

Abstracts for FMA Symposium

The Debates About Same-sex Marriage in Canada & the United States: Controversy Over the Evolution of a Fundamental Social Institution

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Since the beginnings of recorded history, marriage has been a fundamental social institution, but its nature has changed dramatically in response to changing religious beliefs, social values and behaviors and technology. Polygamy, for example, was once a widely accepted form of marriage, and is still practiced in many places, but it is now illegal in North America. At present, Canada and the USA, two countries with many similarities and a common legal heritage, are engaged in debates over same-sex marriage. Previous fundamental changes in family law in North America, such as the introduction of no-fault divorce and the recognition of non-marital opposite-sex relationships, were controversial. Over the past half century the distinctive legal and social roles of "husband" and "wife" have been merging into the androgynous concept of "spouse," making it possible to view marriage as an intimate union of two persons, rather than the intimate union of one man and one woman.

Canada has a relatively broad, functional approach to the legal definition of "family," with significant recognition to unmarried opposite-sex partners and adults with a parent-like role, based on protection of the vulnerable, and recognition of social realities rather than legal formalities. There is a relatively tolerant approach to homosexuality, with decriminalization of homosexual acts in 1969, and court decisions starting in the 1970s recognizing the capacities of homosexual parents. As a result of constitutional litigation and political advocacy, in 2005 the Canadian Parliament enacted a same-sex marriage law. Although highly controversial, same-sex marriage is now supported by a majority of Canadians. Recognition of same-sex marriage is intended to protect the human dignity of homosexuals, while promoting the interests of the growing number of children who live with two parents of the same-sex. American law has given less recognition to non-traditional families than Canadian law, but there is now a growing trend in the USA towards recognition of homosexual relationships. While a number of constitutional challenges by same-sex partners seeking the right to marry have failed, constitutional litigation has resulted in civil unions in Vermont and same-sex marriage in Massachusetts, though those "marriages" may not be recognized outside the state. A number of states and cities have enacted domestic partnership laws. However, there is much greater political and judicial resistance to the recognition of same-sex marriage in the USA than in Canada, and referenda in several states have amended state constitutions to prohibit same-sex marriage. The USA is a more conservative country with stronger religious influences on politics; public opinions polls showing significantly higher levels of opposition to same-sex marriage than in Canada. These attitudinal differences are reflected in the differences in the legislative and the judicial developments in the two countries.

Changes in social attitudes and laws about marriage are inevitably slow and controversial, with a complex interaction between legal and social change. Experience

in Canada and other jurisdictions with same-sex marriage should demonstrate that this is a benign development with positive social value for families and children, and this may ultimately contribute to similar changes occurring in the USA.

Constitutional Thematics and the Peculiar Federal Marriage Amendment

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Our Constitution is thematic: broad and recognizable themes permeate its text. These themes and their continued coherence are important because they serve as an identification of fundamental values for our governing structure and because they assist with constitutional interpretation. Because of the importance of thematic coherence, whenever a provision runs contrary to a particular theme, it does so only in furtherance of another.

The proposed Federal Marriage Amendment, however, is a peculiar one, because it transgresses three strong themes—a commitment to state power over local matters, individual liberty, and equality—without furthering any other recognizable theme. No other constitutional provision does that.

Adopting an amendment that is so contrary to established constitutional themes has serious implications for our identification of fundamental values and for coherent constitutional interpretation. Because the amendment is so antithetical to state power, individual liberty, and equality, does it signal a shift away from these values? Because it furthers no recognizable existing theme in the Constitution, does it signal the creation of a new theme that will infiltrate other aspects of the Constitution?

These are difficult questions with uncertain answers. In light of them, it would be wise to consider carefully whether such uncertainty weighs against the adoption of the proposed amendment and, if not, what language could minimize the risk of unintended adverse impact on our Constitution's themes.

Full Faith and Republican Guarantees: Gay Marriage, DOMA, and the Courts

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Thomas Jefferson wrote in the Declaration of Independence that governments derive their *just* powers from the consent of the governed, which is to say that in order to be legitimate, the exercise of governmental power must be grounded in the consent of the governed. The most troubling aspect of the recent spate of “gay marriage” or “civil unions” rulings from courts and actions by certain executive officials is the utter disregard that has been given to the consent of the people. In California, San Francisco Mayor Gavin Newsome unilaterally decided to alter a century and a half of California marriage law, and to ignore a recent, overwhelmingly-approved state-wide voter initiative, and start handing out “marriage” licenses on his own initiative. In Massachusetts, the Supreme Judicial Court found a “right” to marriage by homosexual couples in a Constitution that had been unchanged in any relevant respect since it was first penned by John Adams in 1780, who undeniably would not have recognized, much less constitutionalized, any such right.

Such actions undermine the core foundational principle of government by consent, and violate the guarantee of a republican form of government found in Article IV of the Constitution. Long thought non-justiciable (due to a ruling by Chief Justice Taney who undoubtedly did not want to be forced to consider the application of the clause in the slavery context), Justice O’Connor, writing for the Supreme Court in the 1992 case of *New York v. United States*, invited a reconsideration of that view, noting that Republican Guarantee Clause claims might well be justiciable when state government officials are altering the forms or methods of operation of government set out in their own state constitutions. The present cases present an opportunity to accept Justice O’Connor’s invitation, and to decide for the present generation whether we intend to be governed by our own consent, or by the raw will of a handful of robed elites.

Why The Politics Of Marriage Matter: An Essay On the

Unsuccessful Legal And Strategic Battles Waged By Gay Marriage Proponents To Win The Right To Marry

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This paper examines gay marriage proponents' recent unsuccessful strategic and political efforts to legalize gay marriage. Despite being backed by America's liberal and intellectual establishment, gay marriage proponents' strategic efforts have failed to convince the rest of America of the legal and moral legitimacy of gay marriage. Central to gay marriage proponents' failure has been their reluctance or even opposition to accept and adopt the "assimilationist" or the "normative" definitions of marriage and family. By attempting to redefine or even abolish what most Americans would consider to be the normative views of marriage and family, gay rights activists and scholars have theorized and politicized the alternative views of marriage and family that are essentially hostile to the traditional values associated with marriage: monogamous relationship, procreation, and roles marriage plays in civic participation. As a result, gay marriage proponents' campaign never connected with the American electorates. Subsequently, gay marriage movement's failure in this respect has been capitalized by opponents of gay marriage—religious conservatives who have emphasized and reminded the electorates of these traditional values at the polls.

“God’s Created Order,” Gender Complementarity, and the Federal Marriage Amendment

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Testifying before the Senate Judiciary Committee in a hearing on the Federal Marriage Amendment (FMA), Congresswoman Marilyn Musgrave, a primary sponsor of the FMA in the House of Representatives, began with these words:

The Declaration of Independence states that, “All men are created equal and endowed by their creator with certain unalienable rights, including life, liberty, and the pursuit of happiness.” The very foundational document of our nation assumes that our rights exist within the context of God’s created order.

The self-evident differences and complementary design of men and women are part of the created order. We were created as male and female, and for this reason, a man will leave his father and mother and be joined with his wife, and the two shall become one, in the mystical, spiritual, physical union we call marriage. The self-evident biological fact that men and women are designed to complement one another is the reason that until recently, for the entire history of mankind, in all societies, at all times, and in all places, marriage has been a relationship between persons of the opposite sex.

Not all proponents of a federal marriage amendment make such an explicit appeal as did Representative Musgrave to divine creation as a ground for preserving “traditional marriage” as the union of one man and one woman. Nonetheless, whether they appeal to religious tradition, cultural practices, procreation, social science, or “common sense,” FMA proponents contend that same-sex marriage threatens the gender complementarity – the union of two different sexes – that is fundamental to marriage, to children’s healthy development, and to society. For example, Mitt Romney, governor of Massachusetts, argued that because children need a mother and a father – with their different, complementary natures and traits – the FMA would declare a proper “national standard” for raising children.

My paper will examine and critically evaluate gender complementarity as a justification for the FMA. Looking primarily at how the argument has featured in Congressional hearings about the FMA, I will take up such issues as: the argument’s foundation in religious conceptions of marriage and the proper ordering of the sexes; its problematic invocation of an unchanging “tradition” about marriage as the union of the two sexes (without attending to legal reform and societal changes concerning gender hierarchy and gender roles within marriage); its premise that marriage is “about” children, not adult love; and its assumptions about how same-sex marriage will exacerbate trends like divorce and nonmarital childrearing. I will also consider some striking differences among supporters of the FMA on whether and why gay men and lesbians should be afforded (a) legal protection of their intimate relationships (e.g., through civil unions, domestic partnerships, or reciprocal beneficiaries laws) and/or (b) parental rights and responsibilities.

Can the Supreme Court Be Expected to Preserve Marriage as a Union Between a Man and a Woman?

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Can the Supreme Court be expected to preserve marriage as a union between a man and a woman? Treating this question as a matter of constitutional law, the simple answer is "No." The United States Constitution has nothing to say about marriage, and no one expects the Court to discover a constitutional guarantee that marriage must be limited to heterosexual unions. If the Constitution is to read that way, it can only be accomplished by constitutional amendment. The current proposed Federal Marriage Amendment [get citation] seeks to do that but is almost certain to fall short of the necessary two-thirds vote required in both houses of Congress.

The more pertinent question is whether the Court can be expected to find in the Constitution a right of same-sex marriage that overrides the Federal Defense of Marriage Act (DOMA) [get cit] as well as the many state statutes and constitutional provisions which limit marriage to a relation between a man and a woman. Obviously this cannot be ruled out. The Supreme Judicial Court of Massachusetts has led the way by finding such a right - never before known to exist - in the state constitution. (get cite) The United States Supreme Court would have no difficulty finding similar flexibility in the U.S. Constitution should it choose to do so.

So, will the Court move in that direction?

I. Recent Supreme Court Cases Involving Homosexual Interests

[I have about 7 cases running from 1967 to *Lawrence* in 2003]

II. Recent State Court Decisions on Same-Sex Marriage

III. Precedent as Restraint or Basis for Prediction

I'll argue (following my book) that precedent is virtually no restraint; but a trend may provide a basis for prediction)

IV. Will the Constitution Itself Matter?

I'll say "not much," again using the argument of my book that the Court feels free to amend it at will. The broad principles of due process, privacy, equal protection, etc., can be twisted in any direction as of course they are by Court and commentators.

V. What Will Matter: Judicial Attitudes

Here I will discuss various determinants of judicial behavior: policy preferences, tendency to frame policy preferences as "rights" issues, self-respect as judges, the political milieu, the recently concocted image of court as protector of individual rights against tyranny of majority, etc.

VI. How Will the Court Decide?

I'll have a better answer when I've written parts I-V, but at this point I think the Court will eventually come down in favor of gay marriage, depending, of course on Court personnel.

The Judicial Role in Enacting a Federal Marriage Amendment

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The public legal discussion of a proposed Federal Marriage Amendment has, understandably, focused on such issues as the political prospects of such an amendment, drafting of the amendment, and the potential effects of various versions of such an amendment.

The elephant in the room, though, is the fact that the most important factor in determining the prospects for a Federal Marriage Amendment will be the ruling of state and federal courts on the question of whether marriage is consistent with constitutional guarantees.

The record of courts in this matter has been mixed to this point, but that may be changing as some decisions show an increasing sensitivity to the social institutional nature of marriage and the effect of a redefinition on the social goods marriage now provides.

This paper will argue that the fate of an amendment is really in the hands of judges and will briefly describe how they might best discharge their obligation, given this reality.

Some Undesirable Intended and Unintended Consequences of the Proposed Federal Marriage Amendment

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The Federal Marriage Amendment (FMA) should not be adopted because its foreseen consequences involve harm to families and because it is likely to be interpreted in currently unforeseen ways. Given how some of the state constitutional amendments regarding marriage have been interpreted, we can be quite confident that were the FMA adopted, it would be given a construction by at least some courts which many of those supporting it would never have voted for. Further, this problem is not likely to be avoided merely because the next few Supreme Court appointments will probably be conservative, since conservative Justices have been among those least constrained by the constitutional text, as the current 11th Amendment jurisprudence illustrates. In short, the FMA should be rejected both because of its intended and because of its likely unintended consequences.

Fears of an Article V Convention

by Arthur Taylor

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- I. Amendment Filters
 - A. Filter of Congress
 - B. Filter of the Legislatures

- II. Amendment Risks
 - A. Over-filtering
 - B. Under-filtering

- III. Under-Filtering Fears
 - A. Convention
 - 1. Unknowns
 - 2. Knowns
 - B. Legislature
 - 1. Unknowns
 - 2. Knowns

- IV. Measurement of Risk
 - A. Compound event (Probability theory--product of individual event risks)
 - B. Probability of adverse Convention risk
 - C. Probability of adverse Legislative ratifications
 - D. Compound Risk--True measure of Convention Under-Filtering Risk

- V. Extra-Article V Convention Risk
 - A. Article V Convention
 - B. Convention outside of Article V
 - C. Extra-Article V Convention Risks
 - 1. By definition, not facilitated by Article V Convention
 - 2. Alternate forums already exist to facilitate risk
 - 3. Impact likely small
 - 4. Article V Convention lessens likelihood of Extra-Article V Convention Risks

- VI. Summary
 - A. Risks of over- and under-filtering must both be weighed.
 - B. Over-Filtering risks threaten democracy.
 - C. Under-Filtering risks fear democracy.
 - D. Article V Convention Risks
 - 1. Convention Risk
 - 2. Legislature Risk
 - 3. Compound measure of Risk
 - E. Extra-Article V Risks distinguished and minimized by Article V Convention process

Comparative Constitutional Protection for the Institution of Marriage and Considering A Convention Call for a Federal Marriage Amendment

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Protection for the institution of marriage in constitutional provisions is not a rare or novel thing. In fact, nearly one-half of the national constitutions currently in effect in nation-states around the world contain specific provisions providing constitutional recognition of and explicit protection for the institution of marriage. Ironically, the United States, which is the historic leader among nations in adopting constitutions and providing constitutional protections for cherished rights, principles, relationships and institutions has no constitutional provision explicitly recognizing or providing protection for the institution of marriage – or, for that matter, for any family relationship. This paper will consider why the Constitution of the United States does not have any constitutional provision explicitly recognizing or providing protection for the basic social unit – the institution of marriage.

The paper will discuss some reasons why it might be appropriate for citizens of the United States to adopt an amendment to the Constitution providing explicit constitutional recognition of and constitutional protection for the institution of conjugal marriage. Recent challenges and threats to the legal meaning institution of marriage, creative judicial interpretations of some constitutional doctrines (neither created nor approved by the people) to redefine marriage, the well-established and wide-spread comparative constitutional practice of providing constitutional protection for marriage and family relations, and other points, will be reviewed.

In terms of method, Article V of the Constitution of the United States provides two methods for initiating an amendment to the Constitution. Congress may take the initiative and propose (by two-thirds vote in each house), or “on the Application of the Legislatures of two-[-]thirds of the several States,” Congress must “call a Convention for proposing Amendments” In either case, the proposed Amendment must then be submitted to the legislatures of the several states, and it must be ratified by three-fourths of the states in order to become a part of the Constitution. It is well known that most amendments to the Constitution (all of them except the twenty-first amendment) have been initiated by two-thirds vote of both houses of Congress proposing the language; only one of them (the twenty-first, repealing prohibition) has been initiated by the states applying to Congress for a convention. This paper will consider the pros-and-cons of whether a state-initiated call for a constitutional convention to propose an amendment might be the most effective and successful means of proposing an amendment to give constitutional recognition and protection to the institution of conjugal marriage.

Women, Equality, and the Federal Marriage Amendment

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Heterosexual marriage is a necessary, albeit not a sufficient, condition for social equality for women. Current efforts to legalize same-sex marriage will normalize and legitimate family forms in which women are excluded, or considered unnecessary; will encourage transactional procreation; and will further exploit and devalue women's traditional roles as wives, mothers, and nurturers.

Failure to maintain heterosexual marriage may result in future generations with a decreased ability for men and women willing or able to cooperate in families, and may ultimately contribute to a new form of gender hierarchy in an a new variation of a sex-segregated society.

Massachusetts and several other states seem to have given short-shrift to the contribution heterosexual marriage makes to establishing parity for women. For that reason, a federal marriage amendment may be the only way for women to maintain their status in the family and in society.

Same-Sex Marriage: When Will It Reach Utah?

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Attempts to amend constitutions so as to make legal marriage impossible for same-sex couples are futile. They are nothing more than temporary "legal dykes" designed to create "legal islands", in which a heterosexual majority can continue to discriminate against a lesbian and gay minority in relation to access to legal marriage, and in which this minority is stripped of any possibility of seeking protection against this discrimination from either the legislature or the courts. Where such amendments have been adopted, they will eventually be repealed or invalidated. This is because the "incoming tide", ie, the long-term worldwide trend, will sooner or later bring full legal equality to our fellow human beings who happen to be lesbian and gay individuals or members of same-sex couples, with or without children. Prof. Wintemute will discuss this worldwide trend, with particular reference to developments in Canada, Europe, South Africa, Australia and New Zealand. He will also consider whether, in industrialised secular democracies with good human rights records, there are any equivalents to the existing and proposed Utah and United States constitutional amendments excluding same-sex couples from legal marriage.