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DEBUNKING "CONSERVATIVE" ARGUMENTS AGAINST THE FEDERAL MARRIAGE AMENDMENT

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The question of gay "marriage" is one that has been brewing beneath the surface of public awareness for quite some time. But with the United States Supreme Court's recent decision in *Lawrence v. Texas*[1] giving constitutional protection to consensual sodomy, the long awaited decision from the Massachusetts Supreme Court regarding gay "marriage" in that state now decided,[2] and the introduction in Congress of a Federal Marriage Amendment to the United States Constitution,[3] it seems that a perfect political storm has converged.

Our country stands in severe danger of having the question answered not by the people, through their elected representatives, but rather having it imposed on them by judicial fiat. Despite the majority's assertions that the *Lawrence* decision was not the first step toward a finding of gay "marriage" as a constitutionally protected right, I find Justice Scalia's comments in his dissent in the case are far more compelling:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring;" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?" Surely not the encouragement of procreation, since the sterile and the

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1. 123 S. Ct. 2472 (2003).

2. *See* Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

3. Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003).

> elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.[4]

It took a relatively short period of time for the Court to utterly reverse its finding in *Bowers v. Hardwick*,[5] the 1986 decision upholding the States' right to legislate on sodomy. Is it that difficult to conceive that it would take an even shorter time for the Court to merely extrapolate its finding in *Lawrence* and create a "right" to gay "marriage," the assertions of Justice O'Connor notwithstanding?[6]

The proposed Federal Marriage Amendment (FMA) is our only protection against this coming storm.[7] Despite the fact that nearly every conservative in this country believes that the imposition of gay "marriage" by judicial decree is a real possibility, there is not unanimous support for a constitutional amendment protecting marriage as many conservatives find the FMA to be in violation of certain conservative principles. Their opposition to the FMA is centered on the idea that it is a federal intrusion into marriage and family law. They maintain that marriage has been and should remain under the rightful jurisdiction of the states. Former U.S. Representative Bob Barr (R-GA), the author of the 1996 Defense of Marriage Act,[8] which defined marriage as consisting only in the union of one man and one woman, has been

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4. *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting) (citations omitted).

5. 478 U.S. 186 (1986).

6. *See Lawrence*, 123 S. Ct. at 2487–88 (O'Connor, J., concurring). Justice Sandra Day O'Connor argued in her concurring opinion in *Lawrence* that the Court's opinion did not find that same-sex marriages are constitutionally protected:

> That this law applied to private, consensual conduct is unconstitutional under the *Equal Protection Clause* does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fall under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Id.

7. Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003). The text of the Federal Marriage Amendment is as follows: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." *Id.*

8. Defense of Marriage Act, 28 U.S.C. § 1738C (2003).

widely quoted in opposition to the amendment saying that it is "unnecessary and needlessly intrusive" and that "marriage is a quintessential state issue."[9] I concur that marriage is essentially a state issue. Unfortunately, we face the very real possibility of the judiciary making the issue a federal concern. Consequently, we must pursue a Federal Marriage Amendment not only to preserve the institution of marriage but also to preserve and strengthen the States' historic jurisdiction over issues of marriage and family law.

Many legal analysts predict that the most likely scenario that will bring gay "marriage" to this country is one in which a State court legalizes gay marriage in that State, same-sex couples from around the country flock to that State to get married, return to their home States and then sue for their home States to recognize their marriages under the Full Faith and Credit Clause of the United States Constitution.[10] Such a scenario would clearly be an egregious violation of the principle of federalism because it would provide *de facto* power to a single state to make broad and far reaching decisions on social policy for all of the other states. The Full Faith and Credit Clause contains a provision that grants Congress the ability to regulate how exactly it should be applied.[11] The aforementioned Defense of Marriage Act (DOMA) used this regulative power to exempt any State in the Union from recognizing any same-sex relationship granted marital status by another state.[12]

Some would argue that DOMA, with its reliance on the Full Faith and Credit Clause for its constitutional authority was all that the federal government could rightly do regarding gay marriage. I do not trust the federal judiciary to respect the will of the people in this case. Should the Supreme Court find a right to

9. Carolyn Lochhead, *Alliance Backs Ban on Gay Marriages*, S.F. CHRON., Sept. 18, 2003, at A3.

10. U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause of the Constitution reads: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

11. *Id.*

12. Defense of Marriage Act, 28 U.S.C.A. § 1738C (2003). The essential section of the Defense of Marriage Act reads:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

same sex "marriage" within their privacy jurisprudence, then DOMA surely will not survive the strict scrutiny that the Court would apply to it under the Equal Protection Clause or the doctrine of substantive due process.

It begs mentioning that the Supreme Court has repeatedly found that the Full Faith and Credit Clause is limited in its scope. As recently as this year the Court reaffirmed the doctrine that the Full Faith and Credit Clause did not require "a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate."[13]

Clearly, according to the Court's own reasoning, a State should under no circumstances be forced to recognize a marriage which, through its competent legislation, has been found to be anathema to the very notion of marriage. However, in light of *Lawrence,* and with Justice Antonin Scalia, I am skeptical that the Court will follow its own reasoning.

There is little doubt that if and when gay "marriage" is imposed on the country it will come from the judiciary. As noted above, the Supreme Court has laid the groundwork for such a finding in its *Lawrence* decision. Such a decision would continue the tradition the judiciary has established of taking for itself authority delegated to the legislative branch of the federal government or to the States by the people. As Judge Robert Bork notes, "[t]he areas of national life in Western nations now controlled by the judiciary were unthinkable not many years ago."[14] Whether it be abortion, the role of religion in the public square or issues regarding homosexuality, there is not one major moral question that the federal judiciary has not decided for the people. The Federal Marriage Amendment would give our country the opportunity for open and honest debate on homosexual "marriage." In an age of increasing judicial hubris, the preservation of legislative power vis-à-vis the judiciary must be a core conservative aim. The question of federal intrusion into the area of marriage has already been decided; it will happen. The only question remaining is whether that intrusion will occur after open and honest debate in which the people express their will through their elected representatives or if that intrusion will be mandated from the Supreme Court. No mere act of Congress will preserve the institution of marriage or the maintenance of democratic debate; it is only a constitutional amendment that will put the people's will out of reach of the courts.

13. Franchise Tax Bd. of California v. Hyatt, 123 S. Ct. 1683, 1687 (2003) (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988)) (internal quotations omitted).

14. ROBERT H. BORK, COERCING VIRTUE 137 (2003).

It is by no means unprecedented to use the amendment process to achieve or sustain a societal good. In fact, the people of the United States have resorted to the amendment process to end slavery, secure voting rights, and provide equal protection under the law for all citizens. These things have become the hallmarks of our Republic. In these cases the people of the United States realized that injustices existed which would be repugnant to the very nature of the Republic. In these instances they found it prudent to amend the Constitution in order to secure within the "supreme law" rights and privileges fundamental to that nation and its people. The editors of the journal *First Things* have poignantly described the role of marriage in society:

> Marriage and family law reflects the historically cumulative complexities of necessarily public concerns about property, inheritance, legal liability, and the legitimacy of children—the latter entailing a host of responsibilities for which parents, and especially men, can be held accountable. One of the most fundamental prerequisites of social order, it has been almost universally recognized, is the containment of the otherwise unbridled sexual activity of the human male, and marriage is—among the many other things that marriage is—the primary instrument of that necessary discipline.[15]

It is noteworthy that for the healthy functioning of society marriage must always be first and foremost about procreation and the rearing of children. There is no other institution that is adequately equipped to perform such a function. No child should be sacrificed on the altar of political correctness by depriving her of the benefits of a two-parent, heterosexual family, which has overwhelmingly been shown to be beneficial to her physical, mental, and emotional health.[16]

The Federal Marriage Amendment is not the beginning of the development of federal marriage and family law. The intricacies of this law must be left to the States. Rather, the FMA sets a benchmark that preserves the existing public order from the actions of activist courts and preserves to the States their historic jurisdiction over marriage and family law. The FMA is not a federal usurpation. It is a necessary and proper step in preventing a few federal judges from setting public policy for a nation profoundly disinclined to redefine marriage and thereby fundamentally alter the fabric of the society in which we live.

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15. Editorial, *The Marriage Amendment*, FIRST THINGS, Oct. 2003, at 15.

16. MARK A. REGAN, PRESERVING MARRIAGE IN AN AGE OF COUNTERFEITS: HOW 'CIVIL UNIONS' DEVALUE THE REAL THING 14–15 (2001).