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Federal Constitutional Protection for Marriage: Why and How

*Lynn D. Wardle**

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* Professor of Law, J. Reuben Clark Law School, Brigham Young University. Presented at the Symposium on A Federal Marriage Protection Amendment at J. Reuben Clark Law School, Brigham Young University, September 9, 2005. Parts of this paper were presented earlier at the Federalism and the Law of Marriage Conference at Harvard Law School, August 26-27, 2005, and at the Symposium on State Marriage Amendments at Georgia State University College of Law, April 16, 2005. The paper presented at the Symposium on State Marriage Amendments is being published as *State Marriage Amendments: Developments, Precedents and Significance*, 7 FLA. COASTAL L. REV. 403 (2005). The research assistance of Scott Borrowman, Joseph Wright, Kevin Fiet, and Zachary Starr and the production assistance of Marcene Mason are gratefully acknowledged.

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I. INTRODUCTION

As a result of judicial decisions by American courts mandating the legalization of same-sex marriage or giving marriage-equivalent status and benefits to same-sex unions during the past decade, several amendments to the Constitution of the United States have been proposed for the purpose of protecting the institution of marriage and barring same-sex marriage. These amendments include a variety of substantive, structural, and hybrid substantive-and-structural proposals. Collectively, the proposed amendments are called Federal Marriage Protection Amendments (or “FMPAs”) herein.

These proposals have been controversial for both substantive and structural reasons. Some opponents (including advocates of same-sex unions) object on substantive grounds that marriage should not be cast in constitutional cement, but should remain open to growth, evolution and expansion, reflecting the changing circumstances of our society. Others object on federalism grounds, arguing that the definition and regulation of marriage, including policy decisions whether same-sex unions should be given marital or marriage-like domestic relationship status, benefits and rights, are matters that have been, and should continue to be, left to the discretion of individual states.

This paper addresses two basic questions about proposed FMPAs. First, why are the FMPAs being proposed—specifically, what is the need, and why should they be supported? Second, how may FMPA advocates achieve the objective of securing constitutional protection for the institution of marriage?

In Part II this paper reviews the recent history of proposed constitutional amendments defining marriage including textual developments and the latest proposed variations. Part III addresses the “why” question, noting the reasons advocates of FMPAs give for why a constitutional amendment defining and protecting marriage is necessary. Some of the “why not” arguments and brief responses to the same are also included. Part IV addresses the “how” question, and discusses the ways and means available to achieve the objective of providing constitutional protection for the institution of conjugal marriage. Part V contains a brief conclusion.

At the outset, I should disclose my own background on this issue. As a family law professor for more than twenty-five years, it is my opinion that giving same-sex unions either marital or quasi-marital legal status and benefits would have profoundly detrimental effects not only upon the institution of marriage, but also families, children, and society. Accordingly, I have testified before legislators in several states in favor of proposals that would prohibit recognition of same-sex marriage.¹ I have given similar testimony before both houses of the United States Congress.² However, I also firmly believe in the value of federalism in family law. Indeed, in the summer of 2003, I presented a lengthy scholarly paper at a family law professors’ conference at the University of Oregon School of Law in which I explained why I did not support the proposed Federal Marriage Amendment, and expressed my criticisms of it based on concerns about preserving federalism in family law.³ However, since

1. See, e.g., Oral testimony and written statement presented to Judiciary Committee, Hawaii House of Representatives, Honolulu, Hawaii, (Jan. 21, 1997) (regarding H.B. 117 overturning the ruling in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (that Hawaii Constitution equal protection provisions facially violated by denial of same-sex marriage) (copy in author’s possession)); Written statement of Professor Lynn D. Wardle in support of S.J.R. No. 42 and S.C.R. No. 25, submitted for Alaska Senate Judiciary Committee Hearing on Monday (Mar. 9, 1998) (copy in author’s possession); Oral testimony (written statement provided in 1997) presented to the Judiciary Committee, California State Senate, regarding S.B. 911 (prohibiting recognition of same-sex marriages) (copy in author’s possession); Written statements to state legislative Judiciary Committees in Nebraska and Ohio regarding same-sex marriage (Feb.-Mar. 1997); Testimony about recognition of Same-sex Marriage (S.B. 45) before the State and Veterans Affairs Committee of the Colorado Senate (Feb. 9, 2000) (copy in author’s possession); Testimony regarding adoptions by non-marital cohabitants (S.B. 63) before the Judiciary Committee of the Utah Senate, (Feb. 16, 2000) (copy in author’s possession); Testimony about adoptions by non-marital cohabitants (H.B. 103) before the Judiciary Committee of the Utah House of Representatives (Feb. 24, 2000) (copy in author’s possession).

2. See, e.g., *Statement and prepared statement in The Defense of Marriage Act, Hearing Before the Subcomm. on the Constitution of the Committee on the Judiciary, U.S. House of Representatives*, 104 Cong., 2d Sess., on H.R. 3396, May 15, 1996 (Serial No. 69) at 158-80; *Defense of Marriage Act, Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess., 23-42 (July 11, 1996); *Are Federal and State Marriage Protection Laws Vulnerable to Judicial Activism?: Hearing before the Senate Subcomm on the Constitution, Civil Rights, and Property Rights* (Apr. 13, 2005), available at http://judiciary.senate.gov/testimony.cfm?id=1454&wit_id=4136 (seen Apr. 11, 06) (copy in author’s possession).

3. Lynn D. Wardle, *Federalism in Family Law and the Proposed Federal Marriage*

then, judicial rulings of a number of federal and state courts have invoked various constitutional doctrines to mandate the legalization of same-sex unions and to invalidate laws designed to protect the institution of conjugal marriage. Thus, I have become convinced that, for better or worse, the issue of same-sex marriage is being decided, and before long, will be completely decided as a matter of federal constitutional law by judicial decisions. The question is no longer whether the same-sex marriage issue will be federalized—that already is happening. Rather, the question is how the institution of marriage can be constitutionally protected while preserving as much as possible of the core constitutional principle of federalism in family law. I believe that a clear, textual federal constitutional amendment is the best way to simultaneously protect marriage and to preserve federalism in family law. Thus, I have recently presented two papers in which I expressed my strong support for a federal marriage protection amendment.⁴

II. RECENT DEVELOPMENTS REGARDING A FEDERAL MARRIAGE PROTECTION AMENDMENT

The first version of a proposed Federal Marriage Protection Amendment was introduced in the House of Representatives on May 15, 2002, as H.J. Res. 93,⁵ by Representative Shows and five co-sponsors in the second session of the 107th Congress.⁶ It provided:

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.⁷

Amendment, Address at the International Society of Family Law North American Regional Conference at the University of Oregon School of Law in Eugene, Oregon (June 27, 2003) (copy in author's possession).

4. See Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 UNIV. ST. THOMAS L. REV. 137 (2005) [hereinafter "Wardle, *The Proposed FMA*"]; Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221 (2005) [hereinafter "Wardle, *Tyranny*"]. While some proposals are better than others, I could support many of the federal marriage amendments that have been proposed. I have discussed some pros and cons of various wording in Wardle, *The Proposed FMA*.

5. H.J.Res. 93, 107th Cong., (2d Sess. 2002). It was introduced by Mr. Shows for six sponsors. For a full history of the early proposed Federal Marriage Amendments, see Wardle, *The Proposed FMA*, *supra* note 5, at 137-47.

6. See Stanley Kurtz, *Marriage News*, NATIONAL REVIEW ONLINE (May 15, 2002), available at http://www.nationalreview.com/thecorner/2002_05_12_corner-archive.asp. See generally Wardle, *The Proposed FMA*, *supra* note 5, at 142-73 (detailed history).

7. H.J.Res. 93, 107th Cong. (2002).

The same text was reintroduced the following year (after the November 2002 elections) in the first session of the 108th Congress on May 21, 2003, by Rep. Marilyn Musgrave and five co-sponsors as H.J. Res. 56.⁸ After the June 2003 decision of the U.S. Supreme Court in *Lawrence v. Texas*,⁹ holding that laws prohibiting sodomy are irrational and unconstitutional,¹⁰ and the October 2003 decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Dep't of Pub. Health*,¹¹ declaring the Massachusetts marriage law irrational and unconstitutional and mandating same-sex marriage,¹² more than one hundred twenty-five additional congressmen signed on as co-sponsors of H.J. Res. 56.¹³ Similarly, after those judicial decisions, Senator Allard introduced a Senate version of the Federal Marriage Amendment, S.J. Res. 26, with identical text, on November 25, 2003.¹⁴

The following year, in the second session of the 108th Congress, Senator Allard with eight other co-sponsors introduced an alternative version of the FMPA, S.J. Res. 30, on March 22, 2004.¹⁵

On May 13, 2004, the House of Representatives Subcommittee on the Constitution of the Judiciary Committee held hearings on H.J. Res. 56.¹⁶ The United States Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Property Rights held a one-day hearing on March 3, 2004, on the subject "Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts *Goodridge* Decision and the Judicial Invalidation of Traditional Marriage Laws?"¹⁷ Earlier, on September 4, 2003, before S.J. Res. 30 was introduced in the Senate, the same subcommittee held hearings entitled "What

8. H.J. Res. 56, 108th Cong. (2002).

9. 539 U.S. 558 (2003).

10. *Id.* at 578-79.

11. 798 N.E.2d 941 (Mass. 2003).

12. *Id.* at 948.

13. As of October 9, 2004, there were 131 House member co-sponsors for H.J. Res. 56. See Library of Congress, Bill Summary for 108th Congress, H.J. Res. 56.

14. S.J. Res. 26, 108th Cong. (Nov. 25, 2003). As of September 22, 2004, it had 10 co-sponsors. See Library of Congress, Bill Summary and Status for 108th Congress, S.J. Res. 26, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SJ00026://bss/d108query.html> (last visited Sept. 22, 2004) or <http://judiciary.house.gov/media/pdfs/printers/108th/93656.PDF> (last visited Apr. 12, 2006).

15. S.J. Res. 30, 108th Cong. at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.J.RES.30>: (last visited Sept. 27, 2004).

16. *The Federal Marriage Amendment (The Musgrave Amendment), Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 108th Cong. (2004).

17. *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?*, Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights, 108th Cong. (2004) at <http://judiciary.senate.gov/hearing.cfm?id=1072> (last visited Sept. 22, 2004).

is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?”¹⁸ Three weeks later, on March 23, 2004, the full Senate Judiciary Committee held hearings on S.J. Res. 26,¹⁹ and three months later, on June 22, 2004, the whole Senate Judiciary Committee held yet another related hearing titled “Preserving Traditional Marriage: A View from the States.”²⁰

After these hearings, Senator Allard reintroduced a slightly modified version of his bill as S.J. Res. 40, on July 7, 2004, with a total of 19 co-sponsors. This new version of the FMPA provided:

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.²¹

Just one week after being introduced S.J. Res. 40 was presented for a record vote in the full Senate on a motion to invoke cloture (to end debate—a threatened filibuster).²² The Senate vote was 48 - 50 - 2 (Senators Kerry and Edwards did not vote).²³

The House also proceeded to consider a proposed FMPA. On September 23, 2004, Rep. Musgrave introduced H.J.Res. 106,²⁴ a revised

18. *Hearing Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Senate Committee on the Judiciary*, 108th Cong. (2004) at http://judiciary.senate.gov/testimony.cfm?id=906&wit_id=2539 (last visited Sept. 22, 2004).

19. *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004), at <http://judiciary.senate.gov/hearing.cfm?id=1118> (last visited Sept. 22, 2004).

20. *Preserving Traditional Marriage: A View from the States: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004), at <http://judiciary.senate.gov/hearing.cfm?id=1234>, (last visited September 22, 2004). Massachusetts Governor Mitt Romney and former Representative Bob Barr were the primary witnesses.

21. S.J. Res. 40, 108th Cong. (2004) at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.J.RES.40>; (last visited Sept. 27, 2004). My thanks to Andrew Koppelman for sharing the identification of this Resolution.

22. Record Vote No. 155, U.S. Senate Roll Call Votes, 108th Cong. (July 14, 2004), at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=2&vote=00155 (last visited Sept. 27, 2004).

23. *Id.*; see also 150th CONG. REC. S8061-03 (July 14, 2004), available at <http://thomas.loc.gov/cgi-bin/query/R?r108:FLD001:S58091> (last visited Sept. 27, 2004).

24. It states, “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.” H.J.Res. 106, 108th Cong. (2004), at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.J.RES.106>; (last visited Oct. 9, 2004). The bill had 121 co-sponsors within five days. See Library of Congress, Bill Summary and Status for the 108th Congress, H.J. Res. 106, at <http://thomas.loc.gov/cgi-bin/bdquery/D?d108:1:/temp/~bdRycD:@@N/bss/d108query.html> (last visited Oct. 9, 2004).

version of the FMPA, with language almost identical to S.J. Res. 40.²⁵ On September 30, 2004, the House voted on H.J.Res.106, with 227 members supporting the proposed amendment and 186 opposing it.²⁶ Although this vote represented a strong majority it was far short of the required 2/3 vote for passage of a proposed constitutional amendment.²⁷

Following these votes, the 2004 federal elections brought relatively few changes to Congress. Yet, congressional interest in a federal marriage amendment seems to wane in non-congressional-election years.

On January 24, 2005, shortly after the first session of the 109th Congress convened, S.J. Res.1 was introduced by Senator Allard and initially co-sponsored by twenty-four (now twenty-eight) other Senators.²⁸ Styled the “Marriage Protection Amendment,” it provides:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.²⁹

In the House of Representatives, a significantly different proposal, H.J. Res. 39, was introduced on March 17, 2005, by Representative Daniel Lungren on behalf of ten congressmen.³⁰ It provides:

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.

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 be-

25. H.J. Res. 106 uses the word “solely,” while S.J.Res. 40 uses the word “only” to describe the legal exclusivity of the institution of conjugal marriage.

26. Library of Congress, Summary of Bills Introduced in the 108th Congress, H.J. Res. 106, at <http://thomas.loc.gov/cgi-bin/bdquery/D?d108:4:/temp/~bdBT8h::> (last visited Oct. 9, 2004).

27. *Id.*; see also U.S. CONST. art. V.

28. Sen. J. Res. 1, 109th Cong. (2005), at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109: SJ00001:@@L&summ2=m&> (last visited Sept. 5, 2005).

29. *Id.*

30. H.R. J. Res. 39, 109th Cong. (2005), at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109: HJ00039:@@L&summ2=m&> (last visited Sept. 5, 2005).

tween 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.³¹

Both proposals were referred to each house's respective Judiciary Committee; S.J. Res. 1 was approved by a Subcommittee and is expected to be voted upon in Spring 2006.³²

On April 14, 2005, Senator Sam Brownback proposed an alternative federal marriage amendment. It reads:

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.³³

The Subcommittee on the Constitution, Civil Rights, and Property Rights, chaired by Senator Brownback, as well as the full U.S. Senate Judiciary Committee have since held hearings about the need for and considerations regarding a proposed federal marriage amendment.³⁴

Thus, every year for the past four years, in three consecutive congresses, at least one or more version of a proposed federal constitutional amendment to protect the institution of conjugal marriage has been introduced. The initial votes on the proposed amendments came only two years after the first proposed amendment was introduced; while they fell far short of the two-thirds approval required in either house in 2004, they won a significant majority vote in the House and received a near-majority in the Senate, and are expected to draw more votes in 2006. President Bush declared his support for a federal marriage amendment in his 2004 State of the Union address.³⁵

31. *Id.*

32. *Id.*; see also *supra* note 27. S.J. Res. 1, Latest Major Action (11/9/2005 subcommittee approved), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SJ00001:@@X> (seen May 1, 2006); see also James Downing, *Marriage amendment picks up four votes over '04*, *The Hill* (April 12, 2006) available at <http://www.hillnews.com/thehill/export/TheHill/News/Campaign/041206.html> (seen May 1, 2006) ("A majority of the Senate this year will support the Federal Marriage Amendment . . .").

33. See S.J. Res. 13, 109th Cong. (2005) (introduced by Sen. Brownback on Apr. 14, 2005); Information and Materials, *Federalism and the Law of Marriage Conference*, Aug. 26-27, 2005, at Harvard Law School, at Tab. 16 (copy in author's possession).

34. *Are Federal and State Marriage Protection Laws Vulnerable to Judicial Activism: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary*, 109th Cong. (2005); *An Examination of the Constitution Amendment on Marriage, Hearing Before the Senate Committee on the Judiciary*, 109th Cong. (2005) at <http://judiciary.senate.gov/hearing.cfm?id=1641> (last visited Oct. 18, 2005) (hearing scheduled for Oct. 20, 2005).

35. President George W. Bush, State of the Union Address (Jan. 20, 2004), at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited October 6, 2004).

Additionally, other Senators have discussed (without formally introducing) other variations of a federal marriage protection amendment. Senator Hatch has suggested:

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.³⁶

Various academics also have proposed alternative language for a Federal Marriage Protection Amendment. For example, Professors Nelson Lund and John O. McGinnis have proposed:

Sec[ti]on 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[ti]on 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.³⁷

Thus, it is clear that there is a strong movement to amend the Constitution of the United States to protect the institution of conjugal marriage. It appears that the movement for a Federal Marriage Protection Amendment is still alive and well, but makes significant progress only in federal election years; it was perceived by the Republicans in 2004 to be an issue that would help them win elections. Thus, one may expect Congress in 2006 to become active in discussing, and perhaps voting upon, a proposed FMMPA.

36. See NR Editors, *A Battle, Joined, Marriage and the Constitution*, NATIONAL REVIEW ONLINE, http://www.nationalreview.com/nr_comment/editors200403040830.asp (last visited October 17, 2005); see also Information and Materials, *Federalism and the Law of Marriage Conference*, Aug. 26-27, 2005, at Harvard Law School, at Tab. 16 (copy in author's possession). Ultimately, Senator Hatch supported the proposed FMA. See Sen. Orrin Hatch, *Floor Statement: "Federal Marriage Amendment"* (July 12, 2004), at http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.View&PressRelease_id=1101 (last visited Oct. 17, 2005).

37. Nelson Lund & John O. McGinnis, Colloquium, *The Boundaries of Liberty After Lawrence v. Texas: Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1613, n.210 (2004) (Section Three of the proposal is omitted.); see also Scott Dodson, *Constitutional Thematics and the Peculiar Federal Marriage Amendment*, 20 BYU J. PUB. L. 233 (2006 in press) (possible improved FMMPA language suggested).

III. WHY A FEDERAL MARRIAGE PROTECTION AMENDMENT SHOULD BE ADOPTED

There are many reasons why it is reasonable—indeed, critical—that an amendment to the Constitution of the United States protecting the institution of marriage by defining marriage as the union of a man and a woman be adopted. First, constitutions are intended to reflect the core values and protect the cherished institutions and relationships of the people, especially those that the people perceive to be threatened. “Constitutions reflect society’s fundamental beliefs and cherished values.”³⁸ There is strong evidence that the American people highly value the institution of conjugal marriage and believe that it is in jeopardy.³⁹ Second, there has been a growing pattern of judicial attempts to radically redefine marriage to include same-sex couples.⁴⁰ Third, the constitutions of most of the nations of the world (most of which have been adopted in the past sixty years and reflect modern social conditions and dangers) expressly provide protection for family and marriage relations in the text of their constitutions.⁴¹ Fourth, many important international conventions, compacts, and human rights declarations provide explicit protection for family and marriage relations.⁴² Fifth, a narrow and precise Federal Marriage Protection Amendment will re-establish the principle of federalism in family law, and effect a much more modest alteration of traditional federalism than the trend of recent judicial decisions redefining marriage to include same-sex unions.⁴³

A. The American People Highly Value the Institution of Conjugal Marriage, Believe That It Is In Jeopardy, and Want to Adopt Constitutional Protections for Marriage

38. William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 448 (1997); see also *In re Gault*, 387 U.S. 1, 62 (Black, J., concurring) (“[T]he Bill of Rights safeguards . . . are the very vitals of a sound constitutional legal system designed to protect and safeguard the most cherished liberties of a free people.”); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1687 (2004) (“Americans properly revere our Constitution for its protection of individual rights.”); Samuel D. Brooks, Note, *Native American Indians’ Fruitless Search for First Amendment Protection of The Sacred Religious Sites*, 24 VALPO. U. L. REV. 521, 530 (1990) (“The framers of the Bill of Rights intended the first amendment to protect against the type of government oppression of the individual that motivated their escape to the ‘New World.’”).

39. See *infra* Part III.A.

40. See *infra* Part III.B.; see also Wardle, *The Proposed FMA*, *supra* note 5, at 185-94; Wardle, *Tyranny*, *supra* note 5, at 255-61.

41. See *infra* Part III.C.

42. See *infra* Part III.D.

43. See *infra* Part III.E; see also Wardle, *Tyranny*, *supra* note 5, at 262-63.

Constitutional provisions and amendments historically have been adopted to protect basic rights and institutions that are perceived to be threatened.⁴⁴ Thus, for example, in 1787 there was bona fide concern about the national government granting “Title[s] of Nobility”⁴⁵ and about the State governments granting “Letters of Marque and Reprisal,”⁴⁶ so the delegates to the Federal Convention in Philadelphia included specific provisions in the Constitution to prevent those possible abuses.⁴⁷ Likewise, in 1789, the right of the people to be secure in their homes from being forced to quarter government troops was perceived to be in jeopardy, so James Madison and the other drafters of the Constitution and the Bill of Rights proposed, and the legislatures of 3/4 of the states ratified, a specific amendment to the Constitution protecting that facet of family life from government intrusion.⁴⁸ Further, in 1865, it was widely believed that unless slavery was constitutionally abolished, some states would revive a form of the practice of slavery (at the time considered to be a “domestic relationship” and regulated by the states as such), so slavery was constitutionally outlawed by the Thirteenth Amendment.⁴⁹ Today, titles of nobility, letters of marque and reprisal, forced quartering of troops, and slavery are no longer considered to be imminent threats, and it is likely that if the Constitution were to be rewritten today, some of those provisions might not be included.

Today, the majority of American people believe that marriage is seriously threatened by the movement (including judicial decisions) seeking to legalize same-sex marriage and that constitutional protection for marriage is needed. Voters in nineteen states have passed state marriage

44. See generally Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents and Significance*, 7 FLA. COASTAL L. REV. 403 (2005) (hereinafter “Wardle, *SMA*s”).

45. U.S. CONST., art. I, § 9, cl. 8.

46. U.S. CONST., art. I, § 10, cl. 1.

47. See The Federalist No. 44, at 281-84 (James Madison) (Clinton Rossiter ed., 1961) (Madison writing of need for “additional fences against these dangers” to prevent abuses such as prohibition on granting letters of marque and reprisal, passing ex post facto laws, bills of attainder, granting titles of nobility, etc.); *id.* No. 84, at 511 (Alexander Hamilton) (Hamilton noting that prohibition of granting titles of nobility, etc., “are perhaps greater securities to liberty and republicanism than any” other provisions in the Constitution). See generally James Madison, Notes of Debates in the Federal Convention of 1787 at 451-52, 587-89, 651 (1966) (concerns about aristocracy); *id.* at 579, 641 (concern about states granting letters of marque and reprisal).

48. U.S. CONST., amend. III.

49. See generally Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (2004); Michael Vorenberg, *Final Freedom: The Civil War, The Abolition of Slavery and the Thirteenth Amendment* (2001); Alexander Tsesis, *Furthering American Freedom: Civil Rights and the Thirteenth Amendment* 45 B.C. L. REV. 307 (2004) (history of the Thirteenth Amendment); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 47-48 (1987); Jacobus Broek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 174-75 (1951).

amendments (“SMAs”)⁵⁰ and nationally the average vote in favor of such amendments has been 70%.⁵¹ In 2004 alone, voters in thirteen states ratified SMAs by overwhelming margins (from a low of 57% to a high of 87% popular voter support),⁵² and in 2005, voters in Kansas and Texas overwhelmingly approved SMAs.⁵³ State marriage amendments have been approved by legislatures to be on the ballots in six additional states in 2006, and in two other states proposed state marriage amendments are currently in mid-process (involved in multi-year amendment proposal-and-ratification processes).⁵⁴ Moreover, twenty-six other states that have not yet adopted a state marriage amendment have enacted statutory protection for conjugal marriage.⁵⁵ Recent public opinion polls likewise report that approximately 60% of Americans express support for an amendment to the U.S. Constitution defining marriage as an institution for male-female unions only.⁵⁶ In fact, between June 2003 and May

50. Joshua K. Baker, *Status, Substance, and Structure: An Interpretative Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, App. I (2004-2005); National Conference of State Legislatures, at <http://www.ncsl.org/programs/cyf/samesex.htm#DOMA> (last visited Sept. 1, 2005). In 2005, Kansas and Texas adopted state marriage amendments, bringing the total to nineteen states with marriage amendments. See National Conference of State Legislatures, *Same Sex Marriage* (Jan. 2006), available at <http://www.ncsl.org/programs/cyf/samesex.htm#DOMA> (last visited March 28, 2006).

51. National Gay and Lesbian Task Force, *Voting Tallies: State Anti-gay Ballot Initiatives*, at <http://www.thetaskforce.org/downloads/StateBallotPollingData2004.pdf> (last visited Oct. 18, 2005).

52. CNN.Com, *Election Results* at <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/> (last visited Sept. 25, 2005); see also Baker, *supra* note 51, at App. I (noting voters in 13 states approved marriage amendments in 2004).

53. Kansas Const., Art. 15, § 16 (2005); Texas Const., Art. I, sec. 32 (2005); see also Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497, 503 n.24 (2005).

54. See generally Cheryl Wetzstein, *Gay ‘marriage’ battles rage on into their year*, WASH. TIMES, Dec. 26, 2005, available at <http://www.washingtontimes.com/national/20051225-114001-1901r.htm> (last seen January 1, 2006). The states with marriage amendments on the ballot in 2006 include Alabama, Idaho, South Carolina, South Dakota, Tennessee, and Virginia. See also Senate Republican Policy Committee, *State-by-state Marriage Protection Update* (Mar. 31, 2005) (copy in author’s possession).

55. *Id.* Only six or seven states (depending on how Wisconsin is categorized) lack any constitutional or statutory protection for conjugal marriage. *Id.*; *Same Sex Marriage*, National Conference of State Legislatures (Jan. 2006) at <http://www.ncsl.org/programs/cyf/samesex.htm#DOMA>.

56. Jennifer Harper, *More Americans Oppose Gay Marriage, Poll Finds*, WASH. TIMES, Apr. 2, 2005, at <http://washingtontimes.com/national/20050401-114205-2153r.htm> (last visited Oct. 18, 2005) (CNN/USA Today/Gallup poll found 68% of Americans oppose same-sex marriage, and 57% favor and only 37% oppose a constitution amendment defining marriage as the union of a man and a woman); CBS News, *Polls: Few Favor Same-sex Marriage*, Mar. 15, 2004, at <http://www.cbsnews.com/stories/2004/03/15/opinion/polls/main606453.shtml> (last visited Oct. 18, 2005) (59% favor a constitutional marriage amendment to allow only man-woman marriage, up from 55% three months earlier; only 35% oppose, down from 40% earlier); Alliance for Marriage, *National Wirthlin Poll Finds Most Americans Support a Constitutional Amendment to Defend Marriage*, at http://www.allianceformarriage.org/site/PageServer?pagename=mac_30304 (last visited Oct. 18, 2005) (Wirthlin poll released March 3, 2003, by Alliance for Marriage shows 57% of total population sampled, 62% of African-Americans sampled, and 63% of Hispanics sampled favor a federal marriage amendment; 62% of total population agreed marriage is the union of a man and a woman);

2005, Gallup polls recorded an increase in opposition to same-sex marriage from 55% to 68%, and an increase in support for a constitutional amendment from 50% to 57%.⁵⁷ Clearly, a socio-legal-political phenomenon of some significance is occurring in the United States of America. There is no denying that a majority of American people strongly support enacting constitutional protection for conjugal marriage—defining marriage as the union of a man and a woman.

B. Recent Court Decisions Have Attempted to Redefine Marriage or Mandate Marriage-like Legal Status of Same-sex Couples

Public perception that marriage is in serious danger of radical redefinition by the judiciary is well grounded. Courts in eight states already

Rev. Dick Richardson, *Mom-and-Pop Voter Force*, WASH. TIMES, at <http://www.washtimes.com/commentary/20040807-103947-8383r.htm> (last visited Oct. 18, 2005) (“A recent Wirthlin poll found 56 percent of self-identified Democrats support the Federal Marriage Amendment, affirming marriage as the union of a man and a woman.”). However, a Boston Globe (Massachusetts) poll published May 9, 2005, reported that the liberal newspaper found 45% supported a federal marriage amendment, while 47% opposed it. See ReligiousTolerance.org, *Single U.S. Public Opinion Polls: Same-sex Marriage and Civil Unions*, at http://www.religioustolerance.org/hom_mar_p.htm (Last visited Oct. 17, 2005). Likewise, The National Gay and Lesbian Task Force reports that a March 20, 2004 Gallup poll showed only 45% favored a constitutional amendment (the same percentage as nearly a year earlier) while 50% opposed (also the same percentage as nearly a year earlier). *Recent National Polls on Same-sex Marriage and Civil Unions*, (Mar. 20, 2004) at <http://www.thetaskforce.org/downloads/RecentNationalMarch2004.pdf> (last visited Oct. 18, 2005). On the other end of the political spectrum a March 4, 2004 poll reported by Focus on the Family reported that 94% of respondents opposed same-sex marriage and only 6% supported it. These poll results probably were colored by the position espoused by the organization that undertook the surveys in each case. The Barna Group reported in June 2004 that its surveys showed the public strongly divided, with 46% in favor of the proposed (early draft) federal marriage amendment, (including 35% strongly in favor), and 44% opposed (including 31% strongly opposed). The Barna Group, *Public Divided on Marriage Amendment* (June 21, 2004) at <http://www.barna.org/FlexPage.aspx?Page=BarnaUpdateNarrow&BarnaUpdateID=166> (last visited Oct. 18, 2005). In January 2004, an ABC News/Washington Post opinion survey found that most Americans oppose both same-sex marriage and a constitutional amendment banning same-sex marriage; 55% opposed same-sex marriage, 51% opposed civil unions, and only 38% favored a federal constitutional amendment, while 58% favored leaving the issue to the states. David Morris & Gary Langer, *Same-sex Marriage, Most oppose it, but balk at amending the Constitution*, at http://abcnews.go.com/sections/us/Relationships/same_sex_marriage_poll_040121.html (last visited Oct. 18, 2005). The Field Poll showed that in June 2004 Californians opposed same-sex marriage (53% to 43%) but also opposed a federal marriage amendment (54% to 41%). The Field Poll, *Release #2118*, at <http://field.com/fieldpollonline/subscribers/RLS2118.pdf> (June 4, 2004) (last visited Oct. 18, 2005). Clearly, poll wording, timing and location also may influence the results. Michael Foust, *What gives? Polls Show Differing Results on Marriage Amendment Support*, BP NEWS, Feb. 6, 2004, at <http://www.bpnews.net/bpnews.asp?ID=17591> (last visited Oct. 18, 2005) (CBS/NY Times poll in December 2003 showed 55% of Americans favored a federal marriage amendment, while an Annenberg poll the same month found that 52% opposed a federal marriage amendment; difference explained by wording of the questions asked).

57. Joshua K. Baker, *Same-Sex Marriage: Recent Trends in Public Opinion*, IMAPP Policy Brief, at <http://www.marriagedebate.com/pdf/iMAPP.2005opinionupdate.pdf> (Last visited Oct. 18, 2005).

have ruled in favor of same-sex marriage (though some cases have been overturned or are not final).⁵⁸ Cases are currently pending in another eight states challenging marriage laws disallowing same-sex marriage.⁵⁹ While the court of last resort in only one state has forced legalization of same-sex marriage thus far,⁶⁰ the effort is underway in many state courts to achieve the compulsory legalization of same-sex marriage by judicial fiat.

Similarly, court decisions in New York and Iowa have recently called into question the constitutionality of state and federal “Defense of Marriage Acts” (DOMAs) which legislatively defend the definition of marriage.⁶¹ In decisions that have serious implications for the federal DOMA, two state courts in Washington have ruled that a state DOMA is unconstitutional under state constitutional doctrines.⁶² Even more ominously, in early 2005, a federal district court in Nebraska ruled that the state’s DOMA violated the First Amendment (freedom of intimate association), the Equal Protection Clause, and the constitutional prohibition against Bills of Attainder in the U.S. Constitution!⁶³

58. These decisions have come in Hawaii, Alaska, Vermont, Massachusetts, Oregon, Washington, New York, and California. Only the Vermont and Massachusetts decisions are final. See Wardle, *Tyranny*, *supra* note 5, at 259.

59. See Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Baehr v. Miicke, 196 WL 694235 (Haw. Cir. Ct. 1996) (overturned by state constitutional amendment); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 at 6 (Alaska Super. Ct., Feb. 27, 1998) (overturned by state constitutional amendment); Baker v. State, 744 A.2d 864 (Vt. 1999); Goodridge v. Department of Public Health, 798 N.E.2d 941, 943, 959 (Mass. 2003); In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 569-71 (Mass. 2004); Li v. State, 2004 WL 1258167 (Or. Cir. April 20, 2004), *rev’d*, 110 P.3d 91 (Ore. 2005) (because of state constitutional amendment); Andersen v. King County, 2004 WL 1738447 *3,4,11 (Wash. Super. 2004); Castle v. State, 2004 WL 1985215, *11 (Wash. Super. Sep 07, 2004) (both pending on appeal); Hernandez v. Robles, 794 N.Y.S.2d 579 (N.Y. Sup., Feb. 4, 2005) *rev’d*, Hernandez v. Robles, 26 A.D.3d 98, 805 N.Y.S.2d 354 (N.Y. App. Div., 2005); see also Samuels v. New York State Dept. Of Health, 811 N.Y.S.2d 136, (N.Y. App. Div., 2006); In re Coordination Proceeding, Special Title [Rule 1550(c)] Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Ct. San. Fran., Mar. 14, 2005).

60. *Goodridge*, *supra* note 60; *Opinion of the Justices to the Senate*, *supra* note 60 (civil union or any other kind of domestic union other than full, same-sex marriage violates the Massachusetts Constitution).

61. See, e.g., Langan v. St. Vincent’s Hospital of N.Y., 192 N.Y. Misc. 2d 442, 445 (N.Y. App. Div. 2003) (“It is unclear by what authority the Congress may suspend or limit the full faith and credit clause of the Constitution, and the constitutionality of DOMA has been put in doubt.”); *Alons v. Iowa Dist. Court*, 698 N.W.2d 858 (Iowa 2005); see also *Alons v. Iowa District Court for Woodbury County*, Lambda Legal, at <http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=203> (last visited Mar. 19, 2005); *Iowa Supreme Court to Hear Oral Argument Friday in Lesbian Civil Union Dissolution Case*, Jan. 11, 2005, at <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1605> (last visited Apr. 12, 2006).

62. See Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 at *3, *4, *11 (Wash. Super. Aug. 4, 2004) (invalidating state DOMA); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 at *3, *4, *10-13, *16 (Wash. Super. Sept. 7, 2004) (invalidating state DOMA).

63. Citizens for Equal Protection, Inc. v. Bruning, 368 F.Supp.2d 980 (D. Neb. 2005) (permanent injunction of state marriage amendment in part because it is a Bill of Attainder); see also Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004, 1008-11 (D. Neb. 2003) (find-

Thus, public perception that marriage is in danger of being radically redefined by judicial decree is not speculative or fantastic. It is based on a deliberate litigation campaign that has resulted in a growing pattern of serious judicial developments.

C. Explicit Protection for Marriage and Family in National Constitutions is the Global Norm

The constitutions of the majority of nations of the world (most of which have been adopted in the past sixty years and reflect modern social conditions and dangers) contain express, explicit protection for family and marriage relations in the text of their constitutions; many of them expressly define marriage as the union of man and woman. Indeed, of the 191 sovereign nations the United Nations recognizes,⁶⁴ at least 137 of them have national constitutions that contain substantive language protecting or structural provisions allocating power to protect families and/or family relations.⁶⁵ That is 71% of the 191 sovereign nations recognized by and belonging to the United Nations. Some constitutional provisions are extremely eloquent, many very full and robust, others very simple, and a few merely structural or procedural, but it can hardly be said that protection of marriage as a basic human right in the fundamental charter or constitution of a state is unusual.⁶⁶

1. Substantive constitutional protection for marriage is common

For example, Article 54 of the Constitution of Afghanistan provides:

Article 54 [Family]

- (1) Family is a fundamental unit of society and is supported by the state.
- (2) The state adopts necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing

ing likelihood that state DOMA violates Bill of Attainder clause).

64. United Nations List of Member States, <http://www.un.org/Overview/unmember.html> (last visited July 23, 2005). The United States recognizes 192 independent nations in the world. See U.S. Dep't of State, Bureau of Intelligence and Research, Independent States in the World, <http://www.state.gov/s/inr/rls/4250.htm> (last visited Aug. 1, 2005). The United States recognizes the Holy See/Vatican City as a sovereign state, but the United Nations does not (however, they do accord the Vatican Permanent Observer status).

65. Appendix I, *infra*; see also Wardle, *SMA*s, *supra* note 45 at App. I. All data about provisions in national constitutions is referred to as "at least," because a few constitutions could not be found, some were in foreign languages, and some marriage and family-protecting provisions may have been overlooked.

66. *Id.*

of children and the elimination of traditions contrary to the principles of the sacred religion of Islam.⁶⁷

Some European nations have similar provisions. For example, Article 6 of the German Constitution provides:

[Marriage and family, illegitimate children]

- (1) Marriage and family enjoy the special protection of the state.
- (2) Care and upbringing of children are the natural right of the parents and duty primarily incumbent on them. The state watches over the performance of this duty.
- (3) Separation of children from the family against the will of the persons entitled to bring them up may take place only pursuant to a law, if those so entitled fail in their duty or if the children are otherwise threatened with neglect.⁶⁸

At least seventy-eight national constitutions—nearly 57% of the national constitutions that refer to families or marriage, and governing more than 40% of the sovereign nations of the world—contain explicit, substantive provisions identifying marriage as a fundamental and protected relationship, defining marriage, or providing protection for marriage.⁶⁹

Provisions in the national constitutions of at least thirty-two nations could be labeled “Defense of Marriage Act” (DOMA) provisions because they either explicitly define marriage as the union of man and woman (twenty-one nations),⁷⁰ or very strongly indicate that marriage is the union of a man and a woman (eleven nations).⁷¹ Thus, nearly one-sixth of the sovereign nations of the world already have adopted marriage provisions similar to those suggested in the proposed Federal Marriage Protection Amendment.

The national constitutions of nearly 10% of the nations of the earth explicitly define marriage as the union of man and woman. For example,

67. AFG. CONST. art. 54, at http://www.oefre.unibe.ch/law/icl/af00000_.html (last visited Aug. 1, 2005).

68. F.R.G. CONST. art. 6, at <http://www.psr.keele.ac.uk/docs/german.htm> (last visited Aug. 1, 2005).

69. See Appendix I.

70. See BELR. CONST. art. 32; BRAZ. CONST. art. 226; BULG. CONST. art. 46; BURK. FASO CONST. art. 23; CAMBODIA CONST. art. 45; COLUM. CONST. art. 42; ECUADOR CONST. art. 33; HOND. CONST. art. 112; JAPAN CONST. art. 24; LATVIA CONST., art. 110 (amended Dec. 15, 2005); LITH. CONST. art. 31; MOLD. CONST. art. 48; NICAR. CONST. art. 72; PARA. CONST. arts. 49, 51, 52; POL. CONST. art. 18; TAJ. CONST. art. 33; TURKM. CONST. art. 25; UGANDA CONST. art. 31; UKR. CONST. art. 51; VENEZ. CONST. art. 77.

71. See ARM. CONST. art. 32; AZER. CONST. art. 34; P.R.C. CONST. art. 49; CUBA CONST. art. 43; ERI. CONST. art. 22; ETH. CONST. art. 34; MONG. CONST. art. 16; NAMIB. CONST. art. 14; PERU CONST. art. 5; SOMAL. CONST. art. 2.7; SURIN. CONST. art. 35; VIETNAM CONST. art. 64.

Article 32 of the Constitution of Belarus spells out protection of marriage as follows:

Article 32 [Marriage, Family]

- (1) *Marriage*, the family, motherhood, fatherhood, and childhood shall be under the protection of the State.
- (2) On reaching the age of consent, *women and men* shall have the *right to enter into marriage* on a voluntary basis and start a family. A *husband and wife* shall be equal in family relationships. . . .⁷²

The Constitution of Brazil also is quite detailed in its constitutional protection and definition of marriage:

Article 226 [Family]

The family, the foundation of society, enjoys special protection from the state.

- (1) Marriage is civil and the marriage ceremony is free of charge.
- (2) Religious marriage has civil effects, in accordance with the law.
- (3) For purposes of protection by the State, *the stable union between a man and a woman* is recognized as a family entity, and the law shall facilitate conversion of such entity into marriage.
- (4) The community formed by either parent and their descendants is also considered as a family entity.
- (5) The rights and duties of marital society shall be exercised equally by the man and by the woman.
- (6) Civil marriage may be dissolved by divorce, after prior legal separation for more than one year in the cases set forth by the law, or after 2 years of proven de facto separation.⁷³

The specific composition and definitional requirements of marriage are described in Article 46 of the Constitution of Bulgaria:

Article 46 [Matrimony]

- (1) *Matrimony is a free union between a man and a woman*. Only a civil marriage shall be legal.
- (2) Spouses shall have equal rights and obligations in matrimony and the family.
- (3) The form of a marriage, the conditions and procedure for its conclusion and termination, and all private and material relations between the

72. BELR. CONST. art. 32, available at http://www.oefre.unibe.ch/law/icl/bo00000_.html (last visited Aug. 1, 2005) (emphasis added).

73. BRAZ. CONST., *supra* note 71 (emphasis added).

spouses shall be established by law.⁷⁴

Likewise, the Constitution of Honduras provides:

Article 112:

Se reconoce el derecho del hombre y de la mujer a contraer matrimonio, así como la igualdad jurídica de los conyuges. (“*The right of man and woman to contract marriage is recognized, as is the juridical equality of married persons.*”)⁷⁵

The Constitution of Cambodia provides that “Marriage shall be . . . based on the principle of mutual consent between *one husband and one wife.*”⁷⁶ Likewise, the Constitution of Colombia declares that the family “is formed . . . by the free *decision of a man and woman* to contract matrimony”⁷⁷ Japan provides that: “Marriage shall be based only on the mutual consent of *both sexes*”⁷⁸ The Constitution of Lithuania provides that “[m]arriage shall be entered into upon the free *consent of man and woman.*”⁷⁹ The Constitution of Mongolia affirms that “[*m]en and women enjoy equal rights in . . . marriage. Marriage is based on the equality and mutual consent of the spouses who have reached the age determined by law.*”⁸⁰ Poland declares, “Marriage, *being a union of a man and a woman . . . shall be placed under the protection and care of the Republic of Poland.*”⁸¹ The Constitution of Ukraine, also explicitly provides: “Marriage is based on the free consent of *a woman and a man.*”⁸²

74. BULG. CONST. art. 46, *at* http://www.oefre.unibe.ch/law/icl/bu00000_.html (last visited Aug. 1, 2005) (emphasis added).

75. HOND. CONST. art. 112, *available at* http://www.honduras.net/honduras_constitution.html (last visited Apr. 12, 2006) (English translation provided by Google, *available at* http://translate.google.com/translate?hl=en&sl=es&u=http://www.honduras.net/honduras_constitution.html&prev=/search%3Fq%3DHonduras%2Bconstitution%26hl%3Den%26lr%3D%26sa%3DG. (last visited Apr. 12, 2006) (emphasis added).

76. CAMBODIA CONST. (Annotated) art. 45, *available at* http://www.cambodian-parliament.org/english/Constitution_files/constitution.htm (last visited Aug. 1, 2005) (emphasis added).

77. COLOM. CONST. art. 42, *available at* <http://www.georgetown.edu/pdba/Constitutions/Colombia/col91.html> (last visited Aug. 1, 2005) (emphasis added).

78. JAPAN CONST. art. 24, *available at* http://www.oefre.unibe.ch/law/icl/ja00000_.html (last visited Apr. 12, 2006) (emphasis added).

79. LITH. CONST. art. 38 (3), *available at* http://www.oefre.unibe.ch/law/icl/lh00000_.html (last visited Oct. 20, 2005) (emphasis added).

80. MONG. CONST. art. 16 (11), *available at* http://www.oefre.unibe.ch/law/icl/mg00000_.html (last visited Oct. 20, 2005).

81. POL. CONST. art. 18, *available at* http://www.oefre.unibe.ch/law/icl/pl00000_.html (last visited Aug. 1, 2005) (emphasis added).

82. UKR. CONST. art. 51, *available at* <http://www.rada.kiev.ua/const/conengl.htm> (last visited Aug. 1, 2005) (emphasis added).

These are just some examples of the many clear provisions in national constitutions that unequivocally define marriage constitutionally as the union of a man and a woman.

While not explicitly declaring that marriage is only the union of a man and a woman, other national constitutions clearly indicate that both sexes are included in marriage. For example, Article 32 of the Constitution of Armenia provides:

The family is the natural and fundamental cell of society. Family, motherhood, and childhood are placed under the care and protection of society and the state. *Women and men* enjoy equal rights when entering into marriage, during marriage[sic], and in the course of divorce.⁸³

Many provisions refer to “husband and wife,” suggesting dual-gender marriage. For example, the Constitution of the People’s Republic of China provides, “(1) Marriage, the family, and mother and child are protected by the State. (2) *Both husband and wife* have the duty to practice family planning.”⁸⁴ The Constitution of Cuba declares, “*Marriage* is the legal basis of the family, and rests upon absolute equality of rights of *both husband and wife*.”⁸⁵ In Namibia, the Constitution declares that “[*m*]en and women of full age . . . shall have the right to marry and to found a family.”⁸⁶ The Constitution of Somalia provides: “*Men and women* have equal rights and responsibilities. This included equal rights and responsibilities *in marriage . . .*”⁸⁷ In Vietnam, the Constitution provides: “Marriage shall conform to the principles of free consent, progressive union, monogamy and equality *between husband and wife*.”⁸⁸

Additionally, many national constitutions have provisions underscoring the dual-gender nature of the family, such as expressing protection

83. ARM. CONST. art. 32, available at http://www.oefre.unibe.ch/law/icl/am00000_.html (last visited Aug. 1, 2005) (emphasis added).

84. P.R.C. CONST. art. 49, available at http://www.oefre.unibe.ch/law/icl/ch00000_.html (last visited Aug. 1, 2005) (emphasis added).

85. CUBA CONST. art. 43 (1992), available at http://www.cubanet.org/ref/dis/const_92_e.htm (last visited August 1, 2005) (emphasis added); see also *id.* art. 36 (“ARTICLE 36. Marriage is the voluntarily established union between a man and a woman, who are legally fit to marry, in order to live together. It is based on full equality of rights and duties for the partners, who must see to the support of the home and the integral education of their children through a joint effort compatible with the social activities of both. . . .”) at <http://www.parlamentocubano.cu/espanol/const.ingles> (last visited Apr. 12, 2006).

86. NAMIB. CONST. art. 14, available at http://www.oefre.unibe.ch/law/icl/wa00000_.html (last visited Aug. 1, 2005) (emphasis added).

87. SOMAL. CONST. art. 2.7 (Draft), available at http://www.cubanet.org/ref/dis/const_92_e.htm (last visited August 1, 2005) (emphasis added); see also http://www.civicwebs.com/cwvlib/africa/somalia/1995/reunification/appendix_1.htm (last visited Apr. 12, 2006).

88. VIETNAM CONST. art. 64, available at http://www.oefre.unibe.ch/law/icl/vm00000_.html (last visited Aug. 1, 2005) (emphasis added).

for and commitment to motherhood, parenting, or parent-child rights and relationships.⁸⁹ For instance, Articles 41 of the Constitution of Slovakia and 51 of the Constitution of Ukraine provide:

Article 41

(1) Marriage, parenthood, and the family are under the protection of the law. The special protection of children and minors is guaranteed.

(2) Special care, protection in labor relations, and adequate working conditions are guaranteed to women during the period of pregnancy.⁹⁰

Article 51

Marriage is based on the *free consent of a woman and a man*. Each of the spouses has equal rights and duties in the marriage and family. Parents are obliged to support their children until they attain the age of majority. Adult children are obliged to care for their parents who are incapable of work. The family, childhood, motherhood and fatherhood are under the protection of the State.⁹¹

Similarly, Article 46 of the Constitution of Vietnam provides:

It is the responsibility of the State, society, the family and the citizen to ensure care and protection for mothers and children; to carry into effect the population programme and family planning.⁹²

As the last two examples indicate, many nations have multiple provisions protecting family, and/or marriage, and/or motherhood, and/or parenting, and/or defining marriage as a dual-gender institution.

Thus, it is hardly novel for the citizens of a nation to include protection for marriage and family in the foundational legal documents of the country. In fact, such provisions are the norm in the constitutions of the nations of the world. Since protection for the institution of marriage in constitutional provisions is not rare or novel, it is surprising, if not ironic, that the United States, which has the oldest Constitution still in use in the world,⁹³ and is the historic leader among nations in adopting constitu-

89. See Appendix I.

90. SLOVK. CONST. art. 41, available at http://www.oefre.unibe.ch/law/icl/lo00000_.html (last visited Aug. 1, 2005).

91. UKR. CONST. art. 51, available at <http://www.rada.kiev.ua/const/conengl.htm> (emphasis added).

92. VIETNAM CONST. art. 40, available at http://www.oefre.unibe.ch/law/icl/vm00000_.html; see also *supra* note 82 and accompanying text (specific protection of male-female marriage).

93. This does not include the *Legis Statutae Reipublica San Marino*, sometimes considered part of the constitution of San Marino, which was adopted in 1600 and reportedly is still in effect (though it is very difficult to find a copy of it). The Electoral Law of San Marino, November 18,

tional protections for valued basic rights, principles, relationships, and institutions, has no constitutional provision explicitly recognizing or providing protection for the institution of marriage.

2. *Constitutions of nations with federal governments protect marriage and families*

One of the objections to adoption of an FMPA to the Constitution of the United States is the federal design of the United States's government. However, many other nations with federal systems of government have provisions in their national constitutions that provide specific protections for family and marriage. Argentina, Australia, Brazil, Canada, Germany, India, Mexico, Nigeria, Switzerland, and Venezuela, are the ten nations (besides the United States) with the most clearly federal forms of government.⁹⁴ The Constitutions of most of these nations (Argentina,⁹⁵ Brazil,⁹⁶ Germany,⁹⁷ Mexico,⁹⁸ Nigeria,⁹⁹ and Venezuela)¹⁰⁰ contain explicit substantive protection for marriage and/or family. That fact alone suggests that the principle of federalism is not inconsistent with substantive constitutional protection for marriage and family.

However, comparative analysis requires deeper examination, for there are many different forms of federalism. The American form of federalism has a long tradition of strong national deference to, and respect for, the primacy of state regulation of domestic relations. By contrast, the federal systems in several countries appear to give the national government primary, if not plenary, authority to regulate marriage and family law. For example in Argentina,¹⁰¹ Brazil,¹⁰² and Switzerland¹⁰³ it appears

1926, appears to have substantially supplemented if not superceded much of it. *See generally* Gisbert H. Flanz, *San Marino*, in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1, 1 (Albert P. Blaustein & Gisbert H. Flanz eds. 1975) ("The tiny Republic of San Marino does not have a codified constitution but the foundations of its impressive constitutional tradition can be traced back more than a thousand years."); United Nations Development Programme, *Attitudes on Women's Rights in San Marino*, available at <http://www.sdn.undp.org/ww/women-rights/msg00007.html> (San Marino has no constitution).

94. *See generally* Siegfried Wiessner, *The Movement Toward Federalism in Italy: A Policy-Oriented Perspective*, 15 *ST. THOMAS L. REV.* 301, 302 (2002); Ahmed T. el-Gaili, Note, *Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan*, 45 *HARV. INT'L L.J.* 503, 513 (2004); *see also* Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 *NEW EUROPE L. REV.* 129 (1993).

95. ARG. CONST. §§ 14(3) & 20.

96. BRAZ. CONST. art. 226.

97. F.R.G. CONST. art. 6.

98. MEX. CONST. art. 3.

99. NIG. CONST. art. 17 (3), 262, 272.

100. VENEZ. CONST. arts. 75-81.

101. U.S. State Dep't. Country Reports, *Argentina*, available at <http://www.state.gov/r/pa/ei/bgn/26516.htm>; *Guide to the Argentine Executive, Legislative and Judicial System*, July 15,

that the national constitution and legislature set the substantive rules governing marriage and family relations, but the provincial or state courts appear to have primary jurisdiction for implementation and interpretation of those rules. Australia,¹⁰⁴ Canada,¹⁰⁵ Germany,¹⁰⁶ Mexico,¹⁰⁷ and Nigeria¹⁰⁸ have systems of “shared competence” in the regulation of marriage and family law in which both the national and the state or provincial governments have the authority to regulate specific legal relationships or aspects of relationship. For example, in Australia, the national government has authority to regulate marriage and divorce while the states have authority over children, adoption, and child protection.¹⁰⁹ In Canada, the national government has authority under the Charter of Rights to enact substantive regulations of marriage and divorce, while the provinces have authority over form, solemnization, and property is-

2001, <http://www.llrx.com/features/argentina.htm> (last visited Feb. 10, 2006); *Argentine Legal System and Structure*, <http://faculty.cua.edu/fischer/ComparativeLaw2002/bauesachs/ArgentinaMainWebPage.html> (last visited Feb. 10, 2006); see also Kenneth Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 18 (1994) (“The Constitutions of Argentina, Brazil, Canada, and Venezuela confer the powers to regulate criminal and family law on the federal government; in Mexico and the U.S., these powers belong to the states under the residual clauses. These allocations, however, are not in practice mutually exclusive divisions of power. The federal governments of the U.S. and Mexico invade both these areas of state preserves. Similarly, the Argentine and Canadian provinces and the Brazilian states invade the federal domain of criminal law.”).

102. U.S. Dept. of State, Country Reports, *Brazil*, <http://www.state.gov/r/pa/ei/bgn/35640.html> (last visited Feb. 10, 2006).

103. See generally Barbara Graham-Siegenthaler, *International Marriage and Divorce Regulations and Recognition in Switzerland*, 29 FAM. L. Q. 685, 686 (1995); Fridolin M.R. Walther, *Introduction to the Swiss Legal System: A Guide for Foreign Researchers*, LLRX.com, <http://www.llrx.com/features/swiss.htm> (last visited Feb. 10, 2006).

104. See AUSTL. CONST., available at http://www.oefre.unibe.ch/law/icl/as__indx.html; see also Patrick Parkinson, *The Law of Postseparation Parenting in Australia*, 39 FAM. L. Q. 507, 508 (2005) (describing division of authority to regulate family law between Australian federal and state governments); Sylvia Law, *Families and Federalism*, 4 WASH. UNIV. J. L. & POL’Y. 175, 181 (2000) (Australia, Canada, Germany, and Switzerland have different federal structures giving national government more authority over family law than the states).

105. See Constitution Act, 1867, Constitution Act, 1871, Constitution Act, 1982, and Canadian Human Rights Act, available at http://www.oefre.unibe.ch/law/icl/ca__indx.html (last visited Feb. 10, 2006); see also Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L. Q. 69, 74 n.12 (2004) (describing Canadian allocation of authority to regulate family law between the federal and provincial governments); Law, *supra* note 105, at 181 (Canada is one of several federal nations giving national government more authority over family law than the states).

106. “In Germany, there is a strong national authority over marriage, but the states have some areas of regulatory hegemony.” Cultural site available at http://www.germanculture.com.ua/library/facts/bl_federalism.htm states, “The federal government is assigned a greater legislative role and the Land governments a greater administrative role.” *Id.*; see also German Basic Law, Art. 6(1).

107. See Rosenn, *supra* note 102.

108. See generally NIG. CONST. 1999, Chapter VII, 262(2)(a). Sharia competence to judge marriages and dissolutions. See also Marriage Act of 1990 XI, 218 and Marriages (Validation) Act of 1990, XI, 219 at <http://www.nigeria-law.org/LFN-comprehensiveIndex.htm> (last visited Apr. 12, 2005).

109. See *supra* note 105, at § 51 (xx1-xxiii).

sues.¹¹⁰ In Germany, there is a strong national authority over marriage, but the states have some areas of regulatory hegemony.¹¹¹ In Nigeria, it appears that the national lawmakers have authority to establish general baseline principles, but the states may adopt additional regulations (and thus, in Nigeria, twelve states permit Muslims polygamous marriages, but the other states in Nigeria do not).¹¹² Mexican state authority has been intruded upon by the federal government.¹¹³ On the other hand, it appears that in India¹¹⁴ and Venezuela¹¹⁵ the national governments have more central authority over domestic relations generally.

Given the varieties of federalism in the nations of world, it is significant that some nations from all parts of the spectrum of federalism in family law (including strongly national systems of federalism with strong national control of family law, shared competence system, and strong state/provincial systems of federalism with heavy state/provincial control of family law) have included substantive protection for marriage and/or family in provisions of the national constitution. This certainly suggests that substantive constitutional protection for marriage is not inconsistent or irreconcilable with vibrant federalism.

The rich hybrid form of federalism embodied in the Constitution of the United States, with multiple threads of intertwined and balanced powers, multiple concurrent and overlapping areas of regulation, is perfectly suited for the federal definition of human rights baselines, and deference to the states for detailed regulation within those broad parameters.¹¹⁶ In short, the United States' Constitution is perfectly suited to a Federal Marriage Protection Amendment.

110. See generally Canadian Charter of Rights and Freedoms, available at (last visited Feb. 10, 2006).

111. Law, *supra* note 105, at 181(Germany is one of several federal nations giving national government more authority over family law than the states.).

112. Andra Nahal Behrouz, Note, *Transforming Islamic Family Law: State Responsibility and The Role of Internal Initiative*, 103 COLUM. L. REV. 1136, 1145-46 (2003) (12 Nigerians states have adopted Islamic family law); Abdulmumini Adebayo Oba, *The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction*, 52 AM. J. COMPAR. L. 859 (2004).

113. See Rosenn, *supra* note 102, at 18 (describing Mexican federal intrusion upon state regulation of family law).

114. INDIA CONST., Schedule I, Paragraph 3(1)(i), discussing marriage and divorce authority; see also List III Concurrent List, 5. http://www.oefre.unibe.ch/law/icl/in01000_.html. This seems to indicate that there is control over marriage at a regional level instead of a national level.

115. VENEZ. CONST. ch. V art. 77 (national constitution provides that marriage between a man and a woman is protected) available at <http://www.georgetown.edu/pdba/Constitutions/Venezuela/ven1999.html>.

116. To some extent, that collaborative baseline-detail division of regulation describes the regulation of religion in the United States.

D. Express Protection for Marriage in International Covenants, Treaties, Declarations and Multi-national Charters is the Norm

It is also the common practice in basic international (global and regional) charters setting multinational standards for protecting human rights to include explicit provisions protecting marriage and family. As Appendix II illustrates, dozens of international conventions, treaties, compacts and declarations contain explicit reference to and protection for marriage and family relations as a matter of positive international law.¹¹⁷ For example, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, declares:

Article 16

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.¹¹⁸

It bears noting that the implication of the conjoined terms “men and women” as the holders of “the right to marry” and its linkage to “found a family” clearly indicates that marriage was understood by the drafters of the Universal Declaration of Human Rights to be a union of male and female—not same-sex unions. The following non-exhaustive list of similar dual-gender language in numerous other international conventions, treaties, and declarations underscores the male-female nature of marriage: The Preamble of the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, provides “that men and women of full age have the right to marry and to found a family”¹¹⁹ Also, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 9: “[States] shall ensure . . . that neither marriage to an alien nor change of nationality by the

117. Appendix II; *see also* Doha International Conference for the Family, Nov. 29-30, 2004, *The Doha Declaration*, U.N. Doc A/59/592 (Dec. 3, 2004).

118. G.A. Res. 217 (III) (Dec. 10, 1948) (emphasis added).

119. Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 2018 (XX) (Nov. 1, 1965) (emphasis added).

husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”);¹²⁰ CEDAW, Article 16: “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage.”¹²¹ Article 18 of The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,¹²² requires: “States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage” Likewise, the African Charter on the Rights and Welfare of the Child, Article 18 establishes a duty “to ensure equality of rights and responsibilities of spouses with regard to children during marriage.”¹²³ Article 21 of the same Charter provides: “Child marriage and the betrothal of girls and boys shall be prohibited.”¹²⁴

Some international covenants are even more explicit in establishing the dual-gender nature of marriage. For example, Article 23 of the International Covenant on Civil and Political Rights provides, “The right of men and women of marriageable age to marry and to found a family shall be recognized.”¹²⁵ Similarly, Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees, “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”¹²⁶ Likewise, Article 17 of the American Convention on Human Rights provides, “The right of men and women of marriageable age to marry and to raise a family shall be recognized”¹²⁷

Thus, clearly expressed provisions of explicit protection for marriage, including the dual-gender nature of marriage, are well-established in the foundational legal documents in international law. Protection of marriage by explicit provisions in basic human rights charters civil rights declarations, and standards of international conventions is the global norm and, as is typical, the extent of this protection is the amorphous

120. 19 I.L.M. 33 (Dec. 18, 1979) (emphasis added).

121. *Id.* at art. 16.

122. Adopted at the Second Ordinary Session of the Assembly of the Union at Maputo (July 11-Aug. 13, 2003); *see also id.* at (e)-(j) (listing specific legal rights as to which equality of husband and wife is required).

123. OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) .

124. *Id.* at Article 21.

125. 999 U.N.T.S. 171 (Dec. 16, 1966) (ratified with reservations by the Senate on June 8, 1992).

126. 312 U.N.T.S. 221 (Nov. 4, 1950).

127. 1144 U.N.T.S. 123, 9 I.L.M. 673 (Nov. 22, 1969) (Signed by the United States on June 1, 1977).

guarantee of “recognition.” Unfortunately, simply giving men and women the right to marry today may not always clarify that the union has a distinct conjugal meaning.

E. A Federal Marriage Protection Amendment is the Best Hope to Preserve Federalism in Family Law

Some amendment opponents argue that adopting an FMPA will violate and undermine the constitutional principle of federalism in family law. This is a one-sided argument; it ignores that federalism in family law *already* is being undermined by the growing number of judicial decisions which, based on constitutional doctrines, are mandating legalization of same-sex marriage or same-sex “civil unions” or “domestic partnerships.”¹²⁸ Collectively, these decisions threaten to fundamentally undermine the principle of federalism in family law. They expand doctrines which lead to the imposition of a federal definition of, and federal interference with, state marriage and family laws; they intrude boldly into state regulation of family law without preserving any significant boundary or limitation for federalism in family law. In reply, advocates of same-sex marriage justify this judicial encroachment on state regulation by citing at least eight broad constitutional doctrines to support their position.¹²⁹ For their part, courts agreeing with same-sex marriage advo-

128. See *supra* Part III.B. (citing eight courts that have already ruled for same-sex unions).

129. These eight doctrines are as follows: (1) equal protection (*see, e.g.,* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 at 6 (Alaska Super. Ct., Feb. 27, 1998); Coordination Proceeding, Special Title [Rule 1550 (c), Marriage Cases, Superior Ct, San Francisco County, Judicial Council Coordination Proceeding No. 4365 (Mar. 14, 2005); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Baehr v. Miiicke, 1996 WL 694235 (Haw. Cir. Ct. 1996); Goodridge v. Department of Public Health, 798 N.E.2d 941, 943, 959 (Mass. 2003); In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 569-71 (Mass. 2004); Langan v. St. Vincent’s Hosp. of N.Y., 765 N.Y.S.2d 411, 453-54 (N.Y. Sup. 2003); Hernandez v. Robles, ___ N.Y.S.2d ___, 2005 WL 363778 (N.Y. Sup., Feb. 4, 2005); Tanner v. Oregon Health Sci’s Univ., 971 P.2d 435, 443 (Or. Ct. App. 1998); Baker v. State, 744 A.2d 864, 879, 882, 885 (Vt. 1999); *see also* Li v. State, 2004 WL 1258167 (Or. Cir. 2004)), (2) substantive due process (privacy, right to marry, right of association) (*see, e.g.,* Brause, 1998 WL 88743 at 4; Goodridge, 798 N.E.2d at 959-61; Andersen v. King County, 2004 WL 1738447 *3,4,11 (Wash. Super. 2004); Hernandez v. Robles, ___ N.Y.S.2d ___, 2005 WL 363778 (N.Y. Sup., Feb. 4, 2005)), (3) due process standards of arbitrariness or irrationality (*see Goodridge*, 798 N.E.2d at 960; Andersen, 2004 WL 1738447 at *3, *4, *11-*12; *see also Baker*, 744 A.2d at 882, 884), (4) privileges and immunities (*see, e.g., Tanner*, 971 P.2d at 447-48; *Baker* 744 A.2d at 867; Castle v. State, 2004 WL 1985215 at *3, *4, *10-*13, *16 (Wash. Super. 2004); *Andersen*, 2004 WL 1738447 at *3, *4; *Li*, 2004 WL 1258167 *1, 4-*7 (Or. Cir. 2004)), (5) full faith and credit (*see generally Alons v. Iowa District Court for Woodbury County*, Lambda Legal, <http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=203> (last visited Feb. 10, 2006); Iowa Supreme Court to Hear Oral Argument Friday in Lesbian Civil Union Dissolution Case, Jan. 11, 2005, <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1605> (last visited Apr. 12, 2006); DOMA State Grants Lesbians Divorce, 365gay.com, <http://www.365gay.com/newscontent/120703iowaDivorce.htm> (Dec. 7, 2003); Angela Gerald, *Beaumont Judge Lifts Mens’ Divorce*

cates have adopted at least six of these expansive constitutional doctrines in ruling in favor of same-sex unions.¹³⁰ The use of such wide constitutional premises to define marriage as a matter of judicial interpretation of constitutional doctrine and to impose same-sex unions on the states makes a mockery of federalism in family law and would effectively de-

Decree, DALLAS VOICE, April 4, 2003, in *The Lesbian/Gay Rights Lobby of Texas*, <http://www.lgri.org/news/article.php?newsID=25> (last visited Feb. 10, 2006); see also Richard W. Millar, Jr., *Millar's Jurisdiction—A Boon to Divorce Lawyers: Marriage Is No Longer A Prerequisite*, 45-JUN Orange County Law. 8 (June 2003); *Langan v. St. Vincents Hospital*, 196 Misc. 2d at 449, 765 N.Y.S.2d at 418 (Sup. Ct. Nassau Co. N.Y., 2003). *But see Goodridge*, 798 N.E.2d 941 at 948, and (6) the bill of attainder clause (*Citizens for Equal Protection, Inc. v. Bruning*, 290 F. Supp. 2d 1004, 1008-11 (D. Neb. 2003)).

Additionally, proponents of same-sex marriage have long invoked two other constitutional doctrines: (7) the free exercise of religion clause (see, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. Ct. App. 1973) (rejecting the claim of same-sex marriage applicants who claimed marriage law violated their constitutional right of free exercise of religion); Mark Strasser, *Same-sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 598 (2002) (“arguing that Free Exercise guarantees preclude the state from maintaining a same-sex marriage ban without a showing of probable harm,” and “suggesting that the fact that some religions recognize same-sex marriage provides yet another ground upon which to establish that states cannot meet their burden in justifying same-sex marriage bans”); see also Richard A. Epstein, *Of Same-sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 SUP. CT. ECON. REV. 75, 112 (2004) (“For its part, it is not clear how far *Lawrence* will go either. The question of whether its logic will carry over to same sex marriages is unclear and it is highly unlikely that this Supreme Court will go so far as to overrule *Reynolds v. United States*, and find that the free exercise of religion (and freedom of association) should govern there as well.”)), and (8) the establishment of religion clause (see generally James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christianism*, 4 MICH. J. GENDER & L. 335, 373 (1997) (arguing that DOMA is an establishment of religion because it is prompted by no secular purpose); Kevin Metz, Book Note, 108 YALE L.J. 271, 273 n.8 (1997) (reviewing MICHAEL J. PERRY, *TURNING RELIGIONS SHIELD INTO A SWORD, REVIEWING RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES*) (“Perry argues that abortion could be banned on secular grounds without violating the nonestablishment norm, but that prohibitions of legally recognized same-sex marriages cannot be.”); David B. Cruz, *“Just Don’t Call It Marriage”: The First Amendment and Marriage As An Expressive Resource*, 74 S. CAL. L. REV. 925, 948 n.117 (2001) (noting that lawmakers citations of the Bible “are at least a highly problematic basis for law in the United States under the Establishment Clause.”); Gilbert A. Holmes, *The Conversations About the Intersecting Institutions of Marriage*, 4 TEX. WESLEYAN L. REV. 143, 146 (1998) (“Professor Eskridge argued that several constitutional doctrines are violated when the religious aspect of marriage dictates the legal policy of who has access to the marital institution. He suggested that First Amendment restrictions against the establishment of religion prohibit the use of religious beliefs as a justification for prohibiting same-sex marriages.”); see also WILLIAM ESKRIDGE, *EQUALITY PRACTICE* 120 (2002) (noting anti-gay sentiment is strongest where “fundamentalist religions” are strongest); Emily Taylor, *Across the Board: The Dismantling of Marriage In Favor of Universal Civil Unions*, 28 OHIO N. U. L. REV. 171, 171-73 (suggesting secular civil unions instead of marriage because marriage is tainted by religious origins and excludes same-sex couples); Desiree Alonso, Note, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN’S L.J. 207, 228 (2002) (“according to the First Amendment of the U.S. Constitution, ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ Separation of church and state is fundamental to the Constitution. The civil, legal recognition of partnerships should be separate from religious definitions of ‘morality’ and ‘marriage.’”); Vicki L. Armstrong, Note, *Welcome to the 21st Century and the Legalization of Same-sex Unions*, 18 T.M. COOLEY L. REV. 85, 106 (2001) (citing establishment clause in support of legalizing same-sex unions)).

130. See *supra* note 15, doctrines 1-6.

stroy what is left of that important principle of federalism. By contrast, a narrow, focused constitutional amendment defining and protecting marriage could preserve federalism and cause much less radical alteration to that important structural principle.

*F. Federalism Objections by Opponents of an FMPA and a Brief Reply
(They Miss the Point)*

Among the objections to FMPAs is the complaint that it would distort the allocation of powers between the national and state governments. The foundation of this argument is that American dual-sovereignty federalism was the structural device created by the Founders as a barrier against what they quaintly called “tyranny.” Federalism was intended to prevent the national government from accumulating too much power, and, thus, reduce the risk of abuse of power.¹³¹ However, the principle of federalism is not limited to the structural organization of the government and the allocation of powers between the national and state governments.¹³² The principle of federalism also under-girded the Founders’ belief in the importance of preserving and promoting key nongovernmental institutions that preserve the diffusion and prevent the concentration of power.¹³³

Principal among those institutions are marriage and the family because they foster the cultivation of the values and courage necessary to resist tyranny. The Founders believed the institution of conjugal marriage was critical to the maintenance and preservation of the constitutional (republican) government the Founders had established.¹³⁴ Today, the Constitution still is a “superstructure” that rests upon the foundation of a “substructure” of nongovernmental institutions in which are nurtured the intangible human qualities or “virtues” (as the Founders quaintly called them) necessary to motivate individuals to make the sacrifices required to fulfill the responsibilities of citizenship and to willingly forego personal pleasures that cause detriment or disadvantage for the commonwealth.¹³⁵ Just as preservation of the sovereignty of the states is a facet of federalism necessary to prevent the accumulation and subsequent abuse of power, so also is the preservation of conjugal marriage and the marital family a facet of federalism critical to the prevention of tyranny. Marriage-based families constitute mediating structures that resist tyranny,

131. For a detailed discussion of the history of federalism and how it can be reconciled with a FMPA, see generally Wardle, *Tyranny*, *supra* note 5.

132. *Id.*

133. *Id.* at 224-34.

134. *Id.* at 249-55.

135. *Id.* at 263-64.

and marriage is the foundation of the most important social unit of society in which civic virtues, including the courage and commitment to resist tyranny, are cultivated. Far from weakening the intended federal structure, the proposal of a federal marriage amendment will in fact protect federalism by preserving the institution of marriage from being subverted by radical redefinition in the service of an extraneous political movement.

Moreover, federalism in family law is not a monolithic principle of bright lines and sharp divisions.¹³⁶ The fact that Congress and the courts have substantially, whether indirectly and directly, intruded into state regulation of family relations—including state regulation of marriage—illustrates that the issue is no longer about the preservation of *classical* federalism. In fact, it is precisely because this state domain has been invaded by incremental and inconsistent federal regulation that a FMPA is essential to stabilizing and buttressing the balance of power.

Relatively recent jurisprudence clearly demonstrates, that the states no longer have a *carte blanche* in establishing domestic relations laws. For instance, in the past forty years, the Supreme Court has invalidated state marriage laws on federal constitutional grounds at least three times.¹³⁷ In those cases (including *Loving*), the Court found within the U.S. Constitution some limits upon the states' ability to set their own laws and policies governing marriage. Yet, none of those cases singly, nor all of them collectively, has eliminated or significantly undermined the constitutional principle of federalism in family law.

It is not clear why opponents of a proposed Federal Marriage Protection Amendment believe that such a constitutional boundary will have a greater intrusive or undermining effect upon federalism in family law than the *Loving* decision. Both a FMPA and *Loving* draw federal constitutional boundary lines around the basic social/legal institution of marriage to protect it in ways that are critical to society and to the institution. Both *Loving* and an FMPA leave in place the power of the states to regulate marriage and family relations in all other respects, subject only to that particular baseline protection. Just as the *Loving* decision, which rejected an extraneous definition of marriage intended to promote "White Supremacy," did not undermine federalism in family law, an adoption of

136. Wardle, *Proposed FMA*, *supra* note 5, at 173-83, 189-91.

137. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (anti-miscegenation laws violate Equal Protection Clause and Due Process right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (law requiring judicial approval for support-obligor to obtain marriage license unconstitutional violation of Equal Protection Clause); *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulation disallowing prisoners to marry unless prison superintendent found "compelling reason" to allow marriage unconstitutional is unrelated to legitimate penological interests and infringes upon the constitutionally-protected right to marry).

the proposed Federal Marriage Protection Amendment to reject a radically new, ideological definition of marriage that promotes “Gay Rights” will not undermine federalism in family law.¹³⁸ The Supreme Court’s constitutional precedents protecting marriage indicate that a Federal Marriage Protection Amendment would not undermine federalism in family law. Rather, like the *Loving*, *Zablocki*, and *Turner* constitutional decisions of the Supreme Court, the adoption of a Federal Marriage Protection Amendment will eliminate one threat against the institution of conjugal marriage without damaging the constitutional federalism principle.

IV. HOW TO ESTABLISH CONSTITUTIONAL PROTECTION FOR MARRIAGE

Under the text and historic interpretation of the Constitution of the United States there are only three ways to establish constitutional protection for marriage against the threat of judicial, executive, or legislative initiative to radically redefine marriage to include same-sex couples. Article V established two different ways to amend the text of the Constitution. Judicial review provides a third option to amend the Constitution by judicial interpretation.

A. *Congressional Proposal of Constitutional Amendments*

Article V of the Constitution of the United States provides two methods for initiating an amendment to the Constitution. The first, and most oft-used, requires Congress to take the initiative and propose a specific amendment by two-thirds vote in each house.¹³⁹ The proposed Amendment must then be submitted to the legislatures of the several states, or to state conventions, as Congress chooses, and it must be ratified by three-fourths of the states in order to become a part of the Constitution. It is well known that most amendments to the Constitution (all of them except the twenty-first amendment) have been initiated by two-thirds vote of both houses of Congress proposing the language.

The problem is that this method of amending the constitution is anti-populist and very pro-established-political order. It requires the approval and support of the existing elected legislators in Congress. It requires not merely their majority support, but a supermajority of 67% in not just one but both houses of Congress. Thus, if the proposed amendment threatens

138. *Loving v. Virginia*, 388 U.S. 1 (1967).

139. “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . 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 . . . may be proposed by Congress . . .” U.S. CONST. art. V.

the political interests of a significant minority of the members of either house (or, more frankly, the interests of the financial or popular supporters of a significant minority of the members of either house), it will not obtain Congressional approval. It will not be sent to the states for ratification. It will die in Congress. This political establishment lethargy explains (at least in part) why only thirty-two constitutional amendments have been proposed in the entire 216 year history of the United States.¹⁴⁰ Since twelve of them were proposed together as the Bill of Rights in 1789, it is more accurate to state that Congress has only proposed constitutional amendments twenty times in over 200 years.

Furthermore, in recent decades, the process of obtaining Congressional approval for amendments has become much more difficult, as a practical matter. For example, in 1972, Congress proposed the Equal Rights Amendment (ERA)—and it failed to obtain sufficient state ratifications.¹⁴¹ Other than the ERA, in the past forty years Congress has proposed only one additional amendment, the Twenty-sixth, lowering the voting age throughout America to eighteen years of age, and it passed Congress only because of a unique set of circumstances relating to the political realities of drafting young men for the ongoing Vietnam war combined with the invalidation of a popular law.¹⁴² Thus, in the present political climate, absent an extraordinarily unifying combination of forces, it is unlikely that two-thirds of either (let alone both) house of Congress will support sending a Marriage Amendment to the states in the immediate future.

The prospect of obtaining Congressional approval for a proposed Federal Marriage Protection Amendment in the near future is extremely slim. Obtaining a supermajority in the House of Representatives would

140. Darren R. Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problem*, 55 AM. U. L. REV. 145, 149 (2005); *id.* at App. A.

141. The Equal Rights Amendment was proposed in 1972 but failed ratification. Jason Mazzone, *Unamendments*, 90 Iowa L. Rev. 1747, 1838 (2005) (discussing failed proposed ERA).

142. The last amendment to be proposed by Congress that was ratified was the Twenty-sixth amendment which lowered voting age to eighteen during the Vietnam War. That amendment was first proposed in 1941, during the great second world war. When Congress passed the Voting Rights Act of 1965, lowering the voting age to 18 in all elections, the law was challenged on constitutional (federalism) grounds. President Lyndon B. Johnson called for the reintroduction of the amendment in 1968, and when the Supreme Court invalidated the voting age provisions applicable to non-federal elections in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the 26th Amendment was reintroduced in Congress in 1971, passed Congress, and was ratified by the states in the shortest period of ratification time of any amendment. LII, CRS Annotated Constitution, *Twenty-sixth Amendment*, http://www.law.cornell.edu/anncon/html/amdt26_user.html (last visited Feb. 10, 2006). Thus, even this “quick” amendment took 30 years to get through Congress; it is likely that it would not have passed despite the Vietnam War, if prior legislation reducing the voting age had not proven popular and then been invalidated by the Court. The next latest amendment to be proposed and ratified was the Twenty-fifth amendment, which was approved by Congress and sent to the states for ratification on July 6, 1965, more than four decades ago.

be difficult, but it is not impossible, given the strong grassroots support manifest for state marriage amendments, and the members of the House of Representatives' political sensitivity and responsiveness to grassroots movements. However, getting through the obstructionist Senate would be next to impossible without a seismic shift in politics in the next two decades. Supporters of the Federal Marriage Amendment could not muster a bare, simple majority in the Senate in 2004, even though the vote was taken on a remote procedural issue concerning the invocation of cloture, not on the substance of the proposed amendment itself.¹⁴³ The idea that another nineteen Senators would change sides and support a Federal Marriage Protection Amendment just two or four (or even ten) years later is highly optimistic (if not Quixotic). Thus, the prospect of getting a proposed Federal Marriage Amendment through Congress and to the states (or conventions) in the next decade is extremely slim.

If Congress could be motivated to pass a Federal Marriage Protection Amendment, it would then decide the method of ratification—by state legislatures or by state constitutional conventions. It is apparent that this decision would not be made without consideration of political factors. Since the Constitution of the United States itself was sent to state constitutional conventions for ratification, only once has the state constitutional convention method of ratification been used, and that was when supporters of the Twenty-first amendment feared that the political heat on state legislators would be too great to get the amendment passed, so they chose to have the matter put to state ratifying conventions (selected by the state legislatures) where special interests (the liquor industry) could have greater influence than the populist teetotalers who would oppose repeal of the Eighteenth Amendment.¹⁴⁴

B. State Legislature Applications for a Constitutional Convention

The second method of amending the Constitution of the United States authorized by Article V is by a process initiated “on the Application of the Legislatures of two[-]thirds of the several States.”¹⁴⁵ Upon the filing of the requisite number of applications of state legislatures, Con-

143. See *supra* note 24 and accompanying text (vote in Senate on federal marriage amendment); see also Letter from Lincoln C. Oliphant, Research Fellow at The Marriage Law Project to Alan E. Sears, & Glen Lavy, Alliance Defense Fund, Aug. 12, 2005 (copy in author's possession).

144. See generally George Anastapalo, *The Amendments to the Constitution: A Commentary* 202 (Johns Hopkins U. Press 1995).

145. The Congress, . . . on the Application of the Legislature of two thirds of the several States, shall call a Convention for proposing Amendments, which . . . 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 . . . may be proposed by Congress . . .” U.S. CONST. art. V.

gress must “call a Convention for proposing Amendments”¹⁴⁶ The proposed Amendment must then be submitted to the legislatures of the several states, or to conventions in the states, as Congress proposes, and it must be ratified by three-fourths of the states in order to become a part of the Constitution.

The Founders of the Constitution were experienced politicians and understood how a political body dependent upon established powers and constituencies could become an obstacle to needed reform. This alternative process gives the states an equal opportunity—and burden—to propose needed amendments. Nevertheless, the Founders did not appreciate how establishmentarian Americans in general would become over the next two centuries (if they even imagined that the Constitution they drafted would survive as an operative legal instrument for over two hundred years). They lived in the age of constitutional conventions. They embraced the opportunity to write and rewrite constitutions. They had all witnessed (and many had participated in) state constitutional conventions in all of the states for the purpose of drafting or ratifying state constitutions. They saw (some participated in) the drafting of two national constitutions within a period of less than ten years, including the Constitution we now use which was drafted by convention in 1787.¹⁴⁷ They endorsed and created the process of ratification by state constitutional convention for approval and implementation of the Constitution of the United States. They expected further constitutional conventions in their own time, and the prospect of a second convention to propose amendments to the Constitution motivated Congress to propose the Bill of Rights. Thus, the Founders probably did not anticipate how reluctant American citizens, generally, and American politicians, specifically, would be to use the second method of proposing amendments that the delegates in Philadelphia provided.

This reluctance now represents a significant inertial obstacle regarding provisions that have lain fallow since 1787. The Constitution of the United States is a very popular legal document, and there is much (perhaps too much) concern that a “runaway” convention might, like the Philadelphia Convention of 1787 (convened to consider proposing amendments to the Articles of Confederation that ended up writing a completely new constitution), propose amendments that go far beyond the scope of the concerns that led to the calling of the convention.¹⁴⁸ In-

146. *Id.*

147. Eight days after receiving the Constitution from the Philadelphia Convention, Congress sent the Constitution to the states for their ratification. The other constitution, of course, was the Articles of Confederation which was adopted by Congress on November 15, 1777, nine years and ten months before the Convention in Philadelphia approved the Constitution.

148. *See generally* Arthur H. Taylor, *Fear of An Article V Convention*, 20 *BYU J. PUB. L.* 407,

deed, the Bill of Rights was proposed in Congress in no small measure to quiet the movement for a second federal constitutional. In 1789, James Madison (who had argued against such amendments in the Constitutional Convention in Philadelphia,¹⁴⁹ who had written against them in the *Federalist Papers*,¹⁵⁰ and who described the task of drafting and getting them passed in Congress as a “nauseous project”),¹⁵¹ took the lead in Congress of drafting the Bill of Rights amendments. The anti-Bill-of-Rights *Federalist First Congress*¹⁵² acquiesced because proposing the amendments deflated their opponents’ attempts to convince enough states to call for a second (amending) convention—which the Federalists feared might undo much of the great work of the Philadelphia Convention. It is clear that the fear of a convention motivated Madison and the Federalists to push the proposed Bill of Rights through Congress and send those proposed amendments to the States for ratification.¹⁵³

Logically, several structures would prevent the overthrow of the Constitution by a runaway convention. For example, the result of the convention would be proposed amendments that would still have to go to the states for ratification, and which would not be valid unless ratified in three-fourths of the states.¹⁵⁴ Nevertheless, a constitutional convention is something of a “black box”; its novelty entails so many uncertainties and disquieting possibilities that, politically, it is not a popular prospect.

However, the potential value of the constitutional convention application process should not be dismissed. State legislatures have passed and sent to Congress literally hundreds of applications for constitutional conventions in the nearly 220 years of our nation’s history.¹⁵⁵ Some commentators have argued that the cumulative effect of that huge number of state applications for Congress to call a constitutional convention

(forthcoming 2006).

149. James Madison, *NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787* (1966, Norton reissue 1987).

150. *The Federalist Papers*, No. 38 (Madison); *see also id.* No. 84 (Hamilton).

151. James H. Hutson, *The Drafting of the Bill of Rights: Madison’s “Nauseous Project” Re-examined*, 3 *Benchmark* 309 (Madison’s reluctance and political motivation).

152. *See generally* Richard G. Wilkins, *The Structural Rule of the Bill of Rights*, 6 *BYU J. PUB. L.* 525, 525-38 (1992); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 *SUP. CT. REV.* 301-47; Leonard Levy, *Bill of Rights* 258-89 (1986); DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 219 (1990).

153. *See generally* Finkelman *supra* note 153 (reviewing Madison’s ironic role as Father of the Bill of Rights); James H. Hutson, *The Drafting of the Bill of Rights: Madison’s “Nauseous Project” Reexamined*, 3 *Benchmark* 309 (Madison’s reluctance and political motivation).

154. *See generally* Arthur Taylor, *Fear of An Article V Convention*, 20 *BYU J. PUB. L.* 407 (forthcoming 2006).

155. Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution: Article V and Congress’ Present Duty to Call of Convention for Proposing Amendments*, 14 *HAMLIN L. REV.* 1 (1990).

is to put Congress under obligation to do so now.¹⁵⁶ (The validity of that conclusion depends upon whether the issue is the weight of all *applications* for constitutional amendment conventions—whatever their subject—obliges Congress to call a convention for the general purpose of considering amendments, or whether Congress only has that duty when two-thirds of the states submit calls for a convention to propose amendments dealing with the same *topic*.)¹⁵⁷ Congress’ proposal of the Bill of Rights in 1789 clearly illustrates that “the mere threat posed by drives to call conventions for proposing amendments has a substantial *in terrorem* effect on the actions of Congress.”¹⁵⁸ Congress has been stimulated to propose amendments by the serious prospect of a constitutional amendment convention many times since the Federalists dominated First Congress overcame their aversion to a Bill of Rights.

This phenomenon has played an important role in American history, having prodded Congress into proposing several constitutional amendments. The threat was a direct cause of Congress proposing the amendments requiring the direct election of senators (17th Amendment), repealing prohibition (18th amendment), limiting Presidential terms (22nd Amendment), and institution of the presidential succession plan.¹⁵⁹

Proponents of a FMPA hope that Congress’ fear of a rush of radical amendments during a constitutional convention will now motivate them to propose a reasonable FMPA.

Between 1789 and 1989, at least 108 different state applications for a constitutional amendment convention were sent to Congress by forty-nine states.¹⁶⁰ At least five other constitutional amendment convention applications have been submitted by states since then.¹⁶¹ Not long ago, at

156. *Id.*

157. *Id.*

158. *Id.* at 37; see also Conley, *Amending the Constitution: Is This Any Way to Call For A Constitutional Convention?*, 22 ARZ. L. REV. 1011, 1016 n.49 (1980).

159. Van Sickle & Boughley, *supra* note 156, at 37; see also Conley, *supra* note 159, at 1016-17.

160. Van Sickle & Boughley, *supra* note 156, at 50. These authors argue that forty-nine states have at some time since 1789 (multiple times in most cases) submitted applications for Congress to call a convention for the purpose of proposing amendments to the Constitution. *Id.* at 57. The amendments have raised thirty-seven different amendment topics for consideration. *Id.*

161. See, e.g., Sen. Con. Res. 21, 140 Cong. Rec. S7954-06, 1994 WL 374839 (Cong.Rec.) June 29, 1994 (concurrent resolution from Missouri legislature calling for a convention to consider an amendment banning “unfunded federal mandates” upon the states); Sen. Con. Res. 9, 139 Cong. Rec. S8226-03, 1993 WL 231800 (Cong.Rec.) June 29, 1993 (concurrent resolution from Missouri legislature calling for a convention to propose an amendment to prevent the federal judiciary from imposing taxes against the will of the people); Sen. Jt. Res. 3, 139 Cong. Rec. S3362-04, 1993 WL 79737 (Cong.Rec.) March 22, 1993 (joint resolution from legislature of South Dakota calling for a constitutional convention for the purpose of proposing an amendment prohibiting the federal government from reducing the federally financed proportion of the necessary costs of any existing activity or service required of the states by federal law, or from requiring a new activity or service, or an increase in the level of an activity or service beyond that required of the states by existing federal

least nineteen state legislatures submitted formal applications for Congress to call a constitutional convention for the purpose of proposing an amendment to the Constitution to overturn the abortion-on-demand ruling in *Roe v. Wade* (during the 1970s and early 1980s).¹⁶² Thus, the application by states for constitutional conventions may not be a “dead letter” or “toothless tiger.”¹⁶³ While political conservatism has prevented the Founder’s populist purpose embodied in the Constitutional Convention amendment method from being fully effectuated,¹⁶⁴ the method has, nonetheless, served an important function in overcoming Congress’ establishmentarian, anti-amendment inclination.

C. Judicial Invention of Constitutional Protection by Interpretation

The third method of amending the Constitution is both the least legitimate and the very source of the problem regarding same-sex marriage. It is “amendment” by judicial interpretation of existing provisions of the Constitution (or of constitutional doctrines based upon prior interpretations of those provisions).

Thus, one possible way to protect marriage is to begin a litigation campaign to interpret the Fourteenth Amendment as protecting the institution of conjugal marriage as a fundamental constitutional right and to declare laws legalizing same-sex marriage or marriage-like same-sex un-

law, unless the federal government pays for any necessary increased costs); Sen. Jt. Mem. 92-3 (joint resolution from Colorado legislature calling for a limited constitutional convention for the purpose of proposing an amendment prohibiting the federal government from reducing the federally financed proportion of the necessary costs of any existing activity or service required of the states by federal law, or from requiring a new activity or service, or an increase in the level of an activity or service beyond that required of the states by existing federal law, unless the federal government pays for any necessary increased costs); S. D. Jt. Res., 135 Cong. Rec. S3232-01, 1989 WL 172623 (Cong.Rec.) April 4, 1989 (South Dakota legislature calls for a constitutional convention to propose an amendment requiring limited congressional terms). Several state legislatures have rescinded prior calls for a constitutional convention to propose balance budget and other amendments. *See* 135 Cong. Rec. S7909-01, 1989 WL 192944 (Cong.Rec.) July 13, 1989 (Nevada Assembly Resolution withdrawing its call for a constitutional convention to propose a balanced budget amendment); 150 Cong. Rec. H4580-01, 2004 WL 1369495 (Cong.Rec.) June 18, 2004 (Virginia House of Delegates withdraws all past resolutions of the General Assembly applying to the Congress of the United States to call a constitutional convention to amend the Constitution of the United States); 149 Cong. Rec. S6976-01, 2003 WL 21207348 (Cong.Rec.) May 22, 2003 (concurrent resolution of Arizona legislature rescinding all of Arizona’s previous calls for a constitutional convention to amend the Constitution of the United States); 146 Cong. Rec. S739-01, 2000 WL 203887 (Cong.Rec.) February 23, 2000 (concurrent resolution from Legislature of Idaho rescinding all of its previous calls for a constitutional convention); 146 Cong. Rec. S81-01, 2000 WL 64632 (Cong.Rec.) January 26, 2000 (joint resolution from Oregon legislature rescinds call for a constitutional convention for the purpose of passing a balanced-budget amendment).

162. *See* Appendix III.

163. Van Sickle & Boughey, *supra* note 156, at 37.

165. *Id.*

ions unconstitutional. Given the history of marriage at that time, this claim is not without some potential. This option also has some *poetic* appeal, but it does not have *conceptual* appeal to the segment of political society most interested in protecting marriage. They are most inclined to favor “strict construction” of the Constitution and to reject as illegitimate the invention of new constitutional rights by judicial fiat. This approach also has the disadvantage of depending upon judges who are most inclined to utilize such creative construction of constitutional texts in order to favor same-sex unions. It is unlikely that they would be inclined to invent or create conservative, pro-conjugal-marriage “amendments” to the Constitution. Rather, those more politically conservative judges probably would be the most resistant and opposed to such liberal, creative judicial interpretative approaches.

D. Lessons from Loving

The Supreme Court’s decision in *Loving v. Virginia* is a compass for how to deal with the current constitutional crisis over the redefinition of marriage to allow same-sex marriage (or marriage-equivalent same-sex civil unions or domestic partnerships) in four ways. First, the court established clear constitutional boundaries regarding state regulation (definition) of marriage.¹⁶⁵ The holding of the Court drew a clear and bright line in constitutional law.¹⁶⁶ It clarified an issue that needed clarification and settled an issue that needed to be resolved.¹⁶⁷ It established a clear constitutional boundary.¹⁶⁸ Second, the decision of the Court and the principle of constitutional law it established was very focused and dealt precisely with one very specific, narrow point (antimiscegenation requirements—

165. Some may counter that the Court did not establish any rule, but merely enforced a rule that the people of the United States had established when they passed the Fourteenth Amendment. However, the Court rejected that claim when it repudiated the State of Virginia’s assertion that the history of the debates in the Thirty-Ninth Congress showed “that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws.” 388 U.S. at 9. The Court noted: “As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources ‘cast some light’ they are not sufficient to resolve the problem; [*a*]t best, they are inconclusive.” *Id.* (emphasis added); see also CHESTER JAMES ANTIEAU, *THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT* 60 (Mid-America Press 1981) (“Among the people who ratified the Fourteenth Amendment there appears some understanding that [it], in its privileges and immunities clause, embraced the right of a person to marry whomever one pleased, regardless of race.”).

166. The Court declared: “There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.” *Loving*, 388 U.S. at 11.

167. “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Id.* at 12.

168. “[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.” *Id.* at 11, n.11.

defining marriage as an homogenous racial union only).¹⁶⁹ Third, the Court's interpretation of one aspect of marriage (disallowing racial restrictions, requirements, or definitions) clarified an important state policy-making boundary, but it did not noticeably undermine federalism in family law. Fourth, the decision prevented a fringe social movement's attempt to "capture" marriage. The movement to legalize same-sex marriage today is in many respects just the latest successor to a litany of social and political movements that have attempted to capture (and redefine) marriage for the purpose of reconstructing society. Because the family environment wields such profound influence in society by modeling and transmitting basic social values, it has often been an attractive target for movements seeking to transform society.

Two of the most well-known examples of social movements that "captured" marriage were the White Supremacy movement and its pseudo-scientific offshoot, the Eugenics movement. Both were very popular, politically influential, and extremely successful (especially from the Civil War until World War II) in persuading lawmakers to enact laws defining marriage to prohibit the conjugal union of interracial couples (anti-miscegenation laws), and barring the marriage of "idiots" and "imbeciles" (and related regulations providing for involuntary sterilization of persons deemed a threat to a eugenically idealized gene pool).¹⁷⁰ The Supreme Court decision in *Loving v. Virginia*,¹⁷¹ declaring anti-miscegenation to be unconstitutional clearly repudiated the (mis)use of marriage laws to effect social revolution. The movement to legalize same-sex marriage is the successor to those earlier, discredited movements which sought to promote their ideology by capturing, that is, redefining, the institution of marriage. The need to establish a constitutional rule rejecting same-sex marriage is as great as the need to establish a constitutional rule rejecting anti-miscegenation laws.

V. CONCLUSION: PURSUING A THREE-PRONGED APPROACH TO PROTECT MARRIAGE

169. As to the right to marry, the Court held:

To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Id. at 12 (emphasis added).

170. See *Buck v. Bell*, 274 U.S. 200, 207 (1927). See generally Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421 (1988) (review of racial and eugenic policies embodied in anti-miscegenation laws; law in *Loving* was also linked to law in *Buck*).

171. 388 U.S. 1 (1967).

A Federal Marriage Protection Amendment is needed today to manifest and establish the constitutional baseline for, and core meaning of, the institution of marriage. It should reflect the constitutional consensus of the nation. A constitutional amendment or provision protecting the institution of marriage is consistent with international constitutional practice. A constitutional provision or amendment also is consistent with the prevailing international norm of human rights reflected in both international and comparative national human rights charter documents.

An American constitutional marriage amendment is needed because without a clear textual resolution of the policy dispute, the issue will migrate to the courts, which will (and already have begun to) creatively interpret the Constitution. By default, American courts have begun to assume the final decision-making function in settling hotly-contested political disputes that actors in the normal political processes do not seem willing to resolve. That practice weakens the integrity and independence (in the long run) of the judiciary, thrusting it into political thickets that the courts were not designed to enter and which they cannot enter without becoming scarred by politicization, which, in the long run, destroy public confidence in and the integrity of the judiciary.

There are three methods for securing constitutional protection for marriage. All three are difficult, and the prospect of successfully obtaining an amendment protecting conjugal marriage and banning same-sex marriage by any one method seems very slim, at least in the short-run. However, the three methods are not mutually exclusive. Indeed, history suggests a synergistic effect when multiple approaches to amendment are pursued simultaneously. Therefore, I recommend that supporters of a constitutional amendment to protect the institution of conjugal marriage pursue all three avenues simultaneously and vigorously. They should attempt to persuade Congress to propose a Federal Marriage Protection Amendment. At the same time, the movement should also encourage state legislatures to submit applications to Congress to call a convention on a Federal Marriage Protection Amendment. Finally, and simultaneously, activists and public interest law organizations should pursue claims in the court that would establish protection for marriage reflecting the substance of the proposed Federal Marriage Protection Amendments, by interpreting existing constitutional provisions and doctrines to establish baseline, definitional protection for the institution of conjugal marriage and to ban and constitutionally prohibit the legalization of same-sex marriage or of same-sex civil unions. Because protection of the basic unit of society is so important to the people of America, and to their constitutional system, sooner or later constitutional protection for marriage is

very likely to be adopted. It would be better sooner than later.

*Appendix I**137 Nations with Constitutional Provisions Relating to Family and Marriage*¹⁷²

(Research originally compiled by Scott Borrowman,¹⁷³ March, 2005; supplemented by Joseph Wright,¹⁷⁴ Kevin J. Fiet,¹⁷⁵ and Lynn D. Wardle.)

All references are to the Constitution of the respective nation. An asterisk (*) means the constitution refers to family but not explicitly to marriage; no asterisk means that the constitution refers to or protects *both* marriage and family; # means the provision is only structural; @ means the provisions are both structural and substantive.

Afghanistan	Art. 54. *
Albania	Arts. 31, 32, 53, 54.
Algeria	Arts. 48, 58, 63. *
Andorra	Art. 13.
Angola	Arts. 29, 30, 31, 40. @
Barbuda	Prmbl., Art. 3. *
Argentina	Secs. 14(3), 20. * @
Armenia	Arts. 20, 31, 32.
Australia	Sec. 51.
Austria	Art. 10 § 8.
Azerbaijan	Arts. 17, 34, 38, 127(6).
Bahrain	Art. 5.
Barbados	Prmbl.
Belarus	Arts. 27, 32. @
Belize	Prmbl., Arts. 3, 14.
Belgium	Art. 21.
Bolivia	Arts. 158, 193, 194, 195, 196, 197, 198, 199. @
Bosnia-Herzegovina	Art. II § 3.
Brazil	Art. 226. @
Bulgaria	Arts. 14, 46, 47. @
Burkina Faso	Art. 23.@
Cambodia	Art. 45.
Cameroon	Prmbl. *

172. See Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents and Significance*, 7 Fla. Coastal. L. Rev. 403, App.1 (2005).

173. J.D., 2004, J. Reuben Clark Law School, Brigham Young University.

174. J.D. candidate, 2007, University of Kansas School of Law.

175. J.D., 2006, J. Reuben Clark Law School, Brigham Young University.

Canada	Art. VI(91)(26).
Cape Verde	Arts. 86, 87. * @
Chad	Arts. 36, 37, 38. * @
Chile	Art. 1. * @
China	Art. 25. @
Congo	Prmbl., Arts. 34, 38, 39, 40, 58. @
Columbia	Arts. 5, 15, 42, 43, 44.
Congo	Prmbl., Arts. 34, 38, 39, 40, 41, 58. @
Costa Rica	Arts. 51, 52, 53, 54. @
Croatia	Arts. 55, 61, 62, 63, 64. @
Cuba	Arts. 43, 44, 45. @
Cyprus	Arts. 22, 111.
Dominica	Prmbl. *
Dominican Republic	Art. 15. * @
East Timor	Secs. 17, 36, 39, 58.
Ecuador	Sec. III, Arts. 32, 33, 34, 35, 36, 37, 38. @
Egypt	Arts. 9, 10, 11, 12. * @
El Salvador	Arts. 32, 33, 34, 35, 36. @
Equatorial Guinea	Prmbl., Its. 5, 21, 24. @
Eritrea	Prmbl., Art. 22. @
Estonia	Arts. 21, 22, 24, 26, 27. *
Ethiopia	Arts. 34, 35, 36. @
Fiji	Prmbl., Art. 29. * @
Finland	Sec. 19. * @
Gabon	Prmbl. @
Georgia	Art. 36.
Germany	Art. 6. @
Ghana	Art. 28. * @
Greece	Arts. 9, 21, 93. @
Guatemala	Art. 1. * @
Haiti	Arts. 259, 260, 261. @
Hungary	Arts. 15, 66, 67. @
Honduras	Arts. 111, 112, 113, 114. @
Iceland	Art. 71. *
Indonesia	Art. 33. *
Iran	Arts. 10, 12, 21, 31, 43. *
Iraq	Art. 11. *
Ireland	Art. 41. @
Italy	Arts. 29, 30, 31, 36, 37.
Jamaica	Art. 31. *
Japan	Art. 24.
Kazakhstan	Art. 27. @

Kyrgyzstan	Arts. 26, 39. * @
Kuwait	Art. 9. *
Laos	Art. 24.*
Latvia	Art. 110. @
Liberia	Arts. 16, 23. @
Libya	Art. 33. @
Lichtenstein	Art. 15. *
Lithuania	Arts. 31, 38, 39.
Lesotho	Arts. 4, 11, 30. *
Luxembourg	Arts. 11, 21, 108. @
Macedonia	Arts. 25, 40, 41. @
Madagascar	Arts. 20, 21. * @
Malawi	Arts. 13, 22, 23, 24.
Mali	Art. 6. *
Malta	Sec. 32. *
Mauritania	Prmbl., art. 16. * @
Mexico	Art. 3. *
Moldova	Arts. 28, 48, 49. *
Mongolia	Arts. 16, 17.
Mozambique	Arts. 42, 55, 56. @
Namibia	Art. 14.
Nauru	Prmbl. *
Nicaragua	Ch. IV, Arts. 70, 71, 72, 73, 74, 75, 76, 77, 78, 79. @
Niger	Art. 18. @
Nigeria	Arts. 17, 262, 272. @
North Korea	Art. 78.
Oman	Art. 12. *
Pakistan	Art. 35. @
Panama	Ch. 2, Arts. 52, 53, 54, 55, 56, 57, 58, 59. @
Papua New Guinea	Art. 1 [Prmbl.] *
Paraguay	Ch. IV, Arts. 30, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 75, 92, 100.
Peru	Arts. 4, 5, 7, 24.
Philippines	Art. XV, Secs. 1, 2, 3, 4. @
Poland	Arts. 18, 33, 41, 47, 48, 71.
Portugal	Arts. 26, 36, 65, 67, 68, 69, 70, 71, 72.
Qatar	Arts. 21, 37. *
Romania	Arts. 26, 44. @
Russian Federation	Arts. 7, 23, 38. *
Rwanda	Arts. 24, 25. @
Saint Lucia	Prmbl., Ch. 1. *

Saint Vincent	Prmbl. *
Saudi Arabia	Arts. 9, 10, 27. * @
Senegal	Arts. 17, 18, 19, 20. @
Sierra Leone	Art. 15. *
Serbia	Arts. 27, 28, 29.
Slovakia	Arts. 19, 41.
Slovenia	Art. 53. @
Somalia	Art. 2.7.
South Africa	Arts. 15, 28. *
South Korea	Arts. 12, 36.
Spain	Arts. 18, 35, 39. * @
Sri Lanka	Art. 27 (12). * @
Sudan	Art. 15. @
Suriname	Arts. 17, 35.
Sweden	Arts. 2, 8, 13, 14, 41, 116, 119.
Syria	Arts. 44, 46.
Tajikistan	Arts. 33, 34.
Thailand	Sec. 80. * @
Togo	Art. 31.
Trinidad and Tobago	Prmbl. *
Tunisia	Prmbl., Art. 41, 62. * @
Turkey	Arts. 20, 41, 62. * @
Turkmenistan	Art. 25
Tuvalu	Art. 4. *
Uganda	Art. 31. @
Ukraine	Arts. 32, 51, 52, 63. @
Uruguay	Ch. II, Arts. 41, 42, 43, 49. @
Uzbekistan	Arts. 63, 64, 65, 66. @
Venezuela	Ch. V, Arts. 75, 76, 77, 78, 79, 80, 81. @
Vietnam	Arts. 21, 31. @
Yemen	Art. 26. *
Zambia	Prmbl. * @

Appendix II

International Treaties, Charters, Conventions and other Legal Documents With Provisions Concerning Marriage and/or Families

(Research originally compiled by Scott Borrowman, March, 2005)

Convention on the Prevention and Punishment of the Crime of Genocide
Convention relating to the Status of Refugees
Supplementary Convention on the Abolition of Slavery, the Slave Trade,
and Institutions and Practices Similar to Slavery
International Convention on the Elimination of all Forms of Racial
Discrimination
Convention on Consent to Marriage, Minimum Age for Marriage and
Registration of Marriages
Recommendation on Consent to Marriage, Minimum Age for Marriage
and Registration of Marriages
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Convention on the Elimination of All Forms of Discrimination against
Women
Hague Convention on the Civil Aspects of International Child Abduction
Convention on the Rights of the Child
European Convention for the Protection of Human Rights and Funda-
mental Freedoms
American Convention on Human Rights
American Declaration of the Rights and Duties of Man
Conference on Security and Co-operation in Europe, Final Act (Helsinki
Accord)
African Charter on Human and People's Rights (Banjul Charter)
African Charter on the Rights and Welfare of the Child
Protocol to the African Charter on Human and Peoples' Rights on the
Rights of Women in Africa
Geneva Declaration of the Rights of the Child of 1924
United Nations General Assembly Universal Declaration of Human
Rights
Declaration of the Rights of the Child
Proclamation of Teheran
Declaration on Social Progress and Development
Declaration on Social Progress and Development
Declaration on the Rights of Mentally Retarded Persons

Declaration on the Protection of Women and Children in Emergency and
Armed Conflict

Declaration on the Rights of Disabled Persons

Declaration on the Elimination of All Forms of Intolerance and of Dis-
crimination Based on Religion or Belief

International Convention on the Protection of the Rights of All Migrant
Workers and Members of Their Families

Cairo Declaration on Human Rights in Islam

Declaration on the Elimination of Violence against Women

Draft Declaration on the Rights of Indigenous Peoples

Beijing Declaration and Platform for Action, Fourth World Conference
on Women

Proposed American Declaration on the Rights of Indigenous Peoples

Appendix III

*Applications by State Legislatures for Congress to Convene a Convention for the Purpose of Proposing an Abortion-related Amendment to the Constitution*¹⁷⁶

1. *Alabama*
Ala. S.J. Res. 9, 1980 Sess., 1980 Ala. Acts 395, 9 Fam. Plan. Population Rep. 54 (1980).
2. *Arkansas*
Ark. Res. Of Feb. 17, 1977, H.R.J. Res. 2, 6 Fam. Plan. Population Rep. 91 (1977).
3. *Delaware*
Del. Res. Of May 23, 1978, H.R. Con. Res. 9, 7 Fam. Plan. Population Rep. 107 (1978).
4. *Idaho*
Ida. S. Con. Res. 132, 45th Legis., 2d Sess. 1980 Idaho Sess. Laws 1005, 9 Fam. Plan. Population Rep. 55 (1980).
5. *Indiana*
Ind. S.J. Res. 8, Pub. L. No. 352, 98th Gen. Assembly, 1st Sess., 1973 Ind. Acts (Central), 2 Fam. Plan. Population Rep. 105 (1973).
6. *Kentucky*
Ky. H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401, 7 Fam. Plan. Population Rep. 107 (1978).
7. *Louisiana*
La. Res. Of July 16, 1976, S. Con. Res. 70, 5 Fam. Plan. Population Rep. 99 (1976).
8. *Massachusetts*
Mass. Act of June 8, 1977, H.R. 5984, 6 Fam. Plan. Population Rep. 91 (1977).
9. *Mississippi*
Miss. H. Con. Res. 3, 1979 Reg. Sess., 1979 Miss Laws 1137, 1138,

¹⁷⁶ See generally Lynn D. Wardle & Mary Ann Wood, A Lawyer Looks At Abortion 211, App. A (1982).

8 Fam. Plan Population Rep. 23 (1979).

10. *Missouri*

Mo. Res. Of Apr. 24, 1975, S. Con. Res. 7, 4 Fam. Plan. Population Rep. 129 (1975).

11. *Nebraska*

Neb. Res. Of Apr. 21, 1978, Legis. Res. 152, 7 Fam. Plan. Population Rep. 107 (1978).

12. *Nevada*

Nev. S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014, 9 Fam. Plan. Population Rep. 19 (1980).

13. *New Jersey*

N.J. Act of Apr. 21, 1977, S. 1271, 6 Fam. Plan. Population Rep. 91 (1977).

14. *Oklahoma*

Okla. H.R.J. Res. 1053, 37th Legis. 2d Sess., 1980 Okla. Sess. Laws 1205 (West), 9 Fam. Plan. Population Rep. 19 (1980).

15. *Pennsylvania*

Pa. H.R. 71, 1978 Gen. Assembly, 1978 Pa. Laws 1431, 7 Fam. Plan. Population Rep. 107 (1978).

16. *Rhode Island*

R.I., Act of Apr. 21, 1977, H.R. 5159, 6 Fam. Plan. Population Rep. 91 (1977).

17. *South Dakota*

S.D. H.R.J. Res. 503, 52d Legis., 1977 S.D. Sess. Laws 23, 6 Fam. Plan. Population Rep. 91 (1977).

18. *Tennessee*

Tenn. Res. Of Jan. 30, 1980, S.J. Res. 23, 9 Fam. Plan. Population Rep. 103 (1980).

19. *Utah*

Utah H.R.J. Res. 28, 42d Legis., Reg. Sess., 1977 Utah Laws 1317, 1318 (Lorraine), 6 Fam. Plan. Population Rep. 91 (1977).