCE AND REVIVAL OF FEDERALISM IN FAMILY LAW

Federalism is a particular kind of “power map” reflecting “socio-economic realities in the distribution of political power” and it is also a moral compass “reflect[ing] the moral principles underlying polities as regimes.” Federalism in family law charts a cooperative allocation of governmental power and provides a normative guide for our policy makers. Yet the doctrine of federalism in family law today has only ambiguous and debatable validity. As this article has shown, there is a tension in existing federal cases between federalist judicial decisions giving deference to and respect for state priority in regulating family relations, and social activist judicial decisions overriding and invalidating state laws regulating family relations that do not conform to preferred policy images of the ruling judges. How those tensions and ambiguities are resolved is tied directly to the fate of the proposed Federal Marriage Amendment.

Whether the doctrine of federalism in family law should be preserved and strengthened (and both the proposed Federal Marriage Amendment and the proposed nationalization of same-sex marriage recognition rejected), or modified and strengthened (as proposed by proponents of the Federal Marriage Amendment), or buried (as implicitly asserted by proponents of same-sex marriage who seek national imposition of their preferred marriage policy on the states by judicial decree) depends on whether the doctrine of federalism in family law today re-emerges as a real, viable, operative constitutional doctrine. The answer to that question is not yet clear. It is in the hands of the Supreme Court and of other federal and state court judges. If they ignore, circumvent, curtail, or undermine the doctrine of federalism in family law in same-sex marriage cases, and cases involving other same-sex family issues, that is likely to lead to a tremendous cultural and constitutional crisis, and support for the Federal Marriage Amendment will dra-

312. See generally Kurtz, Before the Big One, supra n. 49 ("[I]t will be a . . . culture-war story like no other."); Kurtz, The Right Balance, supra n. 49. "The storm that will break over America after but a single state legalizes gay marriage will surely be a moment of decisive cultural reckoning. In the wake of that first legalization, the battle over gay marriage will be characterized by rapidly escalating confrontation, followed by a radical, nation-wide resolution." Id. at ¶ 1. "[T]he nation will be plunged into a furious legal, political, and cultural struggle. The bitter and ongoing polarization in even an exceedingly liberal state like Vermont is a clear foreshadowing of the conflict to come. As legal and political battles over traveling couples spread from state to state, the chaos will multiply." Id. at ¶ 17. Kurtz, Oh, Canada!, supra n. 98, at ¶¶ 16-17 (The controversy over legalizing same-sex marriage in the United States will be a “bitter[,]” “sharp,” “convulsive[,]” and “drawn out” “cultural battle.”).
matically grow, perhaps to the level of national constitutional super-consensus.\footnote{Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, \textit{The Alaska Marriage Amendment: The People's Choice on the Last Frontier}, 16 Alaska L. Rev. 213 (1999) (Controversy "might generate a national movement for a federal marriage amendment. By so doing, it may plunge the country into strife over marriage and damage its own credibility as a reliable interpreter of the Constitution."); see Kurtz, \textit{Before the Big One}, supra n. 49 (The conflict resulting from efforts to force same-sex marriage on resistant states will ignite a movement to pass the Federal Marriage Amendment.).}

The Federal Marriage Amendment is addressed to two separate but similar problems—the problem of mandatory (inherently overbroad) national uniformity on such questions as same-sex marriage, civil unions, and marital benefits for nonmarital cohabitants, and the problem of judicial activism with judges increasingly assuming the role of ultimate dictators of state marriage policies. The former is a concern of federalism and the latter a matter of separation of powers. When the judges who strike down or dictate state marriage policy are federal judges, the two problems are combined, and sometimes confused. So the FMA faces a dilemma of attempting to preserve federalism in family law while responding to the judicial threat to the survival of federalism in family law.

The drafters of the Federal Marriage Amendment recognize that there is a tension between the principles of federalism and of separation of powers regarding their goal of preventing judicial imposition of same-sex marriage, domestic partnership, and marital benefits. Supporters of the Federal Marriage Amendment apparently believe that the need to respond to the threat posed by judicial activism to separation of powers, or democratic self-government, in matters of marriage policy is greater than the need to protect state government control of family law at least with regard to the state judges compelling same-sex marriage, creating quasi-marriage unions, and ordering marriage benefits for same-sex couples. Thus, the Federal Marriage Amendment attempts to impose a national ban on any judicial definition of marriage or creation of quasi-marriage unions or extension of marital benefits, and in pursuit of the goal of protecting democracy in family law policy-making, the Federal Marriage Amendment even overrides federalism in regards to same-sex marriage, which would preserve state control of the allocation of responsibilities among the judiciary, legislature, and executive of any state to the state itself and the people thereof.

Not all important values need to be constitutionalized. However, when basic social institutions and values are threatened, as in the current crisis of the judicial movement to mandate legalization of same-sex marriage, the process of amending the constitution is an important tool, and may provide an effective remedy to the crisis. When the meaning of fundamental social entities becomes ambiguous, clarification in constitutional certainty can bring peace and restore confidence in the processes and structures of the
legal and political system. The constitutions of more than 40 countries and several international conventions contain provisions protecting marriage, the family, or family life that might be interpreted to forbid same-sex marriage, including more than ten which expressly define marriage as the union of a man and a woman.

The need today for constitutional protection for family relationships, including for exclusively male-female marriage, is becoming increasingly apparent. The notion of fundamental rights that is accepted today is much greater than the notion of rights that prevailed in 1789, and it could be beneficial to explicitly define and protect the notion of marriage upon which our constitutional society is built. Rights then were defined by reference to the threats and abuses that were most prominent. Then the family was not threatened, but cruel and unusual punishment, quartering troops in homes, and suspension of the right to jury trial were very real and recent threats, so those were protected in the Bill of Rights. Using the same test for determining fundamental rights, most would agree that the family is a threatened institution, and that marriage needs particular protection. If James Madison, Thomas Jefferson, George Mason, and Alexander Hamilton were alive today, we could expect to see them leading the movement to adopt constitutional protection for the institution of conjugal marriage.

Constitutionalization of family law can occur at the state level as well as at the national level. Before 2003, at least six American states had enacted constitutional provisions that refer to marriage. Between 1998 and 2002, the citizens of Hawaii, Alaska, Nebraska, and Nevada ratified amendments to the state constitutions that define—or explicitly protect legislative authority to define—marriage as limited to male-female unions. In late 2004, thirteen additional states ratified state marriage amendments, with majorities averaging better than 2:1. Proposed state constitutional amendments are now pending in a dozen other states. Clearly, many Americans are comfortable with using a state constitutional amendment to protect marriage. Whether that would translate into support for a federal constitutional amendment remains to be seen, but it certainly seems possible. From the perspective of federalism in family law, there are significant advantages to constitutionalizing the definition or nature of marriage at the


315. See Alaska Const. art. I § 25; Ariz. Const. art. XX, ¶ 2; Ga. Const. preamble; Haw. Const. art. I § 23; N.M. Const. art. XXI, § 1; Utah Const. art. III.

state level, so long as federalism in family law is a real, respected, judicially protected, and enforced principle.

While state constitutionalization seems very appropriate under the principle of federalism in family law, if that principle is impotent or illusory, merely window dressing, a toothless tiger, it would be foolish to work to establish the substantive policy in state constitutional law which could easily be overridden and invalidated by activist judges claiming federal constitutional pretext for preemption. Thus, the current viability of federalism in family law is critical to the debate over the proposed Federal Marriage Amendment.

As noted earlier, in June 2003 I delivered a paper at a conference of family law professors expressing my criticism of the Federal Marriage Amendment and my unwillingness for reasons of federalism to support it even though I agreed with its basic purpose and with its substantive marriage principles. However, the radical scope and whirlwind pace of judicial activism and gay and lesbian lawlessness (manifested in issuing marriage licenses and getting married in defiance of the law, and arrogantly disregarding democratic processes for deciding whether to change the law) have caused me to change my mind. I now fully support the proposed Federal Marriage Amendment without reservation.

The choice is clear—either in the next dozen years there will be a constitutional rule protecting the institution of conjugal marriage, or there will be a constitutional rule forcing all states to create or to recognize—and effectively leading to domestic approval of—same-sex marriages. The choice is inevitable. There is, and will be, no middle ground. One way or the other, the doctrine of federalism in family law is going to be reshaped. That is not surprising since we believe in a living Constitution. So the fact that federalism in family law needs to be updated to address these new circumstances and challenges is not unusual.

As a firm believer in the value of federalism in family law, the choice for me is clear. Adoption of the Federal Marriage Amendment will work the least intrusive, least dangerous, least radical alteration of the doctrine of federalism in family law. The constitutional positions by which advocates of same-sex marriage are seeking to force all states to accept or recognize same-sex marriage are much broader, much more far-reaching, much more intrusive, and much more threatening to the survival of federalism in family law as a viable principle than the narrow and modest adjustments proposed by the Federal Marriage Amendment. For that reason, I support passage of the Federal Marriage Amendment. If it is ratified, it could signal a revival and renaissance of federalism in family law. That would be good for American constitutional law and good for American families.