

**PREPARED TESTIMONY OF PROF. DWIGHT DUNCAN¹ BEFORE
THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
CONCERNING “LEGAL THREATS TO TRADITIONAL MARRIAGE:
IMPLICATIONS FOR PUBLIC POLICY” ON
THURS., APRIL 22, 2004**

I thank you for the opportunity to testify before you this afternoon. My name is Dwight Duncan, associate professor of constitutional law at Southern New England School of Law in North Dartmouth, Massachusetts. Over the years, I have participated in litigation as attorney for *amici curiae* in opposition to so-called same-sex marriage in Hawaii, Vermont, Massachusetts and New Jersey. I have also co-authored a law review article on the history of this phenomenon entitled “Follow the Footnote, or the Advocate as Historian of Same-Sex Marriage,” in 47 *Catholic University Law Review* 1271-1325 (1998); and I gave expert testimony requested by the Canadian Department of Justice in the Canadian same-sex “marriage” case in 2001. *Halpern et al. v. Clerk of the City of Toronto et al.* My testimony today reflects my knowledge and opinion as a constitutional law professor who has followed the litigation on the subject quite closely. It draws heavily on an article I have written entitled “The Federal Marriage Amendment and Rule by Judges,” which is scheduled to appear shortly in the *Harvard Journal of Law and Public Policy*. My testimony does not represent the views of my law school, or any other organization or person.

The subject of today’s hearing is “Legal Threats to Traditional Marriage.” There are several cases, decided over the past year, that threaten to undermine the age-old consensus of civilization that marriage is uniquely between a man and a woman. First, there is last November’s *Goodridge* case out of Massachusetts: *Goodridge v. Department*

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of Public Health,² the bold Massachusetts decision requiring the state to recognize marriage between persons of the same sex, which was decided by the slenderest of margins (4-3), which meant that one unelected judge was imposing her values on the Commonwealth, and arguably the nation. The breadth of the holding was inversely related to the slimness of the majority. Last June, the U.S. Supreme Court decided in *Lawrence v. Texas*³ to make sodomy a constitutional right and thus forbid the criminalization of private sexual activity between consenting adults. In Canada that same month, the Ontario Court of Appeal legalized gay marriage in *Halpern v. Canada*,⁴ and the Canadian government elected not to appeal the decision to the Supreme Court of Canada but rather to propose enabling legislation to Parliament. Both these cases were cited favorably by the majority opinion in *Goodridge*. I would like to discuss these three cases, and then talk about the threat to religious freedom that is likely to ensue from the judicial imposition of gay marriage.

We are now at an interesting crossroads in the debate over the marital status of homosexual unions. Up until now, the fight has been largely conducted at the state level, with homosexual advocacy groups like Lambda Legal Defense Fund and Gay and Lesbian Advocates and Defenders (“GLAD”) bringing suit in state courts under state constitutional claims, and the state attorney generals and defenders of monogamous, heterosexual marriage trying to counter the state constitutional claims of liberty and equality. When homosexual marriage made progress in the courts, as in Hawaii and Alaska, supporters of traditional marriage successfully put forward referendums on state constitutional amendments, defining marriage as between a man and a woman, which

² 798 N.E.2d 941 (Mass. 2003).

³ 123 S.Ct. 2472 (2003).

⁴ 172 O.A.C. 276 (2003).

passed overwhelmingly.⁵ There is such an amendment pending in Massachusetts which, while reserving the term “marriage” for persons of the opposite sex, would grant all the legal incidents of marriage under state law to same-sex couples united in “civil unions.”⁶ The earliest it could go into effect, however, would be 2006,⁷ and the Massachusetts Supreme Judicial Court in *Goodridge* gave the legislature only 180 days to “take such action as it may deem appropriate in the light of this opinion.”⁸

As a defensive measure, thirty-eight states and the federal government have in the past decade enacted Defense of Marriage Acts.⁹ The Federal Defense of Marriage Act, enacted in 1996, while proclaiming marriage for the purposes of federal law as only male-female couples, attempts to establish a sort of Maginot Line: states will not be required under the Full Faith and Credit clause of the U.S. Constitution to recognize the

⁵ See HAW. CONST. art. I, § 23; ALASKA CONST. art. I, § 25.

⁶ On March 11, 2004, the Massachusetts Legislature took up the issue in constitutional convention and advanced a state constitutional amendment that would define marriage as the union of a man and a woman. *Massachusetts Advances Same-Sex Marriage Ban*, CNN.COM (Mar. 11, 2004), <http://www.cnn.com/2004/LAW/03/11/gay.marriage/>.

⁷ See Ethan Jacobs, *Round Two: Marriage Battle Resumes*, BAY WINDOWS, Mar. 11, 2004, at 14 (“But even if [the] amendment gets on the ballot – in 2006 at the earliest – marriage licenses will have been distributed in Massachusetts for more than two years by then.”).

⁸ 798 N.E.2d at 970.

⁹ See ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. ANN. § 25-101 (West 2000); ARK. CODE ANN. § 9-11-107 (Michie 2002); CAL. FAM. CODE § 308.5 (West Supp. 2004); COLO. REV. STAT. ANN. § 14-2-104 (West Supp. 2003); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2004); GA. CODE ANN. § 19-3-3.1 (1999); HAW. REV. STAT. § 572-1 (Supp. 1999); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West 1999); IND. CODE § 31-11-1-1 (1998); IOWA CODE § 595.2 (2001); KAN. STAT. ANN. § 23-101 (Supp. 2002); KY. REV. STAT. ANN. § 402.040 (Michie 1999); LA. CIV. CODE ANN. art. 89 (West Supp. 2004); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1998); MICH. COMP. LAWS ANN. § 551.1, .271 (West Supp. 2003); MINN. STAT. ANN. § 517.01 (West Supp. 2004); MISS. CODE ANN. § 93-1-1 (Supp. 2003); MO. REV. STAT. § 451.022 (Supp. 2002); MONT. CODE ANN. § 40-1-401 (1997); NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. GEN. STAT. § 51-1.2 (2003); N.D. CENT. CODE § 14-03-01 (Supp. 2003); OHIO REV. CODE § 3101.01 (2004); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25-1-1 (Michie 1999); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004); UTAH CODE ANN. § 30-1-2 (Supp. 2003); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE ANN. § 26.04.020 (West Supp. 2004); W. VA. CODE ANN. § 48-2-603 (Michie 2001). The author is indebted to Bill Duncan of Brigham Young University for this catalog of state DOMAs.

homosexual marriage permitted in another state, should that state, be it Massachusetts or New Jersey, decide to recognize homosexual marriage.¹⁰

The Federal Defense of Marriage Act does not prevent any state from willingly instituting or recognizing homosexual marriage. It purports only to permit the *non*-recognition of another state's marriage, contrary to the usual principle of "married anywhere, married everywhere."¹¹ The theory was that homosexual marriage could be contained within the few relatively liberal states that might choose to adopt it. It has worked so far. But now Massachusetts' highest court has in effect overruled the framers of its state constitution and recognized homosexual marriage. Perhaps New Jersey will do the same next year.

It is increasingly clear that the Maginot Line will not hold. For one thing, homosexual advocacy groups have already announced that couples will flock from the other forty-nine states and the District of Columbia to the first state that recognizes gay marriage, intending to challenge the Defense of Marriage Act on federal constitutional grounds as inconsistent with either the Full Faith and Credit or the Equal Protection clause.¹² After *Romer v. Evans*¹³ and *Lawrence v. Texas*,¹⁴ such an effort might plausibly succeed. But the stronger reason that the Defense of Marriage Act is inadequate to protect the definition of marriage is that it assumes, as a practical matter, that American society can long endure two incompatible conceptions of marriage: one, recognized in

¹⁰ See Defense of Marriage Act, 28 U.S.C. § 1738C, 1 U.S.C. §7 (2000).

¹¹ See e.g., Barbara J. Cox, *Same -Sex Marriage & Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?* 1994 WIS. L. REV. 1033, 1064-65 (1995) (noting the "overwhelming tendency" of states to recognize out-of-state marriages).

¹² See, e.g., Evan Wolfson, *The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 171 (Robert Wintemute & Mads Andenaes eds., 2001).

¹³ 517 U.S. 620 (1996).

¹⁴ 123 S. Ct 2472 (2003).

thirty-eight states and the federal government, which assumes the natural link of marriage to procreation and mother-father parenting, and the other conception, prevalent in a few more liberal jurisdictions like Massachusetts in which marriage might be defined as a form of “friendship recognized by the police.”¹⁵ These are fundamentally incompatible conceptions. Advocates on both sides of this issue are in agreement, I think, that attempts at compromise between them, whether in the form of Vermont-style civil unions or in the form of a patchwork quilt of some-jurisdictions-have-one, other-jurisdictions-have-another, are untenable in the long run.¹⁶ Nevertheless, when the Massachusetts Senate requested an advisory opinion of the Supreme Judicial Court as to whether civil unions would satisfy the Court,¹⁷ the answer was a definitive “no.”¹⁸ But even had the Court answered differently, marriage-in-all-but-name would still most likely be a step on the road to gay “marriage.”

In our national culture, once homosexual marriage is recognized anywhere, there will be enormous pressure to settle for a “least-common-denominator” conception of marriage. The protection of a state boundary, even in a state like Utah, will then count for little. We saw something similar with the universal adoption of “no-fault” divorce in

¹⁵ROBERT LOUIS STEVENSON, VIRGINIBUS PUERISQUE 10 (1896). The majority opinion in *Goodridge* calls it “the voluntary union of two persons as spouses, to the exclusion of all others.” 798 N.E.2d 941, 969 (Mass. 2003).

¹⁶From quite a different perspective, Akhil Amar predicted in 1996 that “in the long run the nation probably cannot exist half slave and half free on [the question of homosexual marriage].” Akhil Reed Amar, *Race, Religion, Gender, and Interstate Federalism: Some Notes from History*, 16 QUINNIPIAC L. REV. 19, 26 (1996).

¹⁷*In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (2004). In response to *Goodridge*, the Massachusetts legislature asked the following question:

“Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all ‘benefits, protections, rights and responsibilities’ of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?”

Id.

¹⁸*See id.* at 572.

the 1970s.¹⁹ Elites in the courts, the bar, the university, and the media are bent on undertaking the social experiment of homosexual “marriage.” If they do not ultimately succeed in Massachusetts, given that the decision has yet to be implemented, they will likely succeed in New Jersey. All it takes is a handful of judges who think they know best and that their opinions supersede the settled traditions of our law regarding the nature of marriage. Once they succeed in one jurisdiction in this country, extensive efforts will be made both through the courts and the media to repeat that success throughout the land.

At the beginning of her opinion declaring homosexual marriage to be a state constitutional right, Supreme Judicial Court Chief Justice Margaret H. Marshall notes that there is deep-seated division over “religious, moral, and ethical convictions” regarding marriage and homosexuality, but it turns out that is irrelevant.²⁰ The court is not following the historical view of marriage and homosexuality, nor the view that “same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors.”²¹ Marshall says: “Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. ‘Our obligation is . . . not to mandate our own moral code.’”²²

¹⁹ See, e.g., MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 188-89 (1989).

²⁰ *Goodridge*, 798 N.E.2d at 948.

²¹ *Id.*

²² 798 N.E.2d at 948 (quoting *Lawrence*, 123 S. Ct. at 2480 (citations omitted)).

That claim must be tested. As everyone knows, Marshall found the exclusion from marriage rights for homosexual couples to be “incompatible with the constitutional principles of respect for individual autonomy and equality under law.”²³ As a remedy, the court “refined the common-law meaning of marriage . . . in light of evolving constitutional standards.”²⁴ The court stayed its judgment for 180 days “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”²⁵

As Justice Robert J. Cordy points out in his dissent, “only by assuming that ‘marriage’ includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the ‘right’ of same-sex couples to ‘marry.’”²⁶ In other words, Marshall had to first envision “marriage” as encompassing homosexual couples before she could conclude that their exclusion violated the “right to marry” or that the exclusion was “invidiously discriminatory.” This is a case of Lewis Carroll’s *Queen of Hearts*: “Sentence first—verdict afterwards.”²⁷ It turns out that the redefinition of the common-law meaning of marriage was not just the remedy but the basis for the circular conclusion that constitutional rights were violated.

Further, changing the common-law definition of marriage is, by its nature, judicial legislation. It is not in the Commonwealth’s Constitution. And so we have it: One unelected judge imposing her values on the commonwealth and the nation.

²³ *Goodridge*, 798 N.E.2d at 949.

²⁴ *Id.* at 969.

²⁵ *Id.* at 970.

²⁶ *Id.* at 984 (Cordy, J., dissenting).

²⁷ LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 108 (Roger Lancelyn Green ed., Oxford Univ. Press 1971) (1941).

A few years ago, at the time of her confirmation hearing, dissenting Justice

Martha B. Sosman testified:

No one elected me to anything and no one has asked me to run the commonwealth from my courtroom. Making the law . . . is not in my job description. Nothing in our constitution, state or federal, gives Martha Sosman or any other judge the power to inflict her own agenda, political or social, on the people of this commonwealth. I not only believe in judicial restraint, I practice what I preach.²⁸

True to her words, Sosman dissented in *Goodridge*. In her dissent, she writes:

[T]he opinion ultimately opines that the Legislature is acting irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure. Placed in a more neutral context, the court would never find any irrationality in such an approach.²⁹

Now that the Supreme Judicial Court has issued its decree, what's next?

Basically, the same recourse as was had in Hawaii and Alaska—amending the state constitution. With this difference: Massachusetts' procedure for state constitutional amendment is cumbersome, requiring repeated votes of the legislature and the public.

The state constitution could be amended no earlier than 2006. This process could not be completed before the expiration of the 180-day period that the SJC gave the legislature to “to permit [it] to take such action as it may deem appropriate in light of this opinion.”³⁰

That would require another favorable vote during the next legislative session (2005-2006) from the members of the legislature (both houses convened in constitutional convention) on the Marriage Amendment that was first approved on March 11, 2004, as well as approval from the voters by referendum in November, 2006.³¹

²⁸ Dwight G. Duncan, *Judicial Restraint in Massachusetts*, 29 MASS. L. WKLY 11 (2000).

²⁹ 798 N.E.2d at 981 (Sosman, J., dissenting).

³⁰ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003).

³¹ See *supra* note 7 and accompanying text.

Lawrence v. Texas, which the U.S. Supreme Court decided in the summer of 2003, invalidated state anti-sodomy laws on grounds that “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.”³² In so ruling the Supreme Court overturned its 1986 decision in *Bowers v. Hardwick*.³³ Most significantly, the Court held that moral disapproval of homosexuality did not constitute a legitimate state interest: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”³⁴ Even Justice O’Connor, who did not join in the substantive due-process overruling of *Bowers*, agreed with the majority on that point.³⁵

Of course, the majority opinion by Justice Kennedy deliberately eschews its implications for marriage: “The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”³⁶ Justice O’Connor in concurrence goes further: “Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”³⁷

³² 123 S.Ct. 2472, 2478 (2003).

³³ 478 U.S. 186 (1986).

³⁴ *Lawrence*, 123 S. Ct. at 2483 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

³⁵ *Id.* at 2487 (O’Connor, J., dissenting).

³⁶ *Id.* at 2484.

³⁷ *Id.* 487-88 (O’Connor, J., concurring).

In dissent, Justice Scalia begs to differ: “But ‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples.”³⁸ He concludes:

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. . . . This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.³⁹

The majority opinion in *Lawrence* supports Justice Scalia’s contention. Early in the majority opinion, Justice Kennedy writes that because the statutes “seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals,” the State or a court should not attempt “to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”⁴⁰ This sounds remarkably like John Stuart Mill’s harm principle, that limitations on a person’s liberty are justified only in order to prevent harm to someone.⁴¹ Of course, there is the additional phrase “or abuse of an institution the law protects.” There is no authority given for this dicta, and it has the feel of being rigged for the occasion, to reserve for another day the matter of homosexual marriage.

More tellingly, later on, the opinion magisterially quotes what Scalia calls the “famed sweet-mystery-of-life passage.”⁴² “At the heart of liberty is the right to define one’s own concept of existence, of *meaning*, of the universe, and of the mystery of

³⁸ *Id.* at 2496 (Scalia, J., dissenting).

³⁹ *Id.* at 2498.

⁴⁰ *Id.* at 2478.

⁴¹ JOHN STUART MILL, ON LIBERTY 21-22 (Longmans et al. eds., 1999) (1869).

⁴² *Lawrence*, 123 S. Ct at 2489 (Scalia, J., dissenting).

human life.”⁴³ If states or courts should not attempt “to define the meaning of a relationship,” because that interferes with “liberty,”⁴⁴ then who is to say what marriage means? Not only can we write our own vows, we can be as creative as we wish. Then the kicker: “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁴⁵ “These purposes” refers back to “the most intimate and personal choices a person may make in a lifetime,” which in turn refers back to “personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education.”⁴⁶ As such, Justice Kennedy has implicitly forced the recognition of homosexual marriage.

Gay-marriage advocate Prof. Laurence Tribe of Harvard Law School agrees with Scalia’s assessment: “Same-sex marriage, as Justice Scalia predicted in his outraged dissent, is bound to follow; it is only a question of time.”⁴⁷

One remarkable feature of the majority decision in *Lawrence* is its reliance on foreign and international precedent. For example, the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*,⁴⁸ that laws proscribing sodomy were invalid under the European Convention of Human Rights, is cited to disparage the *Bowers* decision, even though *Bowers* was subsequent to *Dudgeon*.⁴⁹ Justice Kennedy also noted that “[o]ther nations, too, have taken action consistent with an affirmation of

⁴³ *Id.* at 2481 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (emphasis added).

⁴⁴ *Id.* at 2478.

⁴⁵ *Id.* at 2482.

⁴⁶ *Id.* at 2481.

⁴⁷ Laurence H. Tribe, “*Lawrence v. Texas*: The ‘Fundamental Right’ that Dare Not Speak Its Name,” 117 *HARV. L. REV.* 1894, 1945 (2004).

⁴⁸ 45 *Eur. Ct. H.R.* (ser. A) (1981).

⁴⁹ *Lawrence*, 123 S. Ct. at 2481.

the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”⁵⁰

Justice Scalia is withering in his criticism of this reliance on foreign authority: “The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless dicta. Dangerous dicta, however, since ‘this Court...should not impose foreign moods, fads, or fashions on Americans.’”⁵¹

The fact remains that foreign precedent influenced a majority of the U.S. Supreme Court in *Lawrence*. Let us look north at how our closest neighbor is dealing with the issue of recognizing homosexual marriage, for *Goodridge* concurred with the Court of Appeal for Ontario in its remedy of “refin[ing] the common-law meaning of marriage.”⁵²

On June 10, 2003, the Court of Appeal for Ontario, in the case of *Halpern v. Canada*, declared “the existing common law definition of marriage to be invalid to the extent that it refers to ‘one man and one woman.’”⁵³ The Court reformulated “the common law definition of marriage as ‘the voluntary union for life of two persons to the

⁵⁰ *Id.* at 2483 (internal citations omitted).

⁵¹ *Id.* at 2495 (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990 n. (2002) (Thomas, J., concurring) (denying certiorari).

⁵² *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

⁵³ 172 O.A.C. 276, 308 (2003).

exclusion of all others,”” ordered the decision to have immediate effect, and the Clerk of the City of Toronto to issue marriage licenses to the Couples.⁵⁴

The Court of Appeal for Ontario, in reaching this dramatic decision, accepted the holding of a lower court, which found that the definition of marriage was discriminatory under section 15 (1) of the Canadian Charter of Rights and Freedoms in a manner not justified under section 1 of the Charter.⁵⁵ Courts of Appeal in both British Columbia and Quebec have reached similar rulings.⁵⁶

For our purposes, one of the most interesting constitutional arguments, made by the intervenor Association for Marriage and the Family in Ontario (the “Association”) against recognizing homo sexual marriage concerned the meaning of the word “marriage” in the Constitution Act, 1867. The Association argued that because the Canadian federal government was given exclusive jurisdiction over “marriage and divorce,” it must follow that “as a constitutionally entrenched term, this definition of marriage can be amended only through the formal constitutional amendment procedures.”⁵⁷ The Ontario Court of Appeal found this argument “without merit” because, among other reasons, “to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country’s jurisprudence of progressive constitutional interpretation.”⁵⁸ The Court continued: “[A Constitution] must . . . be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”⁵⁹ “In our view,” the Court then concluded, ‘marriage’ does not have a constitutionally fixed

⁵⁴ *Id.* at 383.

⁵⁵ *See id.*

⁵⁶ *EGALE Canada Inc. v. Canada*, [2003] 13 B.C.L.R.2d 1; *Hendricks v. Quebec*, [2002] R.J.Q. 2506

⁵⁷ *Halpern*, 172 O.A.C. at 287.

⁵⁸ *Id.*

⁵⁹ *Id.* at 288 (quoting *Southam Inc. v. Hunter*, [1984] S.C.R. 145, 155 (Can.)).

meaning. Rather, . . . the term ‘marriage’ . . . has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures.’⁶⁰

This is a significant statement, particularly because the manner of “progressive constitutional interpretation” there exemplified is similar to the method employed in *Lawrence*, whose penultimate paragraph reads as follows:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.⁶¹

If constitutional “liberty” did not *historically* entail sodomy, well, now it does. If marriage in Canada did not *historically* extend to same-sex couples, well, now it does. Of course, Canada’s Constitution Act explicitly mentions “marriage.” The United States Constitution nowhere mentions “marriage,” and the right to marriage has been teased out of the “Due Process Clause.”

What about the argument that this matter is best left to state law? Jonathan Rauch, writing in the *Wall Street Journal*, formulated just such a federalism argument:

For centuries, since colonial times, family law, including the power to set the terms and conditions of marriage, has been reserved to the states, presumably because this most domestic and intimate sphere is best overseen by institutions that are close to home. . . . Same-sex marriage should not be a federal issue.⁶²

⁶⁰ *Id.*

⁶¹ 123 S. Ct. 2472, 2484 (2003).

⁶² Jonathan Rauch, *Leave Gay Marriage to the States*, WALL ST. J., July 27, 2001, at A8.

Rauch's claim of exclusive state jurisdiction over the terms and conditions of marriage is false, however. It runs afoul of *Loving v. Virginia*,⁶³ which said states had no power, under our Federal Constitution, to prohibit interracial marriage. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."⁶⁴ *Loving* also called marriage "one of the vital personal rights essential to the orderly pursuit of happiness,"⁶⁵ thus protecting it from infringement by state law.

In addition to finding the antimiscegenation law a deprivation of liberty without due process, *Loving* found that the law violated the equal protection clause of the Fourteenth Amendment.⁶⁶ *Loving* is a favorite case of advocates of same-sex marriage. Just as you should be able to marry the person you love regardless of race, the argument runs, you should be able to marry the person you love regardless of sex or sexual orientation.⁶⁷ Of course, if the proponents of this argument are correct in predicting a decision along these lines by the United States Supreme Court, then the right to same-sex marriage will be required by the Federal Constitution, notwithstanding state constitutions or state and federal laws to the contrary. The only way of decisively defeating such an outcome would be by means of a federal constitutional amendment such as the Federal Marriage Amendment.

⁶³ 388 U.S. 1 (1967).

⁶⁴ *Id.* at 12 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See e.g., Andrew Koppelman, *Why Discrimination Against Lesbians & Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 284 (1994) (using *Loving*'s result to argue by analogy that "[j]ust as interracial couples cannot be made to suffer any legal disadvantage that same-race couples are spared, gay couples cannot be made to suffer any legal disadvantages that heterosexual couples are spared. Lesbians and gay men must be permitted to marry.").

The claim of exclusive state jurisdiction over the incidents of marriage also is contradicted by *Griswold v. Connecticut*,⁶⁸ which said that states had no constitutional power to prohibit the use of contraceptives within marriage. It runs afoul of those federal cases that refer to a “fundamental right to marry” and strike down state-imposed conditions on its exercise, such as *Boddie v. Connecticut*⁶⁹ and *Zablocki v. Redhail*.⁷⁰ *Zablocki* called the right to marry of “fundamental importance” and a “part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”⁷¹ While the opinion acknowledged that not all regulation of the incidents of marriage was necessarily subject to “rigorous scrutiny” and that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,”⁷² that characterization did not apply to the state-imposed requirement that existing child support obligations be met before a person was allowed to marry, which was declared unconstitutional.⁷³ Similarly, *Turner v. Safley*⁷⁴ invalidated on constitutional grounds a state prohibition on prison inmates marrying.

The Federal Constitution, then, has expanded the circle of those who can legitimately marry under state law (people of opposite races, prisoners, deadbeat dads, those unable to pay courts for a divorce from a previous spouse), while also changing the understanding of what marriage entails (the right to contraception and the unilateral right of the woman to abort⁷⁵). It is at least forty years too late to claim that marriage is

⁶⁸ 381 U.S. 479 (1965).

⁶⁹ 401 U.S. 371 (1971) (striking down a required divorce filing fee for indigents).

⁷⁰ 434 U.S. 374 (1978) (striking down state requirement that child support obligations be met before being allowed to marry).

⁷¹ *Id.* at 384.

⁷² *Id.* at 386.

⁷³ *Id.* at 388 (applying strict scrutiny to the Wisconsin statute at issue).

⁷⁴ 482 U.S. 78 (1987).

⁷⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

exclusively a state matter, or that “the power to set the terms and conditions of marriage . . . has been reserved to the states.”⁷⁶

Finally, I would like to note the problematic consequences for religious freedom that will follow the judicial imposition of a new understanding of marriage. In accordance with a legal opinion I co-signed with other law professors regarding the proposed Massachusetts constitutional amendment,⁷⁷ to the extent a right to same-sex marriage is read by courts into the Constitution, either state or federal, “it gives wide-ranging license to judges to enforce a new social norm on organizations touched by the law—which, as a practical matter, includes almost all organizations of any significance. Most significantly, churches and other religious organizations that fail to embrace civil unions as indistinct from marriage may be forced to retreat from their practices, or else face enormous legal pressure to change their views. Precedent from our own history and that of other nations suggests that religious institutions could even be at risk of losing tax-exempt status,⁷⁸ academic accreditation,⁷⁹ and media licenses,⁸⁰ and could face charges of violating human rights codes or hate speech laws.”⁸¹

⁷⁶ Rauch, *supra* note 18.

⁷⁷ Memorandum dated March 5, 2004 to Massachusetts Catholic Conference concerning Legal Analysis of the Finneran-Travaglini Amendment. The memorandum was signed by Prof. Mary Ann Glendon of Harvard Law School, myself, Professors Scott FitzGibbon and Thomas Kohler of Boston College Law School, Professor Gerard Bradley of the University of Notre Dame Law School, and Professor Robert Destro of the Columbus School of Law, the Catholic University of America.

⁷⁸ *Bob Jones Univ. v. U.S.*, 5561 U.S. 574, 586 (1983) (“an institution seeking tax-exempt status must . . . not be contrary to established public policy”).

⁷⁹ *Trinity Western Univ. v. College of Teachers* (British Columbia), 2001 Carswell BC 1016 (Sup. Ct. of Canada) (reversing decision of the College of Teachers to deny accreditation to Trinity Western University based on its code of conduct prohibiting homosexual behavior).

⁸⁰ *CKRD re Focus on the Family*, Canadian Broadcast Standards Council, CBSC Decision 96/97-0155 (Dec. 16, 1997) (finding that radio station CKRD-AM violated the Canadian Association of Broadcasters’ *Code of Ethics* in broadcasting a segment of the Focus on the Family radio program on Feb. 9, 1997), available at <http://www.cbsc.ca/english/decisions/decisions/1997/971216i.htm>.

⁸¹ See, e.g., Liam Reed, “Legal Warning to Church on Gay Stance,” *Irish Times*, at 1 (Aug. 2, 2003) (Irish Council for Civil Liberties warning that Roman Catholic Church teaching on homosexual unions could

violate Ireland's 1989 Incitement to Hatred Act); "Gay Group Sues After Sermon," *Washington Post*, at B7 (Jan. 3, 2004) (lawsuit alleging "slander and incitement to discrimination" filed against Cardinal Antonio Maria Ruoco Varela after comment in sermon suggesting that same-sex marriage would bring down the country's social security system); *Levin v. Yeshiva*, 754 N.E.2d 1099 (N.Y. 2001) (finding private university housing policy distinguishing between married and unmarried couples to constitute sexual orientation discrimination in violation of city human rights ordinance); *see also Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004) (ruling that Catholic Charities do not fall within the religious exemption of a statute requiring contraceptive coverage as part of employee health insurance plans and are not constitutionally protected from application of the statute); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (upholding Connecticut's exclusion of Boy Scouts from state employee workplace charitable campaign due to organization's policy on homosexual scoutmasters).