



Why HSLDA is Fighting Against Same-Sex Marriage
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a division of Home School Legal Defense Association

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Critical Decision on Text of Constitutional Amendment Protecting Marriage

Having litigated the issues surrounding homeschooling for over 20 years, it is my belief that the fundamental right to direct the upbringing of children, including their education, is largely predicated on the institution of the traditional family and its status in society - a status which predates even the founding of the United States. Should the nature of the traditional family be changed, indeed radically re-defined by the modern state, the constitutional-historical basis of what the family is and its privileges are weakened. We cannot let this happen.

The Supreme Judicial Court of Massachusetts eliminated the small doubt that remained about same-sex marriage in that state. Nothing short of full-fledged marriage would suffice, the court said.

This decision brings same-sex marriage to every state in the nation. But why? Hasn't Congress passed the Defense of Marriage Act, which keeps these decisions from being exported out of Massachusetts? Haven't several states passed their own laws that ban same-sex marriage and eliminate the requirement for recognition of such marriages from other states?

Yes, they have. But we need to look at the legal world that has been radically altered by the U.S. Supreme Court decision in *Lawrence v. Texas*, issued last summer. In short, that decision says that any law based on an anti-homosexual motive is unconstitutional. (If you would like a full explanation of the impact of this decision, go to http://judiciary.senate.gov/testimony.cfm?id=906&wit_id=2543 for my complete legal analysis given in my testimony to the United States Senate Judiciary Committee on September 4, 2003).

After *Lawrence*, any federal law, any state statute, and any state constitutional provision that opposes homosexuality is in jeopardy because of the principle of federal constitutional supremacy. The decision of the Supreme Court perverts the meaning of the 14th Amendment, but like its decision in *Roe v. Wade*, we are stuck with the outcome in an array of circumstances.

We are left with the situation where same-sex marriages performed in Massachusetts will be required to be recognized in every state of the nation. This is because the U.S. Constitution's Full Faith and Credit Clause generally requires the recognition of one state's marriages in every other state. Nothing can prevent this result in the aftermath of *Lawrence*.

There are only two ways to overcome a U.S. Supreme Court constitutional decision of this kind: change the members on the Court or pass a constitutional amendment.

Some people argue for restricting the jurisdiction of the federal courts. That will not help us in this case. If we strip the jurisdiction of every federal court in the country, the *Lawrence* decision is still the law of the land and would be binding on all state and federal courts. Stripping the jurisdiction of the federal courts *before* the *Lawrence* decision would have been a good idea. Now such a law would not help us at all. This approach cannot stop a state court from seizing upon *Lawrence* to invalidate DOMA or any other impediment to same-sex marriage. In fact, it would only make things worse in the event we were able to get new justices on the Court who were willing to reverse the bad decision.

The only way that we can stop same-sex marriage from infecting every state in the nation is to amend the U.S. Constitution.

There is a proposed amendment to the Constitution pending in both the House and the Senate introduced by freshman congresswoman Marilyn Musgrave (R-CO). The language she introduced, known as the Marriage Protection Amendment (MPA), had been around for a long time. At the time it was written, I supported it. But the legal landscape has changed.

Two things have happened since this language was written. First, the *Lawrence* decision has been issued. Second, "civil unions", which make homosexual couples legally recognized "spouses" and give them all the rights of married couples, have burst onto the legal landscape.

The Musgrave text does nothing to stop legislatively enacted civil unions. Vermont, California, and New Jersey have created such laws. The name given the unions varies slightly, but in every case homosexual couples are called legally recognized spouses.

To me, if we call homosexual couples "legal spouses" and give them all the rights of marriage you can call their relationship anything you want but it is still marriage.

Congresswoman Musgrave, as well as the Alliance for Marriage which is the chief proponent of this text openly say that legislatively created civil unions would be permitted if their amendment gets through Congress and is ratified by the states. For the legal impact of the Musgrave language, according to the Alliance for Marriage, go to: <http://www.allianceformarriage.org/reports/fma/colorchart.cfm>.

Here is what the current Marriage Protection Amendment says:

"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."

The second sentence in the Musgrave text is intended to stop courts from imposing their will on this subject. And indeed, it should be effective in stopping courts from ordering states to require homosexuals be allowed to get married. However, the first sentence does that as well.

The Alliance for Marriage says that the second sentence will stop courts from imposing civil unions on the states. Civil unions, they say, can only be enacted by state legislatures.

My fundamental criticism of this version of the FMA is that it is intended to permit legislatively enacted civil unions.

Unfortunately, however, the Musgrave text is unlikely to have its intended outcome of stopping courts from imposing civil unions by judicial fiat.

Let's review the situation in California to understand why this is true. In 2000, in California, the voters overwhelmingly passed Proposition 22 banning same-sex marriage. But the California legislature went around this law by enacting a statute making same-sex couples spouses in "domestic partnerships" California's term for a civil union. Accordingly, in California the legal incidents of marriage are no longer restricted to marriage. They are the legal incidents of domestic partnerships. Other states under the edicts from liberal courts can be required give same-sex couples the "legal incidents" of civil unions. Since these are not the incidents of marriage, but of civil unions, the Musgrave text will not be applicable. Be forewarned: The *Lawrence* decision will be used by a court to say we must respect homosexuality, that civil unions are not marriage, and thus civil unions must be allowed in a state.

In any event, I fail to see the point of all the hard work it is going to take to pass a constitutional amendment if we are going to open the door for civil unions whether they are enacted by legislatures or by tyrannical courts. Same-sex relationships are going to be considered to be legally and morally valid all over this nation even after the Musgrave text is ratified.

Although this is not the best plan, I would prefer to have an amendment with just the first sentence that is silent on civil unions than the Musgrave text with its intended official blessing on legislatively created civil unions.

Thus, I have been fighting behind the scenes for several months to get a constitutional amendment that does the job correctly. Here is the text I believe will do the job:

"Marriage in the United States shall consist only of the union of a man and a woman. Neither the United States nor any State shall recognize or grant to any unmarried person the legal rights or status of a spouse."

We are calling this the Institution of Marriage Amendment. The difference between the FMA and the IMA is this: The FMA protects the "word" marriage, the IMA protects the "institution" of marriage.

However, the truth is that Congress, at least to this point, is unwilling to take on the issue of civil unions.

Some argue that we should leave this matter of civil unions to the states because of federalism. Do not be misled by this argument especially when made by people who spend billions of dollars in violation of federalism every day. The Musgrave text already violates the principle of federalism relative to same-sex marriage; why is there suddenly a federalism principle when the subject is civil unions?

Moreover, the proponents of federalism simply don't understand what constitutes a violation of the principle of federalism. That principle is violated when we transfer jurisdiction from the state legislatures and give power to the Congress. The Institution of Marriage Amendment would not do this. It is simply a limitation of the use of all government power to enact same-sex marriages and their look-a-like twins, civil unions. When all governments are limited, federalism is not implicated; rather, rights are protected.

I cannot understand why Congress lacks backbone in this regard. The polls are with us. Polls clearly indicate that both same-sex marriage and civil unions are disfavored by the American public. And the civil union numbers are too low in these polls because the questions ask whether people agree with giving "some" of the rights of marriage to homosexual couples. Civil unions give all of the rights of marriage and call the partners legally recognized spouses.

There is only one solution that I know that can work. And that solution is you.

We have to barrage the U.S. House and Senate with phone calls to let them know that we want a real marriage amendment. We have to let them know that we want to stop same-sex marriage by whatever name it is called.

If you agree with my analysis, here is what I would like you to do:

Call or write: (1) your U.S. Congressman, (2) both of your U.S. Senators; and (3) the White House. Tell them: "The time is now for a constitutional amendment to protect marriage. We want a stop to same-sex marriage. And we want a stop to civil unions. The Musgrave text is unacceptable. Please support the Institution of Marriage Amendment.

The White House switchboard is 202-456-1414, or you can leave a comment on the comment line at 202-456-1111. Contact information for senators and representatives can be found online at <http://www.hslda.org/toolbox>. Alternatively, you may phone the United States Capitol switchboard at 202-224-3121. A switchboard operator will connect you directly with the office you request.

Although it is important to call every Congressman and Senator, right now the focus should be on Republicans and the White House. They are going to be the ones who decide what the text looks like.

This may be the only time in U.S. history that we can stop the homosexual movement from obtaining full rights of marriage, by whatever name it is called.

Please call now and pass this memo to every friend you have.

Mike Farris
HSLDA Chairman

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