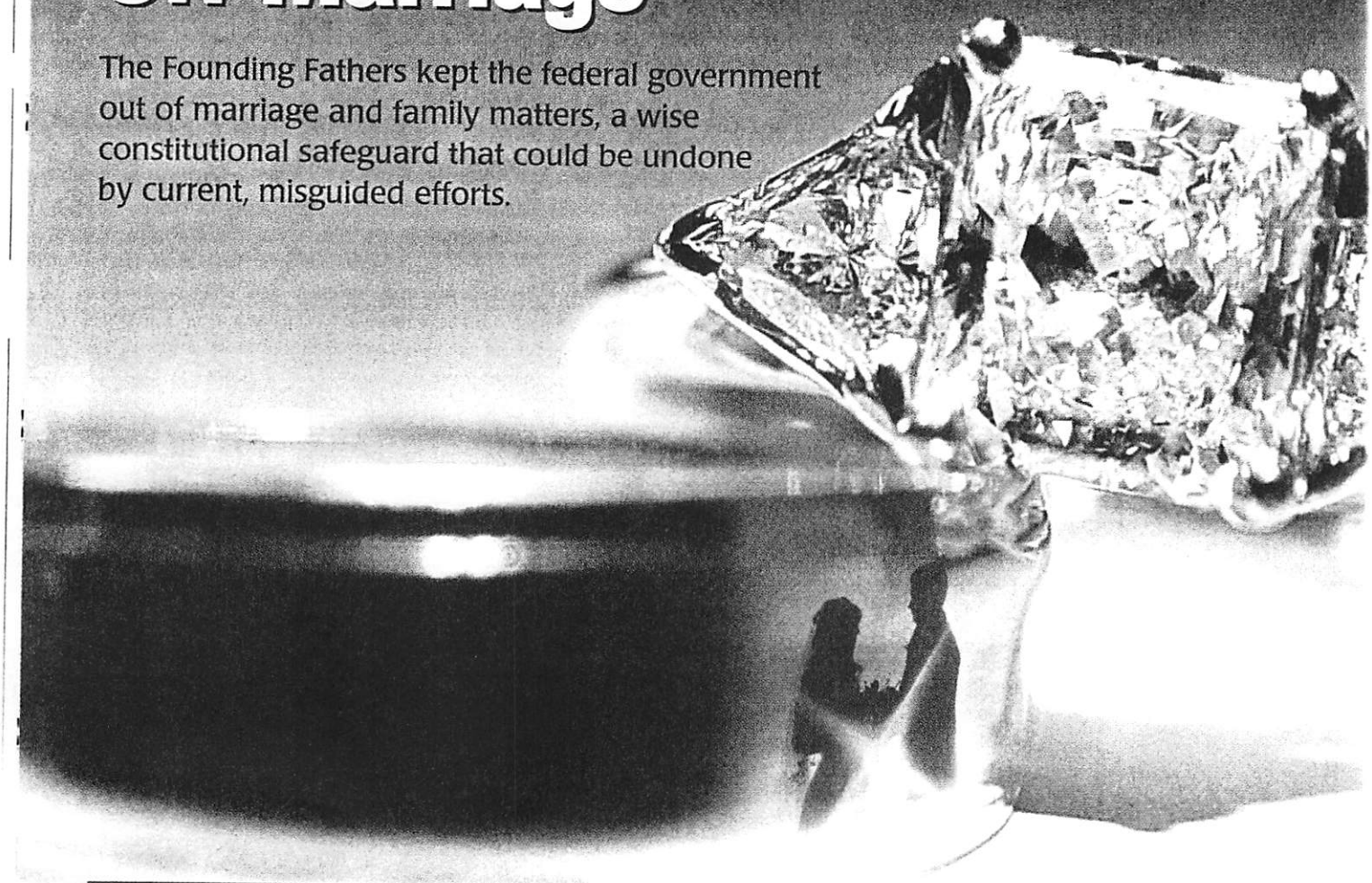
Keep Fedgov's Hands Off Marriage

The Founding Fathers kept the federal government out of marriage and family matters, a wise constitutional safeguard that could be undone by current, misguided efforts.



by George Detweiler

Law and language are the two most pervasive and important legacies derived from this nation's English roots. The American system of jurisprudence has developed from our heritage of the English common law, which was planted in the colonies, dating back to the Mayflower Compact. The law of marriage became a part of jurisprudential systems in the American colonies dating from the earliest days of settlement.

In his classic tome on the common law, *Commentaries on the Laws of England*, Sir William Blackstone wrote: "The second private relation of persons is that of marriage, which includes the reciprocal duties of husband and wife; or as most of our elder law books call them, of *baron* and *feme*." He continued, "Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law: the temporal [common law] courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience." The earliest ecclesiastical reference to marriage is in the book of Genesis in the *Holy Bible* — the union of Adam and Eve, which was exclusively between one man and one woman. Chancellor James Kent of the New York Court of Chancery described marriage in his famous *Commentaries on American Law* in the following words:

> The primary and most important of domestic relations, is that of husband and wife. It has its foundations in nature, and is the only lawful relation by which Providence has permitted the continuation of the human race.

The broader point is that marriage has its origins in antiquity. In England, it is an institution which was recognized both by the common law and the ecclesiastical

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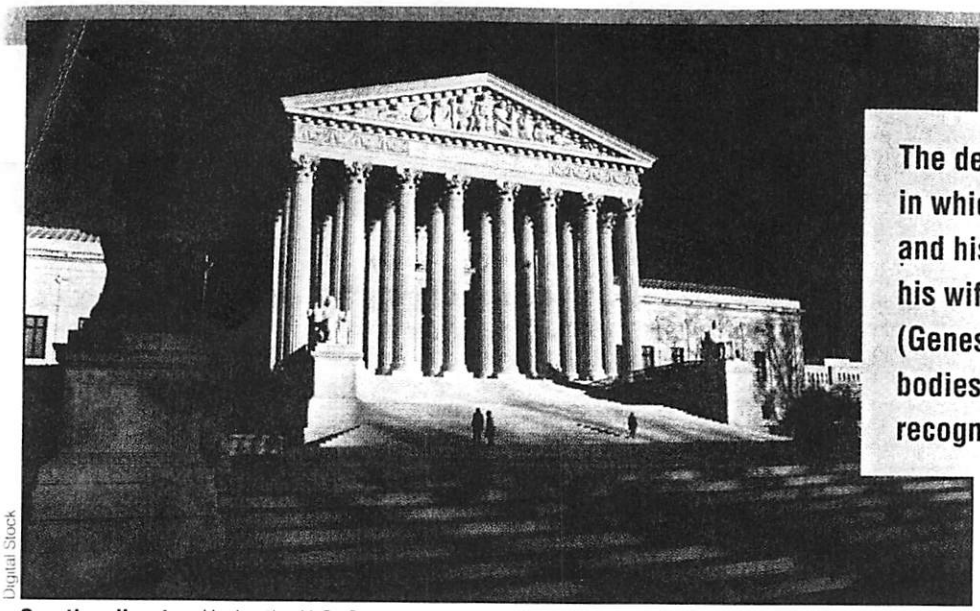

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Courting disaster: Under the U.S. Constitution, the federal courts, including the U.S. Supreme Court, have no jurisdiction over the laws of marriage, which is as the Founding Fathers intended. A constitutional marriage amendment would, for the first time, give the federal courts a claim of constitutional jurisdiction over the laws concerning marriage.

The definition of marriage as a covenant in which "a man [shall] leave his father and his mother, and shall cleave unto his wife ... and they shall be one flesh" (Genesis 2:24) has formed a part of the bodies of state laws and been widely recognized in American jurisprudence.

law. This concept of marriage migrated to the American colonies. The narrower point is that the laws of marriage predate both the U.S. Constitution and the state constitutions.

States' Rights

At the conclusion of the War of Independence, as the colonies became states, the common law of the colonies, including the law of marriage, became the common law of the states. After 10 years of struggling under the Articles of Confederation, the states sent delegates to the convention in Philadelphia in 1787, and the Constitution was written as the creation of the American people. The work was completed with ratification by the ninth state in 1789, when the Constitution became the supreme law of the land. Through all of these changes in the structure of the federal government, marriage remained exclusively a province of state law. The Constitution, to this day, confers no authority over marriage to the federal government.

James Madison, the father of the U.S. Constitution, wrote in *The Federalist*, No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Federal powers must arise from the text of the Constitution, or they do not exist.

"Family policy has historically been regarded as a Tenth Amendment issue, one that's within the purview of the states," comments Dr. Alan Carlson of the Howard Center on the Family. "When the U.S. Constitution was written, one of the powers specifically not delegated by the states to the federal government was control of family law and governance. In contrast to most European constitutions, our foundational document makes no direct mention of children, families, parenthood, marriage, or the family's relationship to the state. This omission reflected the keen interest in the family held by local communities and an unwillingness to subject such sensitive questions to uniform, national answers."

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GLAD victory, sad day for justice: Mary Bonauto, lead attorney for the Gay and Lesbian Advocates and Defenders (GLAD), addresses a press conference in Boston on November 18, 2003, following the Massachusetts Supreme Judicial Court ruling that same-sex couples should be granted marriage licenses in the state. Behind her are the plaintiff couples in the case.

for centuries in the laws and practices of countries throughout the world. That definition has formed a part of the bodies of state laws and been widely recognized in American jurisprudence.

Through the years, the rules of the common law in each state relating to marriage (other than Louisiana, whose law is based on the Code Napoleon) have undergone statutory revisions. But not until recently has any state sanctioned same-sex "marriages" or, to use the insipid euphemism, civil unions. Never, until the Massachusetts Supreme Judicial Court decided *Goodridge v. Department of Public Health* in 2003, has same-sex "marriage" been declared a constitutional right (in this case the Massachusetts constitution). The decision was a naked display of power, lacking any precedent in law, including the Massachusetts constitution. The state's highest court audaciously informed the legislature that it had 180 days to pass legislation to provide for same-sex marriages. It is an atrocious usurpation of power for a court to tell the legislative branch of government what legislation it must pass. Initial reactions from key lawmakers show some willingness to comply. The Massachusetts legislature needs a spinal implant.*

* For more information about this decision, see "Mass. Supreme Court Runs Amok" in the December 15, 2003 issue of THE NEW AMERICAN.

Amendment Dangers

National public outrage at the decision was predictable. A movement is gathering steam to amend the U.S. Constitution to define marriage as the union of one man and one woman, as a precaution against a federal court decision that might parallel the Massachusetts case. Such a decision is likely. So why not amend the U.S. Constitution to support the traditional concept of marriage, as is now proposed in House Joint Resolution 56? That resolution, already cosponsored by over 100 representatives in the House, reads:

> Marriage in the United States shall consist only of the union of a man

Waffling on Homosexual "Marriage"

by William F. Jasper

"Bush Appears to Open Door to Same-Sex Unions." That was the headline of a December 17 Reuters news story by Randall Mikkelsen, reporting on an interview of the president by ABC's Diane Sawyer the previous day. The Reuters story began: "President Bush on Tuesday appeared to open the door to same-sex unions that stop short of marriage, by saying people should be able to make 'whatever legal arrangements' they want as long as a state recognizes them."

The headline and theme of the Reuters story contrasted sharply with most other news coverage of the interview, which tended to give the impression that President Bush is a strong champion of the sanctity of marriage. The headline of the Associated Press story on the Sawyer interview read, "Bush Says He Could Back Gay Marriage Ban." The *New York Times* ran a similar story headlined, "Marriage Amendment Backed by Bush."

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So, is the president for or against same-sex "marriage"? More importantly, what will he do in terms of public policy and in terms of steering the Republican Party's position on this and other homosexual "rights" issues?

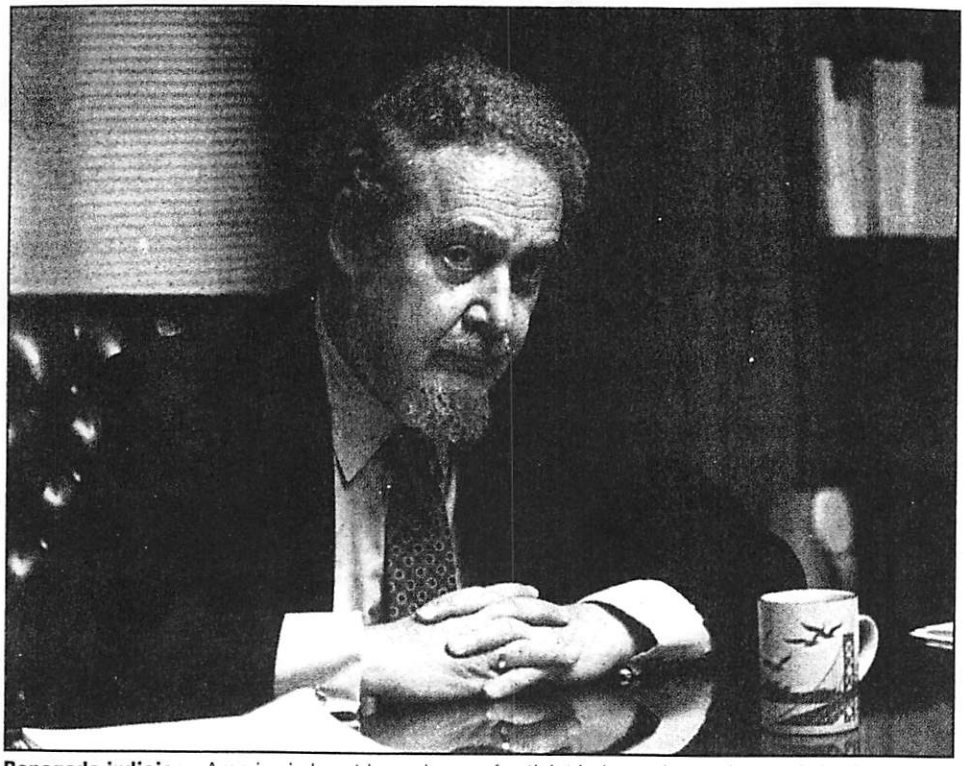
Here's what the president actually said, when Sawyer asked if he would support a constitutional amendment "against gay marriage and against gay civil unions." "If necessary," said Bush, "I will support a constitutional amendment which would honor marriage between a man and a woman, codify that, and will — the position of this administration is that whatever legal arrangements people want to make, they're allowed to make, so long as it's embraced by the state...."

Tony Perkins, president of the Family Research Council, which supports the amendment effort, said that President Bush's statement "sounds as though the administration would support civil unions which are counterfeits of the institution of marriage." The Reuters report noted the president's comments "indicated that Bush, as he heads into his reelection campaign, was walking a fine line between the interests of his social conservative base which favors a constitutional ban on gay marriage and other voters who have shown more acceptance of same-sex unions."

The Bush camp has been straddling this fine line since before it came into office. In an October 2000 campaign debate, then-vice presidential candidate Dick Cheney addressed the issue in a way that alarmed conservatives and cheered the homosexual lobby. "I think states are likely to come to different conclusions, and that's appropriate," he said. Cheney, who has an openly lesbian daughter, continued by proposing that "we ought to do everything we can to tolerate and accommodate whatever kind of relationships people want to enter into." Accommodate? How? This seemed, at the very least, a major GOP weakening in the direction of accepting some sort of legal "civil union" status.

Republican Party Chairman Jim Nicholson tried to soothe anxiety over the remarks by saying that Bush and Cheney recognized that the civil-unions question was a "complicated" issue.

But Nicholson left little doubt of the GOP's direction. "We're a tolerant party," he said. "We don't support discrimination of any kind." Observing the Bush-Cheney-Nicholson dance over the civil-union issue, *New York Post* columnist Rod Dreher wrote at the time: "If a gay-friendly GOP administration takes over, there will be very little effective political opposition standing in the way of what gay-rights activists want. Social conservatives will be further isolated within the GOP." That is precisely what has been happening Dreher continued: "Add that to both Bush and Cheney's weak responses on the RU-486 question, and social conservatives this morning have to be feeling shell-shocked by the men leading the party they thought was their home." ■



ZUMA Press

Renegade judiciary: America is beset by a plague of activist judges who, as former federal judge Robert H. Bork points out, "stretch or even contradict the meaning of the law." This activism "may be rampant, but is completely insupportable" by the Constitution, says Judge Bork.

> and a woman. Neither this Constitution or 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.

The amendment has much superficial appeal, if viewed only in the narrow light of preserving the sanctity of marriage. It is, however, horrendous as a principle of constitutional law.

Throughout this nation's history, especially since the New Deal, federal powers have been enlarged at the expense of the states. Creeping incrementalism aimed at constantly expanding federal power has been fueled by all branches of the federal government, but especially by the Supreme Court. A marriage amendment would actually play into the hands of the judicial revolutionaries and their allies, whose subversive purposes have always been served by increasing federal power.

The danger of such an amendment lies in the fact that it would introduce the law of marriage into the Constitution, presenting federal courts with the opportunity to begin exercising control over the whole range of marital law. The danger exists no matter how carefully the amendment is drafted; it exists because the courts are looking for an opportunity to expand their powers and engage in social engineering rather than apply the Constitution to the facts of each case. The U.S. Supreme Court's infamous *Lawrence v. Texas* decision (2003) shows the extent to which the nation's highest court has already gone to create "rights" to aberrant behavior (sodomy) out of nothing but its desire to be a super legislature. There is not a shred of constitutional support for that decision, despite the court's claim to the contrary. When the U.S. Supreme Court, or any other court, operates on the legal theory that the U.S. Constitution is a living, evolving document whose meaning only the court can discern, it is actually declaring that words have no fixed definitions and there is no written Constitution.

Restrain the Judicial Activists

Robert H. Bork, former judge of the United States Court of Appeals for the District of Columbia, writes in his book *Coercing Virtue*:

> What does it mean to call a judge "activist" or "imperialistic"?... Activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying, or who stretch or even contradict the meaning of the law. They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law. The law in question is usually a constitution....

Judge Bork defines judicial activism as "the ordering of results not supported by any reasonable interpretation of the Constitution." He acknowledges that judicial activism "may be rampant, but it is completely insupportable." Finally, he declares: "A judge who is not bound to the original understanding of a document's principles interprets nothing but his own state of mind."

Attempting to counter judicial usurpation by amending the Constitution implies that the Constitution as written means whatever the activist judges claim it means. So long as that false premise is accepted, we can expect more judicial activism. Not only is it unrealistic to attempt to fight each new outrageous court decision by proposing another constitutional amendment, but adding a series of new amendments to the Constitution would weaken that great document and endanger our liberties. It would suggest that the federal government can exercise powers unless explicitly prohibited from doing so by the Constitution, when in fact it may

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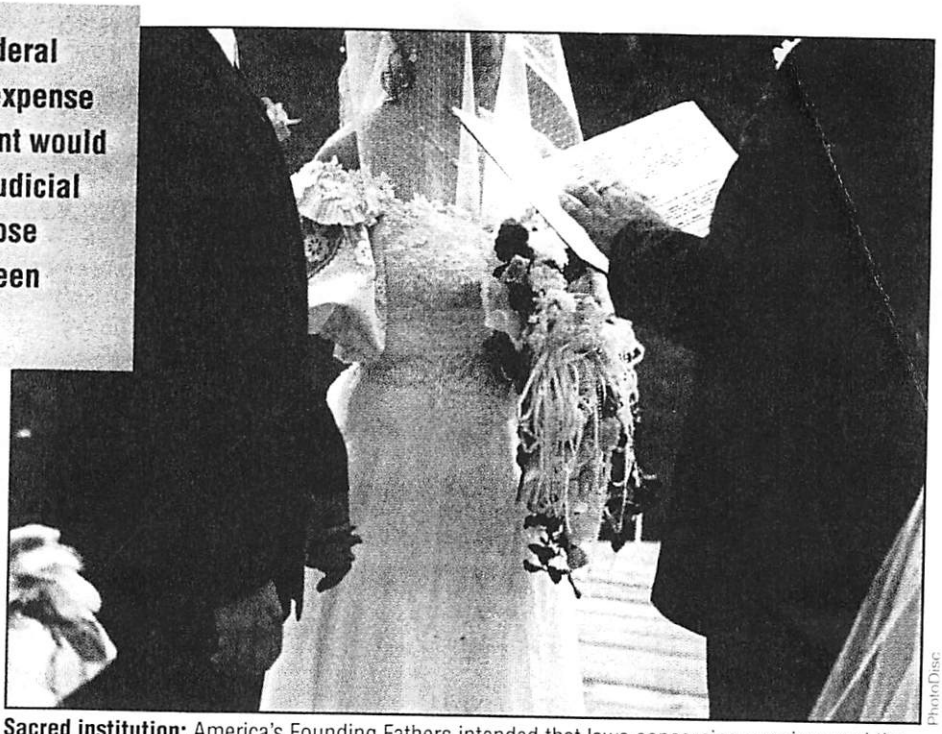

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Sacred institution: America's Founding Fathers intended that laws concerning marriage and the family would be kept in the purview of the states, well away from the meddling and control of federal politicians, bureaucrats and judges.

only exercise powers explicitly granted to it.

The goal, therefore, should be to keep issues out of the hands of the courts, not to amend the Constitution so as to give the courts opportunities to create more constitutional havoc. Article III, Section 2, of the U.S. Constitution empowers Congress to enact exceptions to and to create regulations of the appellate jurisdiction of the Supreme Court. Congress has the authority to control or even entirely eliminate both the original and the appellate jurisdiction of inferior federal courts.

The crying need for Congress to exercise this authority is obvious from the novel language adopted by the authors of House Joint Resolution 56 mentioned above. So far as this writer can determine, this is the first time that Congress has included in the language of a proposed constitutional amendment any directions as to how the courts should construe the new language. This is a stinging indictment of the courts, and it signals a stark realization that the courts have become so enthralled with their own ideas of what the Constitution should provide that they engage in legislative fiat to create constitutional meaning utterly absent from the text. It is a sad day for the Republic when judicial usurpation has become so egregious that congressmen feel compelled to tell the courts how to construe new constitutional language. This is particularly the case considering that Congress also grossly misinterprets the Constitution.

Rather than amending the Constitution, Congress should use its Article III, Section 2 power to protect marriage against federal judicial activists. By simple statute, Congress can eliminate the appellate jurisdiction of the U.S. Supreme Court over such issues as the constitutionality of state laws defining or regulating marriage. Such a statute could contain other exceptions for a wide range of topics where the Supreme Court has abused its discretion. The jurisdictions of inferior federal courts would likewise be limited.

One area of concern remains. Article IV, Section 1 of the Constitution requires states to give "Full Faith and Credit" to the "... public Acts, Records, and judicial proceedings of every other State;..." If a state is cursed with an invertebrate legislature that provides by law for same-sex unions, this constitutional provision would compel other states to recognize the validity of these unions. For this reason, the congressional act limiting the jurisdiction of the federal judiciary in matters of matrimony should also remove jurisdiction of federal courts to rule on any state's failure to accord full faith and credit to same-sex unions. One or more federal statutes of this kind would be easier to enact than any constitutional amendment. Congress can pass legislation by a simple majority vote in the House and the Senate, but a proposal for a constitutional amendment must be passed by a two-thirds majority vote of both houses. Even then, it must be ratified by three-fourths (38) of the states, which is no easy task.

The statutory approach of limiting the jurisdiction of federal courts is not a complete remedy. Some states may choose to give such full faith and credit to same-sex marriages even if the federal courts are prevented from coercing them to do so. A diligent state electorate will need to insist that legislators not do so.

A final remedy may rest with impeachment of state judges who willfully distort the law. This will be a matter for each state to determine, with adequate citizen insistence that the legislature take action. ■