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SAME-SEX MARRIAGE IN THE UNITED STATES

BY JOHN GOCHNOUR

I. INTRODUCTION

The Roman orator Cicero once described marriage as “the first bond of society.” Marriage is a commitment of many dimensions. It is in its simplest terms an agreement between lovers to forge a bond of love and commitment. Beyond that simple dimension the act of marriage carries great significance. President Bush calls “the union of man and woman the most enduring human institution...honored and encouraged in all cultures and by every religious faith.” Marriage is an important and enduring social tradition, representing to many the passing of the young into adulthood and eventually parenthood. It is also a decision of spiritual significance. Religious leaders often perform marriages, ceremonies are often consecrated in churches, and in many faiths the marriage itself is considered a sacrament.

Marriage is significant not only as a relationship between individuals, but also as a relationship between individuals and government. Marriage is used by the federal government as the “legal gateway to a vast array of protections, responsibilities, and benefits—most of which cannot be replicated in any other way...” How and to whom government should extend the responsibilities and benefits of marriage has never been more controversial than today, in the wake of the legalization of same-sex marriage in Northern Europe, a Massachusetts Supreme Court decision that found a right to same-sex marriage

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2 HANNIS TAYLOR, CICERO: A SKETCH OF HIS LIFE AND WORKS 503 (1916).
4 EVAN WOLFSOHN, WHY MARRIAGE MATTERS: AMERICA, EQUALITY AND GAY PEOPLE’S RIGHT TO MARRY 5 (2004).
5 Id. at 4.
in the Massachusetts Constitution, and the proposal of a Federal Marriage Protection Amendment to the United States Constitution.

Same-sex marriage proponents, asserting that a fundamental right to same-sex marriage exists in the U.S. Constitution and that legalizing same-sex marriage is good public policy, argue that the United States should follow the lead of Canada and many European countries and legalize same-sex marriage. In response, same-sex marriage opponents have proposed a Federal Marriage Amendment (FMA) that would define marriage in the United States as a union between a man and a woman. This paper argues that both of these positions go too far. Same-sex marriage proponents are incorrect to call legalized same-sex marriage a fundamental constitutional right and good public policy, yet same-sex marriage opponents also eclipse necessity in their present efforts to amend the Constitution. The U.S. government should continue to support traditional marriage through legislation such as the 1996 Defense of Marriage Act (DOMA), but should also, for the time, respect the boundaries of federalism and leave decisions about whether or not to legalize gay marriage in the hands of the states.

II. SAME-SEX MARRIAGE AS A FUNDAMENTAL RIGHT

The first Amendments to the United States Constitution protected important, even “fundamental” human rights that the Founders felt each citizen was entitled to. In 1997 Chief Justice William Rehnquist defined fundamental rights as those “which are objectively, deeply rooted in this nation’s history and tradition...and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”6 The U.S. Supreme Court has consistently recognized marriage as a fundamental right.7 In a 1967 case that limited states’ ability to prohibit interracial unions, Chief Justice Earl Warren wrote: “The freedom

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to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.8

Same-sex marriage supporters argue that all marriages are equal and should equally protected because the right to marriage is a fundamental right. Carlos Ball, a respected gay marriage advocate, notes that needs of "companionship and affiliation with other humans" cannot be separated from needs of intimacy and sexuality.9 Since humans cannot separate these basic needs, proponents assert that legislation placing limits on an individual's right to marry another person of the same sex deprives him or her of the equal protection of the laws and limits basic Constitutional rights. Same-sex marriage proponents seek to define marriage as the Massachusetts’s Supreme Court did, as a "deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."10 In this view the primary concern of marriage is to promote personal satisfaction and happiness, and allowing same-sex couples to marry is a constitutional requirement.

Same-sex marriage proponents argue that any legislation that limits a fundamental right on the basis of sexual preference must be subject to heightened judicial scrutiny, just like other laws that discriminate based on race or sex.11 If same-sex unions are indeed fundamentally similar to heterosexual unions, then prohibiting same-sex unions is to base marriage law on the same moral grounds which mid-twentieth century laws denying interracial unions were based on. This argument centers on the idea that sexual preference, like skin color, is immutable or unchangeable. Since the Supreme Court ruled in Loving v. Virginia that marriage limitations based on race are suspect classifications entitled to greater judicial scrutiny, limits on the right of homosexuals to marry should likewise be deemed suspect.

8 Loving, 388 U.S. 2 at 12.
Though persuasive, these arguments go too far in ascribing legitimacy to same-sex unions while ignoring the historical and legal reasoning behind marriages designation as a fundamental right. First, a right to same-sex marriage is not rooted in our nation’s history: “Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant, or bigoted.” 12 For more than 2,000 years marriage between a man and a woman has served as a bedrock of western civilization. Aristotle described marriage as the “natural union between husband and wife.” 13 While tradition by itself is not always convincing evidence to continue a practice, as one sees with the earlier debate on interracial marriage, when examining the nature and purposes of marriage, one sees the rationale of historically limiting marriage to couples of opposite sex.

Second, as Justice Williams of the New York Supreme Court noted in that court’s Hernandez v. Robles decision; while government has consistently recognized marriage as a fundamental right, it has done so in decisions concerning individuals of the opposite sex, not same-sex couples. 14 Indeed, the Supreme Court has given marriage a privileged status for very specific reasons. In Skinner v. Oklahoma ex rel. Williamson, the Court stated that “Marriage and procreation are fundamental to the very existence and survival of the race.” 15 A nation is out of necessity interested in promoting marriage as a means to encourage reproduction and to ensure the state survives and prospers. Nations that ignore this priority can face devastating consequences. For example, due to years of government policies that discouraged reproduction and ignored the role of the traditional family to national stability, most of the countries of Eastern Europe and the former Soviet bloc now face the possibility of losing between a third to half of their

13 Quoted in Wolfson supra note 4, at 48.
14 Hernandez, No. 86-89, slip op. at 5.
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... populations by the year 2050. The national governments of several of these nations today must provide heavy subsidies to encourage couples to have children, further taxing the economic resources of newly capitalistic economies. In order to avoid a situation similar to these countries the United States must continue to recognize the important role that marriage and families play in society and continued national stability. In a dissent to the Massachusetts Supreme Court’s ruling in Goodridge v Dept. of Public Health Justice Cordy outlines why legislatures may rationally exclude homosexual couples from traditional marriage. He asserts that the government regulates marriage because the nation has a strong interest in fostering marriage as the social institution that best forges a linkage between sex, procreation and child rearing. Marriage systematically regulates heterosexual behavior, brings order to the resulting procreation and ensures a stable family structure for the rearing, education and socialization of children. In summary, state and federal legislators are not irrational to conclude that procreation and reproduction are the legitimate goals behind government regulation of marriage. The Court has protected marriage as a fundamental right based on these legitimate state concerns, therefore no fundamental rights are violated by a states choice to disallow same-sex marriage.

Third, relating to the argument that legislation restricting same-sex marriage should face heightened judicial scrutiny just as laws allowing discrimination based on race; unlike race, whose designation as a suspect classification is supported by the Constitution’s Fourteenth Amendment, no similar mandate for classification exists for sexual orientation. Suspect classifications like race involve unchanging immutable biological characteristics; claims that homosexuality is immutable are not substantiated by scientific evidence and are weakened by the claims of many former gays and lesbians who claim

heterosexual attraction. Perhaps more importantly, a couple’s race is not related to any legitimate purpose states have in regulating marriage; a couple’s sexual orientation, with its important consequences for procreation, is profoundly related. During the debate in the early 1990s over gays in the United States Military, Colin Powell noted this important difference between race and sexual orientation: “Skin color is a benign, non-behavioral characteristic... Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.”19 Courts rigid examination of all laws that allow any form of discrimination based on immutable and unchanging characteristics is an important component in protecting individual’s rights and liberties; however, this class of suspect classifications should be limited to those characteristics that General Powell referred to as benign and non-behavioral.

The fundamental right to marriage between heterosexual individuals exists and has been protected by the nation’s courts. This right has never been extended to same-sex couples. It is neither unconstitutional nor irrational to legislate against allowing marriage between same-sex couples because the state’s regulation of marriage has very specific goals and purposes. Chief among those is promoting procreation and strengthening the family which has long been regarded as society’s moral bedrock. Same-sex couples truly afford each other the benefits of “mutual caring and sharing, of coinsurance and cooperation, domestic efficiency and proficiency, and sexual comfort and constraint.”20 These are rights of association and should not be limited; however, a fundamental right to same-sex marriage does not exist in the Constitution.

18 LYNN D. WARDLE, Beyond Equality in Marriage and Same-Sex Unions: A Debate, supra note 9, at 186, 186-187.
20 JOHN WITTE JR., Reply to Professor Mark Strasser in Marriage and Same-Sex Unions: A Debate, supra note 9, at 43, 43.
III. SAME-SEX MARRIAGE AS PUBLIC POLICY

In addition to arguing that marriage should be legalized because it is a fundamental right, many proponents of same-sex marriage claim that legalizing it is good public policy. Many proponents and opponents of same-sex marriage agree that marriage promotes emotional stability for adults and children and helps both lead happier, more productive lives. The disagreement lies in whether extending the benefits traditionally associated with marriage to same-sex couples would have a negative effect on marriage as an institution.

Same-sex marriage advocates claim that legalizing same-sex marriage would serve a variety of state interests. For instance, some maintain that same-sex marriage would have positive effects on American families by strengthening the institution of marriage and reaffirming the principles of commitment and fidelity. They argue that the traditional institution of marriage has been so damaged by infidelity, divorce, and abuse among heterosexual couples, that allowing deeply-committed homosexual couples to marry might reinforce a “healthy social trend.” These activists argue that allowing state-sanctioned marriage between committed couples, regardless of gender, will promote and strengthen the institution of marriage.

Early data from Europe, however, shows that legal recognition of same-sex marriage does not in fact strengthen the institution of marriage and may accelerate its decline. The Netherlands legalized same-sex marriage in 1998. Fundamentally changing the definition of marriage has furthered a continuous gradual erosion of the traditional family in the country. According to social scientists, many Dutch today “increasingly regard marriage as no longer relevant”

21 Mark Strasser, The States Interests in Recognizing Same Sex Marriage in Marriage and Same-Sex Unions: A Debate, supra note 9, at 33, 33.


because they have been persuaded that “marriage is not connected to parenthood, and that marriage and cohabitation are equally valid lifestyles...” 24 Alternative forms of cohabitation and childrearing are now widely accepted in the Netherlands, and young people place less value on marriage. The effects of these changes are real; since 1998 there have been overwhelming increases in the divorced percentage of the population, the percentage of out-of-wedlock births, the number of induced abortions, and the number of couples who choose to remain childless.25 While the evidence from the Netherlands and other Western European countries does not show a definite causal connection between legalizing same-sex marriage and the continued decline of the traditional family unit, it does undermine the argument that legalizing same-sex marriage will strengthen traditional heterosexual marriage and the basic unit of a stable society, the family.

Other same-sex marriage proponents argue that legalizing same-sex marriage will benefit the nation by increasing citizens overall happiness and productivity.26 Essentially, this argument says, marriage is a public good that increases individual satisfaction. When individuals are in happy, secure, and open relationships they are more satisfied and better able to focus on other productive economic and civic endeavors. By limiting same-sex couples ability to marry, some would argue the United States stigmatized these couples and left them unable to openly express their emotions in a socially acceptable way. If same-sex marriage were legalized, proponents assert, than the nation would benefit by removing this stigma and thereby increasing same-sex couples’ happiness, satisfaction, and productivity.27

This line of reasoning goes too far, however, in identifying individual happiness as the primary national interest in regulating marriage. Theresa Stanton Collett of South Texas College of Law more accurately describes the government’s interest in marriage:

24 Quoted in id.
26 Mark Strasser, The States Interests in Recognizing Same Sex Marriage in Marriage and Same-Sex Unions: A Debate, supra note 9, at 33, 33.
27 Id. at 34.
"Historically the primary function of marriage has been legitimization of children conceived within the marital union, with subsequent support, socialization, and property transmission to those children."28 While the happiness of citizens is certainly an important goal of any legitimate regime, the primary government policy interest in regulating marriage is promoting stability through the creation of strong families. As early as 1885 the Supreme Court noted the relevant national interest in marriage and the family in Murphey v. Ramsey.

[No legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take its rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis 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. 29

Personal ties between close friends are likewise important, loving, personal commitments between individuals that bring great satisfaction. However, they do not affect the nation's future as does the marital relationship between a man and a woman, and are therefore not regulated by the law and deemed marriage. A fundamental purpose of state regulated marriage is to foster strong families; families which stabilize young men and women, and support, protect, and teach the next generation of citizens.

Another focus in the debate over legalized same-sex marriage concerns the effect that legalizing same-sex marriage will have on religious groups, universities, and other tax exempt organizations that oppose same-sex marriage on religious grounds. Same-

28 THERAESA STANTON COLLETT. Should Marriage be Privileged? The State’s Interest in Childbearing Unions in Marriage and Same-Sex Unions: A Debate, supra note 9, at 152, 159.

29 Murphy v. Ramsey 114 U.S. 15, 45 (1885).
sex marriage opponents worry that many groups who oppose same-sex marriage on religious grounds may be forced to accept and recognize same-sex unions or lose their tax exempt status. Pepperdine Law Professor Douglas Kmiec notes, “an insidious, but less recognized, consequence [of gay marriage] will be a push to demonize—and then punish—faith communities that refuse to bless homosexual unions.” This push has already begun in Massachusetts. Catholic Charities in Boston was one of the nation’s oldest adoption agencies, specializing in finding homes for difficult to place children. However, after the Massachusetts Supreme Court ordered gay marriage legalized, the agency faced a difficult decision, either allow same-sex couples to adopt in contradiction to the doctrines of the church, or close its doors and allow the children it could have otherwise helped to suffer. It chose the latter. Whether it be a specific faith or an organization such as the Boy Scouts, any organization that refuses to abide by laws that same-sex marriages may face grave consequences, including the possibility of having their tax-exempt status revoked.

IV. SEX-MARRIAGE AND FEDERALISM

In 2002 Representative Marylin Musgrave of Colorado proposed a Federal Marriage Amendment (FMA) to the United States Constitution. The Amendment contained two primary ideas. First, marriage in the United States should consist only of a union between one man and one woman. Second, that neither the U.S. Constitution nor the constitution of any state, or any state or federal law, could require that marital status or the legal benefits that accompany marriage could be conferred upon unmarried couples. The second clause faced criticism from both proponents and opponents.

opponents of same-sex marriage because of its implications for a traditionally state-controlled area of law. Since 2002 versions of the FMA have been proposed twice, but as of this writing no proposal has achieved the three-fifths majority vote necessary to end congressional debate, and so the Amendment has never received a full vote.

There are three reasons that the FMA is not the best solution to the same-sex marriage debate. First, the federal nature of the American system gives states primary control over domestic issues, and at this time a Federal Marriage Amendment is an unnecessary abridgement of that sovereignty. Second, the Founders made amendments to the Constitution extremely difficult to pass in order to protect the documents original intent—to balance power and protect civil rights. Some regard a constitutional amendment as the only way to stop the legalization of same-sex marriage. This theory is based on the possibility that the Supreme Court will overturn DOMA and states’ constitutional amendments. This argument does not give enough credence to legislative mechanisms that are capable of protecting traditional marriage without addressing the issue in the Constitution. An amendment should not be regarded as the only solution and, for the time being, an unnecessary one. Third, the Defense of Marriage Act, coupled with state constitutional amendments and statutes prohibiting same-sex marriage, offers a legitimate line of defense for protecting marriage.

A. Regulation of Marriage Is Properly Left to the States

The U.S. Constitution states: “in order...to secure the blessings of liberty to ourselves and our posterity [we] do ordain and establish this Constitution for the United States of America.”33 The Constitution enumerates and defines the powers of the federal government and also checks and balances these powers against each other in order to prevent one branch from usurping power. James Madison famously explained the balance of power between the states and the nation:

33 U.S. CONST. PML.
The powers delegated by the proposed Constitution are few and defined. Those which are to remain to the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce. . . . The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.\textsuperscript{34}

The States have historically been free to determine the conditions of a valid marriage.\textsuperscript{35} In Pennoyer v. Neff, the Supreme Court stated that “the State...has the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”\textsuperscript{36} The Federal Marriage Amendment would take this power away from the states by establishing a constitutionally enshrined definition of marriage and limiting states’ ability to prescribe for themselves what constitutes a marriage. Regardless of one’s position on the issue of same-sex marriage it is difficult to see the necessity of changing the traditional federal power structure on an issue that, while important, is currently effectively being regulated at a state level. Both the legislative and the judicial branches of the Federal Government have at times regulated the states’ ability to prescribe the conditions of civil marriage. For example, in 1862 Congress made bigamy a punishable federal offense in order to eliminate the proliferation of polygamous relationships in the Western United States.\textsuperscript{37} And as discussed earlier the Supreme Court has also limited states ability to set the conditions for marriage in decisions such as \textit{Loving}. These limitations were based on both Congress’ and

\textsuperscript{34} \textit{The Federalist} No. 45, at 292 (James Madison) (Clinton Rossiter, ed. 1961).

\textsuperscript{35} Sherrer v. Sherrer, 334 U.S. 343, 354 (1948).

\textsuperscript{36} Pennoyer v. Neff, 95 U.S. 714, 734-5 (1877).

\textsuperscript{37} Morrill Anti-Bigamy Act, 12 Stat. 501, ch 126 (1862).
the Court's determination that marriage between heterosexual couples was in the nation's best interest and a fundamentally guaranteed right. These congressional and judicial actions secured the national interests without the far reaching step of Amending the Constitution and effectively limiting states' ability to prescribe the conditions of marriage.

B. SAME-SEX MARRIAGE AND AMENDING THE CONSTITUTION

While the Constitution preserves and protects our rights as citizens, one must remember that upon ratification citizens gave the government the right, through statutory law to regulate and even limit freedoms. This delegation of authority requires legislators to take stances on moral issues and to regulate those issues through the legislative process. Prostitution, incest, and drug use are each issues deemed immoral and regulated by the government in order to protect national interests. Society even allows the government to discriminate when it is necessary for the common good. For example, no legislation has been passed to protect those who engage in domestic violence or pedophilia from employment, housing, or public accommodation discrimination. Society has determined that because such actions are morally problematic employers, landlords, and government officials can use them as grounds for discrimination.

As noted above, the 1862 Morrill Anti-Bigamy Law is an example of Congress limiting the states' control over marriage policy through statutory law in order to address a public policy concern. When Congress passed the DOMA, which defines marriage for national purposes as a union between a man and a woman, it addressed a similar concern about protecting the family, and was justified in doing so. However, one should note that


no constitutional amendment prohibiting polygamous relationships was passed; instead the concern was addressed through statutory law.

The Founders believed that amending the Constitution should be an extremely difficult process reserved "for certain great and extraordinary occasions." The legislative process the founders designed allows Congress to address concerns and protect the nation's interest through statutory law while reserving the Constitution for defining government power and guaranteeing fundamental rights. This process has been successful in protecting traditional marriage, the legislature has acted by instituting the DOMA, the Court has and this legislation has so far been upheld by the Courts.

C. THE DEFENSE OF MARRIAGE

In 1996, Congress, with the support of President Bill Clinton, enacted the DOMA to define marriage as "between a man and a woman". DOMA declares that whenever the terms "marriage" and "spouse," appear in federal laws or regulations they do not include homosexual marriage. In other words when determining the meaning of any act of Congress, or any federal rule or regulation, the word "marriage" means only the legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or a wife. DOMA also gives states the authority to refuse to recognize same-sex marriages that have been carried out in other states. DOMA makes it clear that in the United States the fundamental right to civil marriage in the United States applies only to opposite-sex unions. For the last ten years DOMA has served as a guidepost for states in their attempts to protect traditional marriage through statutory and constitutional measures and has allowed states to refuse to recognize same-sex marriages carried out in Massachusetts following the court ordered legalization of same-sex marriage there.

The fact that DOMA allows states to refuse recognition of same-sex marriages in other states indicates its intent to protect

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40 Id. supra note 34, at 311.
states historic power to prescribe the conditions of marriage. As mentioned above, marriage has historically been a subject principally of state concern. Moreover, DOMA adds nothing to the Constitution allowing states the freedom to pursue their desired marriage policies. The Defense of Marriage Act is thus a valid effort by Congress to afford states continued discretion in setting marriage policy.\(^\text{42}\)

The DOMA constitutes a bipartisan effort to protect the traditional American family. Since it was established twenty-six states have passed state constitutional amendments limiting gay marriage and twenty three states have passed statutes defining marriage as a union between a man and a woman.\(^\text{43}\) These amendments and statutes have been rigorously reviewed by judges in several states. In July of 2006 the New York and the Washington Supreme Court overruled lower court decisions supporting same-sex marriage.\(^\text{44}\) Another case in Georgia reinstated a ban on gay marriage that had been overturned by a lower Court.\(^\text{45}\) In each case the majority echoed the importance of procreation and protecting the traditional family as the states primary concern in regulating marriage.

In the years since the Massachusetts Supreme Court ordered the legalization of same-sex marriage in that state, same-sex marriage proponents have been soundly defeated in most state trial courts and in all state appellate courts in which they have argued. This is unsurprising when one considers that 87% of all state court judges are subject to election.\(^\text{46}\) As long as a majority of the American people remains against same-sex marriage a majority of these judges will remain so.


\(^{44}\) See Hernandez v. Robles, No. 86-89, slip op. at 5 (N.Y. July 6, 2006); Andersen v. King County, 138 P.3d. 963 (Wash. 2006).

\(^{45}\) Perdue v. O'Kelley, 632 SE.2d. 110 (Ga. 2006).

as well. Even federal judges with life-terms will be wary of passing a groundbreaking ruling legalizing same-sex marriage. Research on the relationship between the Supreme Court and public opinion shows that that Court rarely strays far from the national consensus on a given issue.\textsuperscript{47} The Justices realize that the Court, while not subject to direct election, relies on the approval and faith of the public for credibility and institutional standing. Since the public feels so strongly about the issue of gay marriage, it is unlikely that in the absence of a grave violation of fundamental rights, the court would act so contrary to popular opinion. The threat of “activist judges” who might legalize same-sex marriage continues to be, for now, hypothetical. While the possibility remains that these bans might be overturned and even that the federal DOMA might be ruled unconstitutional, it appears more likely that marriage will continue legally as a relationship between a man and a woman. In effect, the Federal Marriage Amendment appears to be a pre-emptive strike against this hypothetical adverse decision by the Supreme Court. For now it is best to allow the DOMA and similar state legislation to regulate same-sex marriage, if the Supreme Court rules adversely in a same-sex marriage case it would show the Amendments necessity, until then it is necessary to remember that a preemptive constitutional amendment is rightfully not something that has happened to this point in our nation’s history.\textsuperscript{48}

\textbf{V. CONCLUSIONS}

Proponents and opponents of same-sex marriage both hold extremely entrenched positions about what should constitute a marriage. While both sides present persuasive evidence in support of their positions, legalizing gay marriage and passing a Federal Marriage Amendment represent unnecessary and improper solutions to the issue of same-sex marriage. Marriage has historically been a union

\textsuperscript{47}  \textsc{Thomas R. Marshall, Public Opinion and the Supreme Court} 78-80 (1989).

\textsuperscript{48}  Carpenter \textit{supra} note 46, at 9.
between a man and a woman. This traditional definition of marriage should continue to govern the federal government's determination of what constitutes marriage. For one, granting a fundamental right to gay marriage is to exceed the scope of rights that are fundamental to a person's life, liberty, and happiness. Also, because one of the state's most important concerns in regulating marriage is concern for children, the state should continue to determine the constitution of marriage in a manner that provides the best environment for future generations. Finally, because sexual preference is not an immutable characteristic such as race or sex legislation limiting same-sex marriage should not be subject to heightened judicial scrutiny.

Legalizing gay marriage would also not make good public policy in America. The arguments which advocates use in favor of same-sex marriage ignore the primary importance of the family in marriage relationships. Heterosexual marriage is not only a fundamental right it carries with it fundamental responsibilities deeply rooted in our society. To argue against gay marriage does not mean that homosexual couples are incapable of loving, personal, and deeply committed relationships. They are every bit as capable as any heterosexual; however, it is not in the government's best interest to relegate marriage to an emotional and sexual commitment between two people who choose to be married. As government struggles to control the excesses that have weakened traditional heterosexual marriage, it should continue to promote and strengthen an ideal that will be best for its current citizens and their posterity.

While it is important to limit same-sex marriage in America, an amendment to the Constitution is neither the best nor the only answer to this question. The Constitution clearly gives the states power over domestic issues including the regulation of marriage. It is important to our system of government that the balance of state and national power be maintained. The process of amending the Constitution is difficult for many reasons, among them that the document should not address policy concerns that can be more adequately addressed through statutory law. Recently, the courts have upheld the vast majority of state constitutional amendments limiting same-sex marriage, following
the general public's opinion that legalized gay marriage is not in the nation's interest. Until this situation changes, the best way to limit same-sex marriage is to allow states to continue to prescribe the conditions for marriage under the guidance and direction of the federal DOMA.