

THE NECESSITY OF A FEDERAL MARRIAGE AMENDMENT

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I have been involved in several cases dealing with civil unions, same-sex partners and domestic partnerships. I brought the suit in *Connors v. City of Boston*,¹ which successfully overturned Boston's domestic partners law, and also the *Catavolo*² case that overturned the Cambridge domestic partners law. I argued then, and still consider today, civil unions and domestic partnerships to be Trojan Horses for marriage. Additionally, I brought a lawsuit seeking to overturn the *Goodridge*³ decision in Massachusetts.⁴ I am also involved in several other same-sex marriage lawsuits such as *Kerrigan*⁵ in Connecticut, *Harris*⁶ in New Jersey, and *Bruning*⁷ in Nebraska.

Today, I am speaking in support of the Federal Marriage Amendment (FMA) which states:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor 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.⁸

This bill does not create any new rights and it takes away no rights that we all share today. In fact, very few rights held by married couples are held solely by married partners because they are married. What this bill does do is reserve to the people the right to decide to keep marriage between one man and one woman, unchanged for the future. It would deny to the courts the power to radically alter the nature of marriage any time a new group comes along to change its gender, number, or any of the other traditional criteria for marriage. It would prevent a court

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¹ *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999).

² *Catavolo v. Cambridge*, No. 00-1319 (Mass. Super. Ct. Oct. 30, 2000) (order enjoining defendants from providing insurance benefits to "domestic partners").

³ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁴ *Largess v. Supreme Judicial Court of Mass.*, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 618.

⁵ *Kerrigan v. State* (Conn. Super. Ct. filed Aug. 25, 2004).

⁶ *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003).

⁷ *Citizens for Equal Prot. v. Bruning*, No. 4:03CV3155 (D. Neb. filed Apr. 2003), *complaint available at* <http://www.domawatch.org/cases/nebraska/citizensforequalprotectionvag/complaint.pdf> (last visited Mar. 2, 2005).

⁸ S.J. Res. 30, 108th Cong. (2004).

from allowing brothers and sisters to marry, adults and children to marry, more than two persons to marry and persons of the same sex to marry. It would have stopped *Goodridge*⁹ in its tracks.

I cannot think of any reason to deny to the people their power to preserve marriage as proposed by the Federal Marriage Amendment. This is not a situation in which a discrete and powerless group seeks to win freedom from an oppressive majority. The power of the homosexual lobby far exceeds its numbers due to its affluence, intelligence and placement in the positions of the cultural elite. Their political progress should not have surprised anyone given its powerful base.

This Amendment does not change the well-established historic traditions and understanding of marriage, but preserves the unique legal status of marriage as it has been received and understood in the states since their very founding. It closes loopholes in existing law and expresses in constitutional text the unique value of marriage in the legal system. As a legal institution of the state, marriage dates back to the earliest known legal code, that of Hammurabi ca. 1780 B.C., and contracts exclusively non-incestuous adult unions of men and women; this is exactly its present form in the United States, with respect to age of consent, consanguinity, and sex of the spouses, without change for nearly 4,000 years.¹⁰

The greatest threat to our nation, including the people of Massachusetts, is the growing threat to the integrity of our families. The consequences of the disintegration, redefinition, and devaluation of marriage and of marital parenting are very detrimental, not only to adults who are hurt in demonstrable ways (economic, social, educational, health, and well being) but especially to children. Children are deeply disadvantaged by the devaluation, marginalization, and disintegration of marriage and marital parenting. Marriage is the foundation and the core of the family, and as marriages are appreciated, valued, strengthened, and successful (or devalued, dissolved, and destabilized), the environment in which children are raised is healthy, functionally effective, and supportive (or dysfunctional, dangerous, and disadvantaged). As go the marriages and the families of Massachusetts and America, so go the state and the nation. Yet in many ways we seem to have forgotten this. There is a great need to re-establish basic principles.

Marriage is unique and uniquely important to society and to families. Other relationships do not contribute as much to the well-being of individuals or society. Men and women are different, and the

⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁰ M.E.J. RICHARDSON, *HAMMURABI'S LAWS: TEXT, TRANSLATION AND GLOSSARY* 81-91 (M.E.J. Richardson trans., 2000).

union of a man and a woman is different from the union of two men or two women. The institution of marriage—understood as the union of a man and a woman—is one of the foundational institutions of our society; it forms the bedrock and substructure upon which the superstructure of constitutional rights and government are founded. The FMA will protect that bedrock and preserve that foundation.

Social science confirms that children suffer when biological families do not persevere across generations, that is, when children's own households lack a capacity to reproduce themselves by raising biological children who then raise children themselves, going on to establish stable, harmonious families. The stable, harmonious, multi-generational family therefore arises in direct proportion as one man marries one woman who then stay married, and raise biological children who in turn do likewise. Every departure from this standard therefore reduces the likelihood of multi-generational stability. Furthermore, the stability of a society is directly dependent upon the degree to which such multi-generational families are present within that society.

Several years ago, the Vermont Supreme Court ruled in favor of three same-sex couples that had filed a lawsuit seeking marriage licenses in Vermont.¹¹ The state supreme court ruled that there is no difference between traditional marriages between man and woman and same-sex unions of two gay men or two lesbian women.¹² The court then directed the state legislature to “craft an appropriate means” of either legalized same-sex marriage or registered same-sex domestic partnership laws, “which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing scheme, and extend all or most of the same rights and obligations provided by the law to married partners.”¹³ The Vermont Legislature complied with the judicial demand and enacted civil unions for same-sex couples with the same legal status and rights as marriage.¹⁴ *Baker* was the third case in four years where a state court had either ordered the legalization of same-sex marriage or entered a preliminary ruling in favor of same-sex marriage. In the earlier Hawaii and Alaska cases, the people of the states were able to overturn the radical judicial decisions by enacting constitutional amendments protecting the institution of marriage against demands for same-sex marriage.¹⁵ But in Massachusetts, the procedure for amending

¹¹ *Baker v. State*, 744 A.2d 864 (Vt. 1999).

¹² *Id.* at 886.

¹³ *Id.*

¹⁴ VT. STATS. ANN. tit. 15, § 1201 (Michie 2001).

¹⁵ See ALASKA CONST. art. I, § 25; HAW. CONST. art. I, § 23. Both amendments were passed following court decisions favorable to homosexual unions. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998)

the state constitution is so restrictive and anti-populist that it will take a long time to get an amendment there.¹⁶

In *Goodridge*, the Massachusetts Supreme Judicial Court voted by a slim majority of four to three to strike down Massachusetts's law which prohibited same-sex marriage.¹⁷ The *Goodridge* court did so without the constitutional jurisdiction to decide marital issues, which is given by the state constitution only to the governor and legislature.¹⁸ The court decided that the legislature—the governmental body with constitutional authority to decide this issue or delegate such a decision to the court—lacked even a rational basis to deny same-sex partners the right to marry, despite overwhelming evidence that the prohibition of same-sex marriage is not only rational but overwhelmingly required for the health, welfare, and general well-being of children.¹⁹

It does not take a world class psychologist or a sociologist to conclude that children are better off in a family with a father and a mother. What same-sex marriage endorses is fatherless and motherless families. Groupings of two men deny a mother to any child adopted by that coupling. Similarly, a relationship of two women denies a father to any child adopted by the women. Mothers and fathers are indispensable to the optimum family in which to raise children. Studies documenting the harm to children raised without a father or a mother are voluminous.²⁰

Some say that the federal Defense of Marriage Act (DOMA) by itself will protect families and children.²¹ To protect children, we need more than just DOMA. DOMAs—either federal or state—are not a fail-safe system. DOMA will be attacked under federal and state law, and some courts will begin to uphold those challenges. For example, in a case that I am working on in Nebraska²² which attacks a state constitutional DOMA passed by the people of Nebraska,²³ the trial court upheld, in the

(holding that a marriage statute violated the right to privacy provision in the Alaska Constitution); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that a marriage statute implicated the Hawaii Constitution's equal protection clause).

¹⁶ See MASS. CONST. amend. art. XLVIII, ch. 4.

¹⁷ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that limiting marriage to heterosexual couples violates the Massachusetts Constitution).

¹⁸ MASS. CONST. pt. 2, ch. 3, art. V.

¹⁹ *Goodridge*, 798 N.E.2d at 961.

²⁰ See *infra* notes 27-40 and accompanying text.

²¹ See Defense of Marriage Act, 1 U.S.C. § 7 (Supp. 2004); 28 U.S.C. § 1738C (2003).

²² *Citizens for Equal Prot. v. Bruning*, No. 4:03CV3155 (D. Neb. filed Apr. 2003).

²³ NEB. CONST. art. I, § 29. This section provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." *Id.*

face of a motion to dismiss, a ridiculous theory of bill of attainder.²⁴ This proves that courts will do any foolish thing to uphold the “right” to same-sex marriage. Without the protection of the FMA, this wave of momentary boutique philosophy will pass right over us.²⁵ Those that think that DOMA will not be struck down by some federal or state judge who is hell-bent on changing the law of marriage to conform to the latest same-sex marriage fad are foolish. Despite the overwhelming evidence of the rationality of preferring opposite-sex marriage over same-sex marriage, the judges in Massachusetts went ahead and struck down their laws in favor of an untested theory of same-sex marriage anyway.²⁶

Turning back to the effect of same-sex marriage on children, the salient feature of a female union is its *fatherlessness*. *Fatherlessness* presents a host of difficulties. Children fare best when raised by their own father and mother. *Fatherlessness* is such a salient feature of a female coupling because research has overwhelmingly demonstrated that any and every departure from the standard, often unattainable, ideal of a biological father and mother married for an entire lifetime, raising their own children, is associated with quantifiable problems for children at every stage of the life cycle, persisting not only into the adulthood of the child but even into the next generation.

For example, 90% of all homeless and runaway children, 85% of all children with behavioral problems, 85% of all youth in prison, 71% of all high school dropouts, 63% of all youth suicide, and well over 50% of all teen mothers come from fatherless homes.²⁷ Not all these problems can be caused by *fatherlessness alone*, but it would be foolish to deliberately design a social structure that institutionalizes it. The same is true with respect to male unions and *motherlessness*, but the proportion of male unions with children is much smaller than female unions with children.²⁸ In addition, only recently has it occurred to anyone to question whether children actually need mothers, so that the research confirming they indeed do, convincing as it is, is smaller than for fathers whose necessity was first questioned some forty years ago.

²⁴ Complaint at 14, *Citizens for Equal Prot.* (No. 4:03CV3155).

²⁵ Consider the (as of now) hypothetical situation where a lesbian couple from Pennsylvania flies to Massachusetts, obtains a marriage license, returns to Pennsylvania, and sues the United States or the Commonwealth of Pennsylvania to have the federal DOMA struck down.

²⁶ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

²⁷ *U.S. Divorce Statistics*, at <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Mar. 2, 2005) (compiling statistics from the U.S. Census Bureau, National Center for Health Statistics, Institute for Equality and Marriage, and other organizations).

²⁸ G.C. Mireault et al., *Maternal Identity Among Motherless Mothers and Psychological Symptoms in Their Firstborn Children*, 11 J. CHILD & FAM. STUD. 287, 297 (Sept. 2002).

With respect to *fatherlessness*, quantifiable deficits occur in literally every area of development—socially,²⁹ psychologically,³⁰ educationally,³¹ emotionally,³² relationally,³³ medically,³⁴ even with respect to longevity,³⁵

²⁹ See, e.g., Greg J. Duncan et al., *Economic Deprivation and Early Childhood Development*, 65 CHILD DEV. 296 (1994) (finding that female-headed households were a predictor of behavior problems even after adjusting for differences in family income); Abbie K. Frost & Bilge Pakiz, *The Effects of Marital Disruption on Adolescents: Time as a Dynamic*, 60 AM. J. ORTHOPSYCHIATRY 544 (1990) (finding that, in a study of white 15-year-olds, girls and boys from “disrupted” families engaged in more delinquent behavior, with the impact more profound among girls); M. Eileen Matlack et al., *Family Correlates of Social Skill Deficits in Incarcerated and Non-incarcerated Adolescents*, 29 ADOLESCENCE 117 (1994) (finding improved attainment of social skills and decreased delinquent or criminal behavior among adolescents from traditional families).

³⁰ See, e.g., John Beer, *Relation of Divorce to Self-Concepts and Grade Point Averages of Fifth Grade School Children*, 65 PSYCHOL. REP. 104 (1989) (discovering lower scores on self concept for children from divorced homes); Virginia Smith Harvey, *Characteristics of Children Referred to School Psychologists: A Discriminant Analysis*, 28 PSYCHOL. IN SCHOOLS 209 (1991) (finding that family background was among “the variables that best discriminated” between those elementary school children referred to the psychologist and those not referred); Beverly Raphael et al., *The Impact of Parental Loss on Adolescents’ Psychological Characteristics*, 25 ADOLESCENCE 689 (1990) (finding that adolescents from “disrupted” families reported more neuroticism, less extroversion and poorer perceptions of their bodies).

³¹ See, e.g., EDWARD W. BEAL & GLORIA HOCHMAN, *ADULT CHILDREN OF DIVORCE: BREAKING THE CYCLE AND FINDING FULFILLMENT IN LOVE, MARRIAGE, AND FAMILY* (1991) (finding that even a parent’s death does not bring as much disruption to a family as divorce, which leads to lower educational attainment and less prestigious jobs); Paul R. Amato & Bruce Keith, *Parental Divorce and Adult Well-being: A Meta-Analysis*, 53 J. MARRIAGE & THE FAMILY 43 (1991) (finding that, in a study of over 81,000 individuals, one of the effects of fatherless homes was lower educational attainment for children); Donna Goldberg et al., *Which Newborns in New York City Are at Risk for Special Education Placement?*, 82 AM. J. PUB. HEALTH 438 (1992) (noting a strong link between the marital status of parents and the special education status of their children among black male third graders, with an even stronger link among other groups).

³² See, e.g., Darin R. Featherstone et al., *Differences in School Behavior and Achievement Between Children From Intact, Reconstituted and Single-Parent Families*, 27 ADOLESCENCE 1 (1992) (finding that, for young adolescents, living with both parents “clearly appears advantageous for social-emotional development”); Raphael et al., *supra* note 30 (finding that Australian adolescents in disrupted families were more likely to have consulted a health professional regarding emotional problems).

³³ See, e.g., Angela K. Baker et al., *The Relation Between Fifth and Sixth Graders’ Peer Related Classroom Social Status and Their Perceptions of Family and Neighborhood Factors*, 14 J. APPLIED DEVELOPMENTAL PSYCHOL. 547 (1993) (finding that “children who were rejected by their peers were more likely than average children to have experienced parental divorce”); Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, 106 POL. SCI. Q. 617 (1992) (stating that the trend toward divorce, single-parent families and out-of-wedlock births “leaves too many children with . . . fewer alternatives for establishing intergenerational relationships, and fewer adult role models”); Stephanie Schamess, *The Search for Love: Unmarried Adolescent Mothers’ View of and Relationships With Men*, 28 ADOLESCENCE 425 (1993) (noting that “paternal unavailability” makes adolescent girls “particularly vulnerable to involvement with men who would treat them badly”).

sexuality,³⁶ likelihood of cigarette use,³⁷ drug and alcohol abuse,³⁸ age of onset of sexual activity,³⁹ and likelihood of teen or earlier pregnancy.⁴⁰ *Fatherlessness* produces problems throughout the life cycle and into the following generation. Associated with fatherlessness in the teen years

³⁴ See, e.g., BEAL & HOCHMAN, *supra* note 31 (linking poorer physical health with adult children of divorce); Amato & Keith, *supra* note 31 (showing that, in comparison to adults from intact families, those from disrupted families experienced more problems with physical health); Claudia J. Coultou & Shanta Pandey, *Geographic Concentration of Poverty and Risk to Children in Urban Neighborhoods*, 35 AM. BEHAV. SCIENTIST 238 (1992) (finding that the greatest predictor for problems in health and development for children was illegitimate birth).

³⁵ See, e.g., James O. Mason, *Reducing Infant Mortality in the United States Through 'Healthy Start'*, 106 PUB. HEALTH REP. 479 (1991) (showing that "the presence of both a mother and a father greatly enhances the life chances of infants and children"); Anders Romelsjö et al., *Protective Factors and Social Risk Factors for Hospitalization and Mortality Among Young Men*, 135 AM. J. EPIDEMIOLOGY 649 (1992) (finding, in a 14-year longitudinal study of Swedish men, that "relative hazards of hospitalization and death were significantly increased" among those who came from a disrupted family).

³⁶ See, e.g., Jennifer Glass, *Housewives and Employed Wives: Demographic and Attitudinal Change, 1986*, 54 J. MARRIAGE & THE FAMILY 559 (1992) (finding that housewives and wives employed full-time have a pronounced attitudinal gap on questions "directly related to appropriate gender roles in the family and the impact of mother's employment on children"); Audrey E. Tolman et al., *Social Connectedness and Mothering: Effects of Maternal Employment and Maternal Absence*, 56 J. PERSONALITY & SOC. PSYCHOL. 942 (1989) (finding that college age daughters of mothers employed early in their lives regard themselves as "less feminine" than other young women); Katherine Trent & Scott J. South, *Sociodemographic Status, Parental Background, Childhood Family Structure, and Attitudes Toward Family Formation*, 54 J. MARRIAGE & THE FAMILY 427 (1992) (finding that adults who never lived with their fathers were likely to reject social norms, compared with those adults who had lived part or all their childhood with their fathers).

³⁷ See, e.g., Hillevi M. Aro & Ula K. Palosaari, *Parental Divorce, Adolescence, and Transition to Young Adulthood: A Follow up Study*, 63 AM. J. ORTHOPSYCHIATRY 421 (1992) (finding a distinct propensity toward heavy drinking and smoking persisting among young adults from disrupted families); Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Abuse and Sexual Intercourse in Early Adolescence*, 52 J. MARRIAGE & THE FAMILY 171 (1990) (finding that adolescents from disrupted families are more likely to be involved in sexual activity, marijuana use, smoking and drinking).

³⁸ See *id.*

³⁹ See, e.g., Flewelling & Bauman, *supra* note 37; Schamess, *supra* note 33 (noting that "girls reared by single mothers are significantly more likely to become sexually active in their teens than are those raised by two parents").

⁴⁰ See, e.g., John O. G. Billy & David E. Moore, *A Multilevel Analysis of Marital and Nonmarital Fertility in the U.S.*, 76 SOC. FORCES 977 (1992) (finding that unmarried women are especially likely to bear children if they live in an area where a relatively high proportion of the women are separated or divorced); Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 58 AM. SOC. REV. 210 (1993) (finding that "being in a non-intact family at age 14 significantly increases the risk of a premarital birth" for whites, blacks and Hispanics).

are an increased likelihood of every sexual activity, drug use, delinquency, and much more; drug use often persists into adulthood.

In 2004, a Federal Marriage Amendment to the United States Constitution was procedurally rejected by the Senate.⁴¹ The FMA would have prohibited federal and state judges from making decisions about marriage in place of the voters of the fifty states. The United States Supreme Court in *Lawrence v. Texas*,⁴² and the Massachusetts Supreme Judicial Court in *Goodridge*,⁴³ made it clear that the federal and state courts are ready to usurp the power to decide the definition of marriage which has been held by the citizens of the states for hundreds of years.

In *Lawrence*,⁴⁴ the United States Supreme Court decided to legitimize sodomy, which has been legislatively proscribed throughout the United States for hundreds of years; the Court had itself only recently upheld the constitutionality of a sodomy statute.⁴⁵

These decisions are way outside the mainstream of legal thought and are disconnected from our common law and legislative traditions. They also ignore the facts before these courts. It is important to note that men and women are more unlike by a factor of 2.5 than the number of differences between the human genome and the chimpanzee genome. The sexes are not fungible. A community made up exclusively of one sex is different than a community composed exclusively of the other sex. All of this must be taken into consideration in making a decision about tearing down some 4,000 years of our most important human tradition.

Neither male homosexuals nor female lesbians have a tradition of monogamy which, again, makes their claims of stability disingenuous and adversely affects any children that they have in their care. One study of male homosexual couples showed that homosexuals had sex with someone other than their partner in 66% of their relationships, rising to 90% if the relationship endured over five years.⁴⁶ These differences between male and female relationships and homosexual and heterosexual relationships were never considered by the court in *Goodridge*, which was patently ignorant of all of these important facts mentioned above.⁴⁷ Courts are not bodies set up to hear sociological, moral, and medical evidence regarding the best interests of children or

⁴¹ See 150 CONG. REC. S8150 (daily ed. July 15, 2004).

⁴² *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas statute criminalizing deviate sexual intercourse was unconstitutional).

⁴³ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁴⁴ *Lawrence*, 539 U.S. at 558.

⁴⁵ *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 558.

⁴⁶ See, e.g., JOSEPH HARRY, GAY COUPLES (1984).

⁴⁷ The *Goodridge* dissent criticizes the majority on this basis. *Goodridge*, 798 N.E.2d at 998-1000 (Spina, J., dissenting).

the importance of maintaining an institution that has held us in such good stead for over 4,000 years. Only the legislatures can hold hearings to obtain and organize these materials. Only the legislatures can make these very important decisions regarding the institution of marriage.

The FMA is essential to shore up and work together with DOMA to hold marriage together. Without it, the courts will eventually overrun a 4,000-year-old institution that has brought stability, growth, love, culture, and education to adults and children alike. Without the FMA, it is clear that the attempt to destroy marriage as we have known it will ultimately be successful. If we want to maintain our families, we must be willing to fight for them. Those seeking to deconstruct marriage will surely fight, and without our opposition, will be successful.