

Center for American Progress



**WITH THE CATO INSTITUTE SPECIAL
PRESENTATION:**

**“IS THE FEDERAL MARRIAGE AMENDMENT
CONSISTENT WITH FEDERALISM
AND DEMOCRATIC VALUES?”**

MODERATOR:

**NEERA TANDEN, SENIOR VICE PRESIDENT FOR ACADEMIC
AFFAIRS, CENTER FOR AMERICAN PROGRESS**

SPEAKERS:

**DALE CARPENTER, ASSOCIATE PROFESSOR OF LAW,
UNIVERSITY OF MINNESOTA LAW SCHOOL; AUTHOR, CATO
STUDY, *THE FEDERAL MARRIAGE AMENDMENT:
UNNECESSARY, ANTI-FEDERALIST, AND ANTI-DEMOCRATIC***

BRUCE FEIN, COLUMNIST, *WASHINGTON TIMES*

**LOUIS MICHAEL SEIDMAN, JOHN CARROLL RESEARCH
PROFESSOR OF LAW, GEORGETOWN UNIVERSITY SCHOOL
OF LAW**

**MARK AGRAST, SENIOR FELLOW,
CENTER FOR AMERICAN PROGRESS**

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PROFESSOR DALE CARPENTER: (In progress) – basic facts. Forty-five states have explicitly declared same-sex marriage as contrary to their public policy and they've also barred recognition of same-sex marriages from out of state.

Second, the Defense of Marriage Act passed by Congress in 1996 bars the recognition of same-sex marriages at the federal level and that law – the DOMA law – the Defense of Marriage Act has not been declared unconstitutional by any state or federal court. So even if a state court orders same-sex marriage to be recognized within its own jurisdiction, as the Massachusetts high court did in the *Goodridge* opinion in 2003, that state can resolve internally through its own governmental processes that issue, and it can amend its own state constitution if it wants to, as 19 states have already done.

Historically, we have trusted the states to rein in their own state courts' judicial activism, and in fact most gay marriage claims since the *Goodridge* decision have been rejected. Why is that? Well, there're a lot of very technical, doctrinal reasons why it has happened, but let me inject a note of legal realism into this debate: 87 percent of state court judges in this country are subject to some form of election, whether it's an election to get into office to begin with or some sort of retention or recall election, and since the public opposes gay marriage by very strong majorities in most places in the country even today, it seems very unlikely that these judges are going to rush to thwart that overwhelming popular will. And in fact, it shouldn't be surprising that no Massachusetts same-sex marriage has been exported to any other state.

Now, there are a lot of substantive constitutional doctrines that we might talk about – perhaps, Professor Seidman will talk about them in more detail and perhaps we can talk about them in more detail in the question and answer – that have been said to lead in some way down – us down a judicial path towards the recognition of same-sex marriages, but I don't think any of them are going to get us there any time in the near future because, although we can talk about the merits later, aside from the merits of a constitutional claim for same-sex marriage, I think it is unlikely for historical and practical reasons that the Supreme Court is going to try to impose it on the nation any time in the near future.

Despite the quite fashionable and popular denunciations of judicial activism by many people in this country, it turns out that the Supreme Court rarely strays far or long from a strong national consensus on an issue. It's actually only happened a few times in the history of the country, and if the Court were to order the immediate recognition of same-sex marriage throughout the nation, it would be taking on practically the entire nation when it came to that decision. So I think the fear of court-imposed, nationwide gay marriage is greatly exaggerated. It's based on a fear of an unknown decision by an unknown judge in an unknown court at some date in the future. If that is reason enough to amend the United States Constitution, then we are very quickly going to have a Constitution that looks like a tax code.

Second major reason to oppose this amendment: it is an intrusion and radical, I think, and almost unprecedented intrusion on federalism in an important area that traditionally the states rather than the federal government have spoken on first, and that is family law. States have usually been in charge of defining their own family law, defining marriage in their own jurisdiction, and an amendment would intrude on that state power and prerogative.

Now, federalism has some very practical benefits that we ought to keep in mind. It allows states to experiment with public policies to determine whether those policies work, whether they need to be amended, whether we should follow the example of other states or not, and states under this principle of federalism have been responsible for some of the most important reforms in American law, such as granting women the right to vote, prohibiting child labor, and so on.

In contrast to that tradition, the Federal Marriage Amendment would impose on this country a single nationwide definition of marriage. It would prohibit state courts or even state legislatures acting on behalf of the people from authorizing the recognition of same-sex marriages, but it would go further. It would tell state courts how they had to interpret their own state constitution and state laws if they thought that they were going to grant some sort of recognition to same-sex couples or benefits to same-sex couples.

Now, states are going to arrive at different conclusions under a federalism-based approach to the marriage question. Some of them are going to recognize same-sex marriages, as California's legislature did just last year. Some will call for the recognition of civil unions as Connecticut's legislature did just last year. Some will recognize domestic partnerships. Some will do nothing and some will go so far as to ban same-sex marriage in three or four different kinds of ways including in their state constitutions.

Problems will arise from time to time from property disputes and from divorces that these couples have if they move to a state that doesn't recognize their relationship, but these are the sorts of differences in state laws that we have always been able to resolve through standard traditional choice of law principles. There will always be difficulties; there is no doubt if we let the states go their own way on matters of important policy. Some have called these difficulties chaos; I call it federalism. Federalism is working. We have a debate in this country that is underway on whether or not granting some form of recognition to same-sex couples is a good idea or a bad idea. We will have an opportunity in the years to come with these experiments ongoing to see whether or not the recognition of this relationship entails all of the sorts of harms that people have predicted. We can find out whether the sky falls or whether or not it actually turns out to be a beneficial social reform.

Third problem with the amendment is that it will be peculiarly anti-democratic. Now, at first this notion is counterintuitive. Obviously, in a sense, every constitutional amendment is super-democratic because it requires the passage under the usual process of two-thirds of both of the houses of Congress and an approval by three-fourths of the state

legislatures, but every amendment has anti-democratic effects and this one has some peculiar anti-democratic effects. That don't mean we should never pass a constitutional amendment, but that I think urge or counsel great caution in passing of these amendments.

One anti-democratic effect that every amendment has is that it is anti-democratic as to the states that refuse to ratify it. If a constitutional amendment on the subject of marriage passes, it may well do so over the objections of 12 of the most populous states in the country including California, New York, New Jersey, Massachusetts, Illinois and so on. Those people will have been told they will have been robbed of their traditional power to decide democratically what sorts of relationships to recognize by the will of the people in the other 38 states.

The second anti-democratic effect that every amendment has is that an amendment binds the people of all of the states for all time until there's another amendment from ever reconsidering the issue through normal democratic processes. Under our present system of federalism, the states can opt for one policy now – civil unions, domestic partnerships, marriage, or nothing – and then opt for another policy later based on new evidence and experience that they get over time. The Federal Marriage Amendment would freeze into place current preferences binding the people of the states forever to an earlier decision made by an earlier generation that simply lacked their experience.

But this amendment has a third democratic defect that is peculiar to it. This Amendment would be anti-democratic in that it would be the first time that we amended the Constitution to limit the states' ability to decide democratically through representative processes to expand rights and to include more people in the fabric of American life. Rather than setting a floor on rights and inclusion, as every other amendment has done except one, for the first time in our history the Federal Marriage Amendment would set a ceiling on those rights. What a tragic and needless departure from our history and tradition that would be.

And then the fourth problem with this amendment is that if I have been unable to convince you about everything else that I've said, if I'm wrong about federalism and the anti-democratic effects, and if I'm wrong about allowing – about the fact that we don't need this amendment to prevent some judicial activism in the immediate future, this amendment is not an answer to the claimed need for an amendment that judicial activism is the problem. The Federal Marriage Amendment as proposed does far more than stop courts from experimenting with same-sex marriages. It stops the people themselves, democratic legislatures from being able to experiment with the recognition of same-sex relationships.

So it appears that some of those, at least, who are supporting the Federal Marriage Amendment don't just fear courts, they fear the people themselves. They fear that the people may not adhere in the future to what they now regard as the right view on a particular policy issue, and of course, if we actually read the language of the amendment,

it doesn't necessarily stop it prohibiting same-sex marriages. It may have effects that go well beyond the prohibition on same-sex marriages to include prohibitions on civil unions, domestic partnerships. It could have all sorts of effects that we can talk about in detail in question and answer if you're interested. This is simply not a carefully tailored response to the perceived problem of judicial activism.

So let me conclude with this. I teach constitutional law; I have for a number of years. I am still – I've read the Constitution a number of times and I'm still, believe it or not, in awe when I read the words of this document when I consider the system of government that it brought into being, the country that it brought into being, and the aspirations that it contains. We have amended our Constitution to guarantee the freedom of speech to ensure due process of law, to end slavery, and to grant women the right to vote. Are we really going to put this proposed amendment beside those majestic declarations of human liberty and equality?

Never before in the history of our country have we amended the Constitution in response to a threatened – not actual, but threatened state court decision. Never before have we adopted a constitutional amendment to limit the state's ability to expand democratically the rights that people have and to be able to control their own family law. This is no time to start.

MS. NEERA TANDEN: Thank you so much, Professor Carpenter, and next, I'd like to introduce Mark Agrast, who is a senior fellow here at the Center for American Progress where he oversees our work on constitutional rights, the rule of law, and the history of American progressive thought. He spent over a decade of time on Capitol Hill for Congressman Delahunt and he is a member of the American Bar Association, but very involved in the board of governors.

Mark?

MR. MARK AGRAST: Thank you. Thank you, Neera.

MS. TANDEN: I should apologize for his voice.

MR. AGRAST: I just returned from New Orleans with a case of laryngitis, but I'm going to try to get through my remarks and I hope I will be able to participate in the question period as well.

During those 10 years, 12 years on Capitol Hill that Neera mentioned, I saw a lot of proposed constitutional amendments come and go, including this one the first time around. Some of them were even good ideas, but none of them were ever enacted. Since 1789, over 11,000 amendments have been proposed to the federal constitution; only 27 have been adopted in the last 217 years. There are many reasons why the Federal Marriage Amendment shouldn't become the 28th.

Let me say at the outset that I oppose the Amendment, as does the Center for American Progress, because I believe that the state should be permitted to accord to their gay and lesbian citizens all the rights and responsibilities of civil marriage, but the central issue raised by the amendment isn't what the policy on marriage should be, but rather who gets to decide that question, whether a single definition should be imposed on the entire country or whether the states should be permitted to continue to grapple with this question and decide it for themselves.

Let me offer four reasons that seem to me compelling for leaving this matter in the hands of the states. This list is certainly not exhaustive. I think Dale in his remarks covered a remarkable amount of ground and I concur in virtually everything he had to say. First, the amendment would misuse the Constitution to entrench the social policy preferences of what is after all a transitory majority. Second, as Dale said, by imposing a single definition on the entire the country, the amendment would preempt traditional state control over family law issues that the states are best equipped to determine. Third, the amendment would preclude the states from interpreting their own constitutions in a matter that confers greater rights on their citizens than they would enjoy under the federal constitution. And finally, the amendment would not only diminish the rights of a disfavored minority, as Dale described, but furthermore would curtail their ability or their opportunity to obtain redress through the normal political process.

Let me briefly walk through each of these. The first argument is a very simple one. Like the Prohibition Amendment – the 18th Amendment – the Federal Marriage Amendment is an effort by a contemporary majority to entrench its preferences, its values on a particular social issue in our sacred document: the Constitution. This isn't what the Constitution is for. If you look at all of the amendments that have been adopted over those 217 years, you'll find that not one of them – putting aside the Prohibition Amendment – serves that function. They tend to address either the structural deficiencies or defects of the original Framers' conception of how the government should operate or – and I think perhaps most relevantly – they expand rights. They try to include more people in the American polity that the Framers created. This Amendment of course will do neither of those things, and like the Prohibition Amendment were it to be adopted, it's hard to believe that a future generation wouldn't feel compelled to repeal it.

The second argument is that the Amendment will preempt traditional state control over family law issues that the states are best equipped to determine. Dale mentioned this point, but I think it's worth explaining a little bit more why that's important. Now, some of you might think it's surprising to hear a speaker from a progressive policy institute extolling the virtues of federalism and state control. That's not what we have lately been known for, but the fact is that progressives have always looked to the states to develop innovative solutions to social problems to experiment, and they've looked to state courts and state constitutions to defend individual rights and democratic self-governance as an additional guarantee to the federal one.

It was Supreme Court Justice Louis Brandeis, a leading progressive figure, who conceived of the states as laboratories of democracy and here is what he said: "To stay

experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.” That theory applies with special force in the area of family law. This has always been a state responsibility from the founding, and the states have since then developed a vast and ever-evolving body of law that reflects the traditions, the social mores, and the lived experience of their citizens.

As the pace of social and economic change has accelerated, state courts and legislatures have struggled to meet the changing needs of America’s families. What works in Northern California may not work at all in rural Georgia, and what neither of them need is a federal mandate that freezes the law in place, creates one rule for everybody or sets the law back perhaps by generations.

The third argument against the amendment is that it would preclude state courts from interpreting provisions of their own constitutions in a manner which accords greater protection to individual rights than would be available under the corresponding provisions of the Federal Constitution. This is not a point that Dale made and I think it, in fact, may be a point of interesting contention among the panelists. In fact, I understand that Bruce has proposed an amendment that might have this effect as well, but I’ll leave it to him to describe it.

When the Supreme Judicial Court in Massachusetts held that equal marriage rights were required under the state constitution, opponents of gay marriage quickly labeled this judicial activism. Yet, whatever you think of the merits of that decision or any other, it surely is the essence of federalism, if we take federalism seriously, that the state courts have the right to interpret their own constitutions in the interest of their citizens without federal interference. If the citizens of the state are displeased with the court’s interpretation, they have a remedy and they know how to use it. Thus far, 18 states have adopted constitutional amendments without even waiting to see what their courts will do.

My final argument against the amendment is that it would not only diminish the rights of the disfavored minority, as Dale explained, but furthermore would curtail their ability to obtain redress through the normal political process. Dale acknowledged that all constitutional amendments to some degree are anti-democratic or have anti-democratic effects. He also argued that the FMA is uniquely anti-democratic because it prevents the states from deciding democratically to extend rights to those to whom they’ve been denied and to create a more inclusive national community.

I agree with that analysis, but I’d add another reason that the amendment is peculiarly anti-democratic: it not only diminishes the rights of a politically unpopular minority, but it cuts off their ability to obtain redress through the normal political process. To change what has been done, they have to amend the Constitution once again. It requires a supermajority in most jurisdictions and that’s frankly what’s wrong with it. To

require a minority to seek a supermajority in order to vindicate what we hope at a future date has become a majority position is wrong.

I think I'll stop there and hope we'll have plenty of time for questions.

MS. TANDEN: We're also honored to have Bruce Fein here at the Center for American Progress. Mr. Fein has served in the Reagan Justice Department in a variety of important roles as – from assistant director of the Legal Policy Department, to legal advisor to the assistant attorney-general for anti-trust and the associate deputy attorney-general. He's authored several volumes on the Supreme Court. He's a columnist on legal issues for the *Washington Times* and has written on these and a variety of other matters.

Mr. Fein, thank you so much.

MR. BRUCE FEIN: I'll take my comments informed by Shakespeare's quip that "better be brief than tedious" after what's been said in advance.

Our constitutional dispensation is more a process than any event, and it recognizes through the amendment process that the structure of government, the allocation of power, and participation in democratic process are appropriate subjects for constitutional amendments, but the Prohibition Amendment taught that social policy is not. Social policy deprives the people to learn and struggle with vexing social, economic, or other issues by preempting the democratic process in enshrining for all time a particular standard nationwide.

The Federal Marriage Amendment lacks any redeeming element that comports with our understanding of an appropriate constitutional topic. Number one, it does not try to enshrine a policy permanently because its champions are a discrete or insular minority unable to have their voice heard through the democratic process, as was true, for example, with blacks during Jim Crow and prior to Jim Crow, which eventuated in the 15th Amendment. Those who are opposed to same-sex marriage clearly have the access and volume to have their voices and sentiments enshrined in statute.

Secondly, there is no sense of national identity or need that pivots on a uniform determination of what is marriage nationwide. I think as has been stated earlier, the Massachusetts experiment underway with same-sex marriages has not led to the deterioration or decay of traditional marriage in other states and certainly has not shocked the sinews of our American constitutional dispensation. It does seem to me that there is an appropriate role for an amendment addressing same-sex marriage that's consistent with our understanding of constitutional architecture and that is an amendment that removes from court jurisdiction decision-making authority over the question and ensuring that state legislatures and Congress will exercise exclusive jurisdiction over whether same-sex marriage ought to be recognized.

On that score, the legal playing field ought to be even. There ought not to be permitted under the amendment I would propose a state constitution that prohibited the state legislature from either supporting or opposing same-sex marriage. The legal playing field should not favor or oppose what the legislature might choose on that score.

It also seems to me pertinent to ask what is the political motivation of the Bush administration behind proposing same-sex marriage amendment at this particular point in the political season? On the one hand, it was President Bush who came to office arguing that one-size-fits-all is simply not the appropriate creed for a conservative Republican administration. The Federal Marriage Amendment is exactly a one-size-fits-all theory that President Bush so ardently opposed when he was running for the presidency.

Moreover, it was the Bush administration and many social conservatives who decried judicial activism and would argue that the same-sex marriage amendment is needed to address that issue, but as been pointed out it's actually the Federal Marriage Amendment that decries popular sentiments enshrined in law as being the touchstone for what our position ought to be as a nation with regard to marriage; that is, the Federal Marriage Amendment says to the American people, to the popularly elected representatives in state legislatures, "We don't want to permit you to have a choice over whether or not to recognize same-sex marriages. There's only one option available to you: you have to be opposed to it."

In sum, in my judgment, the political motivation behind this is simply not to advance a conservative political principle, but simply to advance an agenda that is essential to the Bush administration's popular support and the Republican Party's popular support going into the 2006 elections. That seems to me, when it comes to a matter of such high moment of amending the Constitution, to rank no higher than a very squalid motive.

Thank you.

MS. TANDEN: Thank you so much.

And finally, I'd like to introduce Professor Michael Seidman of Georgetown Law School who teaches constitutional law among other subjects. Well, he graduated from Harvard Law School and clerked on the Supreme Court and served as a reporter for the Constitution Project's Amendment Initiative, which produced "Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change," which I hope we will discuss today.

Thank you, Professor Seidman.

PROFESSOR LOUIS MICHAEL SEIDMAN: Thank you, Neera. I'm going to spend most of my time talking about technical and boring lawyerly objections to the amendment, so if you need to stretch your legs or use the bathroom, this might be an appropriate occasion – (laughter) – but because I'm going to mostly talk about that, I

think it's important to start by saying that the most important and surely sufficient reason to oppose this amendment is because of its bigoted, stupid, mean-spirited, and because it attempts to take our foundational document, which ought to belong to all Americans, and turn into a weapon that some Americans can use to oppress other Americans.

Now, having said that, here is the lawyerly boring part. As Neera mentioned, some years ago I was honored to be the reporter for a Constitution Project on constitutional amendments, it was co-chaired by the Honorable Abner Mikva, a former Democratic representative from Chicago, and the Honorable Mickey Edwards, a former Republican representative from Texas, and our task was to design guidelines for amendments to the Constitution, and although members of the committee disagreed about specific amendments, they were united in their commitment to some minimal standards before our foundational document could be changed.

Central among those standards was the requirement that proposed amendments attempt to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles. I'm sorry to conclude that the proponents of this amendment have not met that minimal standard. If enacted, their handiwork is bound to produce outcomes that no one could possibly have intended or wanted as well as an unprecedented transfer of power over domestic relations to federal judges.

So what are the legal problems with the amendment? The current draft introduces two interpretive ambiguities into the law. Federal courts will be required to decide what the words "marriage or the legal incidents thereof" mean, and what the word "construed" means. It's important to emphasize that the answers that these courts come up with for those questions become a matter of federal constitutional law that's not revisable either by Congress or by the individual states.

Now, why do those words pose interpretive problems? Suppose we focus first on the words "marriage or the legal incident thereof." Clearly, the framers of the Amendment meant to distinguish between marriage itself and its legal incidents. That much is obvious because the first section defines only marriage while the second section refers to marriage and the legal incidents. That distinction is puzzling to say the least. Marriage is a legal institution, at least in the civil realm. The only thing it consists of is a collection of legal incidents. Apparently, the framers have in mind a distinction between core attributes which make up marriage and an unspecified list of peripheral attributes which make up its legal incidents. Because the amendment is entirely silent about what is core and what is periphery, it gives federal judges unchecked power to place various aspects of marriage in one category or in the other and short of another constitutional amendment, neither the states nor Congress could do anything to reverse those decisions.

Let me give you a specific example. Suppose that the state court interprets a vaguely worded statute or constitutional provision to allow grandparents visitation rights. This is hardly a far-fetched hypothetical: state courts throughout the country are considering this very question and some courts have afforded grandparents those rights,

but if visitation is an incidence of marriage and if this amendment is enacted, then granting these rights violates the federal Constitution. That's so because grandparents are not part of a union between a man and a woman and are therefore not entitled to enjoy the incidents of marriage. Do the drafters of this amendment really intend that result? Do they really wish to give federal judges the discretion to impose that outcome or not as they choose?

The word "construed" is also ambiguous and its vagueness is certain to cause more mischief. The most sensible reading of the amendment is that gay men and lesbians should not enjoy core marriage rights – whatever they are – but that they can enjoy peripheral incidents of marriage so long as no construal of a constitution is necessary to create them. The amendment will require federal judges to develop a jurisprudence that distinguishes between construal of a state constitutional provision and its mere enforcement. Apparently, if the state provision explicitly and unambiguously grants the incidents of marriage to gay men and lesbians, that would be permissible – permissible because no construction of it will be necessary.

On the other hand, if the state provision is open and a court would be required to construe it, the court could not do so in a fashion that would extend the incidents of marriage to gay men and lesbians. The problem, of course, is that most cases will fall somewhere in the middle. Courts regularly consider constitutional provisions, the meaning of which is not perfectly free from doubt. Perhaps, for example, the wording is somewhat vague or its legislative – but its legislative history leaves no doubt about the intent of the framers. How is a federal court to decide whether a state court's engagement with a particular provision constitutes a forbidden construal or mere enforcement?

Now, perhaps the drafters of this amendment thought that all of this was necessary to save the institution of marriage. The final irony, however, is that the amendment actually weakens the institution of marriage. That's true in two separate respects. First, the amendment has the remarkable, bizarre, and no doubt unintended effect of abolishing the institution of marriage in the state of Massachusetts. (Laughter.) Now, why is that so? Well, as I'm sure members of this audience know, the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Health* that the state's guarantee of equal protection required that gays and straights be treated equally with regard to access to marriage. It's important to understand that nothing in this amendment reverses or modifies that decision. It's true the amendment makes marriage unavailable to gay men and lesbians, but the holding of the Massachusetts Court was not that gay men and lesbians are intended – are entitled to marriage as a substantive matter, but that they are entitled to equal treatment with regard to marriage.

The Massachusetts Constitution hasn't been amended since that holding was rendered and nothing in the proposed federal amendments supersedes it. So even after the amendment is adopted, Massachusetts courts will be under a continuing duty to provide for that equal treatment. Well, equality can be created in one of two different

ways by granting a benefit to the disadvantaged group or by withholding it from the advantaged group.

In *Goodridge*, the Massachusetts Court sensibly chose the first course. If the proposed amendment were adopted, it would deprive the Massachusetts Court of that option and if the Massachusetts Court remains true to its reading of Massachusetts law, it would therefore have no choice but to choose the second course. The upshot would be civil unions for all citizens of Massachusetts and the abolition of marriage in that state. I have to ask again, did the framers of this amendment really intend that result?

The amendment also undermines marriage in a second sense. It does nothing to change the Supreme Court's decision in *Lawrence v. Texas*, which invalidated sodomy statutes as applied to gay men and lesbians; strikingly, the *Lawrence* decision creates a constitutional right to engage in even casual gay sex with total strangers. So when *Lawrence* is read together with this amendment, the upshot is a fundamental constitutional right to casual sex, but an absolute constitutional prohibition on long-term, committed gay relationships. The amendment in effect constitutionalizes the one-night stand. Is that a sensible way to protect the institution of marriage?

All of this for me raises something of a puzzle: why is this amendment so badly drafted? We knew that the people behind this were bigoted, but it could be – could it be that they're also terrible lawyers? (Laughter.) I don't know for sure. Maybe they're just not very smart and just not very good lawyers. I have another hypothesis though, which I find ultimately more disturbing. Perhaps it's badly drafted because the people who wrote it don't really care what it says. They don't really care what it says because on some deep level they don't expect it to be enacted and they don't care whether it's enacted or not. Instead, they're using the amendment process to score political points; to use the private lives of their fellow Americans to shore up their base and somehow rescue the Bush administration from its incompetence and fecklessness.

I have to say – maybe I'm like some other people in this room – I have some sympathy for the grassroots supporters of this amendment. Some of these people are people who grew up with deeply held values that are now under attack and are now changing. They feel marginalized by modern culture. They are people often without a lot of social power. I have some – I don't agree with them, but I have some sympathy for them, but it's important to see that they are being used, and I think increasingly they're recognizing that they're being used. They, in fact, have caught on or at least are starting to catch on, and if in fact they are being used, then this Amendment is not just stupid, not just bigoted, but also cynical; not just manipulative – not just bigoted, but also manipulative and demagogic.

Now, I train lawyers for a living and I therefore have a professional distaste for bad lawyering. I have to admit, though, that being a bad lawyer is not the worst sin in the world and I fear that the drafters of this amendment may be guilty of something much more evil than that.

MS. TANDEN: Thank you, Professor Seidman. I'm relatively confident that no one found that boring. (Laughter.)

So now, we'll start a little – give a few minutes to a panel discussion on some of these issues and then have time for questions. So I'll start it off, but I really hope that people have questions for each other.

MR. FEIN: One of the things that I'd like to say is that I don't believe that structuring the way in which the decision should be made as to whether same-sex marriage should be honored in the state and insisting it be done legislatively as opposed to through a state constitutional decree of a state's supreme court is a constitutional anomaly. The 17th Amendment creating direct election of Senators does not give the states the option any more of electing Senators by state legislatures, and it seems to me that's no more a departure from a uniform nationwide allocation of power than would be this case of a constitutional amendment that says state legislatures, not state courts or federal courts, shall decide whether or not to recognize same-sex marriages.

PROF. SEIDMAN: I think that the problem with that, Bruce, is you're imagining a bright-line distinction between courts creating a right and legislatures creating the right, but courts rarely just say, "Gee, we're inventing this out of whole cloth." Usually, they at least purport to be interpreting statutory language. So –

MR. FEIN: But I'm not disagreeing on that score, Michael. All I'm saying is that the language that they would have to be interpreting would be a state statute, not the state constitution that is subject to change through ordinary legislative processes. It's not that courts cannot be involved in interpreting the statutory policy that was enshrined by popular vote.

PROF. SEIDMAN: And that's not – certainly not a ridiculous position, but it does have some odd consequences. So imagine a state constitution has a state equal protection clause and a court interprets that clause to prohibit – to require gay marriage. A federal court now comes along and strikes that down. Well, the state legislature by a narrower margin could then enact the very same language with less support – popular support than it had to get into the state constitution, and yet, if the court construed that very same language to require gay marriage, then that would be permissible. Now, again I can imagine reasons for that, but it's – I think that is an anomaly.

MR. FEIN: No, but I think the reason is precisely because our constitutional dispensation treasures process as much as the events and conclusion, and if state legislatures would then struggle with the issue every session and decide whether the language ought to be or the policy ought to be changed, and to me it seems that the Constitution is calculated to foster this continual struggle over issues of vexing policy and making us as citizens be in charge of our own destiny, forcing us to decide each year what our policy ought to be. And when you take those issues out of the legislative process on a daily basis, I think that's a harm.

Now, occasionally the harm is justified if you're dealing with discrete, insular minorities who can't otherwise feel they have a fair opportunity to have their voices heard in the state legislative process, but it seems to me the burden ought to be very, very high before we tell people, "No, this matter is of such high magnitude; you are not to be entrusted with responsibility for a decision."

PROF. CARPENTER: Can I just make two observations about this exchange? It would be fascinating if we had before us the Fein Federal Marriage Amendment. It would be an interesting discussion. It would be wonderful, much more interesting and defensible, it seems to me, because it would address what the claimed need for an amendment is; that is, the danger that courts are going to act too aggressively to impose same-sex marriage on the country rather than the federal amendment that we have in front of us, which does far more than address that claimed need. But we don't have the Fein amendment in front of us.

But second, if we did have the Fein amendment in front of us, my initial reaction would be that we have to be able to justify even that amendment, and it seems to me that we shouldn't – we don't need amendments addressing procedural issues unless we have convinced ourselves that there is a sufficient enough problem with the way the process is going know that it can't be addressed in any other way then through a constitutional amendment, and that sort of goes back to the points I was making about these – what I think are exaggerated claims of judicial activism. It's not as if there is not such a thing. It's not as if courts can't get substantive issues wrong, but in fact I think we are in a middle of a decade's long democratic discussion in this country about the merits of recognizing same-sex relationships and that is going to proceed in this country in a lot of different ways, but I think it will proceed without the need for any kind of constitutional amendment.

MR. FEIN: Well, if I could add the element of my proposal that perhaps is overlooked is that mine would prohibit a state constitution itself from enshrining a ban on same-sex marriage into the state constitution trying to prevent the democratic process from operating at the state legislative level, and I would suggest that is a problem at present because there are countless state constitutions that are underway to try to stifle state legislative debate over the issue by making it a matter of state constitutional policy that there cannot be any further debate in that state whether or not to recognize same-sex marriage.

MR. AGRAS: In fact, I think this is the policy choice that the Hawaiian people made. Unlike all of the other state constitutional amendments that I'm aware of, Hawaii reserved to its legislature the ability to make the decision. The language of their amendment reads "the legislature shall have the power to reserve marriage to opposite sex couples." I much prefer, frankly, the way that Bruce has framed it in a much more value-neutral terms because obviously that constitutes a kind of invitation which the legislature then promptly and unsurprisingly took up.

Nevertheless, I do have to agree that I find – first of all, I think stripping the courts of jurisdiction is not an appropriate way of reinforcing the values of federalism. I think part of federalism means respecting the role of state courts in interpreting state constitutions. Second, I think it’s unnecessary because when they go awry, the people do have a remedy, as I said earlier: they can enact a constitutional amendment that would override the views of the court.

MS. TANDEN: Do you want to respond to that?

MR. FEIN: Well, I would just – I don’t find those arguments any different than what could be said to prohibit the direct election of Senators being required of every state. You could say, well, states can decide for themselves if they want state legislatures to elect their Senators directly. The idea was no, the participatory urgency of our democratic dispensation is such that we insist upon direct election of the Senators and I’m suggesting the same arguments justify insisting that state legislatures grapple with this issue even if the states want to entrust this to the courts.

You may recall with regard to the “one person, one vote” decisions of the U.S. Supreme Court, it wasn’t enough for the state legislatures themselves to recognize or to justify of what you might call malapportioned legislatures even if the people voted for it. It was said, no, that political process is so important, we’re going to take the rules of the game out of the federalism arena and make it uniform nationwide.

PROF. CARPENTER: This raises an interesting – this exchange raises another interesting question, which is that while Professor Seidman might be right that there was some bad lawyering involved in the drafting of this amendment, it reflects deliberate choices. You could have written an amendment and there’s been some consideration of an amendment that could be proposed along the lines that Bruce has suggested. That amendment has gone nowhere in the Senate – absolutely nowhere. So we have to ask why is it that we would have before us a proposed constitutional amendment that goes well beyond the stated concerns about courts imposing unwanted social policies on the country?

And many possible answers to that, but let me suggest one. There has been movement in this country and attitudes in this country towards the issue of same-sex marriage, and it has been with fits and starts in the direction of more recognition, of more inclusion and not less.

We now have, for the first time in history of the country, states democratically, not through judicial decision, but democratically choosing to recognize same-sex relationships. As I said, the California legislature just a year or two ago passed a state law that would have recognized same-sex marriages; it was later vetoed by the governor, but it was the first legislative body in the country to have done that. Connecticut without having courts ordering it to do so, enacted a civil union statute last year that grants to same-sex couples all of the benefits and protections of marriage, but under the name “civil union.”

So there is a democratic movement in the country, and I wonder if this Amendment is not really meant to forestall courts, but it's – in other words, not meant to prevent judges from imposing same-sex marriage on the country, but is meant to prevent the people themselves from bringing same-sex marriage to the country over time.

MR. AGRAS: I agree with that and I think that another way of saying that is that the Fein amendment is too even-handed and too open-textured. It leaves the question open, which is his intention and I think it's a noble intention and it's not one that is shared obviously by the proponents of the Federal Marriage Amendment.

On the other hand, there are some circumstances in states in which it is of such constitutional moment that the courts are making a decision based on their own interpretations of their constitutions that it isn't enough to leave it to the ordinary political process. I know that's disturbing to some conservatives, but that is how our Constitution was designed to function and that's how state constitutions were designed to function.

As I say, when courts overreach, there are all kinds of remedies. There are in many jurisdictions judicial elections, whatever one may think of that process, and there are in most jurisdictions the opportunity for the people to override through a constitutional amendment, but I do think that we are talking about not only a set of theorems or a set of social legal constructs, but obviously about the lives of millions of people in this country, and I think for them this matter does rise to a constitutional dimension in terms of protection of their rights. So if a state court says, "Under our constitution, our equal protection clause or our due process clause accords you that right," then I think that that is also something that the federal government is bound to respect.

MR. FEIN: I think those are forceful arguments, Mark, but think it discounts the importance of legitimacy in avoiding unnecessary, gratuitous social strife and friction. Something that comes out of the legislative body – the people themselves directly have been involved in deciding – is going to be accepted far more easily than a court decree like *Roe v. Wade*, and if there were something in the legislative process that indicated it wasn't working, it didn't have genuine reflection and change in policy because of the cultural evolution, then there might be a reason for jumping to judges whose legitimacy is less pronounced as legislative bodies.

But as Dale pointed out, at present there is no indication at all that the same-sex marriage issue isn't being debated openly and forcefully on both sides in state legislatures, and just as the legislative movement before *Roe v. Wade*, it's clearly moving in a direction towards greater recognition and support for same-sex marriage. It's far better for the country to have that come about through an evolutionary process where the people themselves know they had their day in court – so to speak – everybody has a day in court in the legislative process where they voted for a delegate as opposed to having a court make these decisions, whether under state or federal constitutions, and that's why I

think we can avoid the kind of post-*Roe v. Wade* friction if we continue to insist that the people grapple through this through the electoral process.

MR. AGRAS: I actually agree with you as a prudential matter. I think that courts would in most instances be wise to accept your counsel and to refrain from interfering with a political process that is working well. I'm not sure that that describes the state of affairs in all of the jurisdictions where courts are considering cases, but I do think it's a powerful argument for prudence. I simply wouldn't require it of them at the federal level.

MS. TANDEN: I'm just going to move on to a few more questions on the panel and then we'll open it up for questions from the audience. One question I had is that everyone knows that the Federal Marriage Amendment will not pass, so I think proponents and opponents understand that it will not pass. And particularly for you, Professor Seidman, you've written before about the standards for constitutional amendment and the need for consideration around constitutional amendment, and do you think it undermines the gravity and the consideration we should give constitutional amendments the fact that everyone – we're taking up this important issue – an amendment to the Constitution – when everyone seems to know that it will fail?

PROF. SEIDMAN: Yes. (Laughter.)

MS. TANDEN: Would you care to elaborate? (Laughter.)

PROF. SEIDMAN: Sure. It's rather odd in some ways that the same people who support this amendment are the people who make the Fourth of July speeches about the importance of constitutionalism, and I think in some ways actions speak louder than words. The constitutions are meant to be thought seriously about and they're meant to – the constitutional amendment process, which by the way I think it is an important process, is meant to consider and debate fundamental questions about the direction of the country: about what kind of country we are, what kind of governance we want to have, what kind of rights we want to recognize. The process is not meant to achieve or at least it should not be meant to achieve short term political gain.

Now, the drafters of the marriage amendment are not alone in violating that precept. There are people on the other side who have as well, but it is nonetheless – whenever it happens, I think it's really unfortunate. It politicizes a process with a small “p” that should be about politics with a large “P.” We should be talking about fundamental questions about the direction of our country, not about how to rally your base.

MR. FEIN: I'd just add that it's reminiscent of George Wallace standing in the education doorways and saying, “Segregation today, segregation forever,” knowing that what he was doing would never have standing in law in the courts and thinking, “So what? If I can blame somebody else and get a political advantage, it doesn't matter to

what level I'll stoop to demagogue," and that's the gist of what's in my judgment transpiring here.

MS. TANDEN: Great. I wanted to actually ensure that we have time for questions, so if you could just identify – give us your name and the organization you're with and wait for Paige to get to you, who has the microphone.

Paige?

Q: Hi, my name is Ron Schlittler and I'm with the national office of Parents, Families and Friends of Lesbians and Gays, and so we clearly have a real personal interest in this, I think, very deeply. Two questions come to mind for me, and I think Mr. Fein's last comment touches on it a bit. I have – I find myself wondering how this conversation might be playing out in terms of judicial activism if we were still talking about *Brown v. Board of Education* or *Loving v. Virginia* or even *Romer v. Evans*. But what is the role of court, frankly, becomes the question.

And then the second piece is an idea that I haven't heard put forth. Last week, I believe it was in New York, Mayor Bloomberg proposed the idea that really the government has no business deciding who should get married and who shouldn't if that's what they want to do. While I know politicians and lawyers like to hash through all these things ad nauseam, I also find a great deal of something very refreshing about that idea and wonder if he's got a sort of, you know, conceptual framework backing from your perspectives that lend anything to what he's proposed? I don't remember if he said federal government or local, but the general idea that it's not the role of government to say you may or you may not get married.

MR. FEIN: Well, I would think there are matters of degree. People might hesitate if you told them the government had no business prohibiting polygamy; that was an issue that was of grave import to those in Utah for long, long years. So it's a matter of prudence and values that don't have algorithmic answers and that's why in my judgment the decision by the culture may change from time to time and why it's important to keep that entrusted to the legislative process without favoring or opposing how any particular viewpoint unless there comes to the evidence that it simply can't receive a fair hearing in a state legislative forum.

MS. TANDEN: You want to take that?

PROF. CARPENTER: Sure. Judicial activism is a notoriously difficult concept to define and you get different ideas of what it is. It's basically any decision you don't like. Perhaps you don't like it politically or perhaps you have some general what you regard as neutral, interpretive constitutional principles that a particular decision violates.

My own view on this issue is that whatever the merits of a constitutional argument, it would be better for same-sex marriage advocates and it would be better, I think, from a policy perspective for us to approach this issue in the way that I think Bruce

and Mark have suggested – especially Bruce; that is, that this is a major change – that is, same-sex marriage is a major change and it is something that we ought to consider over a long period of time. We ought to allow for evolution in thought. We ought to see what the results are of the experiments in recognizing gay relationships are. I think those results will be good, but am I 100-percent sure that there will be no problem coming up as a result? No. So I think the best approach for the country and for gay couples is to go about this in a sort of incremental, evolutionary fashion. And I think that is warranted in most issues; some not, but on most issues.

On the second – (Prof. Seidman begins to interject) you can come after me in a moment. (Laughter.) On the second issue, here is where I part I guess with some of my libertarian friends: I do not think that the government should get out of the business of recognizing marriages. People who are married, according to most of the research we have, are better off in all kinds of ways than people who are not married: they are healthier, they are wealthier, they are happier in just all kinds of ways, their children are better off when their parents are married. And there is some dispute I suppose about some of that evidence, but I think it is pretty strong. And so I think the government has an interest in making an institution available to people that helps to accomplish those things.

And I also think, by the way, it serves the purpose of less government. And the reason it does so is that when you are married to someone, when you have got a long-term partner there, that person is the first line doctor, fire fighter, police officer for you and performs those functions in a way that no governmental program or governmental officer can ever do. So I think the government does have an interest in doing it, I just think ultimately that the government has an interest in making sure that same sex couples and families who are raising children by the hundreds of thousands, if not million or two in the country, are also included in the benefits that marriage provides.

PROF. SEIDMAN: I would like to dissent mildly from what Dale said. I know that Bruce is going to disagree with what I have to say also.

PROF. CARPENTER: We'll hit you from both sides. (Laughter.)

PROF. SEIDMAN: Right. First, two points. First, it seems to me that both Dale and Bruce are drawing much too sharp a distinction between evolutionary political change on the one hand and judicially mandated change on the other. In fact when you look at the history of the development of rights in this country, the two often work together, so the example of *Brown* here is quite instructive. The NAACP pursued a litigation strategy. They went to court demanding rights, but that litigation strategy was part of a broader political strategy. When Thurgood Marshall went to a particular community to bring a lawsuit, he also organized people. That was an organizing tool that he used in order to achieve his objectives, and so I think part of the evolutionary political process can be a legal strategy.

MR. FEIN: I would say –

PROF. SEIDMAN: Let me just make my second point if I can, and that is Dale's comments remind me of a famous exchange between – I do not know which justice it was, it might have been Jackson and Thurgood Marshall at the *Brown* argument, where I will say Jackson said, "Wouldn't it be better if these changes were done through evolution and legislatively rather than judicially." And Marshall's answer was, "Yes it would be better, sure that would be better, but it is not happening and when it is happening it is not happening fast enough." It is fine for – and now this is me, not Thurgood Marshall, talking much less eloquently – it is fine for us academics to stand up here and say, gee, it would be nice for this to happen slowly and gradually so that everybody was on board, but there are people right now whose rights are being violated, and those are people who do not want to wait 30 or 40 years to have their rights vindicated.

MR. FEIN: I think that your analogy to *Brown* is not convincing because there you had a group that was virtually disfranchised during Jim Crow.

PROF. SEIDMAN: *Brown* was not about disenfranchisement.

MR. FEIN: No, I understand, but in terms of getting the legislative process to move in that direction, you ordinarily have to have a right to vote because that is what moves elected representatives.

PROF. SEIDMAN: Are you saying that *Brown* would have been wrongly decided if blacks had had the right to vote? I don't think you believe that, do you?

MR. FEIN: No, I am not stating that at all. What I am arguing is that the prudential considerations that inform whether or not the legislative process can be entrusted with the decision-making and reaping the benefits of having the people struggle with this issue directly and chart their own destiny depends a lot upon what are the political facts on the ground.

And if you want to suggest that the way in which the debate over same-sex marriages are occurring in state legislative chambers today with what was happening in state legislative chamber in Alabama or Arkansas or throughout the country at the time of *Brown* and racial desegregation, I do not think that that analogy is very apt. It seems to me that there is not evidence, as there was surely at the time of *Brown*, that the arguments and state legislators are not being forcibly made on both sides. And they are, being an evolution that we can see every day, as Dale pointed out, whether it is in Connecticut or elsewhere where without even the prodding of the judges the process of the law is under change.

And because you do sacrifice the important democratic principle of participation in charting your own policy when you move to a judicial as opposed to a legislative-based decision-making framework, the argument that you are suggesting that the court should intervene here like it is true in *Brown* I think is not compelling.

PROF. SEIDMAN: Bruce, I think the necessary implication of your argument –

MS. TANDEN: Professor Seidman, briefly.

PROF. SEIDMAN: Sorry.

MS. TANDEN: No, go ahead and then Mark and then we will go on the next question.

PROF. SEIDMAN: A necessary implication of your argument is that *Brown* was wrongly decided in states where African-Americans had the right to vote because there the political process could function. That is not my belief. My belief is *Brown* – well, this is the second sentence – was *Brown* was rightly decided everywhere, whether the arguments were being presented to state legislators or not, because there was a fundamental right to racial equality. I also think there is a fundamental right to sexual identity equality and for that reason I think the two cases are entirely analogous.

MR. AGRAS: I know you want to move on, so I am going to resist the temptation to get in to this.

MS. TANDEN: Okay.

MR. AGRAS: I did want, though, briefly to address the second half of the question because I think it raises some interesting possibilities. I am not actually familiar with what Mayor Bloomberg has proposed, but there has been, obviously, a lot of talk about the distinction between civil marriage, which is the province of the state, and marriage as a sacrament, which is the province of religious institutions.

There are some people who think it should be left to the state. There are some people who think it should be left to religious institutions. I think it is important that we treat these as distinct things; for example, a lot of people may be under the misimpression that by securing equal rights to marry in the civic sense, gays and lesbians will be breaking down the doors to churches that are unwilling to accord them the recognition in a religious sense that they may be seeking.

From my perspective, I do not think you can be a consistent civil libertarian without also saying that religious institutions have the right to make their own decisions over time as to what marriage will mean for them, and that may diverge from what the civil society decides for its purposes. But I think it does offer an interesting possibility, and that is that we perhaps recognize a state sanctioned form of commitment and perhaps we call that civic marriage, or civic commitment, or civic union for everybody, and that those who also wish a religious form of marriage can get married.

MS. TANDEN: Okay. Next question, I saw someone earlier. Go ahead.

Q: The first thing I wanted to say was a little bit of a comment on *Brown v. Board*. *Brown v. Board* was the 1950s. By the mid 1970s, there was still excessive segregation in a lot of areas. And I think evolution – that 20 years – and even today where there's excessive segregation with inner cities being predominantly African-American and minorities, there is an issue that evolution tends to miss a lot of people, and even though it is the preferred option it may not be what we want in the end or what we need as a country.

But my question is referring to Mr. Fein's amendment. I guess I am a little troubled by the idea of making it be analogous to the 17th Amendment, and please correct me if I am wrong, but I think the 17th Amendment is striking or editing what was previously in the Constitution. Your amendment would add something that was not in the Constitution in the first place, so it seems like you are going beyond the constitutional structure to create something that is very, very specific in the same-sex marriage place.

Perhaps if it is a larger decree on what is the role of judges, then I guess going with Mr. Carpenter it might make more sense, but I guess I am missing what exactly is the purpose of your amendment.

MR. FEIN: I think the purpose was self evident and explained: to entrust – to guide the decision-making process over same-sex marriage by entrusting it to state legislators exclusively with no favoritism or disfavoritism in any state constitution. The 17th Amendment was needed because it was not either implicit or explicit in the original document. That is why it was enshrined in the Constitution. And, indeed, there had been efforts by states prior to the 17th Amendment informally to bind the state legislature to vote for the senator who was popularly elected in a so-called advisory referendum, and that was thought not good enough. The country came to believe that direct senatorial elections was the best way to encourage participation in the process of law making. That's all I am suggesting with regard to decisions over same-sex marriage.

PROF. CARPENTER: I wanted to add on thing on the points about *Brown* and the role of the judiciary in all of this. I agree with Professor Seidman's description of *Brown* as itself part of an evolution, and you are right that even 10 years after *Brown* was decided you still only had a few thousand black schoolchildren in the South going to integrated schools – desegregated schools. It took a long time.

But those who believe strongly that there is a constitutional principal that backs the inclusion of same-sex couples in the marriage institution and who believe that courts – namely the Supreme Court, I suppose – should declare that and try to enforce it immediately, have to confront if they are same-sex marriage advocates I think a very stark reality; and that is that the day after that decision comes down by the Supreme Court, the celebrations are going to last for about half a day because then the real federal marriage amendment process is going to begin. And when this country gets worked up enough about a problem, we can actually do these things pretty quickly and the states could be stamped into it.

I think it would be better for same-sex couples if this occurs over time and I do think it is going to occur over time. I could be wrong, but I do think it is going to occur over time. Yes, that means some people are going to wait for benefits and protections, but if the alternative is a federal constitutional amendment banning same-sex couples from marriage, those couples will wait for the lifetime of everyone who is in this room today because there will be twelve states who will be against repealing that amendment for as far as I can see.

Q: Hello. My name is Rachel Laser. I direct the Cultural Project for Third Way and I am a former University of Chicago law grad, too, but my question might not sound like I am. (Laughter.)

MR. FEIN: That is probably a good thing.

Q: I do not know. I will leave that to you all. I will start with a question for Professor Carpenter which is I am wondering whether your intrusion on federalism and –

PROF. CARPENTER: Not my intrusion.

Q: Intrusion on federalism argument and peculiarly antidemocratic argument, how that would play out or how you would apply it to the *Roe v. Wade* abortion context, recognizing that there are of course big differences procedurally with the Supreme Court having interpreted the Constitution positively to have a right, and here trying to take away a right.

And then similarly with the Fein amendments, I am wondering whether you would argue in an ideal world with a blank slate for the Fein amendment in the context of abortion. And I am wondering also – and this is – whether Professor Seidman left out the argument of states' rights on family issues because he was just doing sort of a textual criticism of the amendment or because of concerns sort of in this, this type arena or other similar concerns.

MS. TANDEN: We will take it in that order.

PROF. CARPENTER: Okay, so I will start. It is interesting that you ask this question about *Roe v. Wade*. In March, a very respected conservative intellectual and policy guru named James Q. Wilson authored an op-ed piece for the *Wall Street Journal* in which he strongly criticized *Roe v. Wade* because it was a kind of top-down, one-size-fits-all solution to the question of abortion in the country and put the country in a straightjacket on that issue. And that in fact there was a lot of democratic decision-making and deliberation going on about *Roe v. Wade* at the time the court came down with its decision.

In the middle of that piece, Mr. Wilson made the point that a Federal Marriage Amendment shares the same defect as *Roe v. Wade* in the sense that it is a kind of top-down, one-size-fits-all, straightjacket solution for the entire country on a very

controversial issue. It has the effect in both cases of causing those who are on the losing side of the issue to become very disgruntled and it kind of infects all of our politics in lots of other ways on issues that have nothing to do with that immediate issue.

Now, there are many disanalogies between *Roe v. Wade* and the Federal Marriage Amendment. Certainly, if you are an abortion rights supporter, you would say *Roe v. Wade* was an expansion of individual liberty, the Federal Marriage Amendment is a contraction of individual liberty and so on, but that connection between the two things touches on this federalism point that I made.

MR. FEIN: With regard to the so-called Fein amendment applied to *Roe v. Wade*, I think the analogy is a very persuasive one. As Dale pointed out, at the time *Roe v. Wade* was announced, state legislatures were relaxing abortion restrictions like ten pins. I was a resident of California in 1967, and then Governor Ronald Reagan signed the statute that was a harbinger of *Roe v. Wade* and he never said he regretted signing that statute.

I also think that for those who wish to strengthen traditional marriage it would be harmful to try something through the Federal Marriage Amendment that is akin to *Roe v. Wade* because it no longer then would require them to come forth with arguments trying to defend why marriage should be so confined to heterosexual couples. And I think those who have been in the abortion debates have come to regret in many respects that *Roe* was issued and made those who were pro[-]choice far too lax in defending the policy reasons they though justified the *Roe v. Wade* decision as a matter of liberty for women.

And there is the danger that by relying upon an amendment to capture ideas, as opposed to arguing it out every day and convincing ordinary citizens that you have it right, that the amendment then becomes words without substance and withers away. But in substance I do think that a Fein amendment applied to *Roe v. Wade* would be preferable at present for the country than the current debates and clashes that come between pro-choice and pro-life in this extra-constitutional act.

MR. AGRAS: I agree it would be preferable, but it is also not necessary. As we said before, the effort to strip courts of jurisdiction over important social issues will eventually leave the courts with little jurisdiction that matters in these areas. If we multiply – let's add to marriage, abortion rights, segregation, educational equity, immigration policy – I mean, I do not know where we stop.

MR. FEIN: We do stop at the place where you can think and have evidence that the political process doesn't work. That is the footnote for *Carolene Products*: a discrete and insular minority. And *Brown* and the racial issue was obviously a case where the process was not working. We know in the issue of abortion that both sides are fully capable of having their views ventilated in state legislative chambers and referenda and in fact do that every day.

MR. AGRAST: Well, again it's an argument for prudence and restraint. Prudence on the part of people who bring cases, restraint on the part of courts that hear them. Obviously, courts do not choose what cases come before them. The Supreme Court does, but most courts do not. They have to decide the cases that they entertain. I think we all would hope that where possible they leave this to the political process where that is feasible, where the conditions that Bruce has described obtain. I just would not require it, and I think by the way that the argument about *Roe v. Wade* is one that was made by Justice Ginsburg herself.

PROF. SEIDMAN: On the question of family law and leaving it out, I think *Loving v. Virginia* was correctly decided. *Loving* is the case where the Supreme Court struck down Virginia's anti-miscegenation law. That was a matter of local family law, but the court put the country in a constitutional straightjacket by saying that experimentation was not going to be allowed on that subject and that anti-miscegenation laws were invalid everywhere, and that was true in cases where – in states where the matter could be fully debated and states where it could not be, and that was so because the right to marry somebody of a race different to yours was a fundamental right.

I do agree with Professor Carpenter that the Supreme Court – if I were a Supreme Court Justice I would take in to consideration the likely result of a decision and if the result of a decision tomorrow was to make a constitutional amendment that would set back the cause, then I would not reach that result, but I would reach it as soon as I reached the prudential judgment that we could get away with it. (Laughter.)

MR. AGRAST: One difference with the *Loving* case is that by the time it was decided there were relatively few states that still had these miscegenation law statutes on their books, which I think does reinforce what I think we all agree: as a prudential matter it is better to use the political process for social change when you can do so, and for the courts to follow rather than lead when that is practical.

MR. FEIN: There is another element, too, to *Loving* that differentiates it from the same-sex marriage issue, and that is the court clearly recognize that the anti-miscegenation laws were simply part of a larger framework of white supremacy. This was not a statute in isolation and this whole bulwark of efforts to create a second-class citizenship for blacks was at work here and the court was not going to blind its eyes to that. I do not think we confront that kind of situation, certainly to the degree that was true in *Loving v. Virginia*. There is not an effort to disfranchise gays from exercising their customary civil rights in a political forum. Even though there is certainly bias and prejudice at work, it is not on the level of saying they should not be able to vote and they should not be able to exercise free speech.

As I say, these are all matters, however, of degree, and reasonable people can differ as to when the degree has reached the stage where the courts have to intervene because the discrimination and the oppression is so pronounced. But we will not solve these problems by algorithms.

PROF. CARPENTER: I do think *Loving* involved a clear constitutional principle where this is much murkier, and maybe that is a substantive disagreement that I have with others on the panel. But it is interesting that the last time that we had a serious discussion in the country about amending the constitution to define marriage came in 1912 when Seaborn Roddenberry of Georgia proposed a constitutional amendment to ban interracial marriage. If he had got his way – and at one point all but nine states did ban interracial marriage – if he had got his way, we would have put in a constitutional straightjacket that view far beyond probably the days of *Loving v. Virginia*. Even as late as the 1950s, 96 percent of white Americans opposed interracial marriage.

MR. AGRAS: Could I just add one other point to what Bruce has said, that this is not really the same situation faced by African-Americans in this country? I totally agree and I do not think that they are at all commensurate. Gay people were never enslaved in this country. They are not forcibly segregated in most instances, apart from the military, but I think it is the case that there is in place a general system of discrimination that has been largely invisible for most of the life of this country.

It is only visible to us now because these issues have come in to play and gay people are more open in their both public and private lives. But you look at the military issue, you look at the fact that unlike married people gay people cannot bring their longtime partners in to this country through the immigration laws, so they have to live their entire lives either outside of this country or in separate countries. Apart from a handful of states, they can still be discriminated against in employment and in housing. They can lose their jobs for no reason at all and they can be denied promotions. So I think we have got a lot of work to do in this area and I do think it is important to recognize that the issue of same-sex marriage is part of a larger matrix of discrimination that this country is just beginning to address.

MS. TANDEN: Thank you so much, and thank you for ending on that note. I was a bit worried that there would be too much agreement on the panel since we all agree about the Federal Marriage Amendment, but thankfully I was completely wrong. And thank you all so much for the lovely discussion and, again, on behalf of the Center for American Progress and the CATO Institute I am hoping this is the beginning of a partnership, but maybe not on too many amendments. (Laughter.)

Thank you all so much.

(Applause.)

(END)