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IS DOMA ENOUGH? AN ANALYSIS

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Introduction

Do we need a constitutional amendment to protect marriage? Some influential elites question the need for a constitutional amendment. As Senator Susan Collins (R-Maine) told the Boston Globe earlier this year, "I don't at this point see the need for a constitutional amendment as long as the Defense of Marriage Act remains on the books."[1]

For people who define the problem as the involuntary spread of same-sex marriage from one state to others, a key question becomes: Are federal DOMA laws enough?

Defining DOMA

The federal DOMA law contains two sections, stating:

> Section 1. In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[2]
>
> Section 2. 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.[3]

The first part creates a federal definition of marriage for the purposes of federal marriage law. Considerable litigation is likely to arise from conflicts between federal law and laws in states in which courts mandate recognition of same-sex marriage, or marriage equivalents.[4] Such cases will increase the temptation for the Supreme Court to create a national definition of marriage on equal protection grounds, as otherwise, legally married couples in different states will be treated substantially differently under federal law.

The second part of DOMA restates general conflict of laws principles: no state is required to recognize a marriage that violates its own public policy. However, it provides no additional legal protection for the people of a state whose judicial elites create a right of same-sex marriage in the state constitution or choose to recognize same-sex marriages performed elsewhere.[5]

I. IS FEDERAL DOMA ENOUGH?

DOMA laws are unlikely to prevent the spread of same-sex marriage from one judiciary to the other, for the following reasons:

A. The groundwork for DOMA's demise has already been laid in the scholarly literature. Legal experts argue DOMA can

be struck down in federal court because it violates principles of equal protection, liberty/due process and full faith and credit.[6]

B. The legal threat to federal DOMA laws is now imminent, because Massachusetts has, for the first time, given plaintiffs standing to challenge the federal law.[7] Previously, courts held that absent a legal state marriage, persons have no standing to challenge the federal DOMA law.[8] Newspaper reports indicate that there are now thousands of couples in at least 46 states who have received marriage licenses in Massachusetts, California or Oregon, and now have standing to challenge DOMA in federal courts.[9]

C. DOMA won't keep legal elites from creating same-sex marriage in many states. Already, in just eight months since the *Goodridge* decision, activists have filed cases across the country seeking to strike down state marriage laws. Today such cases are pending in at least 11 states, including six states which have adopted state DOMA legislation in recent years.[10] Attorneys general and local officials in California, New York and elsewhere are refusing to defend state marriage laws, or are insisting that their state recognize same-sex marriages performed elsewhere.

The New York Attorney General, following the lead of a 2003 trial court judgment,[11] has already indicated that New York law "presumptively requires" recognition of same-sex marriages from Massachusetts.[12] When San Francisco Mayor Gavin Anderson and his counterparts in a handful of other cities across the country began issuing same-sex marriage licenses, the California attorney general chose to simply petition the California Supreme Court for "resolution of these important issues," rather than present an affirmative defense of the state's marriage law.[13] Shortly thereafter, the mayor of Seattle in March declared that his city (and all private groups that contract with the city) must recognize as valid the same-sex marriages of employees, wherever performed.[14]

D. There will be a national definition of marriage, ultimately. The question is whose? Radically different marriage laws in different states are difficult to sustain over time. A federal definition of marriage that is different from state definitions of marriage produces immediate conflicts in many areas of law that the Supreme Court will be tempted to harmonize by ordering recognition of same-sex marriage on equal protection grounds. One way or the other, we will soon have a national definition of marriage. If we pass a marriage amendment, we will retain our shared understanding of marriage as the union of husband and wife, ratified by the people of the United States. If we accept judicial supremacy on the marriage question, we will probably end up with a judicially created and approved national marriage definition that redefines marriage in unisex terms.

E. Legal scholars from both sides agree: Federal courts are now poised to strike down state marriage laws. Speaking about the recent Supreme Court decision *Lawrence v. Texas*, Harvard Law Professor Lawrence Tribe commented, "You'd have to be tone deaf not to get the message from *Lawrence* that anything that invites people to give same-sex couples less than full respect is constitutionally suspect."[15] Georgetown Law Professor Chai Feldblum agreed, stating, "[A]s a matter of logic and principle, there is no reason not to provide the institution of marriage for gay people. The court is leaving that open for the future."[16] Professor William Eskridge of Yale Law School stated "Justice Scalia is right" that *Lawrence* signals the end of traditional marriage laws.[17] Jon Bruning, Attorney General of Nebraska, testified before the Senate in March that a federal judge is likely to soon declare Nebraska's state constitutional marriage amendment unconstitutional: "This is the first federal court challenge to a state's DOMA law. My

office moved to dismiss the suit, but last November, the Court denied our motion to dismiss. The language in the Court's order signals that Nebraska will very likely lose the case at trial."[18]

F. Federal lawsuits attacking marriage laws have already been filed in four states. While most marriage litigation has historically been based on state constitutional provisions,[19] in just the past year, cases in three states (Florida, Arizona, and Nebraska) have brought federal constitutional challenges to both state and federal DOMA laws[20] on equal protection, due process and full faith and credit grounds.[21] In June, the same lawyers that filed the *Goodridge* case in Massachusetts also filed suit alleging that a state law which prevents out-of-state same-sex couples from marrying in Massachusetts violates the Privileges and Immunities Clause of the 14th Amendment.[22]

G. It's not the full faith and credit clause, it's the 14th amendment. Scholars who have testified that DOMA is constitutional under the Full Faith and Credit Clause of Article IV of the Constitution miss the primary threat to DOMA.[23] DOMA's greatest threat springs not from the relatively settled world of Full Faith & Credit jurisprudence, but from the Supreme Court's evolving view of equal protection and personal liberty, as evidenced by such recent cases as *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Romer v. Evans*, 517 U.S. 620 (1996). As Justice Scalia noted in his *Lawrence* dissent, this evolving jurisprudence not only threatens DOMA, but also poses a substantive threat to individual state marriage laws.[24]

H. A federal injunction to strike down DOMA will take only minutes. A Constitutional amendment takes months or years to pass. If we want to protect marriage as the union of husband and wife, the time to act is now.

II. Does a Marriage Amendment Violate Principles of Federalism?

Many legal analysts argue that a constitutional amendment that creates a national definition of marriage violates fundamental principles of federalism. In a letter to Senate Constitution Subcommittee Chairman John Cornyn last September, six law professors including Eugene Volokh of UCLA and Dale Carpenter of the University of Minnesota wrote "[T]here is no need to federalize the definition of marriage. . . . if marriage is federalized, this will set a precedent for additional federal intrusions into state power."[25] Are they correct?

No, for the following reasons:

A. Many fundamental institutions are national in scope. The Constitution already contains such fundamental institutions as representative government (through the guarantee clause, art. IV, § 4) and private property (through the takings clause, Fifth Amendment). A marriage amendment would acknowledge marriage as a fundamental institution, while still leaving the states significant regulatory discretion (procedures, age, consanguinity, etc.).

B. Marriage law has always been subject to federal legal oversight.[26] This is not unlike the federalist model which permits states to experiment with term limits, elected judiciaries, or unicameral legislatures, subject to the underlying guarantee of representative government; or varying state policies on eminent domain, taxation, and rights of way, subject to the underlying premise that government cannot take property without compensation. A marriage amendment would simply clarify that husbands and wives are an essential part of our fundamental, shared American understanding of marriage.

C. The basic definition of marriage has long been considered a national question. The Supreme Court has already affirmed the

right of Congress to sustain a national definition of marriage that excludes polygamy.[27] Without Congress' decisive intervention, upheld by the Supreme Court, we would today have polygamy in some states and not in others.[28] Today, it is federal and state courts that threaten our common definition of marriage. As former Attorney General Ed Meese argued in favor of a constitutional amendment creating a national definition of marriage, "If marriage is a fundamental social institution, then it's fundamental for all of society."[29] As the Supreme Court stated in *Reynolds v. United States*, "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."[30]

III. WHY NOT WAIT UNTIL DOMA HAS BEEN STRUCK DOWN?

A. Waiting until the problem gets worse will not make it easier to solve. A patchwork of different state and local laws will sow confusion for couples, for businesses, for state and local governments. If we intend to protect marriage as the union of husband and wife, the time to settle the question is now.

B. There will never be a magic moment in which to amend the Constitution. Today opponents argue it is too early, because DOMA still exists. Three years from now, DOMA may be struck down and others will say it is too late – tens of thousands of same-sex couples will have already married.

C. The best time for affirming a common definition of marriage is before SSM becomes widespread. If it could be ratified today, a marriage amendment would merely reaffirm the law of 49 states, while undoing eight weeks of change in Massachusetts.[31] Looking ahead, it is difficult to foresee a time where a constitutional amendment defining marriage could be adopted with less legal and personal disruption.

D. The amendment process takes time. A federal judge could enjoin DOMA tomorrow, yet it would take months and perhaps years to propose and ratify the federal marriage amendment.

E. A constitutional amendment is not a constitutional crisis. In the last century, we amended our constitution twelve times, including twice in the 1930's, three times in the 1960's, and again in 1971 and 1992.[32] The amendment process is, by design, not a sign of constitutional crisis, but rather a great democratic and federalist process for reaching national consensus on questions of great importance. Marriage is worth it.

Endnotes

[1] Mary Leonard, *GOP Divided on Marriage Amendment*, BOSTON GLOBE, March 28, 2004, at A1 (quoting Sen. Susan Collins). In response to a newspaper advertisement urging him to support the marriage amendment, Senator Ben Nelson explained: "We have no disagreement about gay marriage. . . . The disagreement is about whether it's necessary to have a constitutional amendment at this time . . . and I don't see that it is." *Nebraska Senators React to Ad Opposing Gay Marriage*, TheAdvocate.com, June 29, 2004. In a recent appearance before the Senate Judiciary Committee, former U.S. Rep. Bob Barr testified against the marriage amendment, arguing that "by moving what has traditionally been a state prerogative -- local marriage laws -- to the federal government, [the marriage amendment] is in direct violation of the principles of federalism" and that "it is unnecessary so long as DOMA is in force." Written statement of

Bob Barr, Senate Judiciary Committee, "Preserving Traditional Marriage: A View from the States," June 22, 2004.

[2] Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996) codified at 1 U.S.C. §7 (1997).

[3] Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997).

[4] Already there have been questions surrounding eligibility for joint tax filing, certain employee benefits, and such federal programs as Medicaid and Social Security. *See, e.g., Mueller v. Commissioner of Internal Revenue*, 2002 U.S. App. LEXIS 13063 (7th Cir. 2002) (same-sex couple seeking joint federal income tax status); Associated Press, *Vt. Panel's New Medicaid Rules Said to Violate Civil Unions Law*, BOSTON GLOBE, April 19, 2003, at B2; Maria Newman, *Survivor in Gay Union Appeals Denial of Benefits to Boy,* NEW YORK TIMES, October 15, 2003, at B1; William C. Symonds, *Gay Marriage's Minefields for Businesses*, BUSINESS WEEK ONLINE, May 17, 2004 ("The upshot: Human-resource managers need to brace along with gays for what's likely to be a long, hard-fought legal battle for equality. In the months and years ahead, gays who are married in Massachusetts will file lawsuits to have their marriages recognized by other states as well as to overturn the federal Defense of Marriage Act.").

[5] This latter possibility is particularly significant in the eleven states which have not yet adopted specific legislation preventing recognition of same-sex marriages performed outside the state.

[6] *See, e.g.,* William Eskridge, *Multivocal Prejudices and Homo Equity*, 74 IND. L.J. 1085, 1099-1100 (1999). ("DOMA might be vulnerable to [*Romer v.*] *Evans* attack, because it denies those couples an extraordinary range of rights and obligations normally accorded other married couples, involves the federal government in micromanaging family formation issues traditionally left to the states, and might be characterized, as congressional opponents did, as premature and unnecessary legislation seeking to scapegoat gay people."); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act* 16 QUINNIPIAC L.REV. 221 (1996) ("In short, DOMA represents an attempt to subvert the requirements of the Full Faith and Credit Clause."); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional* 83 IOWA L. REV. 1, 18 (1997) ("DOMA is a slapdash, ill-considered law that can only be explained by hostility toward a politically unpopular group"); Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution* 7 CORNELL J.L. & PUB. POL'Y 203, 219 (1997) ("Based on the understanding of the Full Faith and Credit Clause manifested by the Framers, the Supreme Court and the states, the clause did not imbue Congress with the power to enact DOMA--and it should be ruled unconstitutional."); Melissa A. Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act* 8 SETON HALL C ONST. L.J. 157, 161 (1997) ("As it is written, DOMA will not withstand judicial scrutiny for several reasons, any of which provide an independent basis upon which the Supreme Court can declare DOMA unconstitutional. . . . [T]his Comment will discuss the grounds for the overturning of DOMA, which include violations of the Full Faith and Credit Clause, the Equal Protection Clause, and the Supremacy Clause, as well as scrutinizing the basis of Congress' power to enact DOMA in the first place."); Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause* 47 DEPAUL L.REV. (1998); Jenni R. Shuki-Kunze, Note, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause* 48 CASE W. RES. L.REV. 351 (1998); Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2687-88 (2004) ("A synthesis of the Supreme Court's substantive due process jurisprudence in the realm of marriage, family, reproduction, and intimate relationships strongly suggests that the freedom to enter into a civil marital relationship with the partner of one's choice--without reference to gender or sexual orientation--is a fundamental right of all individuals. The Defense of Marriage Act's restrictive definition of marriage as 'only a legal union between one man and one woman' directly infringes this liberty.").

[7] Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2687-88 (2004) ("Until recently, DOMA was effectively unchallengeable by the individuals subjected to its stigma. No same-sex couple would secure a marriage license for nearly eight years after DOMA's passage. Accordingly, no potential plaintiff had suffered an injury sufficiently 'concrete and

particularized' to establish standing to challenge either provision of DOMA, and a stigmatizing law was insulated for years after its enactment. Now the time is ripe for a constitutional challenge to DOMA.").

[8] See *Mueller v. Commissioner of Internal Revenue*, 2002 U.S. App. LEXIS 13063 at *3 (7th Cir. 2002) ("The Defense of Marriage Act presumptively denies federal recognition of same-sex marriages should any state choose to recognize such unions. But as the Commissioner argues, Mr. Mueller did not try to have his same-sex relationship recognized as a marriage under Illinois law, and thus the Defense of Marriage Act was not implicated." Internal citations omitted.).

[9] Carolyn Lockhead, *Eager Couples Line Up Early, Gain Massachusetts Licenses,* SAN FRANCISCO CHRONICLE, May 17, 2004, at A1 ("San Francisco issued 4,037 marriage licenses to couples from 46 states and eight other countries between Feb. 12 and March 11"); Christine MacDonald and Bill Dedman, *About 2500 Gay Couples Sought Licenses in First Week*, BOSTON GLOBE, June 17, 2004, at A1 ("At least 164 out-of-state couples came to Massachusetts to get married, from 27 states and Washington, D.C.").

[10] *See, e.g., Lockyer v. City and County of San Francisco,* California Supreme Court, Case No. S122923; *Lewis v. Alfaro,* California Supreme Court, Case No. S122865; *Tyler v. County of Los Angeles*, Los Angeles Superior Court, Case No. 04-088506; *Woo v. Lockyer*, San Francisco Superior Court, No. 04-504038; *City of San Francisco v. Lockyer,* San Francisco Superior Court, No. 04-429539; *Clinton v. State,* San Francisco Superior Court, No. 04-429548; *Sullivan v. Bush*, Case No. 04-CV-2118 (S.D. Fla.) (filed May 12, 2004); *Ash v. Forman*, 17th Judicial Circuit in Broward Co. (Fla.) Case No. 04-003279; *Higgs v. State,* 16th Judicial Circuit in Key West (Fla.) Case No. 04-CA-411-K; *Morrison v. Sadler*, Indiana Ct. App., Docket No. 49A02-0305-CV-447; *Citizens for Equal Protection v. Attorney General*, Case No. 4:03CV3155 (D. Neb.); *Lewis v. Harris*, Superior Court of New Jersey, Appellate Division, Docket No. A-2244-03T5; *Attorney General v. Dunlap*, Bernalillo Dist. Ct. (N.M.), Case No. D-1329-CV-200400292; *Hebel v. Mayor West,* Supreme Court of New York, County of Ulster, Index No. 04-0642; *Hebel v. Village of New Paltz,* Supreme Court of New York, County of Ulster, Index No. 04-1915; *Hernandez v. Robles*, Supreme Court of New York, County of New York, Index No. 103434/2004; *Samuels v. State;* Supreme Court of New York, County of Albany, Index No. 04-1967; *Shields v. Madigan*, Supreme Court of New York, County of Rockland, Index No. 04-1458; *Li v. State*, 2004 WL 1258167 (Or. Cir., Apr. 20, 2004) (appeal pending); *Anderson v. Sims*, Superior Court of Washington, King County, Case No. 04-2-04964-4SEA. *See also* Alan Gomez, "Gay Couples Bring Marriage Fight to County" PALM BEACH POST, July 1, 2004 at A1; Frank Langfitt, *Lawsuit Challenges State Law Barring Same-Sex Marriage: Nine Gay Couples File Suit That Says Statute Violates Md. Constitution*, BALTIMORE SUN, July 8, 2004, at 1A; Joshua Akers, *Same-Sex Marriage Complaint Revised*, ALBUQUERQUE JOURNAL, May 26, 2004, at A1; Doug Grow, *Gay-Marriage Pioneers, Again: After Fading from Public View, Minnesota Couple Files New Suit*, MINNEAPOLIS STAR-TRIBUNE, May 20, 2004, at 2B; Walter F. Naedele, *Gay Couple Seeks Denial of Suit*, PHILADELPHIA INQUIRER, June 18, 2004, at B07.

[11] *Langan v. St. Vincent's Hospital*, 765 N.Y.S.2d 411, 421 (N.Y. Sup. 2003) (recognizing deceased's same-sex partner as a spouse for purposes of wrongful death lawsuit, based on Vermont civil union) ("Here there is no difference for state purposes between a married person and a person joined in civil union under the laws of Vermont *except* sexual orientation. . . . The civil union is indistinguishable for societal purposes from the nuclear family and marriage.").

[12] N.Y. Op. Atty. Gen. Informal Opinion 2004-1, at *12 (March 3, 2004) ("Consistent with the holding of the only state court to have ruled on this question, New York law presumptively requires that parties to [same-sex] unions must be treated as spouses for purposes of New York law."). News reports suggest that Rhode Island attorney general has reached a similar conclusion. Thomas Caywood, *Same-Sex Marriage: Mass. Gay Couples Wedded to History*, BOSTON HERALD, May 18, 2004, at p.6 ("As Massachusetts made history, one of its neighbors took a tentative first step toward following suit. Rhode Island Attorney General Patrick Lynch said he didn't see any legal reason why his state shouldn't acknowledge same-sex marriages from Massachusetts."). *But see,* Press Release, *Attorney General Lynch's Statement Concerning Same-Sex Marriage*, State of Rhode Island, Department of the Attorney General, May 17, 2004 ("No Rhode Island court has addressed or interpreted whether or not Rhode Island's marriage laws permit same-sex couples to marry or whether same-sex marriages, if performed in Rhode Island, would be void. To date,

the only marriages in Rhode Island deemed void involve bigamy, incest or mental incompetence, or marriages in which one or both parties never intended to be married. . . . This Office's review of Rhode Island law suggests that Rhode Island would recognize any marriage validly performed in another state unless doing so would run contrary to the strong public policy of this State. . . . We are also constrained from providing legal advice to other states' governors, or to private individuals, because by law this Office provides legal representation and legal opinions only to the State of Rhode Island, its departments, and agencies.").

[13] Petition for Writ of Mandate, *Lockyer v. City and County of San Francisco,* California Supreme Court, Case No. S122923, at 5 ("Regarding respondents' constitutional challenge, this Court can maintain the rule and uniformity of law on a prospective basis by granting the relief requested in this petition without reaching those constitutional issues at this time, thereby permitting the lower courts to address such matters in due course. Nevertheless, the Attorney General urges this Court's resolution of the constitutional issues now. As the issues presented are pure legal issues, and there is no need for the development of a factual record, these issues are ready for this Court's review. The uncertainty surrounding the validity and effect of certificates already issued by respondents to thousands of persons, and the potential harm to those holders of the same-sex marriage certificates, warrant this Court's immediate intervention and resolution of these important issues.").

[14] Jonathan Martin, *Same-Sex Couples to Sue Here Over State Marriage Laws and Mayor Wants Seattle to Honor the Weddings of All City Employees,* SEATTLE TIMES, March 8, 2004, at A1 ("Mayor Greg Nickels plans to sign an executive order and propose an ordinance to the City Council that would require the city and its contractors to treat gay married couples the same as straight married couples.").

[15] Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling With Sodomy Law Decision*, NEW YORK TIMES, Nov. 19, 2003 (quoting Prof. Lawrence Tribe).

[16] David G. Savage, *Ruling Seen as Precurser to Same-Sex Marriages,* LOS ANGELES TIMES, June 28, 2003, at A21 (quoting Prof. Chai Feldblum). In the same article, Lambda Legal attorney Patricia Logue suggested that the Supreme Court would soon strike down marriage laws: "I think it is inevitable now. . . It's happening in Canada and in Europe, and the *Lawrence* decision obviously helps here. Most of anti-gay discrimination comes down to, 'We don't approve of you, and we don't like you.' But the court has [held] that is not an acceptable reason for discrimination." *Id.*

[17] Tom Curry, *Gay Rights Loom Large on U.S. Agenda*, MSNBC.com, Aug. 5, 2003 (quoting Prof. William Eskridge).

[18] Prepared testimony of Jon Bruning, "Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts *Goodridge* Decision and the Judicial Invalidation of Traditional Marriage Laws?" Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights (March 3, 2004) ("In 2003, the ACLU and Lambda Legal Foundation together sued Nebraska in federal court, arguing that the Nebraska amendment unconstitutionally denies gay and lesbian persons equal access to the political system. This is the first federal court challenge to a state's DOMA law. My office moved to dismiss the suit, but last November, the Court denied our motion to dismiss. The language in the Court's order signals that Nebraska will very likely lose the case at trial.").

[19] *See Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996), *appeal dismissed*, 666 N.Y.S.2d 835 (1997); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); Baker v. State, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003).

[20] See Complaint, *Sullivan v. Bush*, S.D. Fla. (filed May 12, 2004) (challenging the federal Defense of Marriage Act on equal protection, due process, and full faith and credit grounds), *Standhardt v. Superior Court of Ariz*., No. 1 CA-SA 03-0150, 2003 WL 22299701 (Ariz. Ct. App. 2003) (including federal constitutional claims based on *Lawrence v. Texas* in a challenge to Arizona marriage laws); Complaint, *Citizens for Equal Protection v. Attorney General*, Case No. 4:03CV3155 (D. Neb.) (alleging that the

Nebraska marriage amendment, Art. I, sec. 29 of the Nebraska Constitution, violates both the Equal Protection Clause of the 14th Amendment and the prohibition on bills of attainder).

[21] *See,* Complaint, *Standhardt v. Superior Court of Ariz*., No. 1 CA-SA 03-0150 (Ariz. Ct. App. 2003) ("In *Lawrence v. Texas*, the United States Supreme Court succinctly recognized that gay persons have a fundamental privacy right to marry." (citations omitted)); Complaint, *Citizens for Equal Protection v. Attorney General*, Case No. 4:03CV3155 (D. Neb.) (arguing that the marriage amendment is unconstitutional based on *Romer v. Evans*, and also under a bill of attainder claim: "[The marriage amendment] singles out one group of people for unequal treatment without sufficient justification and for the very purpose of making them unequal to everyone else." "[The marriage amendment] legislatively punishes same-sex couples, including plaintiffs' members, based on sexual orientation and without the protections of a judicial trial."); Complaint, *Sullivan v. Bush*, S.D. Fla. (filed May 12, 2004) (including claims that both the Florida marriage law and the federal Defense of Marriage Act are unconstitutional under equal protection, due process and full faith & credit claims: "Excluding same-sex couples from marriage infringes equality, human dignity, liberty and self-determination; thus, violating the Constitution of the United States.").

[22] Complaint, *Cote-Whitacre v. Dept. of Public Health*, Suffolk Super. Ct. No. 04-2656-G (Mass.) (filed June 23, 2004) ("The plaintiff couples who either have had the validity of their marriage called into question or have been barred from obtaining a marriage license seek declaratory and injunctive relief that Defendants' extreme and overbroad application of [a statute preventing residents of other states to evade the marriage laws of those states by traveling to Massachusetts] violates . . . the Privileges and Immunities Clause of the United States Constitution.").

[23] *See, e.g.,* Prepared testimony of Lea Brilmayer, "Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts *Goodridge* Decision and the Judicial Invalidation of Traditional Marriage Laws?" Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights (March 3, 2004) ("Although some people have expressed skepticism about whether DOMA is constitutional, these are mostly people whose expertise lies outside the area of conflict of laws. Even most lawyers are not fully familiar with the history of congressional implementation of the Full Faith and Credit Clause, and they underestimate the latitude it gives to adopt legislation. . . . In my view, the federal DOMA falls within Article IV's grant of congressional power.").

[24] *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) ("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.").

[25] Letter from Eugene Volokh, et al. to Sen. John Cornyn in conjunction with the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights hearing entitled "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996" on September 4, 2003.

[26] See *Loving v. Virginia*, 388 U.S. 1, 7 (1967) ("While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard* v. *Hill*, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)."). *See also, Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a Wisconsin law preventing noncustodial parents from marrying without prior court approval and proof of compliance with child support requirements); *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating Missouri law limiting the right of prison inmates to marry). Other cases in which the Supreme Court has ruled upon various matters incident to marriage include *Stanley v. Illinois*, 405 U.S. 645 (1972) (parental rights of unwed father); *Lehr v. Robertson*, 463 U.S. 248 (1983) (rights of putative unwed father in adoption proceeding); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending access to contraceptives to unmarried couples); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (custody rights of divorced mother who subsequently married a person of a different race); *Michael H. v. Gerald D*., 491 U.S. 110 (1989) (affirming the constitutionality of state presumption that a woman's husband is her child's father); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of contraceptive use by married couples), *Levy v. Louisiana*, 391 U.S. 68 (1968) (ruling that state may not exclude illegitimate children from standing to sue

for wrongful death of a parent); *Weber v. Aetna Casualty & Surety Co*., 406 U.S. 164 (1972) (ruling that illegitimate children may not be excluded from recovery of workers' compensation benefits upon the death of a parent); *Gomez v. Perez*, 409 U.S. 535 (1973) (ruling that a state may not deny illegitimate children the right to parental support); *Trimble v. Gordon*, 430 U.S. 762 (1977) (right of an illegitimate child to inherit from unwed father); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (requiring that illegitimate children be given a bona fide opportunity to prove paternity in seeking parental support); *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding Iowa law imposing one-year residency requirement prior to grant of divorce); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (striking down Connecticut law conditioning the right to divorce upon ability to pay requisite court fees); *Mathews v. de Castro*, 429 U.S. 181 (1976) (upholding Social Security policy distinguishing between divorced and currently married women); *Boggs v. Boggs*, 520 U.S. 833 (1997) (finding ERISA to preempt state law permitting transfer of spouse's right to undistributed pension benefits); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (spousal benefits accruing under Railroad Retirement Act terminate upon divorce and are not deemed community property under state laws); *Estin. v. Estin*, 334 U.S. 541 (1948) (ruling that Nevada divorce did not necessarily terminate separation support order in New York); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) (holding that Nevada divorce does not terminate spouse's rights under New York law); *Williams v. North Carolina*, 317 U.S. 287 (1942) (ruling a divorce decree granted in one state is entitled to full faith and credit in a bigamy prosecution in another state).

[27] *Reynolds v. United States*, 98 U.S. 145 (1878); *Maynard* v. *Hill*, 125 U.S. 190 (1888).

[28] In 1862, Congress passed the Morrill Act criminalizing bigamy. The Morrill Act, ch. 125, § 1, 12 Stat. 501 (1862) (codified at Rev. Stat. § 5352). Under that law, no married person could "marry any other person, whether single or married, in a Territory of the United States," under penalty of a $500 fine or five years in prison. In 1874, responding to the difficulty of getting convictions in regions where people supported polygamy, Congress passed the Poland Act, transferring plural marriage cases from Mormon-controlled probate courts to the federal system. The Poland Act, ch. 469, Part X, 13 Stat. 253 (1874). In 1882, Congress passed the Edmunds Act, which vacated the government in the Utah territory, created a five-man commission to oversee elections, and forbade any polygamist, past or present, to vote. The Edmunds Act, ch. 47, Part X, 22 Stat. 30 (1882) (codified at 48 U.S.C. § 1461) (repealed 1983). By 1887, half the prison population in Utah territory were people charged with polygamy. Mary Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29, 45 (2001). That year, Congress passed the Edmunds-Tucker Act, which, partly to facilitate polygamy convictions, allowed wives to testify against husbands in court. The Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (codified at 28 U.S.C. § 633, 660) (repealed 1978). By 1890, the Church of the Latter Day Saints threw in the towel, advising its members "to refrain from contracting any marriages forbidden by the law of the land." Campbell, supra at 51.

[29] Edwin Meese III, *A Shotgun Amendment,* WALL STREET JOURNAL, March 10, 2004, at A16.

[30] *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (The court also explained the importance of laws regulating marriage, stating "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." *Id*. at 165.).

[31] Forty-two states have laws explicitly defining marriage as the union of a man and a woman, while in the remaining seven states such a definition is implicit from other provisions of the marriage statutes (e.g., references to husband and wife, sex-specific incest prohibitions, etc.).

[32] Amendment XVI (1913); Amendment XVII (1913); Amendment XVIII (1919); Amendment XIX (1920); Amendment XX (1933); Amendment XXI (1933); Amendment XXII (1951); Amendment XXIII (1961); Amendment XXIV (1964); Amendment XXV (1967); Amendment XXVI (1971); Amendment XXVII (1992).