Full Faith and Republican Guarantees: Gay Marriage, FMPA, and the Courts

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I. INTRODUCTION

"What difference does it make to your heterosexual marriage if I enter into a homosexual marriage?" Such is the frequent rejoinder to claims that traditional marriage needs to be protected by state or federal law or even by a federal constitutional amendment. The rejoinder point is admirably well made by Professor Robert Riggs in The Supreme Court and Same-Sex Marriage: A Prediction, also published in this symposium issue. Professor Nick Bala elaborated on the same point and contends that, at symposium in which these papers were delivered, no one offered any argument rebutting that proposition.

I have a different point of view. Marriage may be an individual bond, but it is fostered by society because it also fulfills fundamental societal functions. Indeed, it is my contention that Professor Bala himself offered ample arguments in support of this proposition. He said, for example, that there is a substantial difference between marriage and domestic partnerships both from the individual's point of view and that of society as a whole. He said that there is a profound symbolic significance to extending marriage to same-sex couples. He asserted that such a move would provide an important social validation to same-sex marriage, and that the exclusion of same-sex couples from the institution of marriage perpetuates the view that same-sex relationships are less worthy of recognition—one might instead say less important to society in furthering the societal goals advanced by marriage as it has traditionally been understood.

*Professor of Law, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence. This article is based on remarks delivered at a symposium on the Federal Marriage Protection Amendment held at the J. Reuben Clark Law School, Brigham Young University, in September 2005, and previously at a symposium on the Federal Defense of Marriage Act held at the Columbus School of Law, Catholic University of America, in May 2004.


Professor Bala then told the history—the non-static history—of marriage. In his depiction of marriage history we find an unbelievably important example for us: no-fault divorce. The United States did not embrace no-fault divorce until 1969, and as Professor Bala pointed out, the move to no-fault divorce has *fundamentally changed* the nature of marriage in the short time since it was made.  

There were a significant number of people who, at the time it was proposed, argued against no-fault divorce because it would change the nature of marriage. No-fault divorce, it was argued, would undermine the institution of marriage and the understanding of family, which has been an important foundation for civilized society. Feminist theorists, in particular, expressed concern about the economic consequences of no-fault divorce to women and their custodial children.  

The response then was much the same as it is now—it was what Justice Scalia described in the related context of nude dancing as the “Thoreauvian ‘you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else’ beau ideal”.

How did the availability of no-fault divorce that might be utilized by *others* hurt *your* marriage? Professor Bala answered that for us during his presentation: the move to no-fault divorce *fundamentally* changed the nature of marriage.

The consequences of that change have been profound, even if not perfectly understood. As one particularly insightful citizen noted during recent debate over California’s Proposition 22:

Why do we have the institution of marriage anyway?

I believe that a society is only as strong as its permanent, heterosexual, monogamous marriages. Consider the changes in America in the last 40 years [since the move to no-fault divorce]. We changed from having one of the lowest prison populations to having one of the highest incarceration rates in the world, and 80 percent of the inmates come from families with broken marriages or no marriages.

The teen suicide rate has more than tripled from 1960 to today. During this same period, the divorce rate tripled and the number of children living in homes with broken marriages increased from 8 percent

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3. *Id.*


7. California’s Proposition 22 proposed that only marriage between a man and a woman be valid or recognized in California.
to 24 percent.

The academic achievement of American students falls way behind students from around the world. It is not all the schools’ fault. More than half of the students in our schools are living in broken homes. We can have the best schools in the world, but if a child is not loved, cared for and protected at home, he will almost never succeed in school.

I am coming to believe that the most important factor in achieving a successful, safe and prosperous society is the strength of our marriages. Children are delicate and tender and need, most of all, to have a father and a mother who love each other and are committed to providing them a safe, nurturing, permanent home to grow up in.8

The consequences of the latest push to disconnect marriage from either its procreative or parenting functions will, I predict, be equally profound, even if the full extent of those consequences cannot be predicted with any degree of scientific certainty.

II. THE SHIFTING FOUNDATION FOR MARRIAGE

The Supreme Court’s 1885 decision in Murphy v. Ramsey9 is a good place to start for a description of the earlier understandings of marriage. Murphy was a voting rights case from the Utah Territory. Jesse Murphy and other polygamists challenged the federal law requiring that a prospective voter certify, under oath and as a precondition to voting eligibility, that he was not a bigamist or polygamist. The Court upheld the voting restriction, noting the importance of monogamous, heterosexual marriage in the strongest of terms:

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement.10

There is much wisdom in the Supreme Court’s early view, not the least of which its focus on societal benefit rather than self-autonomy.

10. Id. at 45.
Marriage may be an individual bond, but it is fostered by society because it also fulfills important—indeed, fundamental—societal functions. As a result, questions about the nature and scope of marriage cannot be viewed simply as matters of individual rights, and those who do take this view misunderstand the institution of marriage as well as society’s historical role in fostering that institution and in benefiting from it.

The view of today’s courts is radically different. The entire focus has shifted to the individual rights rather than the social institution view of marriage, undoubtedly the result of a decades-long series of court decisions depicting various rights to privacy and autonomy. The most recent of these “rights revolution” cases, Lawrence v. Texas, cleared the way for an extension of marriage beyond the monogamous, heterosexual relationship grounded in the nature of male and female, that has historically defined the institution. Justice Kennedy, writing for a five-justice majority in Lawrence, held that the Texas anti-sodomy law did not survive rational basis review—the most lenient level of judicial scrutiny—when confronted with the claim that a prohibition on sodomy infringed constitutionally-protected liberty interests. Under traditional rational basis review, the constitutionality of the law is presumed, and courts are required to uphold the law unless the person challenging the law can demonstrate that there is no legitimate governmental purpose furthered by the law. A legislature does not have to be correct in its assessment that the law will further a legitimate governmental purpose as long as it could reasonably believe that a legitimate purpose would be advanced.

The question confronted by the Court in Lawrence was whether the fostering of long-standing views about the immorality of certain sexual conduct was a legitimate governmental interest. The traditional definition of the state’s police power is the power of government to protect the health, safety, welfare, and morals of the people. Sodomy has been considered immoral for thousands of years by nearly every civilization on earth. As Justice Scalia noted in Barnes v. Glen Theatre, Inc., “Our society prohibits, and all human societies have prohibited, certain

15. See, e.g., Plato’s Laws, Book VIII 835d-842a; Genesis 19:5-8, 24-26; Deuteronomy 23:17; Leviticus 18:16-20, 22-23; 25 Hen. 8, c. 6 (1533) (making “buggery committed with mankind or beast” a capital offense); 4 W. BLACKSTONE, COMMENTARIES *215. See Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 525 (1986), from which these citations are drawn. See also Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986).
activities not because they harm others but because they are considered, in the traditional phrase, 'contra bonos mores,' i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy." From that statement and the fact that prohibitions on sodomy had been upheld by the Supreme Court as recently as 1986, it is evident that the Texas legislature could have reasonably believed that its prohibition on homosexual sodomy furthered the legitimate governmental interest of protecting the health, safety, welfare, and morals of the people and therefore, would be upheld as constitutional.

In other words, the Texas statute should have easily survived rational basis review. That it did not has led many commentators, and not a few courts, to infer that Justice Kennedy was actually assessing the Texas statute under a much stricter standard, perhaps even approaching strict scrutiny. For Court tea-leaf readers, other evidence exists that a standard approaching strict scrutiny is afoot. The opinion in Lawrence was released June 26, 2003, the last court day of the term. Among the end-of-term orders released the next morning was a GVR in Limon v. Kansas, a case involving a male-on-male statutory rape conviction that occurred in a Kansas juvenile facility for the developmentally disabled. Although Justice Kennedy specifically noted in Lawrence that the holding of irrationality was limited to actions by consenting adults in the privacy of their own homes, Limon was remanded for further consideration in light of Lawrence despite the fact that it did not involve adults, or consent, or the privacy of one's home. This odd GVR thus indicates that none of the three limitations purportedly so critical to the Lawrence holding were actually material, suggesting that some sort of new-found fundamental right or suspect classification was instead motivating the decision.

It did not take long for the implicit rationale of Lawrence to spread to the same-sex marriage arena. Indeed, Justice Margaret Marshall’s

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17. See, e.g., Laurence Tribe, Lawrence v. Texas: The Fundamental Right that Dare Not Speak Its Name, 117 Harv. L. Rev. 1893 (2004); United States v. Extreme Associates, Inc., 352 F.Supp.2d 578, 592 (W.D. Pa. 2005) (citing Justice Scalia’s dissenting opinion in Lawrence to support application of strict scrutiny to obscenity statute); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118 n.6 (2d Cir. 2004) (acknowledging argument that Lawrence requires strict scrutiny for any state action dealing with procreation, sexuality, and family); see also People v. Downin, 357 Ill.App.3d 193, 199 (2005) (rejecting contention that the “inescapable” conclusion to be drawn from Lawrence is that engaging in homosexual conduct is a fundamental right subject to strict scrutiny); Williams v. Attorney General of Ala., 378 F.3d 1232, 1251-53 (11th Cir. 2004) (Barkett, J., dissenting) (contending that Lawrence actually recognized a fundamental, due process right to private sexual conduct, which is therefore subject to strict scrutiny).
18. GVR is an abbreviation for: grant the petition for writ of certiorari, vacate the judgment below, and remand.
opinion for the Massachusetts Supreme Judicial Court in Goodridge v. Department of Public Health\textsuperscript{20} took a page directly from Justice Kennedy's playbook. Although Justice Marshall claimed to have applied rational basis review in striking down Massachusetts' centuries-old marriage law, that law should easily have passed constitutional muster under the highly deferential standard of rational basis review. It is perplexing, for example, how Justice Marshall could contend that there was \textit{no rational basis} for distinguishing between heterosexual and homosexual couples in eligibility for marriage, even with respect to procreation and the rearing of children\textsuperscript{21}

At least six other state and federal courts within the last ten years have ruled there is a rational relation between the states' definition of marriage and procreation.\textsuperscript{22} In Lewis v. Harris, for example, the New Jersey Court of Appeals noted "that the historical and prevailing contemporary conception of marriage as solely a union between a single man and a single woman is based partly on society's view that this institution plays an essential role in propagating the species and child rearing."\textsuperscript{23} The Indiana Court of Appeals held, in Morrison v. Sandler, that "The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse."\textsuperscript{24} Justice Marshall's argument to the contrary—that not all heterosexual couples bear or raise children, and that some same-sex couples, through artificial

\textsuperscript{20.} Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).
\textsuperscript{21.} \textit{id.} at 964. Professor Riggs conceded this point during discussion at the symposium, stating: "The Goodridge decision is very badly reasoned and should have been based on strict scrutiny."
\textsuperscript{22.} Wilson v. Ake, 354 F.Supp.2d 1298, 1309 (M.D. Fla. 2005) ([T]his court . . . is bound by the Eleventh Circuit's holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest. . . . DOMA is rationally related to this interest") (internal citations omitted); \textit{In re} Kandu, 315 B.R. 123, 146 (Bankr. W.D. Wash. 2004) ("Authority exists [sic] that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern"); Standhardt v. Superior Court, 77 P.3d 451, 463-64 (Ariz. App. Div. 1, 2003) (review denied 2004 Ariz. LEXIS 62, May 25, 2004) ("We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995) ("[I]t appears that the Supreme Court has seen marriage as having a traditional principal purpose: to regulate and legitimize the procreation of children. . . . I believe that this central purpose of the marriage statute -- this emphasis on child-bearing -- provides the kind of rational basis defined in \textit{Heller}, 113 S. Ct. at 2642-43, permitting limitation of marriage to heterosexual couples.""); Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. App. 2005); Lewis v. Harris, 875 A.2d 259 (N.J. App. 2005).
\textsuperscript{23.} \textit{Lewis}, 875 A.2d at 269 n.2.
\textsuperscript{24.} \textit{Morrison}, 821 N.E.2d at 24.
means or adoption, do bear and/or raise children—is one grounded in strict scrutiny’s requirement of narrow tailoring, not in rational basis review’s tolerance of imperfect fits. Reasonable people might disagree about whether sexual orientation should be deemed a suspect classification entitled to heightened scrutiny, or whether perpetuating marriage as a monogamous heterosexual union constitutes good policy, but it is simply dishonest to contend that such a policy judgment by the people of Massachusetts does not pass rational basis review.

Moreover, even if Justice Marshall was correct in her assertion that procreation and child-rearing do not provide a rational basis for traditional marriage, there are other rationales, easily discerned, that should have required the court’s affirmation of the long-standing Massachusetts marriage law. Two businessmen in Massachusetts, troubled by the Goodridge decision, sketched out in graphic form a perfectly sensible and legitimate governmental purpose that is furthered by the historical definition of marriage. Before Goodridge, the family structure encouraged by the Massachusetts marriage law looked something like this:

![Family Structure Diagram]

In order to strengthen this family relationship, the Massachusetts marriage laws restrict inter-family marriage. Chapter 207, Section 1, of the Massachusetts statutory code provides that “No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather’s wife, grandson’s wife, wife’s mother, wife’s grandmother, wife’s daughter, wife’s granddaughter, brother’s daughter, sister’s daughter, father’s sister or mother’s sister.” Similarly, Section 2 provides that “No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother’s husband, daughter’s husband,

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25. Bill Habeeb and Brian Carney at the Wynn Interactive Company in Boston. The graphic depictions which follow are reprinted here with their permission.
granddaughter's husband, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother." The interplay of these laws and the historical understanding of marriage produces the following matrix of permissible relationships:

On its face, Goodridge worked a very small change in this graphical depiction:
And on the larger matrix, the change at first blush likewise seems relatively minor:
This all seems simple enough. Why should such a minor change affect those who choose not to embrace it? What legitimate governmental purpose could possibly be furthered by blocking such a simple thing as this? Let us consider this minor change in light of the other existing provisions of the Massachusetts marriage laws. The statutory prohibitions on incest, for example, apply by their terms only to members of the opposite sex. So unless there is some further development in the law either by the legislature or the Supreme Judicial Court, all of these interactions within the family are now permissible:

Of course, once we realize that it is permissible for a brother to marry his brother, we will have to consider whether there is any possible rationale for continuing to bar him from marrying his sister, and even the existing prohibitions in Massachusetts would fall. The once well-ordered notion of family would give way to this chaotic set of possible combinations:
Surely preventing the slippery slope that would make possible such chaos is a legitimate governmental purpose.

Of course, the courts might instead re-write the Massachusetts incest statutes to ban same-sex intra-family marital relationships as well, and we could write this example off as a silly hypothetical of the sort typically served up by law professors in the classroom. But once we have established that the ability to marry whomever one wants is a fundamental, constitutionally-protected liberty interest—which, in truth, is what the Goodridge decision does—would such a ban be permissible? What principled understanding of liberty requires the recognition of same-sex marriage but still permits restrictions on inter-family marriage by consenting adults, once we have divorced marriage from its societal purpose and made it rather a matter of individual right?

III. THE SLIPPERY SLOPE OF GOODRIDGE AND LAWRENCE

The damage from Goodridge and Lawrence is more far-reaching even than this, however. As I said, by pretending that there is no rational basis for the long-standing Massachusetts marriage laws or the long-standing Texas prohibition against sodomy, the Goodridge and Lawrence courts actually applied some unspoken form of strict scrutiny. Once that proposition is firmly entrenched, a number of other existing restrictions on whom one can marry, or how many one can marry, would likely fall as well. Justice Scalia predicted this in his dissenting opinion in Lawrence:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are... sustainable only in light of Bowers' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

Already there are groups seeking to make good on Justice Scalia's prediction by pressing the outer limits of the Goodridge and Lawrence holdings. In April 2004, for example, a feature article appeared in the

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26. See Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 969 n.34 (Mass. 2003) ("Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws.... Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner").

San Francisco Chronicle sympathetically portraying "polyamorists"—those who have intimate attachments to multiple partners—and their efforts to force recognition of their multi-faceted "marriages." As one woman quoted in the article noted, "I wear a wedding ring for my husband and a bracelet for Conley," the third person in the relationship. The article also described a four-way relationship, noting that although "Ann Spurry and her husband Terrance Rolf did not involve Peter and Conley in their Alameda marriage ceremony, other polyamorist Unitarians have proposed church ceremonies to bless threesomes, foursomes and moresomes." Similarly, new challenges to longstanding restrictions on polygamy have recently been brought, and although such challenges have thus far been unsuccessful, the courts appear to recognize that the *Lawrence* holding will "likely" call into question existing precedent upholding prohibitions on bigamy. As one New Jersey court recently recognized:

The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as "compelling and definitive expression[s] of love and commitment" among the parties to the union.

Will the state not be equally obligated to recognize these "marriages" too, once a liberty-interest-in-personal-fulfillment model of marriage supplants the societal-benefit model heretofore recognized and fostered?

Recently an e-mail circulated across the internet making some humorous predictions of what a state-sponsored marriage license system would look like once the shift to an individual-fulfillment model of marriage had been accomplished. It read something like this:

- Marriage licenses should be like fishing licenses.
- You want resident or visitor? Salt water, fresh, or both? Just for the weekend, 30-days, all year? Lifetime? Wow; brave soul!

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29. Lewis v. Harris, 875 A.2d 259, 270 (N.J. Super., App. Div. 2005); see also Goodridge, 798 N.E.2d at 984 n.2 (Cordy, J., dissenting) ("The same semantic sleight of hand [applied by the majority] could transform every other restriction on marriage into a right of fundamental importance. For example, if one assumes that a group of mature, consenting, committed adults can form a 'marriage,' the prohibition on polygamy . . . infringes on their 'right' to 'marry'.")
• Cotton to your brother or sister? Try the salmon stamp. Endangered species.

• Hey you, Oedipus! Try the Matriarch Special? Only fourteen dollars extra!

• Same-sex? You’ve got a choice of a pink or a blue stamp.

• Plural marriage? Now you’re really talkin’! How many stamps you want?

• These are good only in California, of course. No Full Faith and Credit or Supremacy problems here.

• You want the Traditional Nationwide-Worldwide Special? We have a deal on that, this week only.

• Proceeds from all stamps go to the Marriage Rights Litigation Fund.

• Wear your license on the front of your jacket or hat where it can be seen by the Warden at all times, and remember, anything too young has to be thrown back!

A more serious version of the same proposition was recently published by the San Francisco Chronicle. In a Sunday opinion piece, Professor Colin Jones argued for a “free-market” approach to marriage, in which “a plethora of choices would become available to prospective newlyweds.” He elaborated on just what he had in mind:

A Catholic marital corporation would forbid its members from divorcing. Progressive marital corporations would allow gay marriage. Islamic or Mormon fundamentalist marital corporations could allow polygamy. Plain vanilla marital corporations would probably be popular among people who just want to get married without thinking about it too much. . . . [M]inors below a certain age would be excluded from joining a marital corporation.

At least Professor Jones was honest enough to admit candidly that “allowing same-sex unions (either through a marital corporation regime or the ad hoc approach some states are already following) will eliminate the presumption of reproduction that underlies traditional marriage,” and

31. Id.
that "[i]f the presumption of reproduction is no longer needed, then there is no real reason to prevent incestuous marriages."\textsuperscript{32}

Yet even more absurd consequences will be possible once the shift from the societal-institution model to the personal-fulfillment model as the foundation for marriage is accomplished. In the wake of the \textit{Goodridge} decision, several Massachusetts legislators introduced "An Act Relative to Archaic Crimes"\textsuperscript{33} that would repeal the long-standing statute forbidding the "abominable and detestable crime against nature, either with mankind or with a beast."\textsuperscript{34} Although a new law would continue to forbid "a sexual act on an animal"—apparently the reference to crimes against nature is passé—the punishment was reduced from a maximum 20-year term in state prison by permitting an alternate punishment of a mere two and a half-year maximum term in the county jail or a $5,000 fine,\textsuperscript{35} and one has to wonder how even the reduced punishment can be imposed for such an intrusion on one's liberty.

Although the Massachusetts law has not been adopted, a similar story has already played out in the Netherlands. In March 2004, Reuters reported a story about a Dutch prosecutor who declined to prosecute a man engaged in bestiality because there was no explicit law against bestiality on the books. Legislators who quickly moved to remedy that oversight struggled to find an appropriate ground on which to sustain such a law. The patent immorality of the conduct was no longer sufficient in a world awash in the fundamental right to self-fulfillment, so the legislature instead had to rest its new prohibition on the claim that such conduct would infringe the animal's right to physical integrity \textit{without its consent}, a consent that it is not possible for an animal to give. How that rationale could be squared with the fact that animals' physical integrity is routinely and thoroughly violated without their consent when they are slaughtered for food, the legislature did not say. Nor did the legislature explain why an animal's right to physical integrity should outweigh a human being's right to self-fulfillment—perhaps that will be the subject of the next round of litigation.

A similar scenario played out in Utah a few years ago. A man entered the cage of a crane at the Tracy Aviary in Salt Lake City and proceeded to rape the bird, which subsequently died as a result. The state sought to press charges, but the legislature had omitted the crime of bestiality when it rewrote the criminal code a few years earlier, apparently it the mistaken belief that the prohibition was anachronistic.

\textsuperscript{32} Id.
\textsuperscript{33} Senate Bill No. 938, available at http://www.mass.gov/legis/bills/senate/st00/st00938.htm.
\textsuperscript{34} Mass. Gen. Laws, Ch. 272, § 34.
\textsuperscript{35} Senate Bill No. 938, \textit{supra}, n. 33.
Instead, the man was charged with a simple destruction of property (for the death of the $1200 bird). The legislature reinstated the bestiality statute the next legislative session. 36

These are, of course, slippery slope arguments, and like all slippery slope arguments, they tend to focus on absurd examples to prove a point. The point here is not that these consequences will necessarily follow, or even that homosexual sexual relations are comparable to polygamous or inter-specie sexual relations. The point, rather, is that there is no principled way to distinguish these things once self-fulfillment becomes the *sine qua non* of the institution of marriage.

Maybe all of this makes sense as a matter of policy, but the latest spate of litigation has not proceeded as though this were simply a dispute about policy. Instead, the individual rights model that underlay the latest litigation has encouraged courts to make fundamental policy decisions that heretofore have been made by legislatures. In the process, they have discarded the policy purposes served by the traditional model of marriage, probably at great peril.

IV. SOCIETY’S INTEREST IN TRADITIONAL MARRIAGE

What are the legitimate policies served by the traditional model, and why should we be concerned than unelected, unaccountable judges have so cavalierly discarded such long-standing policy? Recent litigation in California challenging the state’s prohibition on same-sex marriage has brought several to the forefront. 37 In 1859, shortly after California


37. The discussion which follows is drawn from an *amicus curiae* brief I filed in my capacity as Director of the Claremont Institute Center for Constitutional Jurisprudence in the consolidated *Marriage Cases* (Cal. Ct. App., 1st App. Dist., Div. 3, Coordination Proceeding No. 4365) on behalf of James Q. Wilson, Emeritus Professor, University of California, Los Angeles; Hadley Arkes, Edward N. Ney Professor of Jurisprudence and American Institutions, Amherst College; Steven G. Calabresi, George C. Dix Professor of Constitutional Law, Northwestern University School of Law; Lloyd Cohen, Professor of Law at George Mason University School of Law; Edward J. Erler, Department of Political Science, California State University, San Bernardino; Robert P. George, McCormick Professor of Jurisprudence, Princeton University; Leon Kass, University of Chicago; Charles Kesler, Professor of Government, Claremont McKenna College; Douglas W. Kmiec, Chair and Professor of Constitutional Law, Pepperdine University; Daniel H. Lowenstein, Professor, University of California, Los Angeles; David Popenoe, Professor of Sociology, Rutgers University; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Katherine Shaw Spaht, Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center; and Thomas G. West, Professor of Politics, University of Dallas, an interdisciplinary group of legal and family scholars with a professional and scholarly interest in the role of marriage in law and society. The principal author of the brief was co-counsel Joshua K. Baker, Institute for Marriage and Public Policy, who drew on arguments previously published by Maggie Gallagher, President of the Institute for Marriage and Public Policy, in *How Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 Univ. St. Thomas L. J. 33 (Fall 2004).
became a state, the California Supreme Court held in *Baker v. Baker* that, "the first purpose of matrimony, by the laws of nature and society, is procreation." The opinion was written by Justice Stephen Field, who later became a highly-regarded Associate Justice on the Supreme Court of the United States. In *Sharon v. Sharon*, the California Court cited a treatise stating that "the procreation of children under the shield and sanction of the law" is one of the "two principal ends of marriage." More recently, the California Court of Appeals has reiterated Justice Field's view that the "first purpose of matrimony, by the laws of nature and society, is procreation." And in *Maslow v. Maslow*, the Second Appellate District explicitly connected the procreation aspect of marriage to societal interest: "Ordinary marriage relations between husband and wife are the foundation on which the perpetuation of society and civilization rests."  

Nor is California alone in this view. Most states and the United States Supreme Court itself have in the past similarly recognized that the state's principal interest in marriage is procreation. In *Skinner v. Oklahoma*, the Supreme Court noted a connection between marriage and procreation, observing that "[m]arriage and procreation are fundamental to the very existence and survival of the race." The New Jersey courts have recognized that "[p]rocreation, if not the sole, is at least an important, reason for the existence of the marriage relation." The New York courts have adopted a similar view: "The great end of matrimony is... the procreation of a progeny having a legal title to maintenance by the father." The Fifth Circuit in *Poe v. Gerstein* noted that "procreation of offspring could be considered one of the major purposes of marriage." In *Singer v. Hara*, the Washington Court of Appeals noted that "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." The Minnesota Supreme Court in *Baker v. Nelson* recognized that the "institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of

children within a family, is as old as the book of Genesis.\(^{47}\) I could go on at length,\(^{48}\) but I will close with this observation from New Jersey: "Lord Penzance has observed that the procreation of children is one of the ends of marriage. I do not hesitate to say that it is the most important object of matrimony, for without it the human race itself would perish from the earth."\(^{49}\)

Of course, procreation can, and often does, occur outside of marriage. Thus, it must be that the government’s interest in marriage is not simply unfettered procreation, but procreation under circumstances that the state reasonably believes will provide the optimal conditions for raising children—a stable home, headed by a monogamous couple who are the children’s natural parents. As far back as 30 A.D., Musonius Rufus, a Roman Stoic, recognized that the institution of marriage does more than foster mere procreation:

> The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals.\(^{50}\)

In other words, the state’s interest in marriage is in more than just procreation, but in *paternity* as well—the common-sense of which has

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48. See, e.g., Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), aff'd 673 F.2d 1036 (9th Cir. 1982) (observing that a "state has a compelling interest in encouraging and fostering procreation of the race"); Dean v. District of Columbia, 653 A.2d 307, 337 (D.C. 1995) (Ferren, J., concurring and dissenting) (finding that this "central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples"); Zoglio v. Zoglio, 157 A.2d 627, 628 (D.C. App. 1960) ("One of the primary purposes of marriage is procreation"); Lyon v. Barney, 132 Ill. App. 45, 50 (App. Ct. 1907) ("[T]he procreating of the human species is regarded, at least theoretically, as the primary purpose of marriage . . ."); Gard v. Gard, 169 N.W. 908, 912 (Mich. 1918) ("It has been said in many of the cases cited that one of the great purposes of marriage is procreation"); Frost v. Frost, 181 N.Y.S.2d 562, 563 (Sup. Ct. N.Y. County 1958) (discussing "one of the primary purposes of marriage, to wit, the procreation of the human species"); Ramon v. Ramon, 34 N.Y.S. 2d 100, 108 (Fam. Ct. Div. Richmond County 1942) ("The procreation of offspring under the natural law being the object of marriage, its permanency is the foundation of the social order"); Pretlow v. Pretlow, 14 S.E.2d 381, 385 (Va. 1941) ("The State is interested in maintaining the sanctity of marriage relations, and it is interested in the ordered preservation of the race. It has a double interest"); Stegienko v. Stegienko, 295 N.W. 252, 254 (Mich. 1940) (stating that "procreation of children is one of the important ends of matrimony"); Grover v. Zook, 87 P.638, 639 (Wash. 1906) ("One of the most important functions of wedlock is the procreation of children"); Heup v. Heup, 172 N.W.2d 334, 336 (Wis. 1969) ("Having children is a primary purpose of marriage").

49. Turney v. Avery, 113 A. 710, 710 (N.J. Ch. 1921) (citations omitted).

been known at least as long ago as Plato toyed with the idea of a political order based on the community of wives and children.\textsuperscript{51} As Professor John Witte recently noted, American jurists addressing the connection between marriage and procreation have drawn on a long-standing philosophical discourse that understood the word "procreation" to refer to more than the mere physical generation of children's bodies:

Procreation, however, means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living—a common Stoic sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children.\textsuperscript{52}

The State also has a legitimate, indeed compelling, interest in maximizing the likelihood that children are raised by both their mothers and their fathers in a low-conflict marriage. Current social scientific data suggests that the law of marriage protects children to the extent that it increases the likelihood that children will be born to and raised by their biological mother and father in a low-conflict union. Child Trends, a leading and respected child research organization, summed up the current social science consensus on common family structures as follows:

Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.\textsuperscript{53}

The risks to children when mothers and fathers do not get and stay married include: poverty,\textsuperscript{54} suicide,\textsuperscript{55} mental illness,\textsuperscript{56} physical illness,\textsuperscript{57}


infant mortality,\textsuperscript{58} lower educational attainment,\textsuperscript{59} juvenile delinquency and conduct disorder,\textsuperscript{60} adult criminality,\textsuperscript{61} early unwed parenthood,\textsuperscript{62} lower life expectancy,\textsuperscript{63} and less warm and close relations with both


mothers and fathers. Thus, any development that weakens the traditional family headed by married, biological parents is likely to increase all of these risks to children, and also to the communities in which these children live.

Consider, for example, just one of the increased risks children face when mothers and fathers do not get and stay married: criminal and delinquent behavior. An impressive number of social science studies confirm that individual children are more likely to engage in criminal conduct when raised in fatherless households. For example, a 2000 study that looked at crime in rural counties in four states concluded, "[A]n increase of 13% in female-headed households would produce a doubling of the offense rate...."65

A study that analyzed a database following 6,403 males from their teens to their early thirties concluded that after controlling for race, income and family background, boys who were raised outside of intact marriages were two to three times more likely to commit a crime that leads to incarceration. The authors concluded: "The results... show that, controlling for income and all other factors, youths in father-absent families (mother only, mother-stepfather, and relatives/other) still had significantly higher odds of incarceration than those from other-father families.... Youth who never had a father in the household had the highest incarceration odds."66

In addition, recent studies depict important indirect effects of increases in fatherless families on children in intact families as well. In a large (but non-scientific) sample of 4,671 eighth graders drawn from students attending 35 schools in ten cities, researchers found that students attending schools with a higher proportion of teens from single-parent families committed more violent offenses, regardless of their own family structure. "An important thing to notice about the results is that it matters how many single-parent families a student is exposed to,


66. "Other-father families" are families in which the adult male is not the biological father.

regardless of whether the student has one or two parents in the home.”

The benefits of marriage for children described by this social science literature do not appear to be direct legal incidents of marriage, of the kind that the state can therefore transfer at will to other family forms. Children living with remarried parents, for example, appear to do no better than children with single mothers, on average. A review of the last decade’s research published in the Journal of Marriage and Family in 2000 concluded: “[M]ost researchers reported that stepchildren were similar to children living with single mothers on the preponderance of outcome measures and that stepchildren generally were at greater risk for problems than were children living with both of their parents.”

Existing scientific data thus suggests that the law of marriage


69. “Research does not generally support the idea that remarriage is better for children than living with a single mother.” INSTITUTE FOR AMERICAN VALUES, WILLIAM J. DOHERTY, ET AL., WHY MARRIAGE MATTERS: 21 CONCLUSIONS FROM THE SOCIAL SCIENCES 5 (2002); see also, SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS (1994) (“In general, compared with children living with both their parents, young people from disrupted families are more likely to drop out of high school, and young women from one-parent families are more likely to become teen mothers, irrespective of the conditions under which they began to live with single mothers and irrespective of whether their mothers remarry or experience subsequent disruptions.”); Stephen Demuth & Susan L. Brown, Family structure, family processes, and adolescent delinquency: the significance of parental absence versus parental gender, 41 J. RES. CRIME & DELINQUENCY 58, 71 (2004) (“[A]dolescents living in single-mother, singlefather, and stepfamilies report significantly higher delinquency than those in two-biological-parent married families. These differences remain significant even after controlling for child and parent characteristics.”); Thomas L. Hanson, et al., Double jeopardy: parental conflict and stepfamily outcomes for children, 58 J. MARriage & FAM. 141, 146 (1996) (“[F]or the most part, children in stepfather households and children in single-mother households score similarly on the measures of academic performance and psychological adjustment.”); William H. Jeynes, Effects of remarriage following divorce on the academic achievement of children, 28 J. YOUTH & ADOLESCENCE 385, 390 (1999) (“These findings do not support the assumption held by many educators that children of divorce from reconstituted homes are better off academically than children of divorce from single-parent homes. Remarriage following divorce does not positively affect academic achievement and may actually have a negative effect on academic achievement.”) (emphasis in original); Valerie E. Lee, et al., Family Structure and Its Effect on Behavioral and Emotional Problems in Young Adolescents, 4 J. RES. ON ADOLESCENCE 405, 429 (1994) (“Another finding we wish to highlight is the fact that eighth graders are at least as likely to experience problems as a result of living in households occupied by stepfamilies as in single-parent households.”); Wendy D. Manning & Kathleen A. Lamb, Adolescent well-being in cohabiting, married, and single-parent families, 65 J. MARriage & FAM. 876, 890 (2003) (“Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents”); Nicholas Zill, et al., Long-term Effects of Parental Divorce on Parent-Child Relationships, Adjustment, and Achievement in Young Adulthood, 7 J. FAM. PSYCHOL. 91, 99 (1993) (“There is no clear evidence that remarriage has a protective or ameliorative effect against the negative consequences of family discord and disruption”).

protects children to the extent it increases the likelihood that children will be born to and raised by their own mother and father in a reasonably harmonious union. By the same token, the data suggest that anything that weakens the institution of man/woman marriage, or that indirectly encourages people to have children outside of such unions (e.g. by suggesting that mother/father homes have no special importance for children because what counts is only love and not family structure), will place many children at risk.

Meanwhile, relatively little is known from a scientific standpoint about how children fare raised by same-sex couples from birth, compared to other family structures. For example, after reviewing several hundred studies for the Attorney General of Canada, University of Virginia sociologist Steve Nock concluded:

> Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to generally accepted standards of scientific research.  

Other scholars have noted similar concerns. A recent review of social science evidence on same-sex parenting appeared in the Fall 2005 issue of *The Future of Children*, a peer-reviewed journal published jointly by Princeton University and the Brookings Institution. The two gay scholars, both proponents of same-sex marriage, note that because of limitations in this body of research, “What the evidence does not provide, because of the methodological difficulties we outlined, is much knowledge about whether those studied are typical or atypical of the general population of children raised by gay and lesbian couples. We do not know how the *normative* child in a same-sex family compares with other children.”

As the *Goodridge* dissent points out:

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[A]ttempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. . . . Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may . . . wish to see the proof before making a fundamental alteration to that institution.  

Moreover, despite the weakening of our marriage culture that has occurred in the forty years since the “free love” and no-fault divorce movements of the 1960s, the old view of marriage as a loving sexual union that has as a core purpose encouraging men and women to make and rear the next generation together, continues to hold. A 2005 nationally representative poll of American marriage attitudes, supervised by University of Texas sociologist Norval T. Glenn, asked Americans whether the most important good of marriage was “the happiness and well-being of the married individuals” or “children who are well-adjusted and who will become good citizens.” Only 13 percent of Americans said the happiness of adults was the most important purpose of marriage; 74 percent insisted that both are equally important.

Admittedly, there is not a perfect correlation between monogamous, heterosexual marriage and procreation; some heterosexual couples marry beyond the child-bearing years, and others choose not to have children at all. But for the vast majority of heterosexual marriages, procreation remains not only a distinct possibility but an express purpose of marriage, and the institution is designed to encourage that children are

76. The Sacrament of Marriage in the Catholic Church, for example, “is a covenant by which a man and a woman establish in the presence of God and His Church a lifetime partnership, which by nature is ordered for the good of the spouses and the procreation of children.” “MARRIAGE,” GLOSSARY, CATECHISM OF THE CATHOLIC CHURCH 887 (2d ed., 2000) (emphasis added); See also CODE OF CANON LAW, Cod. iur. can., c. 1013 & 7 (“The primary end of marriage is the procreation and the education of children”); THE BAPTIST CONFESSION OF FAITH OF 1689, Ch. 25, ¶ 2 (“Marriage was ordained for the mutual help of husband and wife, for the increase of mankind with a legitimate issue, and the preventing of uncleanness”) (citing Gen. 1:28, emphasis added) (available at http://www.1689.com/Confession/confession.html#Ch.%2025); “HUMAN SEXUALITY: A THEOLOGICAL PERSPECTIVE,” A REPORT OF THE COMMISSION ON THEOLOGY AND CHURCH RELATIONS OF THE LUTHERAN CHURCH-MISSOURI SYNOD, at 7 (“In marriage God intends to provide for (1) the relation of man and woman in mutual love (Gen. 2:18); (2) the procreation of children (Gen. 1:28); and (3) the partial remedy for sinful lust (1 Cor. 7:2)”) (available at
not just conceived, but reared—by both biological mother and biological father, the individuals with the strongest natural bond to the children. Moreover, even marital unions of husband and wife that do not produce children further the state’s interest in procreation and paternity, because they reduce the possibility of alternative sexual unions that may produce out-of-wedlock births. Only by first committing to an exclusive, faithful, enduring sexual, financial and emotional union can men and women attracted to the opposite sex ensure that any children they conceive will be protected by and connected to both their mother and father. As the Indiana Court of Appeals recently noted:

One of the State’s key interests in supporting opposite-sex marriage is not necessarily to encourage and promote “natural” procreation across the board and at the expense of other forms of becoming parents, such as by adoption and assisted reproduction; rather, it encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly.\(^7^7\)

The same circumstance simply does not exist with same-sex marriage. Even where the same-sex couple chooses to raise children, at least one, and frequently both, of the partners have no biological connection to the children. The decision to have children, then, becomes entirely separate from the decision to marry and/or engage in sexual relations, and the more widespread that notion becomes, the more difficult will it be to sustain the procreative and paternal aspects of marriage.

Maggie Gallagher, the President of the Institute for Marriage and Public Policy, has described the problem as follows:

Same-sex marriage in Massachusetts is not merely about opening a new set of legal benefits to more individuals . . . . The meaning of marriage itself must change . . . . The procreative potential of sexual unions must be reduced from the great, brute, obvious, important fact it has been through most of human history, to a minor, not very significant feature of human relationships, largely unrelated to any key purpose of marriage. In the process, the idea that mothers and fathers are the norm for children must also go.\(^7^8\)

\(^7^8\) Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A
Brigham Young University Law Professor Lynn Wardle has elaborated on the point, describing the potential consequences of severing the link between marriage and procreation:

Legalizing same-sex marriage would weaken the nexus between procreation and parenting. The already ambiguous role and meaning of parenthood would be made even more ambiguous. . . . The further separation of procreation from marriage implicit in legalization of same-sex marriage would send a cultural message of parental disconnection from family duties that could further diminish the level of responsibility of absent parents. 79

These observations are confirmed even by many proponents of same-sex marriage, who argue that there is not now any significant connection between marriage and procreation and/or family structure (fathers and mothers). 80 For example, same-sex marriage activist E.J. Graff argues that “[i]f same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers.” 81 According to Professor William Eskridge, the link between marriage and procreation has already been severed: “[I]n today’s society the importance of marriage is relational not procreative.” 82 Andrew Sullivan makes a similar argument, suggesting that “[f]rom being a means to bringing up children, [marriage] has become primarily a way in which two adults affirm their emotional commitment to one another.” 83 And in the pending challenge to California’s marriage laws, the City of San Francisco itself argues that procreation is not an “essential or even important purpose for

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80. As Professor Doug Kmiec notes, some advocates of same-sex marriage contend that there never has been any link between marriage and procreation, or that such a link no longer exists today. Criticizing such claims, Kmiec writes: “In truth, the advocates of same-sex marriage cannot genuinely mean that procreation has not been, in fact, linked with marriage. Rather, what same-sex partisans actually mean is that they would prefer procreation not to be associated with the marital estate . . . . Sexual reproduction for the human species is not merely one of several equally attractive ways to bring forth a child, it is the assumed way. It is no coincidence that those with religious beliefs that correspond most strongly with a traditional understanding of marriage as linked to procreation do, indeed, have the most children.” Douglas W. Kmiec, The Procreative Argument for Proscribing Same-Sex Marriage, 32 HASTINGS CONST. L.Q. 653, 660 (2004).


marriage."  

Judith Stacey, sociology professor at New York University, approvingly suggests that redefining marriage to include same-sex unions may help to supplant the marital family with a new ethic of family diversity:

Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and politics of family life in the United States, helping to supplant the destructive sanctity of The Family with respect for diverse and vibrant families. . . . If we begin to value the meaning and quality of intimate bonds over their customary forms, people might devise marriage and kinship patterns to serve diverse needs. . . . Two friends might decide to "marry" without basing their bond on erotic or romantic attachment. . . . Or, more radical still, perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance, and labor. After all, if it is true that "The Two-Parent Family is Better" than a single-parent family, as family-values crusaders proclaim, might not three-, four-, or more-parent families be better yet, as many utopian communards have long believed?  

A New Jersey Appellate court expressed the same insight, if in less celebratory terms:

The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as "compelling and definitive expressions of love and commitment" among the parties to the union. Indeed, there is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex "because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies."  

These kinds of consequences will not happen all at once, if they

happen at all. They will affect behavior by gradually displacing an older understanding of marriage with the new unisex model of interpersonal commitment, only dimly if at all related to children or family structure. To the extent the court establishes same-sex marriage as a civil right, older conjugal views of marriage will be branded as discriminatory, and (like racism) be subjected to social disapproval and indirect legal pressure. Under these circumstances, fewer people – perhaps very few indeed – in the public square will be willing to say that marriage is about procreation and paternity, or that marriage matters because children need mothers and fathers.

If, as seems likely, same-sex marriage interferes at all with the capacity of marriage to channel the procreative energies of men and women towards exclusive permanent sexual unions called “marriage,” the result will be real harm to potentially millions of children. If it interferes greatly, our society as a whole may well be put at risk.

V. HAS THE JUDICIARY USURPED A ROLE IN THIS POLICY DEBATE?

But the most troubling aspect of this massive shift in public policy is that it has occurred almost entirely outside the deliberative political process. Most of the efforts to redefine marriage are not coming through state legislatures but rather are being imposed by courts, and even when elected legislatures do become involved, it is often the result of court orders that have already largely determined the outcome of the legislature’s policy deliberations, with only the barest of pretext in constitutional text. In Massachusetts, for example, the Supreme Judicial Court in the Goodridge case found a right to same-sex marriage in a Constitution that has been unchanged since 1780 when it was first penned by John Adams, and no one has dared to suggest that John Adams had same-sex marriage in mind when he penned those phrases, or that such was in the minds of those who ratified that constitution. The California courts seem poised to take the same step, in response to San Francisco Mayor Gavin Newsome’s unilateral decision to hand out marriage licenses to same-sex couples, altering a century and a half of California marriage law and ignoring a recent, overwhelmingly-approved state-wide voter initiative in the process.

Perhaps it is a necessary outgrowth of the shift from a societal benefit model to an individual autonomy/rights model of marriage described above, but these judicial decrees are not only overturning the long-standing policy judgments of the people, they are pre-empting any deliberation about the potential societal consequences of this massive
social experiment. This was not the role our nation’s founders envisioned for the Courts, but our interest here is more than simply constitutional purity. Thomas Jefferson captured the concern perfectly in a letter he wrote to William Charles Jarvies toward the end of his life: “You seem to consider the judges as the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.”

Abraham Lincoln, criticizing the Supreme Court’s decision in Dred Scott v. Sandford, made the identical point in his First Inaugural Address:

[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decision of the Supreme Court, . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

Whether one agrees with Goodridge and Lawrence or not, surely it is evident that a judiciary powerful enough to impose such rules is also powerful enough to impose the opposite rules whenever it strikes their fancy. The despotic nature of the action itself, rather than the particular action taken in any given instance, should give us all pause for concern. The question is what ordinary citizens can do to address such arrogations of power.

At the federal level, our Constitution actually envisions several checks on the judicial power, just as it envisions several checks on the powers of each of the other branches of government; the notion that the judiciary is to be entirely independent of the political branches is a relatively modern invention, and it is not only erroneous but dangerous. The checks on the judiciary actually found in the Constitution run the gambit from control over the nomination of “Judges of the Supreme Court,” which is vested exclusively in the President, and control over the actual appointment of judges, which is shared by the President and the Senate, to Congress’s ability to define the scope of the jurisdiction and

88. 60 U.S. (19 How.) 393 (1856).
91. U.S. Const. Art. II, § 2, cl. 2. Congress may vest the appointment of “inferior officers” “in the President alone, in the Courts of Law, or in the Heads of Departments,” and it remains an open question whether lower court judges, who serve on “inferior Courts,” see Art. III, § 1, qualify
even the very existence of the lower courts\textsuperscript{92} and also the scope of the appellate jurisdiction of the Supreme Court,\textsuperscript{93} to Congress’s power over appropriations,\textsuperscript{94} and ultimately to Congress’s power of impeachment.\textsuperscript{95} Yet most have proved to be utterly ineffective.

Quite frankly, it is becoming more and more clear that the full range of these constitutional checks on the federal judiciary needs to be revived as viable options—up to and even including the impeachment of judges who, despite acknowledging that the Constitution does not address a certain matter, will nevertheless invalidate acts of the elected legislature by judicial fiat. Without such checks on the judiciary—and to the list of constitutional provisions cited above we should add non-enforcement by the Executive, a check suggested by Alexander Hamilton in Federalist 78 for courts that exercise “Force” or “Will” instead of “merely judgment—we are in danger of proving the predictions made by Jefferson and Lincoln.

Similar horizontal checks exist on the judiciaries of the several states, by virtue of various separation-of-powers provisions in their respective state constitutions. The Judiciary Committee of the Colorado House of Representatives, for example, recently held a hearing to consider Articles of Impeachment against a Colorado state court judge who had ignored Colorado’s prohibition on same-sex adoption and ordered that a custodial parent be required to share custody of her child with a former lesbian partner.\textsuperscript{96}

The state courts also have vertical checks on them, most frequently exhibited by virtue of the Supreme Court’s appellate jurisdiction over them.\textsuperscript{97} State court judges are bound to support the federal Constitution

\textsuperscript{92} U.S. Const. Art. III, § 1 ("The judicial Power of the United States shall be vested ... in such inferior Courts as the Congress may from time to time ordain and establish").

\textsuperscript{93} U.S. Const. Art. III, § 2, cl. 2 ("the supreme Court shall have appellate Jurisdiction ... with such Exceptions, and under such Regulations as the Congress shall make"); Ex Parte McCordale, 74 U.S. (7 Wall.) 506 (1868).

\textsuperscript{94} U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

\textsuperscript{95} U.S. Const. Art. I, § 2, cl. 5 ("The House of Representatives ... shall have the sole Power of Impeachment"); Art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments"); Art. II, § 4 ("[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"); Art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior").

\textsuperscript{96} Colo. H.R. 04-1007, Concerning the Impeachment of Judge John W. Coughlin; Impeachment Hearing Before Colorado House of Representatives, Judiciary Committee (April 22, 2004); see also In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004) (affirming in part, vacating in part, and remanding to trial courts).

\textsuperscript{97} Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816).
as well, and Article IV, section 4 of that Constitution provides that “The United States shall guarantee to every State in the Union a Republican Form of Government,” which, at its core, requires that major policy judgments be made with the consent of the people rather than imposed on them by an unaccountable judiciary.

Although claims premised on the Republican Guaranty Clause have long been viewed as nonjusticiable political questions in most circumstances, Justice O’Connor noted in New York v. United States “that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.” Contemporaneous commentators, she noted, “have likewise suggested that courts should address the merits of such claims, at least in some circumstances. Several lower courts have, post-New York, acknowledged that the Republican Guaranty Clause might present justiciable questions, but thus far all have found that the Clause had not been violated in the particular circumstances at issue in the cases. For these courts, the essence of the republican guaranty is the right of a State’s citizens to “structure their government as they see fit,” and in New York itself, the Supreme Court dismissed the Guarantee Clause claim only because the statute in that case did not “pose any realistic risk of altering the form or the method of functioning of New York’s government.” When courts take it upon themselves to decide major social policy issues without express textual support in the state or federal constitutions, the basic separation-of-powers structure of those constitutions is violated.

There is a final check on both federal and statute judiciaries that should be addressed, namely, the right of the people to amend the Constitution, essentially removing from the courts any claimed

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98. U.S. Const. Art. 6, cl. 3.
103. Kelley, 69 F.3d at 1511.
104. 505 U.S. at 186.
105. U.S. Const. Art. V; See also Declaration of Independence ¶ 2 (1776).
authority over the subject. The proposed Federal Marriage Protection Amendment currently pending before Congress is just such an effort. The first provision of the proposed amendment, aimed at the federal courts, would preempt any Supreme Court decision that would judicially impose same-sex "marriage" on the entire country, mandating that "Marriage in the United States shall consist only of union of a man and a woman." But as we learned in Goodridge and elsewhere, there are a number of state courts that have done or will soon do the same thing, so a second provision of the FMPA would bar activist state courts from judicially imposing same-sex marriage at the state level. "Neither this Constitution [the federal], nor the constitution of any state shall be construed"—that's not a bar on legislative action, for it is courts that "construe" constitutional provisions—"to require that marriage or the legal incidence thereof be conferred upon any other union than the union of a man and a woman."

Despite protestations to the contrary, the FMPA currently under consideration in Congress would not bar state legislators from authorizing civil unions and otherwise conferring on same-sex couples some of the benefits of marriage. But such judgments would, under the FMPA, have to be made by the elected branches of government as a matter of social policy, judgments that would be well within the exercise of the state's police power—the power to regulate the health, safety, welfare, and morals of the people.

In other words, the Federal Marriage Protection Amendment is both pro-federalism and pro-separation of powers. It would prevent courts from imposing a national rule on the states, and it would prevent state courts from imposing their will against the will of the people of their state. There would be a restoration of the people's primary role in determining fundamental questions of social policy that can have, and in the past (in such matters as no-fault divorce) have had massive social consequences. These are questions of social policy and they ought to be deliberated by the body politic rather than imposed by unelected judges. Otherwise, we should all fear that Lincoln's prediction has come true—that if policy decisions affecting the whole people are to be "irrevocably fixed" by judicial decision, "the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."8106

8106. Abraham Lincoln, supra note 89.