

FOREWORD

FEDERAL MARRIAGE AMENDMENT: YES OR NO?

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In the past few years, no U.S. domestic policy issue has garnered more intense scrutiny than same-sex marriage. The Supreme Court's decision in *Lawrence v. Texas*¹ in 2003, interpreted by some legal commentators as the precursor to constitutionalizing same-sex marriage,² has spawned enormous activity—in the courts, at the local governmental level, in legislatures and state constitutional referenda, and in the academy.

Litigation, filed both in state and federal courts, has sought to build on the framework of *Lawrence* and establish a constitutional right to recognize same-sex unions as marriages—and gay rights advocates achieved singular success in the Massachusetts Supreme Judicial Court decision, *Goodridge v. Dept. of Pub. Health*.³ Local officials in California,⁴ New Mexico,⁵ New York,⁶ and Oregon⁷ began asserting and briefly exercised the authority to issue marriage licenses to same-sex couples. In the November 2004 elections, citizens of eleven states considered provisions that would amend their state constitutions to prohibit same-sex marriages, and all eleven provisions passed by substantial margins.⁸

Countless media features, lectures, and academic conferences across the country have focused on the topic; within the legal academy, for exam-

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1. 539 U.S. 558 (2003).

2. Laurence Tribe, for example, predicts, "I think it's only a matter of time. . . ." Joan Biskupic, *Decision Represents an Enormous Turn in the Law*, USA Today A05 (June 27, 2003).

3. 798 N.E.2d 941 (Mass. 2003).

4. *Lockyer v. City & County of S.F.*, 95 P.3d 459, 465 (Cal. 2004).

5. Susan Montoya Bryan, *New Mexico Clerk Rebuked for Issuing Gay-Marriage Licenses*, Denver Post (Feb. 24, 2004) (available at <http://www.denverpost.com/Stories/0,1413,36%257E158%257E1976455,00.html>) (66 marriage licenses issued to same-sex couples before attorney general issued opinion that such licenses would be invalid); Ltr. from Patricia Madrid, N.M. Atty. Gen., to Timothy Z. Jennings, St. Sen., (Feb. 20, 2004) (available at 2004 WL 2019901).

6. *People v. West*, 780 N.Y.S.2d 723, 723 (N.Y. Just. Ct. New Paltz 2004).

7. *Li v. State*, 2004 WL 1258167 (Or. Cir. 2004), *rev. granted*, 95 P.3d 730 (Or. 2004).

8. Traditional Values Coalition, *50 State Survey of Marriage Protection Amendments*, http://www.traditionalvalues.org/pdf_files/MarriageAmendments50States.pdf (accessed Apr. 2, 2005).

ple, several law schools have sponsored symposia on the implications of the *Lawrence* decision and on same-sex marriage, and more are coming.⁹

In Congress, there has been a lot of action too. In spring through early fall 2004, the 108th Congress devoted a good deal of attention to a constitutional amendment, the Federal Marriage Amendment (FMA). This two-sentence proposal defines marriage in the first sentence to “consist only of a union of a man and a woman.”¹⁰ Both the Senate and the House have held hearings on the FMA, and both the Senate and the House have brought their somewhat differently-worded proposals to a vote—the Senate proposal receiving 48 votes in favor, 50 opposed; the House proposal receiving 227 supporting and 186 opposing votes.¹¹

There should be little doubt then that, in this evolving milieu, Congress will return to the FMA. There should also be no question, therefore, that this symposium, which the University of St. Thomas Law Journal hosted on September 24, 2004, is timely. As Dean of this excellent law school, in only its fourth year of existence, I am also proud that this symposium will stand up in intellectual depth and breadth to any of the other law review symposia that have been or will be held on this topic. Indeed, I believe this symposium has made a major contribution to the emerging discussion of same-sex marriage and the FMA for at least three reasons.

First, the six individuals who graciously gathered to speak on September 24 and to publish their papers in this Journal are among the most prominent commentators in the country on this topic. Three of the six have testified at congressional hearings on the FMA—Professor Teresa Collett of the University of St. Thomas School of Law, Professor Dale Carpenter of the University of Minnesota School of Law, and Maggie Gallagher, nationally-syndicated columnist and author and President of the Institute for Marriage and Public Policy. All six have written extensively on same-sex marriage and related topics. We are honored that these six distinguished scholars, including Professors Andrew Koppelman of Northwestern University, Mark Strasser of Capital University, and Lynn Wardle of Brigham Young University, gathered together at our law school to debate this critical topic.

Second, the symposium is noteworthy in both posing and exhaustively treating the three core issues raised by the Federal Marriage Amendment:

9. E.g. Tex. J. on Civ. Liberties and Civ. Rights, *The State of Our Union: The Debate Over Same-Sex Marriage*, <http://www.utexas.edu/law/journals/tjclcr/index2.html> (accessed Apr. 2, 2005) (symposium held on Mar. 24, 2005); Yale Law School, *Breaking with Tradition: New Frontiers for Same-Sex Marriage*, <http://islandia.law.yale.edu/samesexmarriage/> (accessed Apr. 2, 2005) (symposium held Mar. 4 – Mar. 5, 2005).

10. *Federal Marriage Amendment*, Sen. Jt. Res. 30, 108th Cong. (Mar. 22, 2004); H.R. Jt. Res. 56, 108th Cong. (May 21, 2003).

11. For a complete discussion of legislative history, see Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. St. Thomas L.J. 140 (2004) (located *infra*).

1. Whether the FMA, by seeking to define marriage in the U.S. Constitution, inappropriately intrudes into an area—family law—that has traditionally been reserved for the 50 states (as Professors Carpenter, Koppelman, and Strasser contend), or whether it is a necessary and timely response on a national issue of fundamental social policy (as Professors Collett and Wardle, and Ms. Gallagher argue);

2. Whether the FMA is well-crafted to accomplish its stated purpose (as Professor Collett contends), or whether its language is rife with ambiguity and imprecision so that its reach extends far beyond defining marriage as the union of one man and one woman—including, but not limited to, prohibiting the states from giving legal recognition to same-sex civil unions (as Professors Carpenter, Koppelman, and Strasser argue);

3. Whether, as a matter of public policy, marriage between a man and a woman should be the only legally-recognized option (as Professors Collett and Wardle, and Ms. Gallagher assert and seek to justify), or whether, as advanced by Professors Strasser and Koppelman, “opposition to same-sex marriage is one of steady decay”¹² and marriage should be open to partners of the same gender.

The third and final reason why I believe this symposium makes a major contribution is its intellectual diversity. Quite frankly, in sharp contrast to many of the other legal academic conferences that have been organized around this general topic, I think you will find this symposium explores in a robust, respectful, and balanced way the various legitimate perspectives on the three core issues associated with the FMA. Three of the authors in this journal argue, in different ways and for various reasons, that the FMA is ill-conceived. Three of the authors argue, in different ways and for various reasons, that the FMA is a necessary and prudent exercise of congressional authority.

Intellectual depth and breadth are—or should be—the calling cards of every great law school. Penetrating and balanced debate are particularly important for those of us who are part of the St. Thomas School of Law community. Our mission, as a Catholic law school, is not to emulate this country’s most intellectually vibrant law schools, but to extend beyond those communities by integrating “faith and reason in the search for truth through a focus on morality and social justice.”¹³ For us at St. Thomas, our mission includes building and welcoming a community of scholars, faculty, and student professionals, who—in exploring the spiritual dimensions of our lives and in applying our different faiths to our professional identities—embody a deep dedication to intellectual engagement in a robust and respectful environment. We believe that in collectively engaging—from our

12. Andrew Koppelman, *The Decline and Fall of the Case against Same-Sex Marriage*, 2 U. St. Thomas L.J. 5, 32 (2004).

13. U. of St. Thomas School of Law, *Mission Statement* (available at <http://www.stthomas.edu/law/about/mission.asp>).

many different perspectives—the most pressing social, legal, and professional issues of the day, we contribute to our own and to society's search for the truth.

I am pleased and proud to introduce the readers of the *University of St. Thomas Law Journal* to this assemblage of prominent and intellectually diverse scholars debating the topic of the Federal Marriage Amendment, and, in so doing, to facilitate our readers' own search for the truth.