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# MARRIAGE MATTERS: A CASE FOR A GET-THE-JOB-DONE-RIGHT FEDERAL MARRIAGE AMENDMENT

STEVEN W. FITSCHEN\*

*For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh.<sup>1</sup>*

*I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.<sup>2</sup>*

## I. INTRODUCTION

Marriage wars rage in the United States and around the world. Some seek to eliminate the traditional definition of marriage and force society to abandon the limitation of marriage to one man and one woman.<sup>3</sup> On the other side, of course, are those who believe that traditional marriage (hereinafter marriage)<sup>4</sup> must be defended.<sup>5</sup> I am a partisan in these wars; I am one of those who believe that marriage must be defended.

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1. *Genesis* 2:24 (New American Standard) (emphasis added).

2. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) (emphasis added).

3. *See infra* notes 34-43 and accompanying text.

4. For those of us on my side of the marriage wars, terminology is problematic. For us, the term "marriage" must be limited to one man and one woman. Thus, no adjective—such as "traditional"—is required. In fact, many of us believe that adding such terms gives away part of the battle. Similarly, we are loath to use the term "same-sex marriage." For us same-sex marriage is an impossibility. Sometimes we get around this by putting the word "marriage" in snicker quotes, thusly: same-sex "marriage." However, this can present problems of its own. For example, I have wondered whether the practice might be offensive to judges or justices reading briefs I have filed in same-sex "marriage" cases. It is certainly offensive to people on the other side of the issue. *See, e.g.,* Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 389-90 (1999) (raising numerous related linguistic objections to the language usage of folks on my side of this issue).

5. Some on my side have suggested other solutions. For example, Monte Stewart, President of the Marriage Law Foundation, discusses those who use "man-woman marriage" for that institution

This article proceeds along simple lines. It *assumes* that “marriage matters”—note that the title of this article is not *Why Marriage Matters*. Although the article assumes this starting point, a limited discussion of this question, including a limited defense of this assumption and an explication of the “slogan” will constitute Part II of this article. To be clear, either side of the marriage wars could invoke this “slogan.” As will be explained in Part III, some opponents of traditional marriage seek to destroy marriage while others seek to obtain marriage. From their point of view, marriage matters too. Either it is so pernicious that it must be destroyed or it is so valuable, it must be redefined to make it available to those who are ineligible. However, when I say “marriage matters,” I mean that marriage is vitally important to society and must be defended.

Part III briefly documents the assault on marriage being made by proponents of same-sex marriage, as well as by those who seek to destroy marriage. Given that the perspective of this article is that “marriage matters” and that marriage is under assault, it naturally follows that the article advocates for a defense of marriage. Part IV examines the to-date, primary federal response to the assault—the Defense of Marriage Act (DOMA).<sup>6</sup> This Part examines what DOMA does and does not do, and also documents the legal challenges against DOMA. This author believes that DOMA is not a sufficient response to the assault on marriage—both because of what it does not do and because of its susceptibility to legal challenge—therefore, Part V examines what the states can do and what they have done so far to protect marriage. Finally, Part VI examines the need for a federal constitutional amendment. It discusses why principles of federalism should not stop a federal marriage amendment—indeed, why these principles support a federal marriage amendment—and it will delve into various proposed versions, and will advocate the view of the present author. Finally, Part VII provides some concluding thoughts.

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and advocates the use of “genderless marriage” for what is commonly called same-sex marriage. Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL’Y 313, 318-19 (2008). As stated before, I reject the use of modifiers for the word marriage when used in its traditional manner. Thus, I will use “marriage” for “opposite-sex marriage.” My terms for “same-sex marriage” will vary a bit depending on the context.

5. See, e.g., many of the articles published from a symposium at Regent University School of Law: Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U.L. REV. 221 (2004-2005); William C. Duncan, *DOMA and Marriage*, 17 REGENT U.L. REV. 203 (2004-2005); Maggie Gallagher, *The Case for the Future of Marriage*, 17 REGENT U.L. REV. 185 (2004-2005); Vincent P. McCarthy, *The Necessity of a Federal Marriage Amendment*, 17 REGENT U.L. REV. 211 (2004-2005); Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U.L. REV. 279 (2004-2005). Most of these authors publish prolifically on this topic.

6. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

## II. WHY MARRIAGE MATTERS

What does it mean to assert that “marriage matters”? The question can be answered from two perspectives. First, one could proceed empirically. One could design some sort of social science evaluation in which one formulated a thesis statement and then proceeded to seek to determine whether marriage *vel non* impacted various outcomes. Indeed, such studies have been conducted, and marriage comes out looking fairly good.<sup>7</sup> Of course, any social science study could be assailed from at least two perspectives. First, one could assail the study’s design.<sup>8</sup> Second, one could assail the value judgments underlying the theses.<sup>9</sup>

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7. See, e.g., John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1019-20 (2001) (citations omitted):

In the past decade, a substantial new body of social science literature has emerged seeking to make the statistical case that marriage is a good institution. The central thesis of this new literature is that, on the whole, it is healthier (1) to be married or remarried than to remain single, widowed, or divorced; (2) to have two parents raising a child rather than one or none; and (3) to have marital cohabitation rather than non-marital cohabitation for couples who are planning to be together for the long term. On average, a number of recent studies show, married adults are less likely than non-married adults to abuse alcohol, drugs, and other addictive substances. Married parties take fewer mortal and moral risks, even fewer when they have children. They live longer by several years. They are less likely to attempt or to commit suicide. They enjoy more regular, safe, and satisfying sex. They amass and transmit greater per capita wealth. They receive better personal health care and hygiene. They provide and receive more effective co-insurance and sharing of labor. They are more efficient in discharging essential domestic tasks. They enjoy greater overall satisfaction with life measured in a variety of ways. Men, on average, enjoy more of these health benefits of marriage than women. The presence of children in the household decreases the short-term benefits but increases the long-term benefits of marriage for both spouses. Most children reared in two-parent households perform better in their socialization, education, and development than their peers reared in single-or no-parent homes.

*Id.*

8. Little, if any, of the law review literature attacks the pro-marriage social science on this front. While I have not attempted to exhaustively look for such attacks, I have not come across any in the course of my research. However, this sort of criticism can be illustrated by an evaluation of the social science studies in a related area: the impact of same-sex parenting on children. Numerous studies claimed that “children with two parents of the same gender are as well adjusted as children with one of each kind.” J. R. HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* 51 (1998). However, social scientists Robert Lerner, Ph.D., and Althea K. Nagai, Ph.D., examined forty-nine such studies and concluded that every one had one or more of the following design flaws: “unclear hypotheses and research designs[,] missing or inadequate comparison groups[,] self-constructed, unreliable and invalid measurements[,] non-random samples, including participants who recruit other participants[,] samples too small to yield meaningful results[, and] missing or inadequate statistical analysis.” ROBERT LERNER & ALTHEA K. NAGAI, *NO BASIS: WHAT THE STUDIES DON’T TELL US ABOUT SAME-SEX PARENTING* 3 (2001).

9. See, e.g., Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 141 n.39 (2003) (“For instance, some demographers compare the earnings of married men with those of single men, and infer that marriage is good because the former group earns more.” (citing Peter Cappelli et al., *It Pays to Value Family: Work and Family Tradeoffs Reconsidered*, 39

However, instead of proceeding along the lines of empirical study, one can proceed by *presupposing* that “marriage matters.” That is, one can believe that marriage matters regardless of whether it leads to increased social goods. Here, again, one can presuppose that marriage matters from at least two vantage points. One could view marriage from a purely secular point of view, or one could view marriage from a religious worldview.

As for the former, one can readily turn to the various reasons that have been put forth in the litigation over the constitutionality of DOMA and of several states’ marriage statutes.<sup>10</sup> As for the latter, one could look to one’s own religious tradition, or one could look to principles of natural law<sup>11</sup> or of the Tao, at least in the sense that C. S. Lewis famously used the term.<sup>12</sup>

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INDUS. REL. 175 (2000); Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 AM. SOC. REV. 132 (2002)). “The same data would support different normative conclusions, including a proposal to abolish marriage on the ground that it is inequalitarian.” *Id.*

10. See, e.g., *infra* notes 162-165, 200, 253 and accompanying text.

11. Using the term “natural law” is admittedly problematic. Various schools of legal theory can fall under that rubric, often labeled the ontological, deontological, and teleological. See generally A.P. D’ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* (1951); Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371 (1998). Without weighing in on this question, I use the term here in a generic way that would partake at least partially of the views of Aquinas, Blackstone, the Declaration of Independence, and—to draw on a more modern source—J. Budziszewski. A cynic might assert that this is just camouflage for embracing particular religious reasons for one’s opinions. Nothing could be farther from the truth. As the remainder of the paragraph to which this is appended makes clear, I have no hesitancy about invoking a particular religious viewpoint. However, the whole point of natural law, as here qualified, is that members of society can agree on certain principles that cross religious lines. For a modern court—indeed a modern court considering the same-sex marriage issue—invoking natural law, see *Godfrey v. Spano*, 836 N.Y.S.2d 813, 815 (2007) (“It is well settled in New York that the courts as a matter of comity will recognize out-of-state marriages, including common-law marriages, unless barred by positive law (statute) or natural law (incest, polygamy) or otherwise offensive to public policy.”).

12. Lewis writes:

St Augustine defines virtue as *ordo amoris*, the ordinate condition of the affections in which every object is accorded that kind and degree of love which is appropriate to it. Aristotle says that the aim of education is to make the pupil like and dislike what he ought. When the age for reflective thought comes, the pupil who has been thus trained in “ordinate affections” or “just sentiments” will easily find the first principles in Ethics: but to the corrupt man they will never be visible at all and he can make no progress in that science. Plato before him had said the same. The little human animal will not at first have the right responses. It must be trained to feel pleasure, liking, disgust, and hatred at those things which really are pleasant, likeable, disgusting, and hateful. In the Republic, the well-nurtured youth is one “who would see most clearly whatever was amiss in ill-made works of man or ill-grown works of nature, and with a just distaste would blame and hate the ugly even from his earliest years and would give delighted praise to beauty, receiving it into his soul and being nourished by it, so that he becomes a man of gentle heart. All this before he is of an age to reason; so that when Reason at length comes to him, then, bred as he has been, he will hold out his hands in welcome and recognize her because of the affinity he bears to her.” In early Hinduism that conduct in men which can be called good consists in conformity to, or almost participation in, the Rta—that great ritual or pattern of nature and supernature

The description of the Symposium for which this article is being published states, in part, “The [North Dakota Law Review] desires to provide its readers with arguments for either following the traditional definitions of family and marriage in projecting the future of these institutions, or in proposing a change to those definitions.”<sup>13</sup> Implicit in that statement seems to be an unvoiced “from multiple perspectives.” I appreciate this approach and want to be explicit about my perspective. I write from within the Evangelical Protestant tradition,<sup>14</sup> and am the most comfortable relying upon the Protestant canon and upon the view of that canon that considers it to be inerrant.<sup>15</sup>

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which is revealed alike in the cosmic order, the moral virtues, and the ceremonial of the temple. Righteousness, correctness, order, the *Rta*, is constantly identified with *satya* or truth, correspondence to reality. As Plato said that the Good was “beyond existence” and Wordsworth that through virtue the stars were strong, so the Indian masters say that the gods themselves are born of the *Rta* and obey it. The Chinese also speak of a great thing (the greatest thing) called the *Tao*. It is the reality beyond all predicates, the abyss that was before the Creator Himself. It is Nature, it is the Way, the Road. It is the Way in which the universe goes on, the Way in which things everlastingly emerge, stillly and tranquilly, into space and time. It is also the Way which every man should tread in imitation of that cosmic and supercosmic progression, conforming all activities to that great exemplar. “In ritual,” say the *Analects*, “it is harmony with Nature that is prized.” The ancient Jews likewise praise the Law as being “true.”

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This conception in all its forms, Platonic, Aristotelian, Stoic, Christian, and Oriental alike, I shall henceforth refer to for brevity simply as “the *Tao*. . . .” [W]hat is common to them all is something we cannot neglect. It is the doctrine of objective value, the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are.

C.S. LEWIS, *THE ABOLITION OF MAN* 26-29 (MacMillan Co., 1947).

13. North Dakota Law Review, Symposium Issue, <http://www.law.und.edu/LawReview/symposium.php> (last visited Mar. 31, 2008).

14. Protestant Christians are those who trace their heritage to the Sixteenth Century Reformation. 4 *ENCYCLOPEDIA OF CHRISTIANITY* 395 (2005). As a subset of Protestants, Evangelicals—at least in America—are marked by several characteristics, including beliefs that the Bible is the supreme authority in the life of the Christian, salvation comes only through belief in the atoning death of Jesus Christ, and the literal return of Christ at the end of the world. 2 *ENCYCLOPEDIA OF CHRISTIANITY* 217 (2001).

15. The Protestant canon—those books of the Bible considered to be inspired by God and thus authoritative—is different from the Catholic and Orthodox canons and includes sixty-six books. *NEW DICTIONARY OF THEOLOGY* 628 (1988). The Protestant canon includes thirty-nine books in the Old Testament and twenty-seven books in the New Testament. GLEASON L. ARCHER, JR., *A SURVEY OF OLD TESTAMENT INTRODUCTION* 68-93 (rev. ed., 1985). Inerrancy and infallibility are often considered synonyms. As late as 1976, an important book dealing with the authority of the Bible contained this passage: “A word needs to be said about the use of the words *infallible* and *inerrant*. There are some who try to distinguish between these words as though there is a difference. I do not know of any standard dictionary that does not use these two words interchangeably.” HAROLD LINDSELL, *THE BATTLE FOR THE BIBLE* 27 n.1 (1976). However, the terms have diverged. Certain scholars

have urged that since biblical infallibility focuses on salvific guidance (showing God in Christ and the path of devotion) historical, geographical and scientific details might

Nonetheless—and this is the point of the version of natural law that I discussed above<sup>16</sup>—views such as mine would overlap with the views of other non-Evangelical Protestants, of other Christians, and of people of other religions. Therefore, I will not engage in a discussion of the views of various religious traditions as they relate to marriage. Rather, as stated in the Introduction, I will merely assert my views.

I pause to point out that those views will come into play in three main ways. First, in the next several paragraphs, I will briefly explain why my beliefs cause me to assert that “marriage matters.” Second, immediately thereafter, I will explain why I think it is important that Evangelical Protestants<sup>17</sup> need not, and indeed, should not, self-censor on this issue. Finally, in Part VI, I will bring to bear my religious beliefs in making an argument as to why the United States Constitution can be amended consistently with biblical principles. That view may not matter to many people engaged in the marriage wars, but I have been in meetings with Protestant Christian partisans in the marriage wars who think that marriage matters, yet who think that based on principles of federalism, the United States Constitution ought not to be amended to deal with this issue or ought only to be amended in certain ways. I hope that some of these people will be among the readers of this symposium, and I direct that argument to them.

As for the first of these three points, for me, marriage matters because it is ordained by God.<sup>18</sup> However, it is beyond the scope of this article to engage in a detailed theological defense of marriage. Rather, I will merely adduce a few of the reasons “why marriage matters” that are obvious on the face of the Protestant scriptures. Concededly, I am not rigorously defending the use I am making of these scriptures, but I believe that they are valid.

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be substantially false without infallibility being lost . . . . But other evangelicals . . . censure this proposal as the thin edge of a wedge. . . . They urge that full inerrancy must be maintained if infallibility is not to be a nose of wax; that to treat factual statements proceeding from the God of truth as untrue is deeply irreverent.

NEW DICTIONARY OF THEOLOGY 338 (Sinclair B. Ferguson & David F. Wright eds., 1988).

16. See *supra* text accompanying note 11.

17. I will not interrupt the following discussion at every point to note that what is true for Evangelical Protestants is also true for Christians of many other stripes, and sometimes for adherents of other religions, but the reader should remember the point. The use of “Evangelical Protestants” should often be read as “Evangelical Protestants, Christians who self-describe in other ways, and adherents of other religions that teach that marriage is ordained by God.”

18. I will consider the scriptural basis for this assertion immediately below. The assertion is also discussed in the law review literature. See, e.g., Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 315 nn.323-27 (2000) (collecting articles making this and the opposite argument).

In other words, I am not engaged in the hermeneutical fallacy of “proof texting.”<sup>19</sup>

First, God ordained heterosexual marriage from the beginning of human history. For some of those who accept either the inerrancy or infallibility of Scripture,<sup>20</sup> and even for those who hold a lower view of Scripture,<sup>21</sup> the passage in Genesis 2:24 is key: “For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh.”<sup>22</sup> This passage speaks of man and woman, and with very little stretch is an anti-polygamy, anti-polyandry, anti-divorce passage, i.e., it speaks of the relationship of one man and one woman until separated by death.<sup>23</sup> The immediate objection, of course, is that the Old Testament allowed both polygamy and easy divorce by the husband. The obvious illustration of the former is King Solomon who “had seven hundred wives, princesses, and three hundred concubines.”<sup>24</sup> As for the latter, the Old Testament law contained explicit permission for a man to divorce his wife: ““When a man takes a wife and marries her, and it happens that she finds no favor in his eyes because he has found some indecency in her . . . he [may] write[ ] her a certificate of divorce and put[ ] it in her hand and send[ ] her out from his house. . . .”<sup>25</sup>

For the Evangelical Christian, the words of Jesus are a complete answer to these objections:

Some Pharisees came to Jesus, testing Him and asking, “Is it lawful for a *man* to divorce his wife for any reason at all?” And He answered and said, “Have you not read that He who created *them* from the beginning *made them male and female*, and said,

19. “Proof texting” can have a positive connotation, simply signifying citing scripture in scholarship, the same as one would cite anything else. BERNARD RAMM, *PROTESTANT BIBLICAL INTERPRETATION: A TEXTBOOK OF HERMENEUTICS* 174-78 (3d rev. ed., Baker Book House 1970). However, “proof texting” usually has a negative connotation and is used to describe the process whereby a writer simply invokes a scripture out of context that superficially supports his position and uses it as a “trump card.”

20. See *supra* note 15.

21. “Lower views” of Scripture include all those views that do not see Scripture as divinely inspired and, thus, not as infallible or inerrant. For example, one such view is Neo-Orthodoxy. For those holding that view, “[s]tatements or judgments attributed to God in the Old Testament but which seem to be too severe for Christ’s standard of meekness, patience, and love as contained in the New Testament, are to be rejected as mere human inventions concocted by Israel in their earlier stage of religious development.” ARCHER, *supra* note 15, at 28-29. In our case, Christ quoted Genesis 2:24 in Matthew 19:5-6 and Mark 10:7-8, thereby bringing the Genesis passage fully within this standard.

22. *Genesis 2:24* (New American Standard).

23. See KENNETH A. MATHEWS, *THE NEW AMERICAN COMMENTARY, GENESIS 1-11:26*, at 222-24 (1996).

24. *I Kings 11:3* (New American Standard).

25. *Deuteronomy 24:1* (New American Standard).



*‘For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?’* [sic] “So they are no longer two, but one flesh. What therefore God has joined together, let no man separate.”

They said to Him, “Why then did Moses command to *give her a certificate of divorce and send her away?*” [sic] He said to them, “Because of your hardness of heart Moses permitted you to divorce your wives; but from the beginning it has not been this way.”<sup>26</sup>

My sense is that while the typical Evangelical Protestant is completely comfortable with this—at least for us, the Evangelical Protestants—commonsense approach, some Evangelical Protestants who are actually engaged in the culture wars are nervous about making these arguments. First, they may fear that explicitly biblical arguments “won’t play” with the very audience we seek to persuade, i.e., persons who are on the fence on the issue of same-sex marriage. That, I believe, is a judgment call for each pro-marriage activist and scholar to make.

However, I believe there is a second reason why some are nervous about making explicitly biblical arguments—the fear that somehow doing so will open up our legislative victories to charges of violating the Establishment Clause.<sup>27</sup> Certainly there is scholarship making this claim.<sup>28</sup> However, this fear is misplaced. First, with the role marriage has played in society for millennia, we are surely within the United States Supreme Court’s safe harbor created by its oft-quoted reminder that “the ‘Establishment’ Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.”<sup>29</sup> Furthermore, even though this article has not even intended to engage in a major defense of the assertion that “marriage matters,” the reader has already seen that in addition to explicitly biblical arguments in support of marriage, arguments can also be made from natural law and from social science.<sup>30</sup> Surely, when so many reasons are offered in support of restricting marriage to one man and one woman,

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26. *Matthew* 19:3-8 (New American Standard).

27. “Congress shall make no law respecting an establishment of religion. . . .” U.S. CONST. amend. I.

28. See, e.g., James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 373 (1997); Justin T. Wilson, Note, *Preservationism, or The Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL’Y 561, 566 (2007).

29. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

30. See *supra* notes 7-12 and accompanying text.

Evangelical Protestants are free to make explicitly biblical arguments in support of that restriction.

To take DOMA as a case study, religious motivations were only one of six documented reasons advanced for its passage. One scholar examined the legislative history of DOMA and found that the major reasons put forth in support of it could be summarized as follows: “(1) politics and economics, (2) history and tradition, (3) religion, (4) the essential nature of marriage and the family, (5) social decay, and (6) morality.”<sup>31</sup> Surely, Evangelical Protestants, and others whose faith traditions teach that marriage is ordained by God, should not be shut out of the public debate over this important issue. When Evangelical Protestants come to the table and make their case for their position, just as everyone else, they do not somehow taint the process.

Therefore, this article will make no further defense of its assertion that “marriage matters.” Rather, given this perspective, it naturally follows that I consider any assault upon marriage to be a social evil. Admittedly, marriage is under attack on multiple fronts: “Sexual revolution . . . Therapeutic revolution . . . Feminist revolution . . . Divorce revolution. Each feeding and sustaining one another. Each weakening the institution of marriage, the foundation of stable family life.”<sup>32</sup> By addressing this article to the threat from homosexual activists, I do not mean to minimize the threat—or the damage already done—by what we should rightfully call heterosexual activists, including those in the legal profession. After all, it was *Playboy Magazine* that named the American Law Institute one of the “unsung heroes” of the sexual revolution for its work on decriminalizing sexual activity between consenting adults,<sup>33</sup> something that surely negatively impacted marriage. Nonetheless, it is to the assault by homosexual activists that I now turn.

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31. Alec Walen, *The “Defense of Marriage Act” and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619, 619 (1997). Even though Walen thinks that none of these reasons were an adequate basis to enact DOMA, his work on the legislative history is helpful.

32. Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 1-2 (2003) (citations omitted). One significant attack on marriage not covered by this quotation is the threat represented by the advocates of plural marriage. For this threat, see Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59 (2008).

33. William C. Duncan, “A Lawyer Class”: *Views on Marriage and “Sexual Orientation” in the Legal Profession*, 15 BYU J. PUB. L. 137, 180 n.333 (2001) (“Indeed, the ALI itself notes (presumably with some pride) that *Playboy* magazine ranked the ALI 34th in its list of ‘men and women who changed the face of sex, for good or bad, during the past hundred years.’ (citation omitted). The entry, according to the ALI Reporter read: ‘The American Law Institute: The unsung heroes of the sexual revolution. In 1960 this group of legal scholars drafted a model penal code that decriminalized sexual activity between consenting adults (from sodomy to fornication).’” (citation omitted)).

### III. THE ASSAULT OF THE HOMOSEXUAL ACTIVISTS

While homosexual activists make no bones about their assault on marriage, they are not unified in their agenda. Some really want to obtain same-sex marriage; others seek to destroy marriage as an institution.<sup>34</sup> The law review literature is rife with articles by homosexual activists and academicians that lay out alternate battle plans for achieving same-sex marriage.<sup>35</sup>

Although some may object to the characterization, two main approaches have been identified, with each having sub-approaches:

In research exploring the dominant sexual ideologies in lesbian, gay, bisexual, and transgender (LGBT) communities published in the *Journal of Homosexuality* in 2003, the authors identify two “prominent sexual ‘ideological types’”—assimilationist and radical. These positions are familiar, especially in the context of the same-sex marriage debates. But the truth is, each one of these positions comes in multiple flavors. Within the assimilationist position, there are dignity strands, but there are also moralist strands. So too in the radical position, where there is a wide range of positions. In the gay-marriage context, for instance, there are arguments against the institution of marriage per se, arguments against the resulting exclusion of marriage laws, as well as more strategic arguments against marriage for gays. And these tensions have been present for a long time. The different variations are themselves different ideologies. The two ideal types form a spectrum, not a dichotomous pair. There are, in effect, moral assimilationists, incremental assimilations [sic], strategic assimilationists, among others, as well as radical anti-assimilationists, libertarian radicals, and separatists—a whole plethora of gay-friendly ideologies in the identified LGBT community.<sup>36</sup>

From the point of view of someone on the outside looking in, I would say that assimilationists believe that they seek to *obtain* marriage; radicals believe that they seek to *destroy* it. However, those of us who seek to

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34. See, e.g., *infra* notes 36, 38-43 and accompanying text.

35. See, e.g., *infra* notes 36, 38-43 and accompanying text. In this span of notes there are both articles written by homosexual activists and articles interacting with such articles.

36. Bernard E. Harcourt, “*You Are Entering a Gay and Lesbian Free Zone*”: *On the Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503, 521-22 (2004).

*defend* marriage,<sup>37</sup> believe that if *either* the assimilationists or the radicals succeed, marriage will be destroyed: If same-sex couples can be declared to be married, marriage will have been redefined, and *ipso facto*, destroyed. When an institution is facing a proposed significant change, those who oppose the change will often object that the institution *as we know it* will cease to exist. While such assertions may sometimes be hyperbole, sometimes they are completely accurate. The latter is the case with marriage: If the assimilationists succeed in obtaining marriage, it will cease to exist as we know it. For example, it will cease to exist as an exclusively man-woman institution. It will also cease to exist as an institution linked to procreation. This was certainly the view of one of the dissenting Justices in *Goodridge v. Department of Public Health*,<sup>38</sup> the Massachusetts same-sex marriage case. Justice Cordy wrote that “[p]aramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized.”<sup>39</sup>

Professor Lynn Wardle has also noted that some homosexual activists themselves have admitted that they seek to transform the meaning of marriage:

Leading advocates acknowledge that same-sex marriages are different than traditional marriage. They are different because same-sex couples’ relationships are different, and their expectations of those relationships as marriages are different. These differences strike at the very core of the concept and nature of marriage. To accommodate same-sex marriage, the concept of the legal institution of marriage will have to be reformed.

Thus, attorney Evan Wolfson argues for same-sex marriage because “marriage is something that we [gay and lesbian couples] can shape.” Professor William Eskridge argues for same-sex marriage on the ground that gays and lesbians who marry “buy[] into an institution that is changing.” Another same-sex marriage

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37. I acknowledge that this is a loaded statement from the point of view of our opponents. However, I use this language consistently with the competing views explained above in notes 3-5 and accompanying text. The reader should understand that all subsequent similar statements are made in the same context.

38. 798 N.E.2d 941 (Mass. 2003).

39. *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting).

advocate argues that “legalizing same-sex unions might even transform marriage into a state divested of its sexist base.”<sup>40</sup>

Professor Wardle further explained the extent of the transformation sought:

[S]ame-sex marriage advocates perceive their efforts as designed to “transform” *the core meaning and concept of* marriage. That desired transformation is so fundamental that it would constitute a basic replacement of the essential concept of marriage. Moreover, claims for same-sex marriage are predicated upon a philosophy that is fundamentally incompatible with traditional marriage.<sup>41</sup>

This is why those defending marriage believe that redefining marriage causes it to cease to exist the way we know it—between one man and one woman. This is why we believe that redefining marriage destroys it.

The attack on marriage proceeds on three fronts. Efforts have been made to obtain the incidents of marriage, to obtain a marriage-like substitute institution, and to obtain marriage *qua* marriage. Writing in the midst of the same-sex marriage battle in Hawaii, Deborah M. Henson explained:

Lesbian and gay couples seek recognition of their bonding as validation of the quality and importance of their relationships and, in part, as a means of ending discrimination against homosexuality in general. Many lesbian and gay couples also want the same sort of civil effects that flow from marriage. Some of these relationship advantages are: employment benefits for their partners and children, particularly reduced or free dependent health care coverage and pension rights; spousal status for medical decision-making or other emergencies where the partner may lack the capacity for making his or her own decisions; certain tax benefits; spousal inheritance and other property rights pertaining to the couple’s joint estate; and joint adoption and custody rights concerning their children.

The equal dignity afforded to homosexual relationships if marriage were an option probably would go further to eradicate the deep-seated prejudice against homosexuals and their families than any other type of legal reform. One family law specialist underscores this position:

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40. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 758-59 (1998).

41. *Id.* at 756-57 (emphasis added).

Even while we resist the regimentation that marriage entails, we accept it as a sort of “gold standard” that signifies the desire for deep and permanent commitment. To be barred from marriage to one’s chosen partner is to see one’s individual relationship trivialised, one’s personal commitment deemed unworthy of public acceptance.

Others share her view. Some who advocate the legalization of same-sex marriage believe that doing so would disrupt the traditional gendered definition of marriage as a power hierarchy for homosexuals and heterosexuals alike, thereby producing a widespread socio-cultural impact stretching beyond merely the lesbian and gay population and providing a model of egalitarian, intimate relationships. However, certainly not all lesbian and gay activists agree with this agenda for change. Some activists and feminists have expressed great dissatisfaction with the patriarchal institution of marriage, and some even consider it better to abolish the institution altogether.<sup>42</sup>

Furthermore, whether as a goal or as the best they can get, homosexual activists have used domestic partnerships, civil unions, and similarly named arrangements as a vehicle to obtain many, and in some cases, all of the benefits of marriage. For example, in 2001, Nancy Maxwell wrote:

“[D]omestic partnership” ordinances have been adopted in recent years in many municipalities, counties and other governmental entities. Although “[d]omestic partnership is not a legal substitute for marriage,” the ordinances provide, for those who have registered as domestic partners, such incentives as group health insurance, family sick leave, bereavement leave, and hospital visitation rights. Today, over six hundred companies, educational institutions, municipalities, and states provide domestic partnership benefits. In addition, the State of Vermont enacted legislation in the spring of 2000 creating “civil unions,” an institution that grants exactly the same rights and benefits of marriage to same-gender couples who enter into them.<sup>43</sup>

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42. Deborah Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii’s Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 557-58 (1993-1994) (quoting Herma Hill Kay, *Private Choices and Public Policy: Confronting the Limitations of Marriage*, 5 AUSTL. J. FAM. L. 69, 85 (1991)).

43. Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT’L & COMP. L. 141, 197-98 (2001).

Thus, whether the plan is to destroy marriage; obtain same-sex marriage; obtain a same-sex marriage-like institution that eliminates marriage's uniqueness; or to obtain for non-married people the incidents heretofore available only to married people, marriage will no longer hold its unique place in our social structure.

There have, of course, been both state and federal responses to the assault on marriage. For several reasons, I will look at the latter first. First, I want to show that DOMA is an inadequate response. Second, I want to demonstrate that even what it has accomplished has been and continues to be subject to constitutional challenge and thus could be lost. Third, I want to show with a sufficient degree of specificity, the types of attacks that can be mounted against efforts to protect marriage. It is simply beyond the scope of this article to examine, in a sufficient level of detail, each of the challenges to state statutes and constitutional provisions that have been brought. Starting with a detailed analysis of the attacks on DOMA will permit me to discuss the situations in the states more generally. Finally, and least importantly, some discussion of the state cases will be introduced in the discussion of the DOMA challenges since the courts often interact with these cases.

#### IV. DOMA AND THE ATTACKS UPON IT

To date, the primary federal response to the assault on marriage has been DOMA.<sup>44</sup> It is important to understand what DOMA does and does not do, to appreciate the adequacy or inadequacy of the states' responses and the need for a federal constitutional amendment.

DOMA does two things. First it defines the terms "marriage" and "spouse" for federal statutory and regulatory law:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>45</sup>

Second, it declares:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or

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44. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

45. 1 U.S.C. § 7 (2006).

judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>46</sup>

Thus, assuming DOMA withstands constitutional challenge, it accomplishes some important things. First, on its face, it prevents the imposition of same-sex marriage at the federal level and it prevents one state from forcing same-sex marriage on the rest of the states.<sup>47</sup> Second, absent federal legislation specifically creating civil unions or something similar, the incidents of marriage are also off-limits to homosexual couples.<sup>48</sup> This latter accomplishment is substantial and indeed has been one of the greatest complaints of DOMA's critics.<sup>49</sup> In a letter dated January 31, 1997, the General Accounting Office (GAO), through an associate general counsel, responded to a research request of the late Representative Henry Hyde (R-IL).<sup>50</sup> In that letter, the GAO identified at least 1049 federal statutes impacted by DOMA.<sup>51</sup> The GAO did not even deal with regulations and indicated that, very likely, significantly more laws were impacted than it had been able to identify.<sup>52</sup> Furthermore, the GAO limited its search to laws enacted prior to DOMA's enactment.<sup>53</sup> Additionally, in some of the litigation, under much looser criteria than that used by the GAO, other numbers have been utilized to show the possible impact of DOMA. For example, the court in *In re Kandou*<sup>54</sup> wrote that Congress itself noted that "[t]he word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times."<sup>55</sup>

However, it is also important to realize what DOMA does not do. It does not prevent states from *voluntarily* honoring each other's same-sex marriages. This is evident from the face of DOMA: It states that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be

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46. 28 U.S.C. § 1738C (2006).

47. *Id.*

48. 1 U.S.C. § 7 (2006).

49. See, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 1 (1997).

50. Letter from Barry R. Bedrick, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary (Jan. 31, 1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>.

51. *Id.* at 2.

52. *Id.* at 2-3. Note the detailed limitations discussed on the GAO's search.

53. *Id.*

54. 315 B.R. 123 (Bankr. W.D. Wash. 2004).

55. *In re Kandou*, 315 B.R. at 132 (quoting H.R. Rep. No. 104-664, at 10 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2914).



required to”<sup>56</sup> recognize a marriage of another of these jurisdictions.<sup>57</sup> Furthermore, on its face, DOMA does not even address domestic partnerships, civil unions, and similar arrangements. Therefore, conceivably, Congress could pass a federal civil unions act that would not use the word “spouse” and would not conflict with DOMA. Indeed, in one area of the law, this very approach has been attempted repeatedly: Since 2000, the Uniting American Families Act (under various names) has been repeatedly introduced in both houses of Congress.<sup>58</sup> The Act would allow same-sex immigrant couples the benefits of marriage in the same way that civil unions do.

Thus, there is plenty for the states to worry about. Until Congress acts to deal with the matter, states are vulnerable under DOMA. However, before turning to what states have done and can do to protect themselves, as discussed in Part V, it must be noted that DOMA is not immune from constitutional challenge.<sup>59</sup> Indeed, DOMA has, as of this writing, already been challenged several times.<sup>60</sup> In addition, the literature is rife with ideas for additional challenges, and as this article is being written, Gay & Lesbian Advocates & Defenders (GLAD) is targeting DOMA again.<sup>61</sup> This time the attack is based on DOMA’s federal provision:

GLAD has run two ads in publications asking homosexual military veterans who wish to be buried with their spouses at Arlington National Cemetery to contact the group. The ad also encouraged same-sex couples to contact them if they were refused the right to care for a sick spouse under a federal law that allows workers to take unpaid medical leaves.<sup>62</sup>

This article will examine the actual past challenges first, then note the other challenges advocated in the literature.

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56. 28 U.S.C. § 1738C (2006) (emphasis added).

57. This is the standard understanding of DOMA. See, e.g., Dwight G. Duncan, *Federal Marriage Amendment and Rule by Judges*, 27 HARV. J.L. & PUB. POL’Y 543, 549 (2004).

58. Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 345, 372-73 (2007).

59. See discussion *infra* Part IV.A.-E. and text accompanying notes 277-80.

60. See discussion *infra* Part IV.A.-E.

61. GLAD Targets Defense of Marriage Act, UNITED PRESS INT’L, Nov. 5, 2007, available at [http://www.upi.com/NewsTrack/Top\\_News/2007/11/05/glad\\_targets\\_defense\\_of\\_marriage\\_act/2443/](http://www.upi.com/NewsTrack/Top_News/2007/11/05/glad_targets_defense_of_marriage_act/2443/) [hereinafter GLAD Targets].

62. *Id.*

### A. AN ABORTIVE ATTACK ON DOMA

In *Mueller v. Commissioner*,<sup>63</sup> the first attempted constitutional attack on DOMA occurred.<sup>64</sup> There, the plaintiff, Robert Mueller, challenged deficiencies issued by the IRS due to Mr. Mueller's failure to file tax returns for the years 1986-1995.<sup>65</sup> Because Mr. Mueller was homosexual, he raised and extensively briefed the argument that DOMA violated "equal protection."<sup>66</sup> However, the Seventh Circuit, in upholding the Tax Court, simply noted that DOMA was not in force during the period for which the deficiencies had been issued.<sup>67</sup>

### B. THE FIRST (REAL) ATTACK ON DOMA

However, the first substantive attack occurred in *In re Kandu*. In fact, the *Kandu* court did not even take notice of *Mueller*, writing, "[t]his Court is unaware of any published opinion by a federal court addressing its constitutionality."<sup>68</sup> This statement, of course, was accurate for two reasons. First, *Mueller* was an unpublished opinion. Second, *Mueller* did not analyze DOMA's constitutionality; it merely noted its inapplicability. Thus, *Kandu* stands as the first case in which certain arguments against DOMA's constitutionality were assessed.

*Kandu* involved two lesbians who had obtained a Canadian same-sex marriage.<sup>69</sup> One of the two women filed a *pro se* Chapter 7 bankruptcy petition, listing the other woman as a joint debtor pursuant to 11 U.S.C. § 302.<sup>70</sup> The court filed an Order to Show Cause for Improper Joint Filing.<sup>71</sup> In response the debtor challenged the constitutionality of Section 2 of DOMA.<sup>72</sup> She alleged that DOMA violated the Tenth Amendment, the principles of international comity, the Search and Seizure Clause of the Fourth Amendment, and the due process and equal protection guarantees of the Fifth Amendment.<sup>73</sup>

The basis of Ms. Kandu's Tenth Amendment challenge was that regulation of marriage is not among Congress's enumerated powers and that that

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63. 2001 U.S. App. LEXIS 9777 (7th Cir. Apr. 6, 2001).

64. *Mueller*, 2001 U.S. App. LEXIS 9777, at \*2.

65. *Id.* at \*1.

66. *Id.*

67. *Id.*

68. *In re Kandu*, 315 B.R. 123, 131 (Bankr. W.D. Wash. 2004).

69. *Id.* at 130.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 131.

power was retained by the states.<sup>74</sup> The court's response was instructive. It noted that DOMA had been enacted as a response to *Baehr v. Lewin*,<sup>75</sup> the case in which the Hawaii Supreme Court appeared to be forcing same-sex marriage on the State of Hawaii.<sup>76</sup> The *Kandu* court cited the legislative history:

Congressional history indicates a profound concern over the consequences such a decision could have on both federal law and the impact it would have on other states. Particularly, with regard to federal law, "a decision by one State to authorize same-sex marriage would raise the issue of whether such couples are entitled to federal benefits that depend on marital status." According to the House Report, "[t]he word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times." Until recently, Congress did not define the term marriage or spouse in those sections, because it was believed that state and federal definitions of those terms were consistent, namely, that marriage is the union of one man and one woman. In light of *Baehr*, Congress recognized the potential for confusion, adopting DOMA to preserve the traditional definition of marriage intended by Congress for application of federal law.<sup>77</sup>

Thus, because DOMA applies only to federal laws and because the states remain free to define marriage as they see fit, the court concluded that DOMA does not violate the Tenth Amendment.<sup>78</sup>

The *Kandu* court also addressed the plaintiff's secondary Tenth Amendment argument.<sup>79</sup> Ms. Kandu had argued that Congress could preempt states' marriage laws only when certain conditions were met.<sup>80</sup> The

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74. *Id.*

75. 852 P.2d 44 (Haw. 1993).

76. *In re Kandu*, 315 B.R. at 132 (citing *Baehr*, 852 P.2d at 68). The *Kandu* court stated that "Congress recognized that the Hawaii Supreme Court appeared to be on the verge of requiring the State of Hawaii to issue marriage licenses to same-sex couples." *Id.* To be precise, the Hawaii Supreme Court sent the case back to the trial court with instructions that Hawaii's opposite-sex only marriage law was presumptively unconstitutional under the state constitution. *Baehr*, 852 P.2d at 68. The State of Hawaii responded by altering its constitution: "The legislature shall have the power to reserve marriage to opposite-sex couples." HAWAII CONST. art. 1, § 23.

77. *In re Kandu*, 315 B.R. at 132 (citations omitted).

78. *Id.*

79. *Id.* at 132-33.

80. *Id.* The court did not explain what conditions Ms. Kandu argued must exist, but noted that she relied upon *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and *United States v. Yazell*, 382 U.S. 341 (1966). In *Hisquierdo*, the Court invoked the Constitution's Supremacy Clause to prevent California's community property law from reaching Railroad Retirement Act benefits in a divorce proceeding. *Hisquierdo*, 439 U.S. at 590-91. In *Yazell*, the Court refused to displace Texas's law of coverture in a dispute over a Small Business Administration loan. 382 U.S. at 358.

court responded by noting that there was no conflict between DOMA and the laws of the state of Washington, where Ms. Kandu resided.<sup>81</sup>

The court next examined Ms. Kandu's comity claim.<sup>82</sup> The court easily disposed of this argument in a two-step process. First, the court noted that Ms. Kandu's argument that the comity of nations is mandatory was simply wrong; comity is voluntary.<sup>83</sup> Second, the court explained why, in this case, it should not grant comity to the Canadian marriage.<sup>84</sup> In so doing, the court relied upon *Hilton v. Guyot*<sup>85</sup> for two propositions of law.<sup>86</sup> The first is that in the instance of a conflict between the laws of two nations, a court must prefer its own laws.<sup>87</sup> The second was a specific application of the first: "[a] judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, *unless contrary to the policy of its own law.*"<sup>88</sup> The court held that Canadian marriage law and DOMA were in conflict; thus DOMA must prevail.<sup>89</sup>

Furthermore, Ms. Kandu's statutory construction arguments did not alter this result.<sup>90</sup> Ms. Kandu had argued that canons of statutory construction required the court to construe the statute in such a way as to "avoid unreasonable interference with the authority of other nations."<sup>91</sup> The court disagreed stating that its job was to apply the statute according to its terms unless it was ambiguous.<sup>92</sup> Finding that DOMA was not ambiguous, it did not deviate from its decision to reject the comity challenge.<sup>93</sup>

Next, the court turned to Ms. Kandu's Fourth Amendment challenge.<sup>94</sup> She claimed that DOMA violated the Search and Seizure Clause.<sup>95</sup> The

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81. *In re Kandu*, 315 B.R. at 133.

82. *Id.*

83. *Id.*

84. *Id.*

85. 159 U.S. 113 (1895).

86. *In re Kandu*, 315 B.R. at 133.

87. *Id.* (citing *Hilton*, 159 U.S. at 163).

88. *Id.* (quoting *Hilton*, 159 U.S. at 167) (emphasis added).

89. *Id.* at 134.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* The first thing the court did was clarify confusion over the nature of the claim:

The Debtor next alleges that DOMA violates the Fourth Amendment to the U.S. Constitution because it takes federal rights and responsibilities from married same-sex couples. Although the Debtor used the word "take" that suggests an argument under the Takings Clause of the Fifth Amendment to the U.S. Constitution, the Debtor made clear in her memorandum, as well as at oral argument, that she intended her argument to fall within the search and seizure provisions of the Fourth Amendment.

court acknowledged that the Supreme Court has extended the Clause's application beyond its origin in the criminal arena to the civil arena.<sup>96</sup> The *Kandu* court noted, however, that this extension occurs "only when the purpose of the governmental action is within the traditional meaning of search and seizure."<sup>97</sup>

Applying the "traditional meaning" standard to Ms. Kandu's argument, the court rejected it.<sup>98</sup> First, the court articulated the test it would employ: "According to its traditional definition, a seizure under the Fourth Amendment occurs when the government interferes with an individual's possessory interest in property in some meaningful way."<sup>99</sup> Noting that this test requires more than "an abstract need or desire for the benefits claimed,"<sup>100</sup> the court emphasized that "'a legitimate claim of entitlement'" to the benefits" is required to satisfy the test.<sup>101</sup> Unfortunately for Ms. Kandu, she cited no legal authority to support her argument and actually conceded at oral argument that her "her reasoning has no legal basis."<sup>102</sup> Thus, the court easily found no violation of the Fourth Amendment.<sup>103</sup>

Finally, the court examined the Fifth Amendment due process and equal protection claims. Based upon the space given these claims in the opinion, the court took these more seriously.<sup>104</sup> Ms. Kandu argued that the fundamental right to marry included the fundamental right to marry someone of the same sex and that DOMA's classifications should be evaluated under heightened scrutiny and struck down under that standard.<sup>105</sup>

The United States Trustee, who filed a brief in the case, argued that the United States Supreme Court case of *Baker v. Nelson*<sup>106</sup> disposed of both the due process and the equal protection argument.<sup>107</sup> The court first walked through the significance of the *Nelson* case and why it did not consider it to be binding.<sup>108</sup> In *Baker*, the Minnesota Supreme Court affirmed a

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*Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 135 (citing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

100. *Id.* (citing *Greene v. Babbitt*, 64 F.3d 1266, 1271 (9th Cir. 1995)).

101. *Id.* (citing *Greene*, 64 F.3d at 1271 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))).

102. *Id.*

103. *Id.*

104. *Id.* at 135-48.

105. *Id.* at 135.

106. 409 U.S. 810 (1972).

107. *In re Kandu*, 315 B.R. at 135.

108. *Id.* at 135-38.

trial court's quashing of an alternate writ of mandamus, which a homosexual couple had brought in order to compel the issuance of a marriage license.<sup>109</sup> Baker appealed to the United States Supreme Court under its then-mandatory appellate jurisdiction under the now-repealed 28 U.S.C. § 1257(2).<sup>110</sup> The Supreme Court dismissed the appeal for want of a substantial federal question.<sup>111</sup> Such a dismissal is a decision on the merits.<sup>112</sup> This was significant since the *Baker* plaintiffs, like Ms. Kandou, had both due process and equal protection claims.<sup>113</sup>

The *Kandou* court, however, carefully circumscribed *Baker's* reach under the rule that a dismissal for want of a substantial federal question is a decision on the merits:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

When the Supreme Court summarily affirms, it “‘affirm[s] the judgment but not necessarily the reasoning by which it was reached.’”

Nonetheless, the Supreme Court has limited the scope of the precedential value of such summary decisions. “The precedential effect of a summary affirmance can extend no farther than ‘the precise issues presented and necessarily decided by those actions.’” Furthermore, “‘questions which ‘merely lurk in the record,’ . . . are not resolved, and no resolution of them may be inferred.’”<sup>114</sup>

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109. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

110. *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 872-73 (C.D. Cal. 2005). In *Smelt*, the *Baker* argument was again made and analyzed. The *Smelt* court gave more complete procedural details than the *Kandou* court and is cited here for that reason.

111. *In re Kandou*, 315 B.R. at 136 (citing *Baker v. Nelson*, 409 U.S. 810 (1972)).

112. *Id.* (citing *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975)).

113. *Baker*, 191 N.W.2d at 186.

114. *In re Kandou*, 315 B.R. at 136 (citations omitted).

The court also opined that significant differences existed between its case and *Baker*:

Yet there are differences that could sufficiently distinguish *Baker* from the current case. For instance, the appellants in *Baker* sought review of the constitutionality of a state marriage licensing statute, while the Debtor here seeks review of subsequently-enacted federal legislation with its own Congressional history that concerns exclusively federal benefits. Additionally, the appellants in *Baker* challenged the statute under the Equal Protection and Due Process Clauses of the Fourteenth Amendment; the Fifth Amendment is at issue here.<sup>115</sup>

The distinctions are not altogether persuasive. The court did not even attempt to explain the significance of the latter distinction. As for the former distinction, determining who can marry is tantamount to defining marriage. That is certainly the approach the Minnesota Supreme Court took, consulting as it did various dictionaries to define marriage.<sup>116</sup> Similarly, while DOMA clearly implicates numerous benefits,<sup>117</sup> on its face, DOMA *defines* marriage. Furthermore, a subsequent court that addressed equal protection and due process challenges to DOMA decided that such challenges present “the same issues” as those presented in *Baker*.<sup>118</sup>

The court also noted that another limitation on the precedential value of dismissals for want of a substantial federal question is that such value only continues “until ‘doctrinal developments indicate otherwise.’”<sup>119</sup> Ms. Kandu argued that *Lawrence v. Texas*,<sup>120</sup> *Romer v. Evans*,<sup>121</sup> and *Zablocki v. Redhail*,<sup>122</sup> constituted such doctrinal developments.<sup>123</sup>

Based on the two differences noted and the possible doctrinal developments, the court held that *Baker* did not control the case.<sup>124</sup> Therefore, the court turned to the merits of the due process and equal protection claims.<sup>125</sup>

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115. *Id.* at 137.

116. *Baker*, 191 N.W.2d at 186 n.1.

117. *See supra* text accompanying notes 50-55.

118. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005).

119. *In re Kandu*, 315 B.R. at 137 (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1974)).

120. 539 U.S. 558 (2003) (challenging the Texas sodomy statute).

121. 517 U.S. 620 (1995) (challenging Colorado’s constitutional amendment prohibiting special rights for homosexuals).

122. 434 U.S. 374 (1977) (challenging Wisconsin’s statute regulating re-marriage of parents in arrears on child support payments).

123. *In re Kandu*, 315 B.R. at 137-38.

124. *Id.* at 138.

125. *Id.* at 138-48.

The court began by traversing the familiar ground that if legislation impacted a fundamental right, it was subject to strict scrutiny; while if it did not impact a fundamental right, it was subject only to rational basis scrutiny.<sup>126</sup> The court invoked the Supreme Court's much cited definitions of fundamental rights as being those that are "“implicit in the concept of ordered liberty””<sup>127</sup> without which "“neither liberty nor justice would exist.””<sup>128</sup> Such rights must be "“objectively, “deeply rooted in this Nation's history and tradition.””<sup>129</sup> Marriage is a fundamental right.<sup>130</sup> Thus, the question became whether the fundamental right to marry includes the fundamental right to same-sex marriage.<sup>131</sup> The court pointed out that no federal court had ever *explicitly* held that there was a fundamental right to same-sex marriage.<sup>132</sup> Thus, the court had to determine this question.<sup>133</sup>

In so doing, the court noted Ms. Kandu's argument that such a right had been *implicitly* recognized by the United States Supreme Court in *Lawrence* and by two non-federal courts,<sup>134</sup> namely the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*<sup>135</sup> and by the Superior Court for King County, Washington in *Andersen v. King County*.<sup>136</sup> The *Kandu* court addressed each case in turn.

First, it noted that the *Goodridge* decision was decided under the Massachusetts Constitution which the Supreme Judicial Court has declared to be more protective of individual liberty, equality, and spheres of private life than the United States Constitution.<sup>137</sup> The court next looked at *Lawrence*. Ms. Kandu tried to read *Lawrence* broadly, by stretching its holding—that the Due Process Clause protects the right of two individuals of the same-sex to engage in private consensual sexual relations—to stand for the proposition that the Clause also protects the right of same-sex couples to marry.<sup>138</sup> The court chided Ms. Kandu, however, for failing to note the Court's explicit statement about marriage: “[T]he case did ‘not

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126. *Id.* at 138.

127. *Id.* at 138-39 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

128. *Id.* at 139 (quoting *Glucksberg*, 521 U.S. at 721 (quoting *Palko*, 302 U.S. at 325)).

129. *Id.* (quoting *Glucksberg*, 521 U.S. at 720-21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion)) (emphasis added by the *Kandu* court)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. 798 N.E.2d 941 (Mass. 2003).

136. No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Aug. 4, 2004).

137. *In re Kandu*, 315 B.R. at 139 (citing *Goodridge*, 798 N.E.2d at 948-49).

138. *Id.*



involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>139</sup> The *Kandu* court also pointed out that the *Lawrence* Court had applied rational basis scrutiny, not strict scrutiny to the Texas sodomy law.<sup>140</sup> This was significant in its analysis; it went on to cite *Standhardt v. Superior Court of Arizona*,<sup>141</sup> a case in which the Court of Appeals of Arizona upheld Arizona’s opposite-sex marriage law.<sup>142</sup> The *Standhardt* court held, as described by the *Kandu* court, “that if the Supreme Court did not view same-gender sexual relations to be a fundamental right, the Court could not have intended to confer such status on same-gender marriage.”<sup>143</sup>

At bottom, and in light of all of the above, the *Kandu* court simply believed that as a bankruptcy court—“a trial court of limited jurisdiction”—it should not declare a new fundamental right.<sup>144</sup> On that basis the court simply stated that it disagreed with the Superior Court for King County, Washington in *Andersen*, which had come to the opposite conclusion.<sup>145</sup> Of course, with hindsight we now know that the *Anderson* trial court was reversed on appeal to the state supreme court.<sup>146</sup>

Turning to the equal protection claim, the court again traversed familiar territory. It explained that while the Fifth Amendment does not have an equal protection clause, it has been construed to have an equal protection “component.”<sup>147</sup> The court then evaluated and rejected Ms. Kandu’s two proffered classes that purportedly required the court to engage in strict scrutiny analysis: gender and homosexuality.<sup>148</sup>

As for the gender classification argument, *Kandu* relied on the so-called *Loving* analogy.<sup>149</sup> The *Loving* analogy, based upon the case of *Loving v. Virginia*,<sup>150</sup> is standard fare in same-sex marriage litigation.<sup>151</sup> In

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139. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

140. *Id.* at 139-40.

141. 77 P.3d 451 (Ariz. 2003).

142. *In re Kandu*, 315 B.R. at 140 (citing *Standhardt*, 77 P.3d at 457).

143. *Id.* (quoting *Standhardt*, 77 P.3d at 457).

144. *Id.* at 141.

145. *Id.* at 140.

146. *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006). The case involved state constitutional challenges to the state DOMA. *Id.*

147. *In re Kandu*, 315 B.R. at 141-42.

148. *Id.* at 142-43.

149. *Id.*

150. 388 U.S. 1 (1966).

151. For the use of the *Loving* analogy in another challenge to DOMA, see *infra* text accompanying notes 248 & 249. For the use of the *Loving* analogy in other same-sex marriage cases, see, e.g., *Shahar v. Bowers*, 114 F.3d 1097, 1105 n.17 (11th Cir. 1997); *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003); *In re Marriage Cases*, 143 Cal. App. 4th 873, 912 (Ct. App. 2006); *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993); *Conaway v. Deane*, 932

*Loving*, the United States Supreme Court declared that Virginia's anti-miscegenation laws violated the Equal Protection Clause even though on its face it applied equally to blacks and whites.<sup>152</sup> The *Kandu* court succinctly summarized the pertinent part of the *Loving* case:

In *Loving*, the State of Virginia argued that its anti-miscegenation statutes did not violate constitutional prohibitions against racial classifications because the statutes affected both racial groups equally. The Supreme Court disagreed, noting that the fact of equal application does not immunize the state from the "very heavy burden of justification" that the Equal Protection Clause "traditionally required of state statutes drawn according to race." The Court held that the laws at issue were founded on an impermissible racial classification and therefore could not be used to deny interracial couples the fundamental right to marry.<sup>153</sup>

In response to Ms. Kandu's argument, the court noted, first, the United States Trustee's argument that "DOMA does not discriminate on the basis of sex because (1) on its face, it makes no detrimental classification that disadvantages either men or women; (2) it cannot be traced to a purpose to discriminate against either men or women; and (3) it does not reflect either the baggage of sexual stereotypes or stigmatization of women";<sup>154</sup> and second, that various other courts had held that opposite-sex marriage laws do not create a sex-based classification.<sup>155</sup> However, the court hung its hat on the fact that the legislative history revealed no discriminatory purpose,<sup>156</sup> thus finding the United States Trustee's second argument virtually outcome determinative.

Turning to the second proffered classification, homosexuality, the court also rejected it, based primarily upon the reasoning of the Ninth Circuit in *High Tech Gays v. Defense Industries Security Clearance Office*,<sup>157</sup> where the court held that homosexuals constituted neither a suspect nor a quasi-suspect class.<sup>158</sup> Thus, any classification based upon homosexuality is

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A.2d 571, 599 (Md. 2007); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006).

152. *Loving*, 388 U.S. at 2, 8-9.

153. *In re Kandu*, 315 B.R. at 142-43.

154. *Id.* at 142.

155. *Id.* (citing *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Dean v. District of Columbia*, 653 A.2d 307, 362-63 & n.2 (1995) (Steadman, J. concurring); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974)).

156. *Id.*

157. 895 F.2d 560 (9th Cir. 1990).

158. *In re Kandu*, 315 B.R. at 143-44.

subject only to rational basis scrutiny.<sup>159</sup> Furthermore, the court held that the Supreme Court's decision in *Lawrence* did not impact the *High Tech* court's analysis.<sup>160</sup>

Thus, the *Kandu* court proceeded to analyze both the equal protection and due process claims under a rational basis test. The court took the rational basis approach seriously, noting what a high hurdle it is for a plaintiff challenging a governmental action:

“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*” Rational basis review is “a paradigm of judicial restraint” and “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” “Nor does it authorize ‘the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.’”

A statute is presumed constitutional. “‘The burden of establishing the unconstitutionality of a statute rests on him who assails it.’” The burden is to “‘negative every conceivable basis which might support it,’ whether or not the basis has a foundation in the record.” The government “has no obligation to produce evidence to sustain the rationality of a statutory classification.” “Courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it ‘is not made with mathematical nicety or because in practice it results in some inequality.’” “A statutory classification fails rational-basis review only when it ‘rests on grounds wholly irrelevant to the achievement of the State’s objective.’”<sup>161</sup>

The court mentioned both the governmental interest advanced by the United States Trustee and the interests the court itself found in the legislative history.<sup>162</sup> The trustee argued that DOMA was rationally related to the interest in encouraging relationships that are optimal for procreating and

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159. *Id.*

160. *Id.* The court noted that the *Lawrence* Court specifically refused to declare homosexuals a suspect class. *Id.* at 138.

161. *Id.* at 144-45 (citations omitted) (alteration in original).

162. *Id.* at 145.

raising children.<sup>163</sup> The court discerned four additional interests in the legislative history: “(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.”<sup>164</sup> However, the court upheld DOMA on the ground offered by the Trustee and thus, declined to evaluate the reasons stated in the legislative history.<sup>165</sup>

Ms. Kandu countered with various reasons as to why DOMA was not rationally related to the purported interests:

(1) [A]s to procreation, federal recognition of marriage has never been limited to couples willing or able to conceive and raise children; (2) the exclusion of all same-sex married couples from federal recognition undermines the state’s goal to encourage responsible procreation, because same-sex couples can reproduce with outside assistance; (3) as to the raising of children by both biological parents, the Debtor alleges that because same-sex couples can now both be biological parents of a child, DOMA in reality undermines the state’s goal; and (4) the Supreme Court has held that procreation is not a necessary or definitive aspect of marriage and has specifically rejected the notion that the purpose of marriage is to encourage the rearing of children by both of their biological parents.<sup>166</sup>

The court’s answer was that rational basis scrutiny permitted DOMA to be simultaneously over- and underinclusive.<sup>167</sup>

Finally, Ms. Kandu argued that DOMA should suffer the same fate that Colorado’s “Amendment 2” suffered in *Romer v. Evans*.<sup>168</sup> In *Romer*, the Supreme Court held that a state constitutional amendment could not withstand rational basis scrutiny because it targeted homosexuals for disparate treatment.<sup>169</sup> The *Kandu* court noted that Amendment 2 *facially* targeted

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163. *Id.*

164. *Id.* (quoting H.R. Rep. No. 104-664, at 12, *reprinted in* 1996 U.S.C.C.A.N. at 2916).

165. *Id.* at 148.

166. *Id.* at 145.

167. *Id.* at 146-48.

168. *Id.* at 147 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

169. *Romer*, 517 U.S. at 635. Amendment 2 reads:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority

homosexuals and withdrew from them all political protections.<sup>170</sup> The court held that unlike Amendment 2, DOMA was not driven by animus.<sup>171</sup>

Having thus denied Ms. Kandu's due process and equal protection claims, it rejected one last argument. Ms. Kandu argued that since her same-sex partner had died since the filing of the petition, granting the petition would not offend the purpose of DOMA, i.e., the court would not have to recognize an ongoing relationship as a marriage.<sup>172</sup> The court countered with the common sense answer that it did, in fact, have to evaluate the relationship at the time of the filing of the petition.<sup>173</sup> In light of its prior analysis, the court refused to do so and upheld DOMA against all of Ms. Kandu's claims.<sup>174</sup>

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status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. 2, § 30b.

170. *In re Kandu*, 315 B.R. at 147. As president of the National Legal Foundation, the organization that helped draft Amendment 2, I utterly reject the notion that Amendment 2 was motivated by animus toward homosexuals. It is all too easy to make this claim. For example, David Tedhams quotes a snippet from a letter written by one of our former staff attorneys advocating language "'prohibit[ing] homosexuals from claiming any rights regarding employment, education, housing or status,' essentially writing discrimination into the fundamental law of Colorado and influencing the activity of state agents." David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 159 n.161 (1994) (citation omitted). This is clearly taken out of context. These rights would be denied *only if sought because of* "homosexual, lesbian or bisexual orientation, conduct, practices or relationships. . . ." COLO. CONST. art. 2, § 30b.

Justice Scalia also utterly rejected the *Romer* Court's assertion that Amendment 2 had been motivated by animus:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

*Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (citation omitted).

Justice Scalia later put a finer point on the matter:

The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct.

*Id.* at 644.

171. *In re Kandu*, 315 B.R. at 147.

172. *Id.*

173. *Id.*

174. *Id.*

### C. THE SECOND ATTACK ON DOMA

The second major attack on DOMA occurred in *Wilson v. Ake*,<sup>175</sup> a Florida case. There, two lesbians, who had been married in Massachusetts, tried to have their marriage recognized in Florida.<sup>176</sup> Invoking both the Florida marriage statute and DOMA, a deputy clerk of court refused to do so.<sup>177</sup> In response, the lesbians sued seeking declaratory and injunctive relief as to both laws.<sup>178</sup> Then-Attorney General Ashcroft filed a Motion to Dismiss and the opinion addresses only the DOMA claims.<sup>179</sup>

The plaintiffs claimed that DOMA violated the Full Faith and Credit Clause, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the Commerce Clause.<sup>180</sup> We will look at each in turn.

The court first addressed the plaintiffs' Full Faith and Credit arguments. As summarized by the court, the Plaintiffs' argued that

“[o]nce Massachusetts sanctioned legal same-gender marriage, all other states should be constitutionally required to uphold the validity of the marriage.” Plaintiffs believe that the differences in individuals' rights to enter into same-sex marriages among the States, such as Florida and Massachusetts, is exactly what the Full Faith and Credit Clause prohibits. They also assert that DOMA is beyond the scope of Congress' legislative power under the Full Faith and Credit Clause because Congress may only regulate what effect a law may have, it may not dictate that the law has no effect at all.<sup>181</sup>

The court disagreed. It thought DOMA was a quintessentially correct exercise of Congress's authority under the Full Faith and Credit Clause, or in the court's words “exactly what the Framers envisioned.”<sup>182</sup> Were this not so, the court explained, any state could force its views on the entire country.<sup>183</sup>

Turning to plaintiffs' due process and equal protection claims, the court addressed Ashcroft's argument that *Baker* controlled the case.<sup>184</sup> The

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175. 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

176. *Wilson*, 354 F. Supp. 2d at 1301.

177. *Id.*

178. *Id.* at 1301-02.

179. *Id.* at 1302 n.5.

180. *Id.* at 1302.

181. *Id.* at 1303 (citations omitted).

182. *Id.*

183. *Id.*

184. 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

*Wilson* court, unlike the *Kandu* and *Smelt v. County of Orange*<sup>185</sup> district courts, as noted above and below,<sup>186</sup> considered *Baker* to be binding, and therefore concluded that the case must be dismissed.<sup>187</sup> Nonetheless, the court engaged in a brief analysis of both the equal protection and the due process claims.

Starting with the due process claim, the court first noted that the plaintiffs invoked the Fourteenth Amendment's Due Process Clause, while they should have invoked the Fifth Amendment's Due Process Clause since only the latter applies to the federal government.<sup>188</sup> The court then traversed the same black letter law ground noted above when discussing the *Kandu* case.<sup>189</sup> The court also noted that while the right to marry was a fundamental right, no federal court had extended that right to include the right to marry someone of the same sex.<sup>190</sup>

The court also rejected plaintiffs' argument that the Supreme Court's logic in *Lawrence* implicitly led to the conclusion that same-sex marriage was a fundamental right.<sup>191</sup> The court rejected the argument for two reasons. First, that is how *Lawrence* had been interpreted by others, including the Eleventh Circuit, whose opinions were binding on it;<sup>192</sup> the Arizona Court of Appeals in *Standhardt*;<sup>193</sup> and Justice Scalia in dissent in *Lawrence*.<sup>194</sup> Second, "the majority in *Lawrence* was explicitly clear that its holding did not extend to the issue of same-sex marriage."<sup>195</sup>

The court then moved on to the equal protection claim.<sup>196</sup> The court again relied upon Eleventh Circuit precedent for its analysis. It simply noted that the Eleventh Circuit had declared that homosexuals were not a

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185. 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part, vacated in part and remanded by* 447 F.3d 673 (9th Cir. 2006).

186. *See supra* text accompanying notes 108-124; *see also infra* text accompanying notes 233-243.

187. *Wilson*, 354 F. Supp 2d. at 1305.

188. *Id.* at 1305 n.9.

189. *Id.* at 1305-06.

190. *Id.* at 1306.

191. *Id.*

192. *Id.* ("We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right." (quoting *Lofton v. Sec. of Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004)) and citing *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004)).

193. *Id.* (citing *Standhardt v. Superior Ct.*, 77 P.3d 451, 456-57 (Ariz. Ct. App. 2003)).

194. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting)) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'").

195. *Id.*

196. *Id.* at 1307.

suspect class and then segued immediately into rational basis review of both the due process and equal protection claims.<sup>197</sup>

Here, the court did not quite issue the paean to rational basis scrutiny that the *Kandu* court had.<sup>198</sup> Nonetheless, the court took the same forceful, if more concise approach. In particular the court noted that “[t]he burden is on the Plaintiffs to negate ‘every conceivable basis which might support [the legislation], whether or not the basis has a foundation in the record.’”<sup>199</sup> The court noted that General Ashcroft argued that:

The United States asserts that DOMA is rationally related to two legitimate governmental interests. First, the government argues that DOMA fosters the development of relationships that are optimal for procreation, thereby encouraging the “stable generational continuity of the United States.” DOMA allegedly furthers this interest by permitting the states to deny recognition to same-sex marriages performed elsewhere and by adopting the traditional definition of marriage for purposes of federal statutes. Second, DOMA “encourage[s] the creation of stable relationships that facilitate the rearing of children by both of their biological parents.” The government argues that these stable relationships encourage the creation of stable families that are well suited to nurturing and raising children.<sup>200</sup>

Noting that the plaintiffs “offer[ed] little to rebut” General Ashcroft’s argument—instead just repeatedly arguing the level of scrutiny—and that the Eleventh Circuit had already held that encouraging the raising of children in homes with a married mother and father is a legitimate interest, the court rejected the equal protection and due process claims.<sup>201</sup>

#### D. THE THIRD ATTACK ON DOMA

The third significant attack on DOMA was repelled in *Smelt*. Although as pointed out at the end of Part III,<sup>202</sup> I intend to deal primarily with the challenges to DOMA in this part. Since the *Smelt* case involved multiple challenges to both DOMA and the California marriage laws, it is worth a brief interruption to demonstrate that the assault on marriage does not lack

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197. *Id.* at 1307-08 (citing *Lofton*, 358 F.3d at 818).

198. *See In re Kandu*, 315 B.R. 123, 144-45 (Bankr. W.D. Wash. 2004).

199. *Wilson*, 354 F. Supp. 2d at 1308 (quoting *Lofton*, 358 F.3d at 818) (alteration in original).

200. *Id.* (citations omitted) (alterations in original).

201. *Id.* at 1308-09 (alterations in original).

202. *See* discussion *supra* at Part III.



imagination. States do indeed need to protect the institution. In *Smelt*, two homosexuals who had tried unsuccessfully to marry in California claimed that the pertinent California laws violated

equal protection; due process; “the Right to Life, Liberty and the Pursuit of Happiness”; “the right to be free from an undue invasion of the Right to Privacy; . . . the Ninth Amendment Right of Reservation of all Rights not Enumerated to the People, and the Right to Travel, and The Right of Free Speech.” The complaint also asserted that [one of the California laws] violates the Full Faith and Credit Clause of the United States Constitution.<sup>203</sup>

In addition to challenging the constitutionality of the California marriage statutes, the plaintiffs challenged the constitutionality of two parts of DOMA.<sup>204</sup> First, they alleged that Section 2 of DOMA “violates the United States Constitution’s Due Process Clause (Fifth Amendment), equal protection rights (Fifth Amendment), the Right to Privacy, and the Full Faith and Credit Clause.”<sup>205</sup> Second, they alleged that Section 3 of DOMA violates “the ‘liberty interests protected by the Due Process Clause;’ discriminates ‘on the basis of gender’ and ‘sexual orientation’ in violation of equal protection; and violates ‘the privacy interests protected by the Right to Privacy.’”<sup>206</sup>

The district court abstained from deciding the state claims; held that the plaintiffs lacked standing to challenge Section 2 of DOMA; held that the plaintiffs did have standing to challenge Section 3 of DOMA, and declared Section 3 constitutional.<sup>207</sup> The Ninth Circuit affirmed the district court on its abstention decision.<sup>208</sup> On the DOMA claims, the Ninth Circuit affirmed the district court’s standing decision as to Section 2.<sup>209</sup> However, the Ninth Circuit reversed the district court’s standing decision as to Section 3.<sup>210</sup> Thus, the Ninth Circuit did not analyze the attack on Section 3.

Nonetheless some instructive insights can be garnered from the Ninth Circuit’s opinion, as well as from the district court’s opinion. After laying out the black letter law on Article III and prudential standing,<sup>211</sup> the Ninth

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203. *Smelt v. County of Orange*, 447 F.3d 673, 677 (9th Cir. 2006).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 678. The district court invoked, and the Ninth Circuit upheld the *Pullman* abstention. *Id.* (citing *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)).

208. *Id.* at 681-82.

209. *Id.* at 683.

210. *Id.*

211. *Id.* at 682-83.

Circuit evaluated the plaintiffs' standing vis-à-vis each section.<sup>212</sup> As for Section 2, the Ninth Circuit emphasized as I have above,<sup>213</sup> that "no state is required to give full faith and credit"<sup>214</sup> to another jurisdiction's same-sex marriages. The plaintiffs' "insurmountable hurdle"<sup>215</sup> was that they could not show any actual or imminent injury since no state had declared them married.<sup>216</sup> As for section 3, the Ninth Circuit reiterated that they were not married under any state's law (or, and this was an additional point, any foreign country's law).<sup>217</sup> Furthermore, they had not applied for, let alone been denied, a federal benefit.<sup>218</sup> Additionally, the Ninth Circuit specifically rejected the district court's reliance upon the plaintiffs' status as domestic partners under California law.<sup>219</sup>

Furthermore, while technically *dicta*, the Ninth Circuit explained that even if the plaintiffs had had Article III standing, they would have still lacked prudential standing.<sup>220</sup> This may prove significant for future challenges. The Ninth Circuit noted that the plaintiffs' challenge to section 3 was a facial challenge and that they could not claim prudential standing as either taxpayers or citizens.<sup>221</sup> Specifically, the court noted that the plaintiffs had argued that DOMA impacted over 1,000 federal statutes,<sup>222</sup> and that

their attack on DOMA in its multitude of applications is one that every tax-payer and citizen in the country could theoretically bring on the basis that the definition does not include some favorite grouping within its definition of marriage. Thus, anyone could argue that some federal statute might deprive some person in some group of some benefit. Any citizen or taxpayer could as easily claim that some application or other of the DOMA definition to some as yet undesignated statute, which confers some public

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212. *Id.* at 682-86.

213. *See supra* text accompanying notes 56-57.

214. *Smelt*, 447 F.3d at 683.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 684.

219. *Id.*

220. *Id.* at 684-86.

221. *Id.*

222. *Id.* at 684-85. Interestingly, the court complained that the plaintiffs "would leave [it] to fossick in over a thousand statutory provisions to find those that may apply to them at this time should they seek benefits." *Id.* at 685 n.35. Apparently, the plaintiffs failed to cite the GOA letter or the legislative history mentioned above. *See supra* text accompanying notes 51-55.

benefit or right, might exclude that person because DOMA requires a legal union, a man, and a woman.<sup>223</sup>

The court went on to complain that “[b]ecause of the generality of the abstract facial attack made here, neither we, nor anyone else, can know whether in the context of some particular statute as applied to some particular person in some particular situation Congress’s use of the word ‘marriage’ will amount to an unconstitutional classification.”<sup>224</sup> It seems that GLAD, in recruiting members of the military to mount a constitutional challenge to DOMA, has heeded the Ninth Circuit’s concerns.<sup>225</sup>

In sum, the only point of disagreement between the Ninth Circuit and the district court was over the plaintiffs standing to challenge Section 3 of DOMA. The district court in *Smelt* held that:

Plaintiffs are registered domestic partners in California, which is a “legal union” recognized by the state. For purposes of federal law, DOMA defines “marriage” as a legal union between one man and one woman. Plaintiffs’ legal union is excluded from the federal definition of marriage because it is not between a man and a woman. Because of DOMA’s definition, Plaintiffs’ legal union cannot receive the rights or responsibilities afforded to marriages under federal law. This is a concrete injury personally suffered by Plaintiffs, caused by DOMA’s definition of marriage. The United States concedes, and the Court agrees, Plaintiffs have standing to challenge section 3.<sup>226</sup>

Obviously, the Ninth Circuit disagreed with the concession of the United States, which had intervened as a defendant at the district court’s invitation pursuant to 28 U.S.C. § 2403(a).<sup>227</sup>

It is worth noting the district court’s comments about the merits of the challenge to Section 3. First, like the *Kandu* court and unlike the *Wilson* court, it rejected the argument that its case was controlled by *Baker v. Nelson*.<sup>228</sup> Second, it analyzed each of the challenges to Section 3.<sup>229</sup> As for *Baker*, the court, like the *Kandu* court, walked through the significance

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223. *Id.* at 685.

224. *Id.*

225. See GLAD Targets, *supra* note 61.

226. *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 871 (C.D. Cal 2005).

227. *Id.* at 865. The language of the statute states that when a suit challenges the constitutionality of a federal statute, “the court shall certify such fact to the Attorney General, and shall permit the United States to intervene.” 28 U.S.C. § 2403(a) (2000). The district court, however, as noted, characterized this as the court “inviting” the United States to intervene.

228. *Smelt*, 374 F. Supp. 2d. at 872-74 (discussing *Baker v. Nelson*, 409 U.S. 810 (1972)).

229. *Id.*

of the case and why it considered it not to be binding.<sup>230</sup> Here again, as in *Kandu* and *Wilson*, the applicability *vel non* of *Baker* was significant since the plaintiffs in all these cases had brought both due process and equal protection claims.<sup>231</sup> Furthermore, the plaintiffs in *Baker* and *Smelt* brought privacy claims.<sup>232</sup>

Tracking the *Kandu* court closely, the *Smelt* district court, however, carefully circumscribed *Baker*'s reach under the rule that a dismissal for want of a substantial federal question is a decision on the merits, using nearly identical reasoning. The court also opined that the laws at issue in *Baker* and its case were very different; the former determining who could marry, the second allocating benefits.<sup>233</sup> I have already addressed why this distinction is not persuasive.<sup>234</sup> Furthermore, the *Smelt* court admitted that "[t]he difference between DOMA and the state statutes in *Baker* is relatively minor, and the governmental interests advanced by each may be similar,"<sup>235</sup> and that the *Wilson* court already decided that "a constitutional challenge to DOMA presents the 'same issues' as *Baker v. Nelson*."<sup>236</sup>

The court also questioned whether the equal protection claim would now be considered unsubstantial after *Romer*, whether the due process claim would now be considered unsubstantial after *Lawrence*, or whether the sex-based classification claim (acknowledged before *Baker*) now subject to intermediate scrutiny (a post-*Baker* development) would now be considered unsubstantial after the *United States v. Virginia*<sup>237</sup> case.<sup>238</sup>

Thus, the *Smelt* district court turned to the merits of the challenge to section 3. The court rejected the plaintiffs' equal protection claims, one based on a sexual orientation classification and one based on a sex-based classification.<sup>239</sup> First, the court emphasized that it believed DOMA creates a sexual orientation classification, albeit not a facial one.<sup>240</sup> The court held that DOMA would have a disproportional impact on homosexuals because it withheld federal benefits from same-sex unions.<sup>241</sup> The court opined that

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230. *Id.*

231. *Baker*, 191 N.W.2d at 186; *In re Kandu*, 315 B.R. 123, 135 (Bankr. W.D. Wash. 2004); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1302 (M.D. Fla. 2005).

232. *Smelt*, 374 F. Supp. 2d at 864; *Baker*, 191 N.W.2d at 186.

233. *Smelt*, 374 F. Supp. 2d at 873.

234. *See supra* text accompanying notes 115-18.

235. *Smelt*, 374 F. Supp. 2d at 873.

236. *Id.* at 873 n.18 (quoting *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005)).

237. 518 U.S. 515 (1996).

238. *Smelt*, 374 F. Supp. 2d at 873-84.

239. *Id.* at 874-77.

240. *Id.* at 874.

241. *Id.* at 875.

this holding was consistent with the decisions of every other court that had evaluated the constitutionality of DOMA or state laws prohibiting same-sex marriages.<sup>242</sup> The court noted one court had explicitly so held and that all others must have done so implicitly.<sup>243</sup>

Next the court held that DOMA did not create a sex-based distinction.<sup>244</sup> The court surveyed the decisions of other courts, which were split on the issue.<sup>245</sup> The court rejected the plaintiffs' *Loving* analogy.<sup>246</sup> Taking a different approach than, for example, the *Kandu* court,<sup>247</sup> the *Smelt* district court summarized the analogy this way: "Under this view of *Loving* . . . the conclusion might be that, although DOMA applies equally to men and women, it creates a sex-based classification. The classification would not be between men and women, but would be between opposite-sex couples and same-sex couples."<sup>248</sup> That is not a particularly artful way to characterize the analogy. Elsewhere, including in *Kandu*, it has been explained this way: Under the *Loving* statute, a white person could marry anyone he wanted as long as the other person was white, and a black person could marry anyone he wanted as long as the other person was black.<sup>249</sup> So under DOMA, a man can marry anyone he wants as long as the other person is a woman, and a woman can marry anyone she wants as long as the other person is a man. Since the Supreme Court rejected the argument that anti-miscegenation laws do not create a racial distinction despite operating equally to all races, the court should reject the argument that DOMA does not create a sex-based distinction despite operating equally on both sexes. However, rather than reject the plaintiffs' *Loving* analogy based upon the defendant's argument—that the discriminatory legislative intent evident in Virginia's anti-miscegenation laws had no counterpart in DOMA, i.e., DOMA did not intend to discriminate against either men or women—the court rejected it because in all cases in which the Supreme Court has struck down laws for containing sex-based classifications, the laws actually distinguished between men and women on their faces.<sup>250</sup>

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242. *Id.* at 875 n.20.

243. *Id.*

244. *Id.* at 877.

245. *Id.* at 875.

246. *Id.* at 876.

247. *In re Kandu*, 315 B.R. 123, 142 (Bankr. W.D. Wash. 2004).

248. *Smelt*, 374 F. Supp. 2d at 876.

249. *In re Kandu*, 315 B.R. at 142.

250. *Smelt*, 374 F. Supp. 2d at 876.

Turning to the plaintiffs' due process claim, the court held that the fundamental right to marry does not include the fundamental right to marry someone of the same sex.<sup>251</sup>

Having made the preceding determinations, the court declared that the opposite-sex requirements of DOMA would be subject to rational basis scrutiny.<sup>252</sup> Having reached this conclusion, the court gave a scant five paragraphs to the actual analysis of the equal protection and due process claims combined. The court easily accepted the state's assertion that "it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents."<sup>253</sup>

Finally, the court gave even shorter shrift to the privacy claim, relegating it to a footnote. The court wrote that "[t]he 'right to privacy' is not an independent right. It is 'implicit in the . . . Due Process Clause.' Having decided to review Plaintiffs' Due process claim, there is no separate claim to be decided."<sup>254</sup> In other words, since the privacy claim was subsumed under the due process claim and since the court already analyzed the due process claim, it declined to separately analyze the privacy claim.

#### E. THE FOURTH ATTACK ON DOMA

To date, the final challenge to DOMA occurred in *Bishop v. Oklahoma ex rel. Edmondson*,<sup>255</sup> where two lesbian couples challenged the constitutionality of DOMA and the Oklahoma constitutional amendment that barred same-sex marriage.<sup>256</sup> Specifically, they claimed that the provisions violated the Due Process Clause, the Equal Protection Clause, the Full Faith and Credit Clause and the Privileges and Immunities Clause.<sup>257</sup>

The court first addressed standing. Since one couple had never entered into a marriage or other union, the court held that couple did not have standing to challenge Section 2.<sup>258</sup> However, the other couple entered into both a Vermont civil union and a Canadian same-sex marriage.<sup>259</sup> The court considered each possible basis for standing in turn. The court turned to *Smelt* for guidance. Noting that the *Smelt* district court and court of

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251. *Id.* at 879.

252. *Id.*

253. *Id.* at 880.

254. *Id.* at 879 n.23 (citation omitted).

255. 447 F. Supp. 2d 1239 (N.D. Okla. 2006).

256. *Bishop*, 447 F. Supp. 2d at 1243-44.

257. *Id.* at 1244.

258. *Id.* at 1245.

259. *Id.* at 1246.

appeals had found that a same-sex couple that possessed a California domestic partnership nevertheless lacked standing to challenge Section 2, the court applied the same reasoning to Vermont's civil unions—they simply are not marriages.<sup>260</sup> The court then decided that the word “state” in Section 2 referred only to the various states within the United States, not to foreign nations; thus the plaintiffs' Canadian marriage did not confer standing either.<sup>261</sup>

The court next looked at standing to challenge Section 3.<sup>262</sup> It again dispatched the first couple quickly; they had never entered into any legal relationship that would deprive them of any federal benefits under DOMA.<sup>263</sup> However the court concluded that it should not declare that the second couple lacked standing at the pleadings stage.<sup>264</sup> In doing so, the court again looked to *Smelt* for guidance. It rehearsed the holding of the *Smelt* district court on standing and then examined the reasons that the Ninth Circuit had reversed it on that issue.<sup>265</sup> The court then noted differences between the plaintiffs in *Smelt*, who had possessed “only” a California domestic partnership and the plaintiffs before them, who possessed both a Vermont civil union and a Canadian marriage.<sup>266</sup> Based on these differences, the court concluded that it would be improper to decide either Article III or prudential standing at the pleading stage.<sup>267</sup>

Thus, refusing to get rid of the case on standing, the court moved on to the various challenges to DOMA. First, it quickly dispensed with the Full Faith and Credit and Privileges and Immunities challenges to Section 3.<sup>268</sup> The court simply noted that both clauses apply to the states, not to the federal government.<sup>269</sup> Finally, the court held that the due process and equal protection claims survived the motion to dismiss.<sup>270</sup> As of this writing, the

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260. *Id.* at 1248. The court noted, however, that civil unions made the question a closer call than did domestic partnerships. *Id.*

261. *Id.* at 1249.

262. *Id.* at 1249-51.

263. *Id.* at 1249.

264. *Id.* at 1251.

265. *Id.* at 1249-51.

266. *Id.* at 1250-51.

267. *Id.* at 1251. Parenthetically, I note that it seems likely that GLAD, in recruiting “homosexual military veterans who wish to be buried with their spouses at Arlington National Cemetery . . . [and] same-sex couples . . . if they were refused the right to care for a sick spouse under a federal law that allows workers to take unpaid medical leaves” took the hint that if plaintiffs could demonstrate deprivations of federal benefits, they would be more likely to be able to demonstrate standing. GLAD Targets, *supra* note 61.

268. *Bishop*, 447 F. Supp. 2d at 1251-52.

269. *Id.* at 1252.

270. *Id.* at 1252-53.

case was stayed pending the outcome of the state defendants' appeal of the Eleventh Amendment immunity issue.<sup>271</sup>

#### F. DOMA'S BENEFITS, SHORTCOMINGS, AND POTENTIAL FUTURE ATTACKS

Before leaving the discussion of DOMA, it is worth noting that there *have been* cases in which it has done exactly what it was designed to do. There have been cases in which a court relied upon Section 2 to refuse to consider someone a spouse for federal purposes,<sup>272</sup> and other cases in which a court has relied on Section 3 to allow a state to refuse to recognize a same-sex marriage.<sup>273</sup>

However, an important point also needs to be made. While the previous discussion has concentrated on the challenges to DOMA—all of which have been unsuccessful to date—it would be a mistake to miss several interrelated points. First, DOMA has been subject to challenges on the basis of the Tenth Amendment; the principles of international comity; the Search and Seizure Clause of the Fourth Amendment; Due Process and Equal Protection grounds; the Commerce Clause; the Right to Privacy; the Privileges and Immunities Clause; and the Full Faith and Credit Clause.<sup>274</sup> These attacks are ongoing—*Bishop* is currently stayed.<sup>275</sup> Third, as noted previously with regard to the current GLAD recruitment of plaintiffs<sup>276</sup> and as could be suggested in other ways, the homosexual activists seem to be learning from their losses. It seems likely that at a minimum they will soon be able to bring test cases that survive standing challenges.

Furthermore, additional bases for challenging DOMA have been suggested in the literature and are yet to be tried. In addition to establishment clause claims suggested by the discussion in Part II, other suggested challenges include the following: Evan Wolfson has made the rather ill-defined claim that “because DOMA effectively nationalizes domestic relations law, shattering historical precedent, it is unconstitutional.”<sup>277</sup>

271. *Bishop v. Oklahoma*, No. 04-CV-848-TCK-SAJ (N.D. Okla. Oct. 30, 2006) (order granting stay).

272. *See, e.g., In re Goodale*, 298 B.R. 886, 893 (Bankr. W.D. Wash. 2003). In fact, one may speculate that it was the court's invocation of DOMA in this case that caused Ms. Kandu, whose bankruptcy case was litigated in the same court, to challenge DOMA's constitutionality.

273. *See, e.g., In re Estate of Gardiner*, 22 P.3d 1086, 1109 (Kan. App. 2001); *Rosengarten v. Downes*, 802 A.2d 170, 174 (Conn. App. Ct. 2002) (citing the trial court's reasoning).

274. *See* discussion *supra* Part IV.B.-D.

275. *See Bishop*, No. 04-CV-848-TCK-SAJ (N.D. Okla. Oct. 30, 2006) (order granting stay).

276. *See* GLAD Targets, *supra* note 61.

277. Evan Wolfson and Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 227 (1996).



Because Wolfson is one of the key homosexual litigators, we could someday see this assertion turned into a colorable legal claim. Similarly, Wolfson claims that DOMA violates the right to marry and the right to travel.<sup>278</sup> Finally, he claims that DOMA violates the right to intimate association.<sup>279</sup> In addition, opposite-sex only marriage statutes have been attacked on at least one other ground that might serve as a basis of attack on DOMA, namely that such statutes violate the freedom of expression.<sup>280</sup> Presumably, a claim for violation of the right to expressive association could also be brought.

Thus, DOMA is an inadequate solution to the homosexual attack on marriage even in what it attempted to do. To make matters worse and as noted previously, DOMA was never intended to protect states from their own courts.<sup>281</sup> Thus, a state could validate a same-sex marriage from Massachusetts or from another country. Indeed, at least one case has reached a state supreme court in which a state court is being urged to recognize a Canadian same-sex marriage for the purposes of issuing a divorce.<sup>282</sup> Similarly, DOMA was not intended to protect states from their own legislatures: States are free to enact legislation allowing same-sex marriage, which none has ever done free-willingly,<sup>283</sup> or civil union/domestic partnership type legislation, which several *have* done free-willingly.<sup>284</sup> Furthermore, DOMA does not deal with localities trying to grant some of the incidents of marriage.

Additionally, to introduce a new issue as a segue to the next Part, while the states may attempt to add statutory or constitutional protection to fill in the gaps left by DOMA, those attempts are subject to both state and federal constitutional challenges. Thus, as discussed in Part VI, the only sure solution is a federal constitutional amendment. And not even all of those will

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278. *Id.* at 230. The right to marry would almost certainly have to be recast as one or more of the arguments that have already been litigated; however, the right to travel would be a new argument.

279. *Id.* at 235.

280. David B. Cruz, “*Just Don’t Call It Marriage*”: *The First Amendment and Marriage As An Expressive Resource*, 74 S. CAL. L. REV. 925, 936 (2001).

281. See text accompanying *supra* notes 56-57.

282. O’Darling v. O’Darling, No. DF-104107, slip op. (D. Okla. Dec. 20, 2006), available at <http://www.samesexconflicts.com/odarling>.

283. Massachusetts never enacted legislation providing for same-sex marriage. It is simply operating under the Supreme Judicial Court’s interpretation that the statute cannot be applied so as to prohibit same-sex marriage. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

284. See, e.g., CAL. FAM. CODE § 297 (2006); CONN. GEN. STAT. ANN. § 46b-38aa (2004); HAWAII REV. STAT. § 572C-2 (2006); ME. REV. STAT. ANN. tit. 22, § 2710 (2004) (Supp. 2007); N.J. STAT. ANN. § 26:8A-2 (2007); VT. STAT. ANN. tit. 15, § 1201 (2002).

do the job. But before moving too far afield, it is important that the states' responses be considered.

## V. STATE EFFORTS AT SELF-PROTECTION

The states have not been idle. Just as Congress responded to the Hawaii Supreme Court's decision in *Baehr*, so have the states.<sup>285</sup> Some responded prior to or contemporaneously with the enactment of DOMA, i.e., in 1996 or earlier. These states include Alaska<sup>286</sup> (which of course was facing its own litigation),<sup>287</sup> Arizona,<sup>288</sup> Delaware,<sup>289</sup> Georgia,<sup>290</sup> Idaho,<sup>291</sup> Illinois,<sup>292</sup> Kansas,<sup>293</sup> Louisiana,<sup>294</sup> Michigan,<sup>295</sup> North Carolina,<sup>296</sup> Oklahoma,<sup>297</sup> Pennsylvania,<sup>298</sup> South Carolina,<sup>299</sup> South Dakota,<sup>300</sup> Tennessee,<sup>301</sup> and Utah.<sup>302</sup> Other states acted post-DOMA and a few had pre-existing protections. Many states enacted several statutes or enacted both statutes and amended their constitutions.

It is truly hard to tell the players without a score card. Anything that is put in print is quickly outdated. Indeed, while working on this article, I came across an Internet article that claimed that "Six States Work to Pass Amendments to Protect Traditional Marriage."<sup>303</sup> Furthermore, I found that—at least for my purposes—many of the compilations of state statutes

285. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); see *supra* text accompanying note 75.

286. ALASKA STAT. § 25.05.013 (2004).

287. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*1 (Alaska Super. Ct. Feb. 27, 1998).

288. ARIZ. REV. STAT. ANN. §§ 25-101(c), 25-112 (2000).

289. DEL. CODE ANN. tit. 13, § 101 (1999).

290. GA. CODE ANN. §§ 19-3-3.1, 19-3-30(b)(1) (2004).

291. IDAHO CODE § 32-209 (1996).

292. 750 ILL. COMP. STAT. ANN. 5/212, 5/213.1 (West 1999).

293. KAN. STAT. ANN. §§ 23-101, 23-115 (2003).

294. Louisiana's House of Representatives passed a Continuing Resolution in 1996, H. Con. Res. 124, 1996 Reg. Sess. (La. 1996). Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2176-78 (2005). Statutory enactments and a constitutional amendment would come later. LA. CIV. CODE ANN. art. 89, art. 3520(B); LA. CONST. art. XII, § 15.

295. Mich. Comp. Laws Ann. §§ 551.1, 551.3, 551.4, 551.271(2), 551.272 (2004).

296. N.C. GEN. STAT. § 51-1.2 (2003).

297. OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001).

298. 23 PA. CONS. STAT. ANN. § 1704 (West 2001).

299. S.C. CODE ANN. § 20-1-10, 20-1-15 (2004).

300. S.D. CODIFIED LAWS § 25-1-1 (1999).

301. TENN. CODE ANN. § 36-3-113 (2001).

302. UTAH CODE ANN. §§ 30-1-2(5), 30-1-4.1 (2005).

303. *Six States Work to Pass Amendments to Protect Traditional Marriage*, CitizenLink.com, Jan. 7, 2008, <http://www.citizenlink.org/content/A000006226.cfm>. While the article itself has been removed from the web site, the headline is still available.

and amendments available in the literature and on the Internet, even when they are current, present the summary of types of responses unreliably. However, some are fairly trustworthy. These tend, however, to be rather convoluted if in the literature (or alternately, merely a literal compilation) or scattered across multiple pages, often one for every state, if web-based.

As of this writing, nine states have passed constitutional amendments that ban same-sex marriage.<sup>304</sup> Another eighteen states have amendments that ban both same-sex marriages and marriage substitutes, such as civil unions and domestic partnerships.<sup>305</sup> The statutes are harder to summarize. In many states, pertinent provisions are scattered in various code sections and they take diverse approaches. Twenty-four of the states that have constitutional protections also have statutory protections.<sup>306</sup> Another seventeen have only statutory protections.<sup>307</sup> A useful categorization of the effects of various state statutes, which also shows how states have tried to protect themselves in multiple ways, provide the following information: three define “spouse” as someone of the opposite sex; fifteen state that same-sex marriage violates the state’s public policy; twenty-six prohibit or declare void same-sex marriage; twenty-eight define marriage as being between a man and a woman; and, twenty-eight deny recognition to another state’s same-sex marriages.<sup>308</sup> Thirteen states and the District of Columbia have old style marriage evasion statutes, although the language of some addresses only some evasive marriages, not including same-sex marriages.<sup>309</sup> Importantly, several states include the so-called reverse evasion clause, which says that the state shall not issue licenses to citizens of other states who seek to evade their own marriage laws.<sup>310</sup> Such a provision has come to national prominence because Massachusetts, the only state that issues same-sex marriage licenses, has a reverse evasion law and then-

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304. ALASKA CONST. art. I, § 25; COLO. CONST. amend. 43; HAW. CONST., art. I, § 23; MISS. CONST. art. 14, § 263a; MO. CONST. art. I, § 33; MONT. CONST. art. 13, § 7; NEV. CONST. art. I, § 21; OR. CONST. art. XV, § 5a; TENN. CONST. art. XI, § 18.

305. ARK. CONST. amend. 83; GA. CONST. art I, § 4, ¶ 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. art. XXV, § 402; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; NEB. CONST. art. I, § 29; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. 2, § 35; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

306. The Heritage Foundation, Marriage in the 50 States, <http://www.heritage.org/Research/Family/Marriage50/index.cfm> (last visited Apr. 6, 2008).

307. *Id.*

308. The Heritage Foundation, Outline of the State Laws, <http://www.heritage.org/Research/Family/Marriage50/Dataforall50States.cfm> (last visited Apr. 2, 2008).

309. Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons From the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 111 n.159 (2004).

310. *Id.*

Governor Romney ordered it to be enforced.<sup>311</sup> When it was challenged, the Massachusetts Supreme Judicial Court upheld the law.<sup>312</sup> This important decision keeps Massachusetts' same-sex marriages from spreading around the country.

However, as was the case with DOMA, the state responses can only be partially successful. First, to be fully effective, either a statute or a constitutional amendment would have to prohibit both same-sex marriages and marriage substitutes, and would have to include prohibitions against recognizing such marriages and marriage substitutes from other jurisdictions. Old style marriage evasion statutes would only cover other states' same-sex marriages, not their marriage substitutes. Furthermore, since all state statutes and constitutional amendments are still subject to legal challenges and could fail those challenges (as will be touched upon immediately below),<sup>313</sup> in order to protect each other, states would also need to pass a reverse marriage evasion provision. Furthermore, a handful of states have still done nothing to protect themselves and the rest of the nation.<sup>314</sup>

We also know that legal challenges to traditional marriage laws, i.e., to marriage laws as they existed prior to the homosexual legal assault on marriage, have sometimes succeeded. Thus, while New York<sup>315</sup> and Maryland<sup>316</sup> courts have recently upheld old marriage laws, and the Supreme Court of Rhode Island recently stated that same-sex marriage was not permitted under its laws and that it would, therefore, not recognize a putative same-sex marriage from Massachusetts,<sup>317</sup> New Mexico remains unprotected and its old statute<sup>318</sup> remains susceptible to challenge. Furthermore, the states of California, Connecticut, New Hampshire, New Jersey, Oregon, Vermont, Maine, Washington, and Hawaii, have, either willingly or in response to their courts declaring their marriage statutes violative of their respective constitutions, enacted various versions of civil unions or

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311. *Id.* at 87.

312. *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 631 (Mass. 2006).

313. *See infra* notes 318-23 and accompanying text.

314. Obviously, when I write "protect themselves," I assume that the states agree with my perspective. Clearly, many legislators do not. However, even in the remaining states, the *people* want to stop same-sex marriage. *See* William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 233, 234-36 (2006) (compiling statistics).

315. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. Ct. App. 2006).

316. *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007). Maryland's law, while pre-dating the current same-sex marriage debate, nonetheless explicitly limited marriage to one man and one woman. MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006).

317. *Chambers v. Ormiston*, 935 A.2d 956, 965 (R.I. 2007).

318. N.M. STAT. ANN. § 40-1-9 (2006).

full or partial domestic benefits.<sup>319</sup> Therefore, any state whose protections do not address these marriage substitutes remains at risk. Furthermore, the challenge to Connecticut's marriage law is in the bosom of its Supreme Court. Additionally, only a handful of states have prevented their localities from granting the incidents of marriages through local ordinances.<sup>320</sup> Finally, any state that is relying on statutory protection faces both state and federal constitutional challenges to those laws. Even those states that have amended their constitutions face federal constitutional challenges. This, of course, is exactly what happened to Nebraska.<sup>321</sup>

Thus, just like DOMA, the various responses of the states are inadequate. Further, some of the responses of the states (those that have free willingly enacted domestic partner statutes) are actually part of the attack. It seems obvious that the only full answer is a federal amendment to deal with the attack on marriage.

However, not all proposed, or possible, federal marriage amendments are created equal. Before evaluating some of these in Part VI.B., Part VI.A. explains why a federal marriage amendment is an appropriate—as opposed to an effective—response. This Part will perhaps be of interest primarily to a sub-set of the readers of this Symposium. Surely, those seeking to obtain same-sex marriage or seeking to destroy marriage<sup>322</sup> will not care what my reasons are. Second, those who seek to protect marriage by any means available will think this is much ado about nothing. However, as mentioned in Part II, in my years as a marriage partisan, I have encountered those who firmly desired to protect marriage, yet believed that amending the United States Constitution was an inappropriate way to proceed. This was inevitably on federalism grounds. Therefore, the following discussion offers them reasons why federalism is no barrier to pursuing a federal marriage amendment. Further, because a subset of these people have been Evangelical Protestants, making this argument allows me to once again contribute that perspective to this Symposium.

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319. CATEGORIES OF LAWS INVOLVING MARITAL STATUS 2-3 (1997), available at <http://marriagelawfoundation.org/mlf/publications/International.pdf>.

320. See, e.g., OHIO CONST. art. XV, § 11; OR. CONST. art. XV § 5a; TEX. CONST. art. I, § 32; VA. CONST. art. I, § 15-A.

321. In *Citizens for Equal Protection v. Bruning*, a federal district court held that Nebraska's marriage amendment violated the Equal Protection Clause, was an unlawful Bill of Attainder, and violated the First Amendment. *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980, 985 (D. Neb. 2005). The Eight Circuit reversed on all grounds. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006).

322. See discussion *supra* Part III.

## VI. A FEDERAL MARRIAGE AMENDMENT RESPONSE

A. THE APPROPRIATENESS OF THE RESPONSE <sup>323</sup>

I believe that a resort to first principles instructs that an amendment is an appropriate remedy for the same-sex marriage issue. Five lines of reasoning point in the same direction. After outlining some general issues that supply background for the entire discussion, each argument will be considered in turn, namely, biblical insight, textual evidence, the intent of the Framers, the pre-existing duty of the federal government to prohibit same-sex marriage, and historical precedent.

In the otherwise—from my point of view—abominable abortion regulation decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>324</sup> Justices O'Connor, Kennedy, and Souter wrote: “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations.”<sup>325</sup> Despite the fact that they did not understand covenant principles, their assertion was surely correct. The scholarship of men like Donald S. Lutz and Daniel Elazar document this truth. In November 1979, more than 100 scholars, including Lutz and Elazar, convened for a series of workshops on covenants and politics at Temple University’s Center for the Study of Federalism.<sup>326</sup> Their work could, without hyperbole, be called groundbreaking and paradigm setting. A summary statement by Lutz will have to suffice here:

Viewing the United States Constitution as the critical expression of the American constitutional tradition, we move back in time, seeking the less differentiated, more embryonic expression of what is in that document. Our search takes us to the earliest state constitutions, then to colonial documents of foundation that are essentially constitutional such as the Pilgrim Code of Law, and then to proto-constitutions such as the Mayflower Compact. The political covenants written by English colonists in America lead us to the church covenants written by radical Protestants in the late 1500s

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323. Much, though not all, of what appears in Part VI.A. appeared in a newsletter distributed primarily to National Legal Foundation donors and supporters. Steven W. Fitschen, *Thoughts on a Federal Marriage Amendment*, 14 THE NAT’L LEGAL FOUNDATION MINUTEMAN 1 (n.d.). Similarly, various close versions have been disseminated in memo form to various pro-family leaders on a number of occasions from 1996 through 2007, an indication that my belief that a federal marriage amendment is necessary pre-dates the enactment of DOMA. However, this material has never been published in a scholarly article before.

324. 505 U.S. 833 (1992).

325. *Casey*, 505 U.S. at 901.

326. See DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (1982).

and early 1600s, and these in turn lead us back to the Covenant tradition of the Old Testament. The American constitutional tradition derives much of its form and content from the Judeo-Christian tradition as interpreted by the radical Protestant sects to which belonged so many of the original European settlers of British North America.<sup>327</sup>

Given this fact, we should expect two things. On the one hand, the Bible should provide useful illustrations of covenant principles that are applicable to our question. On the other hand, we should expect the Constitution to both contain covenant principles and to be subject to them. And I believe all of these expectations are met.

Most germane to the discussion at hand is the concept of the “limited modifiability” of a covenant.<sup>328</sup> This biblical principle is enshrined in the amendment process itself. It is through amendments, and amendments only, that the Constitution is to be modified. Parenthetically, I have argued elsewhere that this is one reason why Christians have a special reason to be upset when judges ignore the Constitution or claim to be free to re-interpret it because it is “living.”<sup>329</sup> Thus, it is appropriate to examine a biblical example of covenant modification. In particular, it will be most helpful to examine an example of a fundamental change in the political/legal structure. After all, that is the concern of some—that we may be about to pursue a fundamental change in the political/legal order by allowing the federal government to regulate marriage. We should then be able to ascertain similar examples in American constitutional theory and history.

To understand biblical covenantal principles, it is important to clarify the content of the covenant under investigation. The example to be examined from the Mosaic or Sinaitic covenant, and one must understand that it includes all the various commandments given by God in the Torah, or Pentateuch, from Exodus 19: 1 until the end of the book of Deuteronomy.

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327. *Id.* at [vii].

328. For ancient Near Eastern covenants, this generally meant that “once written, the covenants were not to be altered or annulled although parts could be explicated or elaborated.” EVANGELICAL DICTIONARY OF BIBLICAL THEOLOGY 124 (1997). However the biblical covenants differed in some ways from other ancient Near Eastern covenants, and we will explore momentarily an example of covenant modification in the biblical text. The idea of covenant was adapted somewhat in the American colonial and early national experience, such that by the time of the framing of the Constitution, the need for an amending process was well understood. 3 DANIEL J. ELAZAR, COVENANT AND CONSTITUTION: THE GREAT FRONTIER AND THE MATRIX OF FEDERAL DEMOCRACY 33-38 (1998). See generally THE THEORY AND PRACTICE OF CONSTITUTIONAL CHANGE IN AMERICA: A COLLECTION OF ORIGINAL SOURCE MATERIALS (John R. Vile ed., 1993).

329. Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 118-19 (1998).

In particular, it includes the commandments about the distribution, inheritance, alienage, and redemption of individual parcels of land—the Promised Land.<sup>330</sup> In Numbers 26, God commanded Moses to take a census of the Israelites, *by their father's houses*, which were determined strictly by following the lineage from father to son—strictly the male blood lines. The land was to be divided accordingly. This, of course, had enormous social, economic, and political consequences.<sup>331</sup> One need only consider the large amount of the biblical text devoted to the description of the boundaries of the various land allotments to understand this.<sup>332</sup> Similarly, the redemption of the land in the Year of Jubilee demonstrates that the apportionment of the land to the proper persons/tribes was of vital interest to God.<sup>333</sup> Yet in Numbers 27:1-4, the daughters of Zelophehad came to Moses seeking a modification of this aspect of the covenant.<sup>334</sup> They wanted to be able—as females—to inherit land, too. Moses brought their petition to God, and God modified the inheritance laws.<sup>335</sup> Even something that is this central to the political/legal structure of the nation could be modified. Thus, for those who believe that allowing the federal government a role in regulating marriage constitutes a fundamental change in our political/legal structure, biblical principles of covenant allow this.

The only Biblical argument against this illustration that has occurred to me is that in the case of Zelophehad's daughters, they sought the modification quickly upon hearing of the covenant terms.<sup>336</sup> In the case of the same-sex marriage issue, such a change is contemplated more than 200 years after the formation of the covenant. I found no examples in the Bible that would indicate that this timing issue precludes modification. Furthermore, Zelophehad's daughters sought modification when they realized that the implementation of an aspect of the covenant would adversely affect them. In our case, the threat we are seeking to address has just become apparent in

330. See, e.g., *Leviticus* 25:8-38 (New American Standard); *Numbers* 26:53-56, 33:50-35:8 (New American Standard); *Deuteronomy* 21:15-17 (New American Standard).

331. We will see one example of this in the biblical passage discussed immediately below (*Numbers* 27:1-11). There, certain women were afraid the imposition of the inheritance laws without allowing any exceptions would create irreparable harm to the God-ordained allotment of land. A further refinement of the story occurs in *Numbers* 36:1-13, where God gave additional instructions to ensure that land allotments did not impact positively or negatively the positions of the various tribes within the nation of Israel.

332. See, e.g., *Joshua* 13:8-19:51 (New American Standard).

333. See, e.g., *Number* 36:1-13 (New American Standard) (describing how the implications of the Year of Jubilee play out in the daughters of Zelophedad's case).

334. *Numbers* 27:5-11 (New American Standard).

335. *Id.*

336. The story of Zelophehad's daughters occurs immediately after the story of the census that was taken to help determine how much land each tribe would be given. *Numbers* 26:1-65, 27:1-11 (New American Standard).



the last few years and some folks immediately began to work on an amendment.<sup>337</sup>

Thus, even in Old Testament Israel, a covenant could be modified under certain circumstances. By the time of the Framing, the necessity of modification was well-known.<sup>338</sup> Indeed, the Framers believed that even the most basic components of the Constitution should be subject to alteration. They were drawing on their own experience under state constitutions and the Articles of Confederation. This experience taught them that the basic frame of government must be amendable in even the most basic elements.<sup>339</sup> However, many of the Founders undoubtedly knew that covenantal principles generally applied to the new federal Constitution.<sup>340</sup> After all, the very term federal is derived from *foedus*, which is Latin for covenant.<sup>341</sup>

This belief that even the basic components of the Constitution must be amendable includes matters that go to the most cherished elements of federalism and checks and balances. George Washington stated in his Farewell Address: “If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates.”<sup>342</sup> In that same address, Washington warned against amendments that would “impair the energy of the system.”<sup>343</sup> However, he also strongly emphasized three times the amendability of the document.<sup>344</sup>

Here Washington was repeating a truth—the necessity of amendability—that had been hammered home to the American people ever since the Constitution was proposed. It is well documented that this was the view of the ratifiers of the Constitution and that ratification likely would not have occurred were it not for a belief that *any* defects, excepting only those discussed in the third argument, could be corrected through amendment. Indeed, if the fundamental aspects of the Constitution were not thought amendable, it may well have never been ratified by the required number of states. David E. Kyvig provides this summary of the situation:

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337. See *infra*, Part VI.B. *ab initio* for my personal involvement in this effort since 1996.

338. See *supra* note 329 and accompanying text.

339. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995*, at 19-41 (1996).

340. See ELAZAR, *supra* note 328, at 1-98.

341. CHARLES S. MCCOY & J. WAYNE BAKER, *FOUNTAINHEAD OF FEDERALISM* 11-12 (1991).

342. GEORGE WASHINGTON, *Farewell Address*, in *GEORGE WASHINGTON: A COLLECTION* 512, 521 (W.B. Allen ed., 1988).

343. *Id.* at 519.

344. *Id.* at 517-21.

Article V, the 1787 U.S. Constitution's provision for its own amendment, became the hinge upon which swung acceptance of the Philadelphia convention's proposal. In the state conventions that considered ratification, the existence of a clear and specific revision process armored defenders of the new charter and somewhat disarmed those assaulting it. Again and again the same argument could be heard: whatever defects the new structure of government proved to contain, remedies could be applied. The new amending arrangements would overcome the state unanimity obstacle to constitutional reform contained in the Articles of Confederation. While the ratification debate was intense, eleven states accepted the Constitution within ten months of its transmittal by Congress. Although much attention naturally focused on doubts expressed about the new charter, perhaps more notable was its remarkably rapid approval by conventions in states large and small, South and North, robust and fragile. All appeared to find the amending provision reassuring as they committed themselves to the new constitutional arrangements.

As soon as Congress placed the proposed Constitution before the states, public scrutiny and discussion of every clause commenced. The crucial debates took place within the state conventions held to decide upon ratification. Only partial convention records survive, but they provide insight into the central conflicts and accords. References to the amendment provision arose throughout the discussions. Collectively they suggest that Article V contributed in an important way to the achievement of ratification, particularly in the large, crucial states of Pennsylvania, Massachusetts, Virginia, and New York, where in three out of four cases the margin of victory was quite slender.<sup>345</sup>

Kyvig goes on to provide twenty-one pages of detail culled from the state ratification conventions and other sources.<sup>346</sup> Furthermore, it was almost certainly the amendability of the Constitution that helped the Federalists carry the day in the ratification debates against the Anti-Federalists. The latter,

other than offering a shaky defense of the Confederation, were reduced to worrying about a stronger central government and complaining that the Constitution lacked a bill of rights to protect

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345. KYVIG, *supra* note 339, at 66.

346. *Id.* at 66-86.

citizens against abusive government. The antifederalist position buckled under the weight of the counterargument, first made in Massachusetts and thereafter embraced in other closely divided conventions, that the best way to correct this problem was to employ the easier amending system offered by the Constitution once it was ratified. Nowhere was this more evident or influential than in Virginia and New York.<sup>347</sup>

Indeed, Hamilton devoted the last number of the Federalist Papers (No. 85) largely to this topic.

Therefore, even those who are persuaded that heretofore the federal government has had no role in regulating marriage should not be concerned that the distribution of power between the federal and state governments would be changed by a marriage amendment. The Framers and Ratifiers believed that such a course of action should be, indeed must be, open to the people.

Moving to the third argument, the text of the Constitution itself indicates that such an amendment is permissible. Article V states in its entirety:

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.<sup>348</sup>

Under the well-known rule of interpretation of *expressio unius est exclusio alterius*, the two exceptions enumerated in Article V are the only two types of amendments that are off-limits. Clearly, a proposed marriage amendment does not implicate either of the exceptions. (The cryptic reference to “the first and fourth clauses in the ninth section of the first article” dealt with slavery and taxing issues.) Thus, an amendment, whereby

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347. *Id.* at 75.

348. U.S. CONST. art. V.

marriage is defined for the entire nation, is permissible even if it changes the regulation of marriage from a state to a federal issue.

Moving to the fourth argument, we will address the assertion that marriage has traditionally been a state, and not a federal, matter. This is simply not true. What is true is that the states have regulated both *malum in se* and *malum prohibitum* aspects of marriage. Things that are *malum prohibitum*, of course, are those things that are wrong only because some human legislating body says it is wrong.<sup>349</sup> That is why different states have different age requirements, different parental and/or judicial consent requirements, different consanguinity requirements, different blood test requirements, and different paper work requirements.

*Malum in se* are those things that are wrong because God says they are wrong.<sup>350</sup> (Of course, lawyers are forced to interact with the *malum prohibitum/malum in se* distinction without necessarily believing in God, and will therefore often assign these distinctions to statutory vs. common law,<sup>351</sup> or similar distinctions.) That is why all states prohibit incest polygamy, and—until recently—same-sex marriage. Recall from Part II, the court in *Godfrey* made basically this very distinction: “It is well settled in New York that the courts as a matter of comity will recognize out-of-state marriages, including common-law marriages, unless barred by positive law (statute) or natural law (incest, polygamy) or otherwise offensive to public policy.”<sup>352</sup>

It is also true that the federal government has never sought to regulate in the *malum in se* area. This undoubtedly has led to the impression that it has not been involved in the marriage issue at all. However, as mentioned above, this is simply not true. In the case of *Murphy v. Ramsey*,<sup>353</sup> the Supreme Court had before it a statute of the United States that stripped the franchise from polygamists in the Utah territory.<sup>354</sup> In that case, the Court reasoned:

The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the

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349. Stuart P. Green, *Why It's A Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1570-72 (1997).

350. *Id.* at 1570.

351. Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum In Se and Prohibitum Crimes*, 73 WASH. U. L. Q. 1369, 1370 (1995).

352. *Godfrey v. Spano*, 836 N.Y.S.2d 815, 815-16 (N.Y. App. Div. 2007).

353. 114 U.S. 15 (1885).

354. *Murphy*, 114 U.S. at 44-45. It must be conceded that the argument that laws outlawing polygamy in the old United States territories proves that the federal government has regulated marriage is a poor argument because Congress exercised exclusive jurisdiction over the territories and as such functioned like a state legislature.

States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. This doctrine was fully and forcibly declared by the Chief Justice, delivering the opinion of the court in *National Bank v. County of Yankton*. If we concede that this discretion in Congress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided, that the act of Congress here in question is clearly within that justification. For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.<sup>355</sup>

The opinion of the federal government, as expressed through the Supreme Court, was that any territory that wanted to become a state must be dedicated to marriage being limited to one man and one woman for life.

If this were all on the subject, it could perhaps be dismissed as *dicta* by the judicial branch and certainly not an example of the federal government *legislating* on the issue. But it is not all. The enabling acts of Utah and many other southwestern states expressly declared that outlawing polygamy<sup>356</sup> was a term of statehood.<sup>357</sup>

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355. *Id.* (citations omitted).

356. *See supra* text accompanying note 26 discussing why the Old Testament practice of polygamy does not negate the argument that polygamy is *malum in se*.

This in-and-of-itself would be enough to show that the federal government has stepped in to make sure that no state will allow any *malum in se* marriages. However, there is more. By comparing Utah's enabling act to those of other states, it can also be discerned that Congress and the Supreme Court took this stance because they had a pre-existing duty to protect marriage. Enabling acts are typically entitled "[a]n act to enable the people of . . . to form a Constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states." Yet the terms of each was not on its face "equal." For example, Louisiana's Enabling Act states that its constitution shall be "consistent with the constitution of the United States."<sup>358</sup> Other states' enabling acts require their constitutions to be consistent with, or not repugnant to, "the [C]onstitution of the United States and the principles of the Declaration of Independence."<sup>359</sup> Utah's Enabling Act has this latter language and goes even further because it also states that "polygamous or plural marriages are forever prohibited."<sup>360</sup>

How are these differences explained? Do these different versions really constitute equal footing? Yes they do (and let us be glad, lest we have a constitutional crisis of enormous proportions on our hands!). The first two versions—that citing the United States Constitution and that citing both the Constitution and Declaration—are easily explained. These two documents are driven by the same principles. Many people use the analogy that the Declaration is the real preamble to the Constitution.<sup>361</sup> But we must see that outlawing polygamy is also inherent in the principles of the Declaration and the Constitution—it is repugnant to the "Laws of Nature and of Nature's God" and, thus, the federal government has a pre-existing duty to prohibit any state from allowing it. The same is true of same-sex marriage.<sup>362</sup>

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357. See, e.g., *infra* note 360.

358. Act of Congress Feb. 20, 1811, 2 Stat. 641.

359. See, e.g., Act of Feb. 22, 1889, ch. 180, § 1, 25 Stat. 676 (1889) (incorporating the combined enabling act of the States of North Dakota, South Dakota, Montana, and Washington).

360. Utah Enabling Act, ch. 138, § 3, 28 Stat. 108 (1894).

361. Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 967-68 nn.184-85 (1996) (compiling sources).

362. In addition to the fact that we just noted that Old Testament polygamy does not negate the assertion that the practice is *malum in se*, i.e., against the law of nature and nature's God (see *supra* note 11 and accompanying text) we can get confirmation from the Founders' use of the term "law of nature." See, e.g., the anonymous 1836 essay, actually written by Joseph Story, which notes that, "[m]arriage is an institution, which may properly be deemed to arise from the law of nature. It promotes the private comfort of both parties, and especially of the female sex. It tends to the procreation of the greatest number of healthy citizens, and to their proper maintenance and

An enabling act containing an explicit reference to outlawing polygamy is exactly equal to an enabling act not containing such a reference because polygamy is implicitly outlawed by every enabling act, invoking as they do the Constitution and/or the Declaration. Only when a situation arose that required an explicit reference to polygamy was such a reference included. But all states are subject to the United States Constitution and the Declaration of Independence, and the federal government has a pre-existing duty to prevent a perversion of marriage under those principles.

Finally, we may consider the fifth reason—historical precedent. One situation that provides a close parallel is the proposal and ratification of the Eleventh Amendment. This example is especially valuable because many of the Framers were still on the scene.<sup>363</sup>

The Eleventh Amendment was proposed and ratified as a direct result of the Supreme Court's decision in *Chisolm v. Georgia*.<sup>364</sup> In that case, the Supreme Court held that a state could be sued by the citizen of another state or of a foreign country.<sup>365</sup> The Framers clearly believed that they had drafted the language of the Constitution so as to preclude this very possibility.<sup>366</sup> It was clear from the Federalist Papers and from the ratifying conventions that such a possibility was not intended.<sup>367</sup> Nonetheless, the Supreme Court declared that it was possible.<sup>368</sup>

Immediately, work began on an amendment to undo the Supreme Court's decision. This amendment is best understood as an "explanatory" amendment. In other words, the whole people of the United States, through the amendment process, said in effect: "We never intended this and now we will explain what we have meant all along."<sup>369</sup>

There is, of course, a difference between the Eleventh Amendment and the situation under scrutiny here. In the former, particular language of the Constitution was at issue, namely the language from Article III, Section 2. In our case, we are not construing any particular language. Rather the

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education. It secures the peace of society, by cutting off a great source of contention, by assigning to one man the exclusive right to one woman." JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION app. (1971).

363. The fact that Eleventh Amendment jurisprudence is highly problematic does not undercut the use of the Eleventh Amendment as historical precedent.

364. 2 U.S. (2 Dall.) 419 (1793).

365. *Chisholm*, 2 U.S. (2 Dall.) at 420.

366. For this point and the entire discussion of the Eleventh Amendment that follows, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1989).

367. THE FEDERALIST NO. 81 (Alexander Hamilton).

368. *Chisolm*, 2 U.S. (2 Dall.) at 420.

369. Pfander's scholarship demonstrates almost beyond doubt that this was the nature of the Eleventh Amendment. See generally Pfander, *supra* note 366.

concern is with underlying principles discussed above. Nonetheless, it is entirely appropriate to take the same approach. A federal marriage amendment, would be saying:

We, the people, never intended marriage in this country to mean anything that violates the Laws of Nature and of Nature's God. We will explain what has been the definition of marriage all along and that just as no state can enter the Union unless it is willing to toe the line, neither can any state destroy marriage just because it is already a member of the Union.

As James E. Pfander points out, the idea of an explanatory amendment seems foreign to us because explanatory *statutes* are no longer used in this country.<sup>370</sup> Explanatory statutes are generally considered an unconstitutional violation of the separation of powers. However, explanatory amendments, being the work of the entire people cannot constitute a violation of the separation of powers; after all, the people are acting directly, not through delegated authority to a particular branch. Nor are they susceptible to any other constitutional criticism that could be leveled at a federal statute. Rather, in a case such as this, they are the only unassailable solution.

Having shown that for five reasons a federal constitutional amendment is a valid approach to the homosexual activists' attack on marriage, it remains to evaluate various proposals and to suggest what an ideal proposal would look like.

#### B. EVALUATING THE PROPOSALS

As a "marriage wars partisan" I have had the opportunity to consult on, evaluate, and help draft various versions of a federal marriage amendment since 1996. My involvement in these endeavors was almost always part of a team effort and was almost always confidential. I will not break that confidentiality here. While some versions of the federal marriage amendment have been attributed to certain individuals,<sup>371</sup> it is my insider's understanding that such attribution was only allowed when it was believed that the attribution would further the effort, due to name recognition of the individuals involved. Some of what I was involved with never saw the light of day; some of it did. Again, rather than break confidences, I will limit myself to mentioning some of the versions of the amendment that are already

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370. *Id.* at 1314.

371. Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137, 146 (2004) (discussing attribution of one version).



known. After all, my real purpose here is to explain what I believe an ideal version would say.

The first version of a proposed Federal Marriage Protection Amendment was introduced in the House of Representatives on May 15, 2002, and read as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.<sup>372</sup>

The second version eliminated the mention of state and federal law: Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.<sup>373</sup>

The House version of the amendment that was introduced that session differed only in replacing the word “only” with the word “solely”:

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.<sup>374</sup>

The first significantly different version was introduced on March 17, 2005:

SECTION 1. Marriage in the United States shall consist only of a legal union of one man and one woman.

SECTION 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.

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372. H.J. Res. 93, 107th Cong. (2002). This language was re-introduced as S.J. Res. 26, 108th Cong. (2003) and as H.J. Res. 56, 108th Cong. (2003).

373. S.J. Res. 30, 108th Cong. (2004). This language was also introduced as H.J. Res. 88, 109th Cong. (2006). After a series of hearings before various House and Senate Committees and Sub-committees, Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 *BYU J. PUB. L.* 439, 443-44 (2006), the same language was re-introduced as S.J. Res. 40, 108th Cong. (2004), and as S.J. Res. 1, 109th Cong. (2006).

374. H.J. Res. 106, 108th Cong. (2004).

SECTION 3. No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same-sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.<sup>375</sup>

Yet another version was introduced on April 14, 2005: “Section 1: Marriage in the United States shall consist only of the union of a man and a woman. Section 2: Congress shall have the power to enforce this article by appropriate legislation.”<sup>376</sup>

Another version consisted of only Section 1 of the version just mentioned.<sup>377</sup> In 2007, another one sentence amendment was introduced: “Marriage in the United States shall consist only of a legal union of one man and one woman.”<sup>378</sup>

Other proposals have been discussed without being introduced in Congress. For example, Senator Hatch discussed a version of the amendment that he never introduced:

Civil marriage shall be defined in each state by the legislature or the citizens thereof. Nothing in the Constitution shall be construed to require that marriage or its benefits be extended to any union other than that of a man and a woman.<sup>379</sup>

Academics have also proposed amendments. One such proposal reads as follows:

Sec[tion] 1. Nothing in this Constitution shall be construed to require any institution of government in the United States to recognize as marriage, or grant any benefits or incidents of marriage to, any union except that of one man and one woman.

Sec[tion] 2. No state shall be required by any federal law, or by any provisions of this Constitution, to recognize the validity of any marriage except a marriage of one man and one woman.

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375. H.J. Res. 39, 109th Cong. (2005). This language was re-introduced as H.J. Res. 22, 110th Cong. (2007).

376. S.J. Res. 13, 109th Cong. (2005).

377. H.J. Res. 91, 109th Cong. (2005).

378. H.J. Res. 91, 109th Cong. (2006). This language was re-introduced as H.J. Res. 74, 110th Cong. (2007).

379. Wardle, *supra* note 373, at 447 n.36.

Sec[ti]on] 3. Nothing in this article shall be construed as an endorsement of any prior judicial interpretation of any provision of this Constitution.<sup>380</sup>

Another academician-proposed amendment reads as follows: “This Constitution shall not be construed to require that marriage or the legal incidents thereof must be conferred upon any union other than the union of a man and a woman.”<sup>381</sup>

Yet another approach was proposed by former Senator Fred Thompson while he was running for the Republican nomination for President during 2007. In trying to clarify confusion over exactly what his position was, Thompson’s camp finally issued the following statement:

Thompson believes that states should be able to adopt their own laws on marriage consistent with the views of their citizens. He does not believe that one state should be able to impose its marriage laws on other states, or that activist judges should construe the constitution to require that. If necessary, he would support a constitutional amendment prohibiting states from imposing their laws on marriage on other states.<sup>382</sup>

My point here is not to split the hairs between the various versions. I simply want to assert that none is totally adequate and mention a few positive aspects as well as certain fairly common failings. Turning to the latter first, several of the proposed amendments are overly concerned with federalism or with simply foreclosing same-sex marriage being imposed by the judiciary, as opposed to the legislative branch. Further, the theme of almost all of the proposed amendments is that states should not be forced to accept same-sex marriage. The door is left wide open to them to free-willingly doing so. Finally, some of the proposed amendments deal with marriage substitutes, while others do not. On the positive side, some versions seek to prohibit plural marriages as well.

In my view, none of this is adequate. We will only get one chance at a federal amendment—we need to get it right. The attempts to appease federalism concerns or to anticipate concerns based upon the differing roles the legislative and judicial branches are counterproductive. As explained in Part VI.A., there is no reason for the federal government not to weigh in on

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380. Nelson Lund & John O. McGinnis, *The Boundaries of Liberty After Lawrence v. Texas: Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1613 n.210 (2004).

381. Scott Dodson, *Constitutional Thematics and the Peculiar Federal Marriage Amendment*, 20 BYU J. PUB. L. 233, 241 (2006).

382. Good As You, Thompson Corrects FMA Remarks; Barber Doesn’t Realize His Team Lost (Aug. 21, 2007), [http://www.goodasyou.org/good\\_as\\_you/2007/08/thompson-correc.html](http://www.goodasyou.org/good_as_you/2007/08/thompson-correc.html).

this matter. Again, we will only get one chance at a federal amendment and we must get it right. The following language would do the job, although other language is possible:

Section 1. Neither the United States nor any of its states or territories or protectorates [“or . . .”—include whatever might be necessary, for example, “Indian tribes”] nor any subdivision thereof shall ever allow same-sex or plural marriages. Neither the United States nor any of its states or territories or protectorates [“or . . .”—include whatever might be necessary, for example, “Indian tribes”] nor any subdivision thereof shall ever recognize any same-sex marriage of any other country or any subdivision (of whatever level) of any country.

Section 2. Neither the United States nor any of its states or territories or protectorates [“or . . .”—include whatever might be necessary, for example, “Indian tribes”] nor any subdivision thereof shall ever allow any institution that approximates same-sex or plural marriages or that grants any incidents of marriage. Neither the United States nor any of its states or territories or protectorates [“or . . .”—include whatever might be necessary, for example, “Indian tribes”] nor any subdivision thereof shall ever recognize any institution that approximates same-sex or plural marriages or that grants any incidents of marriage of any other country or any subdivision of whatever level of any country (of whatever level).

Section 3. Any same-sex marriage or any relationship previously recognized by the United States or by any of its states, territories, protectorates [“and . . .”—include whatever might be necessary, for example, “Indian tribes”] as a marriage or as fitting within any institution that approximates or that grants any incidents of marriage is hereby declared void or non-recognizable by the United States and by its states, territories or protectorates [“and . . .”—include whatever might be necessary, for example, “Indian tribes”] and any subdivision thereof, as the case may be, whether such marriage or other relationship was originally created by the United States or by any of its states or territories or protectorates [“or . . .”—include whatever might be necessary, for example, “Indian tribes”] or by any subdivision thereof or by another country or any subdivision (of whatever level).

I do not offer this language as a paragon of clarity nor of outstanding wordsmithing. Rather, I offer it as my first thoughts on what would be

necessary to cover the waterfront. I welcome the input and thoughts of others as to how the language could be improved and as to anything that I may not have thought of. I understand that this language looks unwieldy compared to one and two sentence amendments that have been introduced in the past. I understand the political realities of trying to get sponsors for a bill or resolution for such an amendment; of getting an amendment passed by Congress, and of getting an amendment ratified by the states. However, I disagree with many activists with whom I have interacted that therefore, we must pursue an amendment that accomplishes less than it needs to. Therefore, I would welcome any efforts to streamline my language or to cover concerns that I have missed, but I would oppose efforts to do less.

## VII. CONCLUSION

The attack on marriage is not going to stop. DOMA is being and almost certainly will continue to be repeatedly challenged, unless and until it should ever be declared constitutional by the United States Supreme Court. Even should it be declared constitutional, it simply does not “get the job done.” Therefore, the only possible complete answer is a federal marriage amendment. However, as discussed in Part VI, many of the proposed amendments do not get the job done right either.

For those on my side of this issue, it is time to invest our efforts in an amendment that will get the job done right. To come full circle: marriage matters. Half measures will not do. We must do whatever we can to secure the ratification of an amendment that wins a once-for-all victory over the three-pronged attack on marriage. It must shut the door to same-sex marriage, to marriage substitutes such as civil unions, and to the acquisition of the major incidents of marriage.

## VIII. ADDENDUM

As I was writing this article, the issues that drove it were in a state of flux. Both the Connecticut and California Supreme Courts had heard argument in, but had not issued opinions in, same-sex marriage cases. On May 15, 2008, the California Supreme Court issued its opinion in the six consolidated cases before it, which had been given the collective case name of *In re Marriage Cases*.<sup>383</sup> That opinion, as well as action taken by New York Governor Paterson, has dramatically altered the landscape and made the need for a Federal Marriage Amendment all the more necessary. On May 14, the day before the California decision, Governor Paterson

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383. No. S147999, 2008 WL 2051892 (Cal. May 15, 2008).

“directed all state agencies to begin to revise their policies and regulations to recognize same-sex marriages performed in other jurisdictions, like Massachusetts, California and Canada.”<sup>384</sup>

The California opinion is seen by defenders of marriage as much more devastating on a national level to that institution than was the Massachusetts decision because, as noted above,<sup>385</sup> Massachusetts has a reverse marriage evasion statute, but California does not. Furthermore, California has no residency requirement for marriage.<sup>386</sup> Thus, California could open the flood gates. Furthermore, governors in states whose constitution or statutes do not prohibit the recognition of same-sex marriages from other states could follow. The California opinion is problematic for several reasons, as I explain immediately below.

While a detailed analysis of the opinion is not possible in this Addendum (and not necessary since many will be forthcoming), I note the following problems. In so doing, I must assume that the reader has some passing knowledge of the opinion or at least of news accounts of it.

First, the court opined that the problem with the California marriage and domestic partnership scheme is giving virtually identical rights and responsibilities to married couples and domestic partners while using different names for the two schemes.<sup>387</sup> This is in stark contrast to the approach of the Vermont and New Jersey supreme courts, which held that the legislature could enact civil unions as the solution for withholding marriage from same-sex couples.<sup>388</sup> Furthermore, the California court went out of its way to note that this is virtually the identical question pending in Connecticut,<sup>389</sup> and more egregiously to suggest a litigation strategy to homosexual activists in California, Vermont, and New Jersey. As to the former, the court noted that the Ninth Circuit in *Smelt v. County of Orange*<sup>390</sup> had merely abstained on certain questions, and that after the court’s determination of the questions before it, the plaintiffs might now

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384. Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

385. *See supra*, notes 309-12.

386. California Dep’t of Public Health, California Marriage License—General Information, <http://www.cdph.ca.gov/certlic/birthdeathmar/Pages/MarriageLicenseceremonygeneralinfo.aspx> (last visited June 2, 2008).

387. *In re Marriage Cases*, at \*6-7.

388. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

389. *In re Marriage Cases*, at \*6, n.3.

390. 447 F.3d 673 (9th Cir. 2006).

have standing to bring a federal constitutional challenge.<sup>391</sup> As to the latter, the court stated in gratuitous *dicta*:

We note that in *Baker v. State* and *Lewis v. Harris*, the Vermont Supreme Court and the New Jersey Supreme Court specifically reserved judgment on the analogous state constitutional question that would be presented should the legislature decide to extend to same-sex couples the substantive benefits, but not the official designation, of marriage. To date, neither of these courts has addressed this issue.<sup>392</sup>

Turning to the court's analysis of the main claims in the case, I note other problems. First, the court opined that the marriage laws violated the state constitutional right to marry.<sup>393</sup> In so doing it declared that the right at issue was not the right to same-sex marriage, but rather the right to marry.<sup>394</sup> The court ignored the wisdom of Maryland's high court in its same-sex marriage case. That court wrote:

A substantially similar argument has been made to our peers in other jurisdictions in the course of confronting same-sex marriage challenges. *See, e.g., Wilson v. Ake; Standhardt v. Superior Court of State; Dean v. Dist. of Columbia; Jones v. Hallahan; Baker v.*

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391. *In re Marriage Cases*, at \*25, n.26.

392. *Id.* at \*26, n.27. Despite the comments made earlier in this paragraph about the Vermont and New Jersey opinions, the California court may have been picking up on the New Jersey Supreme Court's *dicta*:

We do not know how the Legislature will proceed to remedy the equal protection disparities that currently exist in our statutory scheme. The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done. Whatever path the Legislature takes, our starting point must be to presume the constitutionality of legislation. We will give, as we must, deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution. Because this State has no experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1. We will not presume that a difference in name alone is of constitutional magnitude.

"A legislature must have substantial latitude to establish classifications," and therefore determining "what is 'different' and what is 'the same'" ordinarily is a matter of legislative discretion. If the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons for enacting such legislation. To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate.

*Lewis*, 908 A.2d at 221-22 (citations and footnote omitted).

393. *In re Marriage Cases*, at \*39.

394. *Id.* at \*26-38.

*Nelson; Andersen [v. KingCo.]*. Each of these appellate courts, when presented with the argument, rejected it. For the reasons stated here, we join those courts and hold that the issue is framed more properly in terms of whether the right to choose same-sex marriage is fundamental.<sup>395</sup>

Deciding which is the proper question all but answers the question. The California Supreme Court, of course, decided that the right to marry had been violated.

The second problem with the California court's opinion again shows that it is out of sync with the vast majority of other courts in the country. In determining that the marriage laws violated Equal Protection principles, the court decided that the marriage laws were subject to strict scrutiny because homosexuals constitute a suspect class.<sup>396</sup> At least this time the court acknowledged its divergence from other courts. It cited four cases that came to the opposite conclusion and noted in a parenthetical that one of those cases had cited other cases, although it did not mention that the number of cases cited was ten.<sup>397</sup>

In sum, the California opinion has all the hallmarks of judicial tyranny: as just noted, the California Supreme Court has departed radically from its sister courts and, as noted by the dissenting opinions, it has violated the principles of separation of powers by usurping the role of the legislative branch<sup>398</sup> and has broken its covenant with the people of California.<sup>399</sup> Furthermore, it stands to wreck more havoc on the country than has the decision by the Massachusetts Supreme Judicial court.

Thus, the California Supreme Court's opinion can serve as a siren's call, beckoning the nation to a course of ruin by following the path of the homosexual activists; or it can serve as a siren, sounding the alarm that brings a Federal Marriage Amendment to the rescue. Now more than ever we need an amendment that will "get the job done right."

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395. *Conaway v. Deane*, 932 A.2d 571, 619 (Md. 2007) (citations omitted).

396. *In re Marriage Cases*, at \*45-48.

397. *Id.* at \*45, n. 60 (citing cases, including *Baker v. State*, 744 A.2d 864, 886, 878, n.10 (Vt. 1999) which in turns cites ten cases).

398. *Id.* at \*61 (Baxter, J., concurring and dissenting).

399. *Id.* at \*78 (Corrigan, J., concurring and dissenting). I wish the confines of this Addendum allowed me to pursue this matter further. As noted above at various points, I have sought to write from an explicitly Evangelical perspective (which is often compatible with the views of other Christians). I have elsewhere argued that Christians have special reason to be mobilized when judges violate covenants. See Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U.L. REV. 111, 118-22 (1998). Here I can do no more than refer the reader to that source.