Traditional Values Coalition

SPECIAL REPORT

The Federal Marriage Amendment

Homosexual activists have won the "right" to marry in Massachusetts. Only a Federal Marriage Amendment will protect us from liberal judges who usurp the will of the people.

Homosexuals see the winning of so-called "gay marriage" as a key objective in their goal of overturning all laws governing sexual behavior.

Chris Crain, the editor of the influential homosexual newspaper *Washington Blade,* laid out the homosexual strategy for "gay marriage" in late August, 2003. He told homosexual activists: *"...any leader of any gay rights organization who is not prepared to throw the bulk of their efforts right now into the fight for marriage is squandering resources and doesn't deserve the position. That's right; if they're not ready to make their top priority the freedom to marry, then they ought to resign today."*

Crain believes that all of the other battles for "hate crime" laws and other pro-homosexual legislation will be passed once "gay marriage" is legalized. **The battle for homosexual marriage is where homosexual militants will place their money, time, and propaganda efforts in the next few years.** Crain views a constitutional amendment against homosexual marriage as a serious threat to this objective.

The Massachusetts Supreme Judicial Court issued an edict on November 18, 2003, to legalize same-sex marriage in that state. The case is *Goodridge v. Massachusetts' Department of Public Health.*

Now that same-sex marriage is on the verge of becoming a fact in Massachusetts, the Defense of Marriage (DOMA) laws passed in other states and the federal DOMA law will be challenged as being unconstitutional. These state laws define marriage as a union between one man and one woman in state constitutions.

A majority of Americans — between 53 percent and 62 percent, depending on the poll — favor preserving marriage as it has been practiced throughout history: the union of a man and a woman. (The public is evenly divided on the question of whether lesser legal recognitions of same-sex relationships are appropriate.) If marriage is redefined in the foreseeable future, it will not be because of democratic decisions, but because of a few judges who, in response to a carefully crafted activist agenda, take upon themselves the power to do so.

Recognizing an even stronger societal consensus at the time (68 percent opposition to same-sex marriage), Congress overwhelmingly passed the Defense of Marriage Act ("DOMA") in 1996. It was signed into law by former President Bill Clinton. DOMA did two things. *First*, it recognized the traditional definition of marriage as between one man and one woman for all aspects of federal

law. *Second*, it ensured that no State is obligated to accept another State's non-traditional marriages (or civil unions) by operation of the Constitution's Full Faith and Credit Clause (art. IV, sec. 1). Thirty-seven States have passed constitutional amendments or statutes commonly known as "state DOMAs" that further protect traditional, heterosexual marriage.

Since federal DOMA was passed, academics and activists alike have crafted a plethora of legal arguments claiming that the federal and state DOMAs are unconstitutional. The possibility of a court declaring federal DOMA unconstitutional and mandating same-sex marriage is more likely today than ever before. Gay marriage activists can be expected to pursue several court strategies:

•Full Faith & Credit Challenges. Same-sex couples will "marry" in Massachusetts and then file lawsuits in other States to force those States to recognize the Massachusetts marriage.

They likely will argue that federal DOMA is unconstitutional as an overly broad interpretation of the Full Faith and Credit clause and as inconsistent with principles of equal protection and substantive due process.

•Activists will file new cases similar to *Goodridge* in other States and demand recognition of same-sex marriage as a constitutional right under state law. The Massachusetts decision will serve as persuasive precedent for other courts interpreting parallel provisions in their state constitutions.

•Same-sex couples who have "married" in Massachusetts (or who have civil unions, as some do in Vermont) will apply for federal benefits such as federal employee health insurance, and under federal DOMA those requests will be denied.

They may then sue in federal court and argue that the definition of marriage in DOMA (for federal purposes) is unconstitutional as a matter of federal equal protection and substantive due process. Such a case could end up in the Supreme Court.

This proliferation of lawsuits could well produce additional victories for gay marriage advocates.

The Time to Act is Now

Now that same-sex marriage is on the verge of being legalized in Massachusetts, thousands of homosexual couples from in and out of that Commonwealth will rush to marry. Any later attempts to "react" to the growth of same-sex marriage will then be construed as an effort to deprive those homosexual couples of their legal status. A constitutional amendment to ban same-sex marriage would be taking away a right that has been invented and granted by a court. It is imperative that Congress not allow the institution to spread before Congress acts; otherwise, homosexual couples will rely upon the court edicts and remake their lives accordingly. The legal complications that will ensue, as well as the risk that society will be less willing to confront the question itself when faced with the reality of thousands of same-sex marriages, argue strongly in favor of prompt action to confront this issue.

It is important also to recognize that same-sex marriages in Massachusetts inevitably will impact the legal and social life of other States. Homosexual couples that marry in Massachusetts would have all the benefits of married couples in that Commonwealth. Many will buy property in and out of the State, adopt and rear children, get divorced, incur child support and alimony obligations, and enmesh themselves in the same kinds of legal obligations that most traditionally married couples do. It is inevitable, though, that many of those homosexual

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couples will move out of Massachusetts and seek to enforce those legal obligations in other States' courts. For example, it is easy to anticipate issues relating to child support, alimony, and property division at the time of divorce spilling over into other States.

What will the other State's courts do when asked to adjudicate disputes grounded in Massachusetts same-sex marriages? A complex body of law

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known as "choice of law" has evolved to address these matters in the context of traditional marriages. Moreover, federal and state statutes have been enacted to regularize the treatment of these kinds of obligations across State lines. In the context of same-sex marriage, where 37 States have indicated their opposition to the institution, judges may refuse to apply these statutes. (Recall that federal DOMA defines "marriage" and "spouse" for purposes of all federal laws and regulations.) But no state court will be able to put its head in the sand for long because the practical legal and human problems will proliferate — problems of children in need of child support payments, of custody disputes for divorced homosexual couples, of homosexual former spouses being denied benefits rightfully theirs under Massachusetts law, and so forth. All the efforts to craft uniform solutions to matters of family law over the past half-century could prove useless in the context of homosexual couples who have left Massachusetts. Nor is it a sufficient response to say that these couples should not leave that Commonwealth, because such a solution would threaten the right to travel among the States as recognized by the Supreme Court.

Given our integrated national economy and the mobility of the nation's citizenry, same-sex marriages in Massachusetts will end up affecting the laws and cultures of all other States. As the States struggle to react, the risk of Supreme Court intervention to create a uniform standard (or at the least to permit recognition of out-of-state homosexual unions) will only increase.

The Need For A Constitutional Response

The Massachusetts court has done its part to destroy traditional marriage by redefining its most historic and natural characteristics

This ruling cannot help but remake the social infrastructure of the entire nation if allowed to stand. The question that Congress and the American people must ask is whether it is willing to allow the *courts* to redefine the marital institution based on conclusions of a few judges, or whether the people's strong preference to preserve traditional marriage should be respected and preserved.

Additional Statutes Will Not Be Enough to Stop the Courts

Constitutional amendments ought to be rare — employed only when no other legislative response will do the job. However, no statutory solution appears to be available to address the current campaign through the courts. Congress already has passed DOMA, its effectiveness in the face of strenuous challenges in the courts remains to be seen. Some have suggested that Congress pass a "Super DOMA" — a repeat of DOMA coupled with an effort to deprive the federal courts of jurisdiction to review it under article III, section 2 of the Constitution.

But such a strategy would not prevent state courts from creating same-sex marriage, and litigants surely would challenge such a dramatic effort by Congress to deny litigants the chance to have their purported fundamental rights (be they due process, equal protection, or otherwise) reviewed in federal court. Similarly, some have suggested that Congress should deny States funds unless they protect marriage through a state

DOMA. Such an option would also face constitutional challenges and would have the policy effect of harming many Americans in their greatest time of need. If Congress is to prevent the courts from undoing its work and, once and for all, ensure the preservation of traditional marriage, then it should begin to consider constitutional options.

Any effort to amend the Constitution should emphasize the following principles:

Federal DOMA must be defended from the courts. DOMA ensures that (a) the traditional man-woman marriage standard governs for all federal law, and (b) States' right to deny recognition of other States' untraditional legal relationships remains intact. The Massachusetts *Goodridge* and *Lawrence* (Texas sodomy law) developments demonstrate that neither of these provisions is immune from constitutional challenge.

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The U.S. Constitution should not be construed to change the traditional definition of marriage. Most Americans believe, and it should be United States policy, that no court — from the U.S. Supreme Court down through all federal, state, and territorial courts — should have the power to change the traditional definition of marriage. Neither the original Constitution nor any of its amendments was adopted with such an intention.

States should retain the right to grant some legal benefits to same-sex couples. The Constitution should not limit the ability of States, through their elected representatives or by popular will, to address the question of whether homosexual couples (as couples) should enjoy certain benefits, such as a right to file joint state tax returns, access to medical records, access to pension or other state employment benefits of homosexual partners, inheritance rights, or a variety of other civil benefits.

An Existing Proposal: The Federal Marriage Amendment

There exists at present a vehicle to pursue the above principles, a constitutional amendment proposed in the Senate called the Federal Marriage Amendment ("FMA"). S.J. Res. 30 provides: *Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.*

This amendment would create a uniform national definition for "marriage" for purposes of federal and state law, and would prevent any state from creating same-sex marriage. However, the amendment is designed to preserve the ability of state *legislatures* to allocate civil benefits within each State. State *courts* (like Massachusetts) would not be able to create this new right. In addition, no court at any level would be able to rely upon a state or federal constitution to mandate recognition of another State's distribution of benefits (the "legal incidents of marriage") to non-traditional couples. The Federal Marriage Amendment is the only proposed constitutional amendment presently pending before Congress to address the likely ramifications of the *Goodridge* and *Lawrence* decisions. The FMA has bipartisan support. Some have questioned whether the text of the FMA *would* in fact permit civil unions. And some FMA opponents argue that questions relating to marriage should be left to the States altogether, with no federal role.

Portions of this report were excerpted from "The Threat To Marriage From The Courts," published July 29, 2003.