Executive Summary
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A Defining Moment: Marriage, the Courts, and the Constitution

Matthew Spalding, Ph.D.

The debate over the nature, purpose, and legal status of marriage has emerged as a critical national issue, the resolution of which will shape the future of our society and the course of constitutional government in the United States.

A series of significant judicial decisions has brought the issue of homosexual "marriage" to the forefront of our nation's attention. Last November, a 4–3 decision of the Massachusetts Supreme Judicial Court declared that traditional marriage upholds persistent prejudices and that couples of the same sex have a right to marry in that state. Despite numerous efforts to block or delay the Massachusetts court's controversial edict, the Commonwealth of Massachusetts has been forced to issue marriage licenses to same-sex couples since May 17.

These judicial decisions—as well as the actions of local officials who, intentionally contrary to state law, have issued thousands of fraudulent marriage licenses to same-sex couples—seek to redefine the institution of marriage by judicial fiat and affirm homosexual "marriage" as a fundamental civil right that the federal government has a constitutional obligation to secure nationwide.

Faced with such a concerted legal and political effort to deconstruct and thereby undermine one of the most basic institutions of civil society, policymakers must now take immediate steps at both the state and federal levels to protect marriage, prevent judicial usurpation, and uphold the rule of law.

What is happening is not a slight change in degree that merely extends benefits or rights to a larger class, but a substantive change in the essence of the institution. It does not *expand* marriage; it *alters* its core meaning, for to redefine marriage so that it is not intrinsically related to the relationship between fathers, mothers, and children would sever the institution from its nature and purpose.

The institution of traditional marriage can be protected through actions taken in the following arenas.

Public Education. Concerted efforts must be made at every level to educate the public, policymakers, and political leaders generally about marriage and current threats to the institution of marriage.

Legal Policy. Many significant legal battles are yet to be fought at the state and federal levels. Judicial decisions in Massachusetts and other localities are but the opening moves in a long-term legal strategy to impose homosexual "marriage" through the courts, circumventing lawmakers and the people before they have an opportunity to react through legislation or the electoral process.

This paper, in its entirety, can be found at:
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Above and beyond defending existing state laws and legal precedents that uphold traditional marriage, a primary objective of legal policy is to defend the federal Defense of Marriage Act (DOMA) from inevitable constitutional challenge.

State Policy. It should be kept in mind that, while the marriage debate is now a national issue, it is not primarily a federal policy matter. By tradition, and in accord with our constitutional division of power between the federal government and the states, marriage is recognized and regulated by state law. Most of the key battles, therefore, will occur at the state level.

- State Marriage Statutes. The first line of defense is for states to review their laws concerning marriage and clarify and strengthen public policy preferences that favor traditional marriage.
- State DOMAs. If states want to avoid being forced to recognize the validity of same-sex "marriages" originating in other states, they must clearly and unambiguously declare their state policy and their refusal to recognize those "marriages."
- State Constitutional Amendments. The best way to defend against a state court that might seek to overturn state public policy or force recognition of another state's marriage policy is to amend the state constitution to establish a clear constitutional policy that favors marriage.
- State Petitions. States concerned about the growing threat to marriage ought to petition the U.S. Congress to voice their concerns and express their views about federal legislation and a constitutional amendment to protect marriage.

Federal Legislation. There are several things that Congress could do to support and defend marriage. Consistent with DOMA, Congress could call on the states to clarify their marriage statutes and define in state law, and in state constitutions if necessary, that marriage is the union of one man and one woman. Congress could also take steps to enforce the definition of marriage established in DOMA when it reauthorizes federal programs and otherwise enforces federal policy, ensuring that all federal policies are consistent with that definition. Having authority over the District of Columbia, which currently has no laws defining marriage and has no DOMA, Congress could pass legislation consistent with the federal DOMA that protects the institution of marriage in the District of Columbia.

The most important and responsible step Congress can take to preserve marriage is to send a constitutional amendment that protects the institution of marriage to the states for ratification. While the amendment process should never be taken lightly, and although it is extremely difficult, it is now the prudent and timely course to amend the U.S. Constitution to preserve marriage as the legal union between one man and one woman. If the options are either to allow a few activist judges to redefine marriage by judicial fiat or to amend the Constitution to reflect the established will of the people, the choice is clear. It is imperative, for the sake of constitutional government, that we proceed with the democratic process of amending the Constitution.

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What was once an important debate over the nature, purpose, and legal status of marriage has emerged as a critical national issue, the resolution of which will shape the future of our society and the course of constitutional government in the United States.

The debate has taken form in courts throughout the nation. A series of significant judicial decisions—beginning with that of a trial court judge in Hawaii, followed by a superior court judge in Alaska, and then by the Vermont Supreme Court—has brought the issue of homosexual "marriage" to the forefront of our nation's attention. Last November, a 4–3 decision of the Massachusetts Supreme Judicial Court declared that traditional marriage upholds persistent prejudices and that couples of the same sex have a right to marry in that state.

Despite numerous efforts to block or delay the Massachusetts court's controversial edict, the Commonwealth of Massachusetts has been forced to issue marriage licenses to same-sex couples since May 17. This decision will remake the entire social structure of the state of Massachusetts and trigger state and federal litigation throughout the United States.

These judicial decisions—as well as the actions of local officials who, intentionally contrary to state law, have issued thousands of fraudulent marriage licenses to same-sex couples—seek to redefine the institution of marriage by judicial fiat and affirm homosexual "marriage" as a fundamental civil right that the federal government has a constitutional obligation to secure nationwide.

Talking Points

- By an act of judicial usurpation, the Commonwealth of Massachusetts has been forced to issue marriage licenses to couples of the same sex as of May 17.
- Such judicial decisions—as well as the actions of local officials who have issued thousands of fraudulent marriage licenses to same-sex couples—seek to redefine the institution of marriage for the whole nation.
- To redefine marriage so that it is not intrinsically related to the relationship between fathers, mothers, and children would sever this vital institution from its nature and purpose.
- Policymakers must now take immediate steps at both the state and federal levels to protect marriage, prevent judicial usurpation, and uphold the rule of law.
- The most important and responsible step Congress can take to preserve marriage is to send a constitutional amendment that protects the institution of marriage to the states for ratification.

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Faced with such a concerted legal and political effort to deconstruct and thereby undermine one of the most basic institutions of civil society, policymakers must now take immediate steps at both the state and federal levels to protect marriage, prevent judicial usurpation, and uphold the rule of law.

Although the amendment process should never be taken lightly, and although it is an extremely difficult endeavor, it is now the prudent and timely course—for the sake of constitutional government and the sake of marriage—to amend the U.S. Constitution to preserve marriage as the legal union between one man and one woman.

What Is at Stake

For thousands of years, on the basis of experience, tradition, and legal precedent, every society and every major religious faith have upheld marriage as a unique relationship by which a man and a woman are joined together for the primary purpose of forming and maintaining a family. This overwhelming consensus results from the fact that the union of man and woman is apparent and manifest in the most basic and evident truths of human nature.

Marriage is the formal recognition of this relationship by society and its laws. While individual marriages are recognized by government, the institution of marriage pre-exists and is antecedent to the institution of government, which in turn presupposes and depends on the institution of marriage. Society's interest in uniquely elevating the status of marriage among human relationships is that marriage is the necessary foundation of the family, and thus necessary for societal existence and well-being.

The basic building block of society is the family, which is the primary institution through which children are raised, nurtured, and educated, and develop into adults. Marriage is the cornerstone of the family: It produces children, provides them with mothers and fathers, and is the framework through which relationships among mothers, fathers, and children are established and maintained. Only in the context of family built on the foundation of marriage can the sometimes competing needs and interests of men, women, and children be harmonized.

Because of its characteristic relationship with the family, marriage is uniquely beneficial to society. Based on existing studies comparing two-parent and single-parent households, social science overwhelmingly demonstrates that children do far better when they are raised by two married parents in a stable family relationship and that children raised in other household structures are subject to significantly increased risk of harm.

Evidence further suggests that one reason children do better in a married household is not just the stability of having two parents, but the fact that a male and a female parent each bring distinctive strengths, perspectives, and characteristics to the family unit that benefit both children and the parents. Although we have little information concerning children raised in households with same-sex parents, what we do know is that marriage between a man and a woman provides unique social, economic, and health benefits for children, adults, and society in general.

Moreover, because of the shared obligations and generational relationships that accrue with marriage, the institution brings significant stability, continuity, and meaning to human relationships and plays an important role in transferring basic cultural knowledge and civilization to future generations.

In the end, despite all the changes that law and cultural trends have wrought concerning marriage—despite the laws concerning prenuptial agreements, divorce, tax, and property that treat marriage as a contract—it has never before been, nor is it now completely, the case that marriage is a mere contract. Society has changed the *form*, but never the *substance*, of marriage; and it is the substance of marriage—its very nature, definition, and purpose—that creates and justifies its unique position as a social institution and continues to give lawmakers strong and reasonable arguments for upholding traditional marriage and protecting it in law.

The Threat to Marriage

Marriage is being challenged by a number of state and federal court decisions that seek to overthrow the customs, laws, and social norms of human experience.

In 1993, a plurality of the Hawaii Supreme Court declared that the state's existing marriage statute was a form of "sex discrimination" that could be justified only by a "compelling state interest."[1] Three years later, a Hawaii trial court ruled that the state's marriage law violated the Hawaii constitution.[2] In response, the people of Hawaii amended their state constitution to allow the legislature to reserve marriage to opposite-sex couples, and the legislature passed a Marriage Protection Act that defined marriage as the union between one man and one woman.

In 1996, in the face of this unprecedented circumstance, the United States Congress passed a bipartisan federal Defense of Marriage Act (DOMA), signed by then-President Bill Clinton, that both defines marriage "for all purposes of federal law" as the union of one man and one woman and clarifies that the effect portion of the "Full Faith and Credit" clause of the U.S. Constitution does not require that states be forced to recognize as a marriage any union other than that of one man and one woman.[3]

In 1998, after cases in California, Florida, and New York failed to establish the recognition of same-sex "marriages," a superior court judge in Alaska declared that "the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy" and ruled that the Alaska marriage statute violated the state constitution.[4] In response, Alaska voters approved a constitutional amendment to define marriage as the union of one man and one woman.

The next year, the Vermont Supreme Court ruled that the legislature must grant full and equal benefits of marriage to same-sex couples, and the Vermont legislature was forced to pass an extensive "civil unions" law that provides virtually all protections and benefits afforded to civil marriage.[5]

In 2003, the U.S. Supreme Court held in *Lawrence* v. *Texas* that homosexuals, like heterosexuals, have the right to "seek autonomy" in their relationships and cited "personal decisions relating to marriage" as an important area of that autonomy. The Court also noted that whether a majority of the public opposes "a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[6]

Massachusetts Rejects Marriage

In November 2003, seizing upon the premise dangled before it by the U.S. Supreme Court in *Lawrence* v. *Texas*, a divided Massachusetts Supreme Judicial Court ruled 4–3 that homosexual couples are legally entitled to marriage under the Massachusetts state constitution.

The court decided that traditional marriage "is rooted in persistent prejudices" and "works a deep and scarring hardship on a very real segment of the community for *no rational reason*." Marriage is "a caste-like system," added the concurrence, defended by nothing more than a "mantra of tradition."

On the premise that marriage is "an evolving paradigm," the court reformulated the common-law definition of civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others," declaring that "the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare."

The court stayed its entry of judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."[7] When the state Senate asked whether a "civil unions" bill would satisfy the ruling, the court rejected the

1. *Baehr* v. *Lewin*, 852 P.2d 44 (Hawaii, 1993).
2. *Baehr* v. *Miike*, 910 P.2d 112 (Hawaii, 1996).
3. Defense of Marriage Act, § 1 U.S.C.A., § 7 (1996).
4. *Brause* v. *Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super.,1998).
5. *Baker* v. *State*, 744 A.2d 864 (Vt., 1999).
6. *Lawrence* v. *Texas*, 539 U.S. 558 (2003).
7. *Goodridge* v. *Department of Public Health*, 798 N.E.2d 941 (Mass., 2003).

alternative, writing that traditional marriage amounts to "invidious discrimination" and that "no amount of tinkering would remove that stain."[8]

The state legislature in convention responded by passing an amendment to the state constitution that would effectively overturn the court's decision, but because of the lengthy constitutional amendment process in Massachusetts, the amendment cannot be enacted prior to the scheduled enforcement of the decision, which the court adamantly has refused to delay further.

The Redefinition of Marriage

The argument of these judges is that homosexual "marriage" is simply the extension of privileges to a discriminated class in the name of civil rights. The parallel is made to the Supreme Court's striking down, as instances of arbitrary and invidious discrimination, statutes that had been drawn according to race, in particular laws against interracial marriage.[9]

But this analogy does not work. The first court faced with this argument as the ground used to justify same-sex "marriage" made the obvious point: "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[10]

What is happening is no minor adjustment, a slight change in degree that just extends benefits or rights to a larger class, but a substantive change in the essence of the institution. It does not *expand* marriage; it *alters* its core meaning, for to redefine marriage so that it is not intrinsically related to the relationship between fathers, mothers, and children formally severs the institution from its nature and purpose.

Expanding marriage supposedly to make it more inclusive, no matter what we call the new arrangement, necessarily ends marriage as we now know it by remaking the institution into something different: a mere contract between any two individuals.

In general, fundamental social changes in long-standing traditions and institutions should be seriously considered only where there is strong consensus for change, as well as clear evidence and powerful reasons for the modification. Change for the sake of social experimentation and perceived "cultural progress" is inherently dangerous and jeopardizes the ordered liberty that is necessary for a free society.

This change threatens the very coherence and stability of marriage as a social institution. Social science today tells us quite a bit about how the experiments of recent decades with household forms other than the intact family—such as cohabitation and single parenting—have affected children and adults alike.

Changing the definition of marriage—or even remaining neutral as to that definition—breaks down the very argument that gives marriage its unique and preferable status in society. If marriage becomes just one form of commitment in a spectrum of sexual relationships rather than a preferred monogamous relationship for the sake of children, the line separating sexual relations within and outside of marriage becomes blurred, and so does the public policy argument against out-of-wedlock births or in favor of abstinence.

Based on current evidence and settled reasoning, it would be a terrible folly to weaken marriage either by elevating non-marital unions to the same position or by lowering the institution of marriage to the status of merely one form of household.

A New Status Quo

Imposed by the courts, the redefinition of marriage is the legal establishment of a new status quo. While it is not correct to say that homosexuality or the advance of same-sex "marriage" is solely to blame—traditional marriage measured in terms of divorce, cohabitation, illegitimacy, and fatherlessness has been in decline for some time—the judicial redefinition of marriage, forced by the push for same-sex "marriage," essentially codifies and affirms these trends.

8. *Opinions of the Justices to the Senate*, SJC 09163 (Feb. 3, 2004).
9. See *Loving* v. *Virginia*, 87 S.Ct. 1817 (1967).
10. *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn., 1971).

With time, this new legal status quo will be upheld, applied, and enforced throughout our laws, with implications that go well beyond the immediate decision. With the establishment of homosexual "marriage" as a matter or right, a whole host of laws and regulations will be triggered to assure non-discrimination and equal treatment.

Consider a few possibilities:

- Freedom of Association. If homosexual "marriages" are recognized by federal and state governments, there will be no principled reason to oppose new federal laws forbidding discrimination in hiring based on sexual orientation. Churches, synagogues, mosques, religious schools, and faith-based charities, as well as secular organizations of every kind, would be subject to a new kind of government scrutiny.
- Free Speech. The legalization of homosexual "marriage" would invite an ongoing assault on individuals and organizations that uphold traditional marriage or have moral or religious objections to the practice of homosexuality. By definition, all dissenters will find themselves at odds with the new political ethos and are likely to be stigmatized as prejudiced and discriminatory. Such characterizations already have been made by activists, politicians, and judges who are sympathetic to the arguments for same-sex "marriage." The legalization of homosexual "marriage" will greatly accelerate these pressures to marginalize the nation's religious communities and the values that define them. In some countries, speaking publicly against homosexuality has been criminalized.
- Education. The deconstruction of marriage will affect what children are taught in virtually every subject at public schools. Students will be instructed that marriage, like slavery before it, is a vestige of America's discriminatory past that was overcome by the latest step forward in the advancement of civil rights. At the very least, heterosexual and homosexual relations will be presented in public schools as fundamentally equivalent expressions of individual autonomy.

All told, these changes represent a significant escalation of the cultural debate and divide in our society and could well threaten the civil and religious liberty of individuals and organizations that have moral or religious objections to the new status quo.

What Happens Now?

Advocates of same-sex "marriage" have filed and will continue to file lawsuits in various states seeking recognition of homosexual "marriage" as a constitutional right under state law. At least 20 major lawsuits are pending in Alabama, Arizona, California, Florida, Indiana, New Jersey, New Mexico, New York, North Carolina, Oregon, Washington, and West Virginia. These suits ask state courts to determine that state constitutional provisions require the recognition of same-sex "marriage." To date, these actions affect only individual states.

The successful implementation of the Massachusetts court's decision will create a strong precedent and significantly increase lawsuits to force its ruling on other states. Inevitably, the organized legal strategy that has brought the issue forward thus far will be surpassed by the political and judicial activism that will result as same-sex couples that are married in Massachusetts demand recognition in the other 49 states.

It is likely that, contrary to existing state laws, some state officials, as well as some city and county officials, will recognize same-sex "marriages" promulgated in Massachusetts.

More problematic, same-sex couples that move from Massachusetts will bring suit in other states, arguing that the state or U.S. Constitution requires that their new state recognize their same-sex "marriage" as valid. These judicial cases and actions by individuals will run up against opposition in the 39 states that have passed state Defense of Marriage Acts, as well as those states that have pre-existing laws that define marriage as the union between one man and one woman.

State courts might recognize same-sex "marriages" pursuant to their state constitutions, overriding clear state policy and state DOMAs. Thus, legal recognition of homosexual "marriage" could be spread by way of state courts on a state-by-state basis.

A state or federal court ruling that a state must recognize same-sex "marriages" pursuant to the U.S. Constitution would assuredly lead to an appeal into the federal court system and eventually bring the

case before the U.S. Supreme Court. This would very likely entail a challenge to the federal DOMA.

Under normal circumstances, the federal DOMA would survive constitutional scrutiny. Many thoughtful legal scholars, however, believe that it likely would not withstand activist judges using dubious interpretations of due process or equal protection to advance their policy objectives. Given what is at stake, it is risky to rely solely on the federal DOMA.

In any event, the federal DOMA does not protect the nation from state judges like those in Massachusetts who misconstrue their state constitution to establish same-sex "marriage." Nor does it address various local jurisdictions that openly ignore and violate state marriage laws.

Even if individual states can withstand or postpone direct legal challenges, all states will have to address the very practical and myriad legal problems that same-sex "marriage" generates regarding such issues as adoption, child support and custody, state benefits, and inheritance and property rights. These complications and the legal inconsistencies that are likely to result will increase the likelihood that, at some point, the U.S. Supreme Court will choose to, or be forced to, intervene and resolve the issue for the nation.

If the Supreme Court of the United States gets a word on this issue, it will likely be the last. Assuming the justices follow the logical trend of their own precedents and jurisprudence of recent decades, it would be inconsistent for them *not* to redefine marriage according to their notions of autonomy, equality, and social progress. And if the United States Supreme Court does redefine marriage, the Court will expect, and many will argue, that the American people should accept their mandate as the final resolution of the issue.

What Can Be Done?

The institution of traditional marriage can be protected through actions taken in the following arenas.

Public Education

Concerted efforts must be made at every level to educate the public, policymakers, and political leaders generally about marriage and current threats to the institution of marriage. While there is a growing consensus in favor of traditional marriage, public confusion about what to do invites strong and consistent moral and political leadership. Several themes are important to this effort.

- A clear and compelling case must be made for the nature, substance, and societal importance of marriage.
- Marriage as a unique relationship between a man and a woman should be defended on the basis of empirical evidence and studies provided by social science.
- A strong case must be made that redefining the institution of marriage undermines the institution, destroys the case for promoting an ideal of marriage, and threatens religious liberty and private institutions.

Legal Policy

Many legal battles are yet to be fought at the state and federal levels, and each of these battles is significant. Judicial decisions in Massachusetts and other localities are but the opening moves in a long-term legal strategy to impose homosexual "marriage" through the courts, circumventing lawmakers and the people before they have an opportunity to react through legislation or the electoral process.

Above and beyond defending existing state laws and legal precedents that uphold traditional marriage, a primary objective of legal policy is to defend the federal Defense of Marriage Act from inevitable constitutional challenge. In addition to upholding the constitutional rule of law in the face of activist courts, a major purpose of this legal strategy is to slow down the judicial juggernaut as much as possible so that legislatures and the people will not be excluded from this debate and precluded from acting to protect marriage.

State Policy

It should be kept in mind that, while the marriage debate is now a national issue, it is not primarily a federal policy matter. By tradition, and in accord with our constitutional division of power between the federal government and the states, marriage is recognized and regulated by state law. Most of the key battles, therefore, will occur at the state level.

- State Marriage Statutes. The first line of defense is for states to review their laws concerning marriage and clarify and strengthen public policy preferences that favor traditional marriage. Based on recent legal decisions, states would be wise not only to clearly define marriage as a union between a man and a woman, but also to state, as a matter of public policy, the purpose and rational basis of state marriage policy and the grounds upon which marriage is reserved only to a man and a woman. The long-standing practice of assuming or leaving ambiguous the definition and purpose of marriage is now an invitation for an activist court to deem policy upholding traditional marriage as being irrational.

  This makes it necessary to restate, in a clear and more compelling way, the reasons that sustain the traditional laws on marriage. Massachusetts faces judicially enforced same-sex "marriage," in part, because it lacked a strong public policy on marriage, allowing the court to declare that there is no rational basis for upholding the traditional definition of marriage. It must be made clear that public policy stems from legitimate concerns and objectives, not animus or animosity, and that it bears a real and substantial (i.e., rational and reasonable) relevance to the public health, safety, morals, and general welfare of society.

- State DOMAs. Under traditional legal principles, a marriage performed in one state is valid in another state as long as that marriage does not violate a strong public policy of the other state. If states want to avoid being forced to recognize the validity of same-sex "marriages" originating in other states, they must clearly and unambiguously declare their state policy and their refusal to recognize same-sex "marriages" from other states.

  To date, 39 states have state Defense of Marriage Acts. However, the language in these laws varies widely. Alabama, for instance, has a strong DOMA, but those of Illinois and Iowa are rather weak. Ohio, which already had a DOMA, recently acted to strengthen its statutory language. Massachusetts did not have a state DOMA. Efforts should be made to establish DOMAs in every state and to clarify and strengthen existing state DOMAs where necessary.

- State Constitutional Amendments. The best way to defend against a state court that might seek to overturn state public policy or force recognition of another state's marriage policy is to amend the state constitution to establish a state constitutional policy on marriage. Three states—Alaska, Nebraska, and Nevada—have passed constitutional amendments that prevent same-sex "marriage." Hawaii amended its state constitution to allow the legislature to reserve marriage to opposite-sex couples.

  At this time, 16 states have pending constitutional amendments to protect marriage, and at least three others are expected to introduce such amendments soon. The accumulation of state constitutional amendments will also send a powerful signal to federal courts that might be faced with a decision regarding same-sex "marriage," showing a clear and compelling trend in state policies on the issue. The U.S. Supreme Court will be hard-pressed to ignore the recent passage of 20 or more state constitutional amendments that reiterate and constitutionalize clear state policy preferences that uphold traditional marriage.

- State Petitions. States concerned about the growing threat to marriage ought to petition the U.S. Congress to voice their concerns and express their views about federal legislation and a constitutional amendment to protect marriage. At the same time, they should inform the members of their state congressional delegations about their state policies on marriage. States should also be mindful that they have the power, under Article V of the U.S. Constitution, to call for a convention to propose a constitutional amendment. The passage of such petitions would put pressure on Congress to act to protect marriage.

Federal Legislation

There are several things that Congress could do to support and defend marriage. Consistent with DOMA, Congress could call on the states to clarify their marriage statutes and define in state law, and

in state constitutions if necessary, that marriage is the union of one man and one woman.

Congress could also take steps to enforce the definition of marriage established in DOMA when it reauthorizes federal programs and otherwise enforces federal policy, ensuring that all federal policies are consistent with that definition. Having authority over the District of Columbia, which currently has no laws defining marriage and has no DOMA, Congress could pass legislation consistent with the federal DOMA that protects the institution of marriage in the District of Columbia.

In addition to being good policy, such actions would serve as important proxy votes to build the case for defending marriage and help establish an argument for an amendment to the U.S. Constitution. The most important and responsible step Congress can take to preserve marriage is to send a constitutional amendment that protects the institution of marriage to the states for ratification.

A Constitutional Response

Policymakers ought to be disturbed when judges circumvent the lawmaking process and assume the powers of legislating. They should also be troubled by the ease with which overzealous judges are willing to disregard clear laws and legislative intent because it fails their perception of rationality. Constitutional government is threatened when judges alter the definition of social institutions and reinterpret duly approved laws in order to achieve their own policy preferences.

Policymaking decisions with vast societal implications should be made through the lawmaking process in a way that reflects broad-based public opinion and is informed by long-established traditions and the principles of social order.

But do we need to amend the U.S. Constitution? In our system of law, the powers of government are divided between the federal and state governments. The framers rightly left marriage policy, like so many other things, with the states. Marriage, however, is no mere policy issue. The meaning of marriage concerns the very integrity and essence of one of the primary elements of civil society.

Nor is the definition of marriage a matter for state-by-state experimentation. Society is not harmed when high-tax states live side by side with low-tax states: The market adjusts to the inconsistency. This is not the case where substantive differences exist with regard to the definition of marriage. A highly integrated society such as ours—in which issues such as property ownership, tax and economic liability, and inheritance and child custody cross state lines—requires a uniform definition of marriage.

In a free society, certain fundamental questions must be uniformly addressed and settled for the good of that society. States cannot impair the obligation of contracts, coin their own money, or experiment with forms of non-republican government. And Americans learned the hard way that the nation could not endure half slave and half free.

If marriage is a fundamental social institution, then it has the same value and import throughout all of society. As such, it is not only reasonable but also obligatory that traditional marriage be preferred and defended in the law and, if necessary, protected in the U. S. Constitution.

Preserving marriage in the Constitution does *not* mean that marriage must be completely nationalized or that it should become the regulatory responsibility of the federal government. Policy decisions concerning questions such as degrees of consanguinity, the age of consent, and the rules of divorce should remain with the states.

Decisions to extend certain individual benefits to remedy legitimate grievances that stop well short of marriage—i.e., that do not undermine the distinctive status of marriage or create a parallel institution to marriage—are policy questions that should be the responsibility of state legislatures. But we must protect the integrity of the institution of marriage as such by defining the societal boundaries and determining the limits beyond which no part of society can go.

An amendment should recognize and preserve the institution of marriage and should reserve marriage to unions between one man and one woman. In addition, it should block judges—at the state level as well as the federal level—from redefining marriage, creating "civil unions," or overriding a legislature's decision concerning the benefits of marriage.

A constitutional amendment that defines marriage and blocks the actions of overzealous judges would protect the states' capacity to regulate marriage by sustaining it as an institution. If we are to guard the states' liberty to determine marriage policy in accord with the principles of federalism, we must first ensure that the institution itself is not redefined out of existence or abolished altogether.

A Defining Moment

As designed by the framers of the U.S. Constitution, the amendment process is neither an exclusively federal nor an exclusively state action: It is a shared responsibility of both Congress and the states representing the American people. By intention, it is a very difficult process. To succeed, an amendment proposed by Congress must have the votes of two-thirds each of the House of Representatives and the Senate, and it must then be ratified by three-quarters of the states.

Constitutional amendments ought to be rare and should be pursued only after careful and serious consideration, when it is necessary to address an issue of great national magnitude and when there is broad-based support among the American people throughout the states.

Despite our reluctance to amend our most sacred law—despite the significance of the endeavor and awesome task of changing the Constitution—the critical nature of the recent course of events dictates this action.

The challenge to marriage is unambiguous and the threat of a nationwide redefinition of the institution is increasingly imminent. There is now strong and growing agreement—as reflected in poll after poll and, even more significantly, in the laws of three-quarters of the states—that traditional marriage should be protected. President George W. Bush recognized the "overwhelming consensus in our country" when he called on Congress to send an amendment protecting marriage to the states.

Just as the imposition of same-sex "marriage" is not at all inevitable, with concerted effort, it is by no means impossible to amend the U.S. Constitution to protect marriage. Indeed, the circumstances are ripe for a successful effort at this time.

The very consideration of an amendment that focuses on marriage would be an important vehicle for a nationwide debate about the nature, purpose, and legal status of this fundamental societal institution. States are already strengthening their laws, passing state DOMAs, and considering state constitutional amendments—all of which should be encouraged. A meaningful national conversation about an amendment to defend marriage will further this process and become the centerpiece of a larger and longer-term effort to promote and strengthen marriage and the family.

If the options are either to allow a few activist judges to redefine marriage by fiat or to amend the Constitution to reflect the settled will of the people, the choice is clear. It is imperative, for the sake of constitutional government, that we proceed with the democratic process of amending the Constitution.

The overriding importance of marriage to our nation's future and the difficult and lengthy amendment process make it crucial that we act now.

This is a defining moment for our nation. Americans are a greatly tolerant and very reasonable people. They did not choose this debate or force this issue on the nation. But now that the issue has been joined and the decision has been forced, we must act in accord with our basic principles and deepest convictions to preserve constitutional government and the foundational structure of civilization.

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