

Why the Case for Amending the U.S. Constitution to Prohibit or Regulate Gay Marriage is “Not Proved”

by VIKRAM DAVID AMAR AND ALAN BROWNSTEIN*

Conservative and moderate Republicans (and more than a few Democrats) are waiting to see how vigorously President Bush will campaign, during his second term, for his proposal to amend the U.S. Constitution to prohibit recognition by any State of same-sex marriages. In his January 2005 State of the Union message, the President reaffirmed his support for the idea, but did not give a sense of how hard he will push.

Article V of the Constitution lays out amendment procedures.¹ One path to amending the Constitution under Article V requires a two-thirds vote in both houses of Congress, after which a measure will then be sent out to the States for ratification consideration. At present, the chances seem slim that the proposal will get a two-thirds

* Vikram Amar is the Harry and Lillian Hastings Research Professor at the University of California, Hastings College of the Law, and a Visiting Professor of Law at the University of California at Berkeley. Alan Brownstein is a Professor of Law at the University of California at Davis School of Law. This piece reflects the substance of remarks made by Vik Amar at the Hastings Constitutional Law Quarterly Symposium on gay marriage held at UC Hastings on February 11, 2005, and is adapted from op-ed and on-line columns the two authors have written on these topics.

1. Article V provides, in relevant part:

“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress”

U.S. CONST. art. V. Whether Article V’s procedures are the only ways to legally amend the Constitution is a contentious question. For further discussion of this issue, see Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000).

majority in either house – especially the Senate – but things can change quickly in Washington.

There is in any event another possible amendment procedure provided for under Article V: two-thirds of the State legislatures may call for a “convention” to consider amendments. This route has never been successfully invoked, but it remains a real possibility in this context, especially in light of the gains made by anti-gay-marriage forces in November 2004 in eleven state initiative campaigns.² In short, the issue of a federal constitutional ban on gay marriage appears unlikely to go away any time soon.

In this short essay, we make some general observations on when amending the federal Constitution is a wise thing to consider, and apply those observations to the question of gay marriage.

It is generally recognized that federal constitutional law entrenches legal principles by taking them outside the normal scope of the political process. By this, we mean that requirements and prohibitions embodied in the U.S. Constitution and its interpretation are very difficult, if not impossible, to displace or even modify through conventional political channels. Indeed, one might reasonably say that nothing about the evolution or modification of constitutional law involves the *conventional or normal operation of democratic politics*.

Constitutional law develops in two ways. First, constitutional law unfolds through judge-made interpretations of the Constitution in U.S. Supreme Court and lower court decisions. Concededly, there is a political dimension to judicial rulings – even constitutional decisions by courts cannot be entirely isolated from the prevalent political culture of the United States. Yet judicial decisionmaking is not really political in the same sense that congressional lawmaking is political. And judicial decisionmaking is certainly not unqualifiedly democratic, since the will of the current majority – at least as expressed through current statutes – is often frustrated by what judges do.³

Second, constitutional law evolves through the amendment process by which the text of the document is itself changed.

2. The states that enacted through direct democratic means anti-gay-marriage measures in November 2004 were: Arkansas, Georgia, Kentucky, Michigan, Montana, Mississippi, Ohio, N. Dakota, Oklahoma, Oregon, and Utah. Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39.

3. This does not mean that judicial review is ultimately inconsistent with fundamental democratic principles, insofar as the judicial review is based on enforcing the Constitution that We the People continue (by our failure to amend it) to exalt as the highest expression of majority will.

Compared to judicial decisionmaking, this process is certainly more overtly political – amending the Constitution is accomplished by a “campaign” and a voting process that has many similarities to other elections. Whether it is democratic is a different matter – the relationship between the amendment process and democracy is complex.

Begin by noticing that Article V mandates that three-quarters of the States – what is called a “supermajority” of States, if not of people – must ratify an amendment before it takes effect. That means, in practice, that an amendment, in order to succeed, tends to have to attract overwhelming and geographically broad popular support. It also means that simple democratic majorities in the future may not be able to alter the amendment (which would, again, require a three-quarters State supermajority) or enact statutes inconsistent with it (for the Constitution is, by its own terms, the Supreme Law). The ability of the people in three-quarters of the States to constrain future decisionmaking by a simple national majority has virtues. But it is certainly in some tension with a simple definition of democracy as majority rule, and as rule by the people as they now exist, not as they once existed.

Finally, whether the amendment process is political and/or democratic, it certainly cannot be said to be normal or conventional. To the contrary, the amendment process has been successfully invoked only sporadically. Put to one side the Bill of Rights (which essentially came with the constitutional package in 1787), and the post-Civil War Reconstruction amendments (which were adopted when much of the United States was under military occupation and which, accordingly, depended more on the persuasiveness of union bayonets than political argument).

Other than these, the amendments adopted during our constitutional history include only fourteen “normal” amendments in 215 years. And two of those – the Eighteenth, establishing alcohol Prohibition and the Twenty-First, which repeals the Eighteenth – more or less cancel each other out. In sum, “extraordinary” is a more apt description of constitutional amendment than is “conventional.”

Constitutional law is entrenched whether it develops through judicial interpretation *or* by constitutional amendment. Yet there is an important sense in which the legal substance of amendments is particularly difficult to alter. Judicial interpretations of ambiguous language in the text of the Constitution are susceptible to being limited or overruled by subsequent judicial decisions. The clarity and precision of any particular judicial decision or opinion will not

immunize it from subsequent revision or rejection by the Court, because the Court engaged in the re-interpretative process can claim the same authority and legitimacy for its analysis as the Court that issued the initial interpretation of the disputed text. *Stare decisis* – the doctrine that judicial precedent ought to be accorded weight – may tend to entrench certain Supreme Court decisions somewhat, but not all decisions, and not for all time.

Constitutional amendments are different. A clear and precisely worded amendment cannot as easily be rejected by later judicial decisions, especially before the Amendment has become dated and the world has changed significantly due to the passage of time. As long as an amendment is relatively fresh (a period more likely to be measured in decades, or even centuries, than mere years), a Court attempting to alter or negate the amendment's textual command has significantly less authority and legitimacy than the political process by which the amendment was ratified.

Over the very long haul, of course, the meaning of even a precisely crafted constitutional amendment can sometimes be transformed by judicial interpretation. (Certainly, the current Court's interpretation of the Eleventh Amendment bears little resemblance to the language of the text.)⁴ But we submit that doing so is a much more demanding and costly undertaking for the Court than is a re-evaluation of any meaning assigned to a contested constitutional provision by the Court itself in an earlier case. Put simply, it is much easier for the Court to second-guess its own judgment than to second-guess a judgment explicitly embodied in a clear constitutional amendment.

Amending the Constitution thus uniquely immunizes a legal mandate from both normal political and judicial modification. No other political act can have such long-term, difficult-to-alter consequences. While the Constitution itself provides virtually no substantive constraints on the content of potential constitutional amendments, these procedural consequences raise serious questions about the propriety and wisdom of any proposed amendment.

Some commentators have suggested that certain subjects or topics are particularly appropriate subjects for a constitutional amendment. For example, some people argue that amendments are especially proper to establish ground rules for the operation of the democratic system, such as access to the right to vote. Meanwhile,

4. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1475 (1987).

others urge that particular issues are distinctively inappropriate for resolution at the federal constitutional level. Among the examples given here are health and morality standards – such as the later-revoked prohibition on the manufacturing, sale, or transportation of alcoholic beverages. While these arguments provide relevant background, we are not sure that, standing alone, they are persuasive enough to determine the legitimacy of any given amendment. We suggest today one alternative criterion that, we believe, ought to be of paramount importance – *whether a proposed amendment is being used to short-circuit ongoing democratic deliberation.*

Our suggestion here is simple enough: The Constitution ought not be amended to forestall acceptance of legal developments that are beginning to receive serious attention and consideration for the first time, and are starting to gain democratic traction in the polity. Rather, those kinds of developments should be allowed to be fully considered in democratic debate.

Enacted at moments of high politics, federal constitutional amendments embed into our Supreme law principles that are intended to endure. That is their virtue. But that is also why we must be careful in *adopting* them. We should ask, in essence: How will the mandate we are enshrining in today's proposed amendment look one, two or five generations from now? How likely is it to stand the test of time as an expression of principle, and not simply as an exercise of power? An amendment that cuts off debate precisely at the time when people's views are evolving stands a high chance of looking anachronistic and embarrassing, just as the Eighteenth Amendment's prohibition of alcohol feels so dated and out of touch today.

Some may point out that we were able to “fix” the mistake of the Eighteenth Amendment by enacting the Twenty-First. Yet the latter was easily ratified because Congress committed ratification not to state legislatures, which had ratified the Eighteenth, but to special ratification conventions in each state. The Eighteenth Amendment's adoption by malapportioned state legislatures, perhaps unrepresentative of public views, may have made it particularly easy to undo. Thus, the Prohibition experience doesn't diminish the idea that avoiding constitutional mistakes in the first place is the wiser course.⁵

Proper amendments should ordinarily seek to codify the resolution of an issue that already has been sufficiently vetted both by

5. See Vikram Amar, *Better to Avoid Mistakes Than Make Amends*, L.A. TIMES, Mar. 14, 2004, at M3.

debate and experience. When long-term closure on a particular question has been reached – closure that would likely exist, more or less, even without the formalized act of an amendment – an amendment is appropriate, to memorialize and entrench the resolution that has been achieved, and to provide courts an undebatable means of enforcing it.

How do the current proposals to amend the Constitution to ban same-sex marriage fare under this test? We submit that they fail it pretty clearly. We believe same-sex marriage opponents can fairly be characterized as attempting to forestall democratic deliberation over the long-term on this issue. And as we have noted, an amendment that has the purpose of doing this is the very kind we consider inappropriate.

We start with two observations. First, legal rules relating to marriage have never been constitutionally codified at the national level. There is no constitutional ban on incestuous marriages although, historically, the content of consanguinity laws has varied among the states. There is no constitutional ban on polygamous marriages—although controversy over this issue came close to starting a religious war in the United States. No federal constitutional amendment prohibits a state from recognizing a marriage between an adult and a child. The Constitution does not even explicitly prohibit coerced marriages. In all these situations, and with regard to myriad other questions about the nature and meaning of marriage, state law and federal statutory law are considered adequate to regulate marriage.

Moreover, the only times the Constitution has been applied directly to the regulation of marriage in over two centuries, judge-made constitutional doctrine *has limited a State's ability to prevent people from getting married.*⁶ Accordingly, the use of a constitutional amendment to *restrict* marriage arguably bears a greater burden of justification than an amendment regulating the franchise or office-holding, for example, since the latter subjects are so much more commonly recognized as the kinds of issues that require constitutional attention.

Second, it is only fairly recently that many Americans have begun to focus on, and think critically about, the historical presumption that marriage should be restricted to heterosexual couples. Attitudes about homosexuality have changed substantially

6. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 2 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 377 (1978).

over the last fifteen years. A broadly based dialogue has begun. That discussion takes place in businesses where companies wrestle with questions relating to the provision of employment-related benefits to gay and lesbian couples. It takes place in churches and synagogues as clergy and congregations debate the morality of recognizing same-sex relationships for religious purposes. It is addressed in the halls of Congress, state legislatures, and city councils. And it is reflected in constitutional litigation evaluating both equal protection claims, and right of intimate association claims, relating to same-sex relationships.

Moreover, this new dialogue is no longer limited to a small segment of the population – a narrow class of intellectuals, the gay community itself, or activist judges. Millions of Americans have begun to question conventional responses to this issue. Five years ago, for example, thirty-nine percent of the California electorate voted against a state-wide initiative restricting marriage to a man and a woman.⁷

More importantly, this dialogue is an inter-generational one. Americans under the age of thirty have strikingly different attitudes about same-sex marriages than do Americans over the age of sixty.⁸

Given the reality that this dialogue is just getting under way, and that there has been so substantial a change in cultural attitudes in a short period of time, why should our society be contemplating a constitutional amendment to ban same-sex marriages now?

It is hard to avoid the conclusion that the purpose of this amendment is *to prevent this dialogue from continuing*. The goal would seem to be to prevent ongoing discourse and cultural change that might eventually be reflected in political decision making – in essence, to short-circuit democratic deliberation about this normative issue before further changes in political attitudes occur. If successful, the gay-marriage ban amendment would be the first pre-emptive constitutional amendment in American history. From a normative, if

7. See CAL. SEC'Y OF STATE, *Statewide Measures Submitted to a Vote of Voters (By County)*, at http://www.ss.ca.gov/elections/sov/2000_primary/measures.pdf (last visited Apr. 25, 2005).

8. See, e.g., Dana Blanton, *Majority Opposes Same-Sex Marriage*, FOXNEWS.COM, Jun. 18, 2004, at <http://www.foxnews.com/story/0,2933,103756,00.html>; see also David Morris & Gary Langer, *Same-Sex Marriage: Most Oppose It, But Balk at Amending Constitution*, ABCNEWS.COM, Jan. 21, 2004, at http://abcnews.go.com/sections/us/Relationships/same_sex_marriage_poll_040121.html. Jason Mazzone helpfully suggested to one of us that if so-called originalist methodology has some force because respect for past generations and their wisdom is appropriate, might not the same be true for future generations whose judgments we can already see emerging?

not a legal perspective, it constitutes a misuse of the amendment process.

As we have discussed, all constitutional amendments have an entrenching effect to some extent. But our argument above extends only to amendments to the U.S. Constitution. State constitutions are so much more easily amended than is their federal counterpart – most often by a simple majority vote of the state polity – that it is much harder to argue that such state amendments relating to same-sex marriage are short-circuiting democracy in the same way.

Further, proposals to amend State constitutions to ban same-sex marriage are legitimated by the ongoing litigation in many jurisdictions that seek to use state constitutional law to remove legal obstacles to such relationships. Perhaps because a political response to any of their decisions that the polity may reject is so feasible, state constitutional courts have not displayed as much caution and restraint as has the United States Supreme Court in developing constitutional doctrine in this area.

The Supreme Court's analysis in *Crawford v. Bd. of Educ. of City of Los Angeles*⁹ – a case involving a popular initiative that reversed the California Supreme Court's pro-racial-busing interpretation of the State constitution – suggests that this distinction is valid. *Crawford* implicitly recognized that, if State supreme courts are going to interpret State constitutions expansively, as many State courts do, reaching substantially beyond federal constitutional mandates, then the people of the States must be able to use their political power to countermand those judicial decisions.

Let us be clear: As a personal matter, we both would oppose such State constitutional amendments on the merits. But we do not condemn such efforts in the way that we do condemn anti-same-sex-marriage federal constitutional amendments, as fundamentally inconsistent with constitutional norms.

All of this brings us, then, to the question whether there are counterarguments in support of a federal amendment right now that outweigh the strong presumption against this type of constitutional change we have just described.

Some proponents argue that a federal constitutional amendment banning same sex marriage is necessary to head off an imminent Supreme Court decision that, they predict, will require states to recognize same-sex marriage as a matter of federal constitutional law.

9. 458 U.S. 527 (1982).

Such a ruling is inevitable, they say, due to the logic of *Lawrence v. Texas*¹⁰ – where the Court invalidated Texas’ criminal ban on same-sex sodomy. Thus, they assert, a constitutional ban is really an attempt to promote political resolution of this issue, and avoid having a complex, value-based issue decided by judicial fiat. Further, they suggest, since the inevitable Supreme Court opinion recognizing same-sex marriage would itself prompt an amendment at that time, it is better to adopt the amendment now, so that the Court’s stature is not diminished by a rapid rebuke by the people of its decision.¹¹

Of course, if one takes this argument at face value, then the proposed amendment’s language should be narrowly limited, to say something like: “Nothing in this Constitution should be understood to require a state to recognize as a marriage any relationship other than one between a man and a woman.” Any proposed amendment that reaches beyond this kind of wording simply cannot be justified by the goal of avoiding a federal judicial mandate on this question. Yet many supporters of a constitutional amendment have offered much broader language in their proposals – language that forbids states from recognizing same-sex marriages within their own borders even if they so choose.¹²

In any event, we believe that an argument in favor of an amendment premised on the expectation that the Supreme Court is about to protect same-sex marriage in the name of the federal Constitution anytime soon is wrong-headed.

The Court remains moderate, if not conservative – and new Bush appointees, if there are any, are likely to keep it that way. We find it more than ironic that while liberal groups ponder the non-trivial possibility that the right to have an abortion will be overruled in the next few years, thoughtful conservatives have somehow convinced themselves that the Supreme Court is on the verge of legalizing same-sex marriage in the near future. It just ain’t so. Certainly, the Court

10. 539 U.S. 558, 579 (2003).

11. Doug Kmiec of Pepperdine Law School made this suggestion at the symposium event held at UC Hastings on Feb. 11, 2005.

12. For example, supporters of an amendment would add this language to the Constitution:

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, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

See H.R.J. Res. 56, 108th Cong. (2003) (introduced by Rep. Musgrave); see also S.J. Res. 26, 108th Cong. (2003) (introduced by Sen. Allard).

has done nothing in the last decade to suggest that it is ready to undertake such a radical adventure and move out far in front of the American polity and culture on the gay marriage issue.

It is true that *Lawrence* could be seen as a necessary precondition for such a decision – just as *Griswold v. Connecticut*, which implicitly protected non-procreational sexual activity, could be seen as a necessary precondition for *Lawrence* itself.

But there was a thirty-eight-year interval between *Lawrence* and *Griswold*, not to mention the Court's decision upholding anti-sodomy statutes in *Bowers v. Hardwick* in the interim period. Surely, this history demonstrates that the ultimate constitutional consequences of doctrinal foundations are seldom inevitable and rarely imminent.

Even if the Court someday does issue a decision protecting same-sex marriage, it might not do so for several decades. Indeed, a decision rejecting constitutional challenges to restrictions on same-sex marriage may well precede any future recognition of this equality right. To argue otherwise is, to our way of thinking, to misread *Lawrence* and the current Court's jurisprudence, of which it is a part, in critical ways.

Importantly, the *Lawrence* decision did not really involve the Court breaking new cultural and political ground. Criminal sodomy laws were seldom enforced, increasingly rejected by state courts and legislatures, and substantially out of sync with the country's views about sexuality and fairness. Recent election results regarding same-sex marriage paint a very different picture. If opposition to same-sex marriage is sufficiently strong that getting two-thirds of Congress and three-quarters of the states to support a constitutional amendment banning it is even a possibility, then this Court is not going to barge forward and challenge that orthodoxy.

This is not a Court that rocks the boat on fundamental rights. Mandating same-sex marriage in the near future would involve deliberately sailing into an iceberg.

A key problem with predicting a pro-same-sex-marriage Supreme Court ruling in the near term is that such a ruling would have to command the support of both Justice Kennedy and Justice O'Connor. Yet there are strong reasons to doubt that either of these two Justices would support such a ruling. Justice Kennedy reserves his passion and constitutional condemnations for what he sees as truly egregious governmental conduct. He will righteously protect religious liberty against a naked attempt to suppress a minority faith, as he did

in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹³ He will challenge a state constitutional amendment that exposes homosexuals as a named class to limitless civil disabilities, as he did in *Romer v. Evans*.¹⁴ And he will prohibit the state from sending adults to jail for engaging in consensual sexual acts in their bedrooms when that result seems dramatically inconsistent with conventional norms of fairness and tolerance, as he did in *Lawrence* itself.

But Kennedy goes with the cultural flow when decisions have any plausible, non-invidious justifications that comport with a broadly majoritarian, national consensus. Thus, he voted to uphold the ban on partial-birth abortion in *Stenberg v. Carhart*,¹⁵ and comfortably accepted the government's burdening of the free exercise rights of Native Americans to use peyote in *Employment Div., Dep't of Human Resources v. Smith*.¹⁶

As for Justice O'Connor, she often supports abstract standards of review that would seem to commit the Court to reach liberal results. Thus, for example, she insists that rigorous review is appropriate when laws substantially burden religious practice, that government should not be able to endorse religion, and that the right to have an abortion should not be unduly burdened. But her *applications* of those standards are routinely conventional and conservative.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁷ for example, Justice O'Connor concluded that 24-hour waiting periods and informed consent requirements do not unduly burden abortion rights. And in *Smith* and *Lyng v. Northwest Indian Cemetery Protective Ass'n*,¹⁸ she upheld the government's significant burdening of religion. Similarly, Justice O'Connor votes to uphold most government actions that subsidize religious institutions or express religious messages.¹⁹ In sum, nothing in the jurisprudence of these two Justices suggests that they are going to dramatically interfere with the ability of States to determine the parameters of marriage.

13. 508 U.S. 520, 523 (1993).

14. 517 U.S. 620, 623 (1996).

15. 530 U.S. 914, 956 (2000).

16. 494 U.S. 872, 890 (1990).

17. 505 U.S. 833, 883-87 (1992).

18. 485 U.S. 439, 441-42 (1988); *see also Smith*, 494 U.S. at 891.

19. *See, e.g.,* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 126 (1990); Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 864 (2001).

Finally, yet another problem with predicting a pro-same-sex marriage opinion from the Court is that, in a very real sense, the decisions in *Romer* and *Lawrence* may actually argue in *favor* of reserving questions about same-sex marriage for ordinary political deliberation.

Laws imposing civil disabilities on persons with homosexual orientations, as the State constitutional provision in *Romer* did, or criminalizing homosexual conduct, as the statute in *Lawrence* did, constitute significant impediments to gay people engaging in the political process. Effective political activity requires the ability of actors to identify themselves as members of the class whose interests they are promoting. With laws such as these, where public acknowledgment of one's status as a gay person could subject one to civil or criminal sanction, political conduct is necessarily chilled. (Think about religion as an illustration of this point. If it is against the criminal law to practice Judaism, and even non-practicing Jews are subject to civil sanctions, then membership in the American Jewish Congress and similar groups is going to decline precipitously.)

Viewed this way, cases invalidating such laws may not set the stage for a pro-same-sex-marriage Supreme Court ruling at all. By protecting gay people from persecution and prosecution, *Romer* and *Lawrence* open and level the political playing field. They make possible the kind of free and frank dialogue that civil disabilities and sodomy laws chilled and distorted. Given these holdings, one might argue, there is no reason for the Court to precipitously cut off the very discussions its decisions have made possible.

For all these reasons, we find the argument that an anti-same-sex marriage amendment is necessary to preempt a pro-same-sex-marriage U.S. Supreme Court decision entirely unpersuasive. Let us go on, then, to examine the proposed amendment on its merits.

Constitutional amendments involve a mix of law and policy. We have argued why, as a matter of constitutional law, a federal amendment banning same-sex marriage is simply not proper or necessary. Although we have no claim to special expertise when it comes to social policy, we believe that the character of the institution of marriage, as it has been understood by courts and modern commentators, also militates against enshrining into our supreme law a ban on same-sex marital unions.

Indeed, turning to the substance of the controversy, we think the conflict over same-sex marriage has distorted discussion about the institution of marriage in extraordinary ways. Whether or not there are any plausible reasons for reserving the label of marriage for

heterosexual couples only, we feel that proponents of amending the Constitution often rely on specious arguments. Longstanding and widely-accepted propositions about the nature of marriage – relating to the individual and social benefits of monogamy, personal responsibility, and commitment – seem to have been summarily cast aside for no other reason than that they are incidentally or directly inconsistent with arguments opposing same-sex unions.

Important and complex social institutions such as marriage serve multiple functions. Clearly, one of those functions is to provide a stable foundation for the raising of children. It does no disservice to this goal, however, to recognize that marriage serves other independently valuable purposes as well. This is just common sense. Freedom of speech is no less intrinsic to the operation of democratic self-government if we also recognize that this right serves other purposes, such as the affirmation of personal autonomy.

But many opponents of same-sex marriage insist marriage is primarily about only one objective – procreation and the preservation of the species. Indeed, it is on this issue that debate about same-sex marriage simply falls apart – with proponents of such marriages shaking their heads in disbelief, and trying to find some tactful way to say that the arguments of opponents seem unintelligible.

To put it simply, in our view, marriage is about children, commitment and responsibility, and love and sex. Let's take the bull by the horns and talk about the last factor first. Sex is a powerful force in most people's lives. Entirely unconstrained, it can be disruptive, abusive, and even dangerous. Both the individuals involved and society benefit when sexual activities occur in loving, long-term, monogamous relationships.

This is true whether or not a couple has children. It is true for gays and lesbians as well as heterosexuals. Relationships of this kind further personal and public health goals, social stability, psychological well-being, and for most people, personal happiness.

The institution of marriage promotes loving, long-term, monogamous relationships which in turn further the aforementioned, valuable social and personal purposes. Prior to the debate about same-sex marriage, we thought the above contention was a fundamental axiom of conservative thought. Today, however, this basic understanding seems to have been forgotten by conservatives. Liberals who are traditionalists about marriage, like us, simply cannot understand this change in attitude.

Recognizing the role that marriage plays in providing a constrained and positive framework for the expression of sexual

feelings is intrinsic to our understanding of the meaning and scope of this institution. That is why arguments by opponents of same-sex marriage about extending marriage to two brothers or a mother and daughter living together are irrelevant. Those relationships aren't sexual in nature. Providing a framework for sexual intimacy to take place is one of the unique virtues of marriage as a formal institution.

This understanding of marriage has important ramifications for the same-sex marriage debate. Restricting marriage to heterosexual couples deprives gay couples and society of the value of this formalized sexual constraint. Assuming that most gays and lesbians will neither be transformed into heterosexuals or disappear, the alternatives to long term, loving, monogamous relationships between gay people are celibacy and promiscuity. The former is absurdly unrealistic, and the latter is far less beneficial and much more problematic – again, both for the individuals involved and society. It is difficult to understand why conservatives, in particular, seem entirely unconcerned about the societal consequences of their position.

The second-to-last factor is commitment and responsibility. Again, we are bewildered. When did this become an unimportant aspect of marriage – its importance limited to the extent that it helps to maintain a stable environment for the raising of children?

In a society committed to rampant individualism and materialism, one individual's respect for and caring for another for the long term, putting his or her own interests aside to help his or her partner, is of great value – both for the individuals whose lives are made more secure, and for society, which benefits both from this example of personal responsibility and the tangible care that marital partners provide to each other.

These virtues are never doubted when infertile and/or elderly heterosexuals get married. These marriages show, of course, that procreation is not the exclusive purpose of marriage. But on a deeper level, they also show that the other things that marriage accomplishes are profoundly valuable and deserving of promotion. These marriages are not simply tolerated. They are celebrated with enthusiasm as wonderful events in the lives of the individuals involved. Marriage for these people is a positive good, not something the state grudgingly allows.

Moreover, non-procreative marriages are not some rare and aberrant occurrence. The population for whom non-procreative marriage is at least a possibility is extraordinarily large. For most people, child bearing does not occur after the age of 45. Let's add ten

years to that. Marriages between people who are over 55 do not serve procreative functions. That's a class of over 60 million people, over a fifth of the population of the United States. Over 23 million people in that class are not married. Are all weddings within that class purposeless?

But that's not all. Over 2 million married couples under the age of 45 are infertile. That's about 7% of the married couples in the country.

Then there are couples who are capable of having children but who are deliberately childless. Statistics are less clear here, but we are probably talking about at least 6% of the married couples in the United States. Viewed from another perspective, 18% of women between the age of 40 and 44—that is, women who are very near the end of their childbearing years—have never had a child.

Is marriage meaningless for all the individuals in these overlapping cohorts? Unless we are prepared to demean the marital relationships of millions of our friends, neighbors and colleagues as purposeless and valueless rituals, descriptively as well as normatively, marriage cannot be limited to procreation.

We know that many opponents of same-sex marriage argue that such unions undermine the utility of marriage as the primary institution for the raising of children. That harm, some say, offsets any benefits extending marriage to same-sex couples provides. We leave that discussion for another time. But at least that argument recognizes the other purposes and value of marriage, even though it suggests that they are in tension with the institution's procreative function.

When opponents of same sex marriage deny or trivialize the other purposes of marriage we have described, we are left speechless. That is the argument we simply do not understand, and which, in our view, cannot possibly justify an amendment to the Constitution.

* * *