

April 2006

# Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President

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## Recommended Citation

Tracy A. Thomas. *Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President*, 27 Constitutional Commentary 137 (2006)

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*Elizabeth Cady Stanton on the Federal Marriage  
Amendment: A Letter to the President*

*as recounted by Tracy A. Thomas\**

*Dear President Bush,*

I have read of your call for a Federal Marriage Amendment to preserve the sanctity of the traditional marriage between one man and one woman.<sup>1</sup> The proposed constitutional amendment declares that “marriage in the United States shall consist of only the union of a man and a woman” and that no federal or state constitution can be construed to require otherwise.<sup>2</sup> I was surprised to see such a proposal put forth in light of the failed attempts at such a national marriage amendment in my time during the late nineteenth century. For over sixty years from 1884 to 1947, proposals were made by “pro-family” advocates like you to amend the federal Constitution to give Congress the power to legislate uniform laws of marriage.<sup>3</sup> Until my death in 1902, I was one of the leading opponents and most outspoken critics of the

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\* Professor of Law, University of Akron. Financial support for this research was received from the Faculty Research Committee of The University of Akron. My appreciation goes to James E. MacDonald for all his outstanding research assistance on this and other Cady Stanton projects.

1. See President George W. Bush, State of the Union Address (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>; President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>; see also Press Release, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/print/20040224-2.html>.

2. S.J. Res. 40, 108th Cong., 150 CONG. REC. S7751, S7755 (daily ed. July 7, 2004); see H.R.J. Res. 93, 107th Cong. (2002).

3. See NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 145–50 (1962); MICHAEL A. MUSMANNO, *PROPOSED AMENDMENTS TO THE CONSTITUTION: A MONOGRAPH ON THE RESOLUTIONS INTRODUCED IN CONGRESS PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 104, 108 (1929). None of these proposals ever came to a vote in either house, and only once were they given formal committee action. BLAKE, *supra*, at 145. In 1892, the House Judiciary Committee voted against the proposed congressional marriage amendment based on concerns of the Southern Democrats against continuing the expansion of federal power begun in the Thirteenth, Fourteenth, and Fifteenth Amendments and over opposition to interracial marriage that was threatened to be legalized under a uniform marriage law. *Id.* at 146 (citing H.R. 1290, “Marriage and Divorce,” 52 Cong. 1st Sess. 1–8 (May 5, 1892)).

proposed marriage amendment of the prior century. I write to you now to advise you of the substantial grounds that I advanced against a constitutional marriage amendment, for the arguments continue to be relevant and applicable today.

The outcry for a uniform national marriage law rang loud as I approached my ninetieth year. I weighed in on the issue, as I did with all issues of importance to women, speaking at lectures and professing my views in the newspapers of the day.<sup>4</sup> Indeed, I was as “radical on the marriage question at the age of eighty-six as I had been a half century earlier.”<sup>5</sup> Throughout my career, I agitated for equality in marriage, challenging the traditional marital patriarchy and advocating for marital property rights for women, elimination of the word “obey” from the marriage ceremony, the retention of a wife’s birth name, and no-fault divorce.

With the advent of a national conservative movement against divorce in 1884, I articulated a multi-pronged analytical attack on the constitutional amendment. Marriage reformers then, as now, claimed the need of an amendment to protect against the exportation of liberal state laws of marriage through the Full Faith and Credit Clause. Yet, it seems to me that such claims of threats to federalism are mere pretexts for social targets—first women, and now homosexuals. I opposed the federal marriage amendment of the nineteenth century on grounds that it stunted state democratic action, perpetuated gender discrimination in the family, and denied the true contractual relation of marriage.<sup>6</sup> I recount those arguments here in the hope that per-

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4. See Elizabeth Cady Stanton, *Are Homogenous Divorce Laws in All The States Desirable?*, 170 NO. AMER. REV. 405, Mar. 1900, in THE PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, Reel 41, pp.186–90 (41:186–90) (Patricia G. Holland & Ann D. Gordon eds. 1991, microfilm) (hereinafter “STANTON PAPERS”); Elizabeth Cady Stanton, *The Need of Liberal Divorce Laws*, 139 NO. AMER. REV. 243 (1884), in STANTON PAPERS 23:951; Elizabeth Cady Stanton, *Divorce Versus Domestic Warfare*, 1 ARENA 560, April 1890, in STANTON PAPERS 28:324; Elizabeth Cady Stanton, *National Law for Divorce*, Nov. 15, 1899 (unidentified newspaper clipping), in STANTON PAPERS 40:227; Elizabeth Cady Stanton, *Are Homogeneous Divorce Laws in All the States Desirable?*, BOSTON INV., Dec. 17, 1891, in STANTON PAPERS 38:1011; Elizabeth Cady Stanton, *Are Homogeneous Divorce Laws in All the States Desirable?*, Address to the Nat’l Leg. League (Feb. 24, 1902), in STANTON PAPERS 42:576; Elizabeth Cady Stanton, *Divorce in the Several States*, N.Y. EVE. J., May 18, 1899, in STANTON PAPERS 39:876; Elizabeth Cady Stanton, *Elizabeth Cady Stanton’s Last Plea for Women, A Symposium, Art. XVII*, N.Y. AMER. J., Oct. 28, 1902, in STANTON PAPERS 42:861; Elizabeth Cady Stanton, *How Shall We Solve the Divorce Problem? A Symposium, Art. I*, N.Y. AMER. J., Oct. 13, 1902, in STANTON PAPERS 42:787.

5. BLAKE, *supra* note 3, at 150–51; ECS, *National Law*, *supra* note 4.

6. See *infra* text pp. 108–23.

haps they might be persuasive with regard to the parallel Federal Marriage Amendment championed in this new millennium.

### HISTORY AS A GUIDE

Perhaps I should begin by introducing myself properly. You have referred to me in passing as a “courageous hero” when proclaiming presidential support for Women’s Equality Days.<sup>7</sup> Others know me as a reformer who agitated for woman’s suffrage with my cohort Susan B. Anthony.<sup>8</sup> Still others have remembered me as the leading philosopher and ideologue of the nineteenth-century woman’s movement, even calling me “the most brilliant and dynamic feminist theorist” of the day.<sup>9</sup> Indeed, I spent most of my adult life from 1848 to 1902 working for the advancement of women’s rights beginning with the first meeting on the woman question at Seneca Falls, New York.<sup>10</sup> This momentous first meeting has been memorialized in recent times in the monument to my work created at the National Women’s Rights Park in Seneca Falls.<sup>11</sup> There, etched on the walls flowing with water are the words I wrote in the *Declaration of Sentiments* declaring equality for women in all aspects of social, political, and civil life.

In the *Declaration of Sentiments*, you will find my panoptic philosophy for the ultimate equality and empowerment of women.<sup>12</sup> Included in this broad agenda are attacks on the patriarchal marriage relation and calls for divorce reform so that women could escape unharmonious marriages.<sup>13</sup> As I often re-

7. Proclamation No. 7584, Women’s Equality Day 2002, 67 Fed. Reg. 55,317 (Aug. 23, 2002); *see also* Proclamation No. 7695, Women’s Equality Day 2003, 68 Fed. Reg. 51,673 (Aug. 26, 2003).

8. ELLEN CAROL DUBOIS, *THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS, SPEECHES* (1981); GEOFFREY C. WARD & KEN BURNS, *NOT FOR OURSELVES ALONE: THE STORY OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY* (1999) (book depicting film documentary of the same name); 1 *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY*, 79–81 (Ann D. Gordon, ed., 1997) (hereinafter “SELECTED PAPERS”).

9. ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* xiii (1984); Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 *LAW & HIST. REV.* 25, 26 (1990); Ellen DuBois, *On Labor and Free Love: Two Unpublished Speeches of Elizabeth Cady Stanton*, 1 *SIGNS* 257, 257 (1975).

10. JUDITH WELLMAN, *THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN’S RIGHTS CONVENTION* (2004).

11. *See* Women’s Rights National Historical Park, 16 U.S.C. § 4101i (2004).

12. Declaration of Sentiments, Report of the Woman’s Rights Convention, Held at Seneca Falls, N.Y. (July 19–20, 1848), in *SELECTED PAPERS*, *supra* note 8, at 79–81.

13. *Id.* at 79.

peated, *liberal divorce laws for oppressed wives are what Canada was for Southern slaves*,<sup>14</sup> especially given the fact that the vast majority of applications for divorce in the late nineteenth century were made by women.<sup>15</sup> During my five decades of agitation, I strongly advocated for the no-fault divorce that I believed was critical to achieving equality and partnership for women within marriages.<sup>16</sup> Others labeled me an advocate of “easy divorce,” yet *I hate and repudiate that phrase, and the promiscuous relations it seems to indicate. What I have always insisted on is that the laws of marriage and divorce, whatever they are, shall bear equally on man and woman.*<sup>17</sup> As I recounted in my memoirs, *Eighty Years and More*:

*So bitter was the opposition to divorce, for any cause, that but few dared to take part in the discussion. I was the only woman, for many years, who wrote and spoke on the question . . . I was always courageous in saying what I saw to be true, for the simple reason that I never dreamed of opposition. What seemed to me to be right I thought must be equally plain to all other rational beings.*<sup>18</sup>

Of course, it must be said that I never sought the avenue of divorce for myself, having remained married to the lawyer and reformer Henry B. Stanton for over fifty years.<sup>19</sup> During this time,

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14. ECS, *Liberal Divorce Laws*, *supra* note 4, at 243; Elizabeth Cady Stanton, *Editorial Correspondence*, REVOL., Dec. 23, 1869, in STANTON PAPERS, *supra* note 4, at 2:192; ECS, *National Law*, *supra* note 4; see also ECS, *Several States*, *supra* note 4; see Clark, *supra* note 9, at 30–34 (discussing the analogy of marriage and slavery used by nineteenth-century reformers and Stanton).

15. ECS, *Liberal Divorce Laws*, *supra* note 4, at 243; see NORMA BASCH, *FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS* (1999).

16. See ELIZABETH CADY STANTON, *EIGHTY YEARS AND MORE: REMINISCENCES, 1815-1897* ch. XIV. *Views on Marriage and Divorce*, 215–33 (1898); GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 73–75 (1991) (detailing Cady Stanton’s advocacy in support of divorce); Clark, *supra* note 9, at 26.

17. Elizabeth Cady Stanton, *Mrs. Stanton to Mr. Hooker*, REVOL., Feb. 24, 1870, in STANTON PAPERS, *supra* note 4, at 2:271.

18. REMINISCENCES, *supra* note 16, at 216; see WILLIAM L. O’NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 206, 229 (1967) (“For longer than most Americans could remember, Elizabeth Cady Stanton had stood for free divorce . . . Mrs. Stanton was unsurpassed, of course, in vigor, wit, and clarity of discourse, but she had been speaking on divorce for such a long time that it was possible to disregard her.”).

19. REMINISCENCES, *supra* note 16, at 71; Elizabeth Cady Stanton, Letter to the Editor, *Mrs. Stanton’s Views on Marriage and Divorce*, NATION, May 26, 1898, in STANTON PAPERS, *supra* note 4, at 38:548; Elizabeth Cady Stanton, Diary Entry, Jan. 1, 1898, in 2 ELIZABETH CADY STANTON AS REVEALED IN HER LETTERS, DIARY AND REMINISCENCES 330–31 (Theodore Stanton & Harriot Stanton Blatch eds., 1922); LOIS W. BANNER, *ELIZABETH CADY STANTON: A RADICAL FOR WOMAN’S RIGHTS* 35 (1980) (stating that Cady Stanton denied that her liberal views of divorce derived from

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I could not have been more “pro-family” as I single-handedly raised seven children.

I summarized the tensions surrounding the proposed national marriage amendment in my testimony before the United States Senate Special Select Committee on Woman Suffrage in 1890:

*There is much anxiety just now being expressed by distinguished statesmen, judges, bishops, lest the foundations of our homes are about to be swept away by liberal divorce laws. So strong is this feeling that a demand has been made on Congress for a national law, that will make the code regulating marriage and divorce homogeneous throughout the states. Congress has already made an appropriation to gather statistics on this question. Carroll D. Wright who was employed to make the report, states that there are 10,000 divorces every year, and other statisticians say the majority are asked for by women.*<sup>20</sup>

Beginning in the late nineteenth century, conservative marriage reformers sought to preserve the family and protect against state idiosyncrasies that purported to impose easy divorce upon all the states. Divorce colonies in South Dakota, Indiana, and Iowa raised the ire of church and state leaders nationwide by their alleged promotion of divorce through laws providing short residency requirements and liberal fault grounds for divorce.<sup>21</sup> *I had heard such a hue and cry about Indiana’s divorce laws that I was quite surprised when visiting there in 1870 on a lecture tour to find the mass of men and women living in the same harmonious, faithful relations as in my native state, where divorces are unhonored and unknown.*<sup>22</sup> Nonetheless, Theodore Woolsey, attorney and retired president of Yale University, formed the New England Divorce Reform League which soon grew to national prominence as the National League for the Protection of the Family under the direction of Congregational minister Samuel Dike.<sup>23</sup> Comprised of Protestant and Catholic clergy, lawyers, and later social scientists, the group championed the cause of a

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her own negative experiences with men).

20. Elizabeth Cady Stanton, Address of Mrs. Elizabeth Cady Stanton before the United States Senate Special Committee on Woman Suffrage, in behalf of Senate Resolution (Feb. 8, 1890), in STANTON PAPERS, *supra* note 4, at 28:4, 6.

21. O’NEILL, *supra* note 18, at 231; RILEY, *supra* note 16, at 63, 98, 102, 110.

22. Elizabeth Cady Stanton, *Editorial Correspondence*, REVOL., Mar. 17, 1870, in STANTON PAPERS, *supra* note 4, at 2:295.

23. LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES 34 (1980); RILEY, *supra* note 16, at 108–09; SELECTED ARTICLES ON MARRIAGE AND DIVORCE 2 (Julia E. Johnsen ed., 1925).

uniform national divorce code.<sup>24</sup> The League convinced Congress to fund national statistical studies of marriage and divorce, resulting in the Wright Report of 1887, our first U.S. Census.<sup>25</sup> The results of this report demonstrated an increase in the divorce rate which spurred agitation for a national restriction on divorce.<sup>26</sup>

However, to my mind, the divorce rate per se was not a cause of concern, but perhaps even one for celebration. As two-thirds of the divorces were granted to women on grounds of cruelty and non-support,<sup>27</sup> the laws permitted women's legal escape from destructive marriages that had so long been denied. The instances of domestic violence and brutal, battering husbands fueled my support of divorce as a necessity for women.<sup>28</sup> There had been several aggravated cases of cruelty to wives among the Dutch aristocracy in my home state of New York.<sup>29</sup> *My feelings had been stirred to their depths very early in life by the sufferings of a dear friend of mine, at whose wedding I was one of the bridesmaids. In listening to the facts in her case, my mind was fully made up as to the wisdom of a liberal divorce law.*<sup>30</sup> *She was married ostensibly to a gentleman, but in reality to a brute. At their marriage a place in New Jersey was given to him worth \$60,000—the next day his creditors had it. He stole her jewels, clothes—everything she had. She told me about it. I told her to leave him. Her parents wouldn't take her back. A year later she appeared, thinly clad, with a baby in her arms, at my door. I took*

24. James P. Lichtenberger, *Origin of Divorce*, 7, 24, in MARRIAGE AND DIVORCE, *supra* note 23; BASCH, *supra* note 15, at 89.

25. RILEY, *supra* note 16, at 79, 110.

26. Ironically, the author of these reports, Carroll Wright, came out in favor of divorce. See O'NEILL, *supra* note 18, at 205. The Congressional studies showed 10,000 divorces in 1887 and 25,000 divorces in 1898. See MARRIAGE AND DIVORCE, *supra* note 23, at 2 (reporting that the congressional censuses showed 122,121 divorces for 1867-1876, 2,065,595 divorces for 1877-1889, 352,263 divorces for 1887-1896, and 593,363 divorces for 1897-1906); Lichtenberger, *supra* note 24, at 25 (summarizing Department of Labor reports that counted 43,850 divorces in 1867-1870, and 949,746 divorces in 1871-1888 and reported a rising divorce rate of 28 per 100,000 population in 1870 to 112 per 100,000 in 1916). In comparison, the most recent studies from 2003-04 report over 1 million divorces annually. Center for Disease Control, *Births, Marriages, Divorces, and Deaths: Provisional Data for June 2004*, 53 Nat'l Vit. Stats. Rep. No. 11 (Dec. 9, 2004).

27. RILEY, *supra* note 16, at 79, 90 (citing Wright Report, U.S. Dep't of Commerce & Labor, Marriage and Divorce).

28. Elizabeth Cady Stanton, *Divorce*, LILY, Apr. 1850, in SELECTED PAPERS, *supra* note 8, at 162-63; Elizabeth Cady Stanton, *An Appeal to the Women of the State of New York: By the President of the Women's New York State Temperance Society*, July 1, 1852, in SELECTED PAPERS, *supra* note 8, at 201-02.

29. REMINISCENCES, *supra* note 16, at 215.

30. *Id.* at 216.

*care of her.*<sup>31</sup> *We read Milton's essays on divorce together and were thoroughly convinced as to the right and duty not only of separation, but of absolute divorce.*<sup>32</sup>

Despite my arguments, the national outcry against divorce continued, and, in 1884, congressional leaders responded by proposing a constitutional amendment on marriage.<sup>33</sup> Concerns over curbing the divorce rate and prohibiting Mormon polygamy sparked the national effort of a uniform marriage standard.<sup>34</sup> Amendments were continuously proposed over the span of sixty years intended to give Congress the power to enact national marriage and divorce legislation.<sup>35</sup> It was believed at the time that without such an amendment, Congress lacked the power to legislate on such local matters of marriage and divorce.<sup>36</sup> Perhaps that assumption no longer holds true as Congress seems to have in fact legislated marriage in the 1996 Defense of Marriage Act.<sup>37</sup> Nonetheless, the focus of the nineteenth-century movement was on institutionalizing the marriage standard in a federal constitutional amendment. The call for federal action on marriage continued after my death, when President Theodore Roosevelt took up the issue in 1906, stating:

I am well aware of how difficult it is to pass a constitutional amendment. Nevertheless in my judgment the whole question of marriage and divorce should be relegated to the authority of the National Congress. At present the wide differences in the laws of the different States on this subject result in scandals and abuses; surely there is nothing so vitally essential to the welfare of the nation, nothing around which the nation should so bend itself to throw every safeguard, as the home life of the average citizen.<sup>38</sup>

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31. ECS, *Several States*, *supra* note 4.

32. REMINISCENCES, *supra* note 16, at 216.

33. 15 CONG. REC. 279 (daily ed. Jan. 8, 1884).

34. BLAKE, *supra* note 3, at 145.

35. *Id.* at 145. For further discussion of these various proposals see MUSMANNO, *supra* note 3, at 104–07.

36. MUSMANNO, *supra* note 3, at 104 (“That the States have absolute jurisdiction over the subjects of marriage and divorce there can be no doubt. No direct mention thereof is made in the Constitution; and the only indirect reference, that which prohibits a State from the impairment of contractual obligations (Art. I, sec. 10), has been construed not to refer to the matrimonial relation.”); Mrs. Edward Franklin White, Deputy Attorney General of Indiana, *America's Need of a Federal Marriage and Divorce Law*, in MARRIAGE AND DIVORCE, *supra* note 23 (“It is the almost unanimous opinion of lawyers who have considered the question that an amendment to the Constitution is necessary to enable Congress to pass such a law.”).

37. 28 U.S.C. § 1738(c) (2000).

38. BLAKE, *supra* note 3, at 146 (President Roosevelt's annual address to Con-



As is so often said, it seems to be true that history does indeed repeat itself. Thus, it may be that the arguments I articulated over one-hundred years ago continue to be relevant today.

#### INSTITUTIONAL ANXIETY AND FEDERALIST CONCERNS

The call for a Federal Marriage Amendment in both centuries has thrived upon what Professor Mae Kuykendall has called in this century the “institutional anxiety” of federalism.<sup>39</sup> The fear of opponents of liberalized marriage at each point in time has been that states would be required to recognize marital relationships contrary to the preference of the local community. In the nineteenth century, the institutional anxiety stemmed from interstate conflicts over diverse divorce laws that encouraged migratory divorce and mandated state recognition of such divorces and subsequent marriages under the Full Faith and Credit Clause of the U.S. Constitution.<sup>40</sup> Today, the institutional anxiety argument arises from interstate differences in gay marriage laws created by so-called “activist” judges and the “specter of the Full, Faith and Credit juggernaut” requiring sister state recognition of these laws.<sup>41</sup> As Professor Kuykendall explains, the extensive rhetoric about activist judges asserts that it is problematic for judges to issue non-majoritarian decisions with respect to gay marriage in the guise of judicial review.<sup>42</sup> At bottom, the argument is framed as a concern over anti-democratic action which can be blocked only by federal constitutional amendment, thereby preserving the will of the majority.<sup>43</sup>

It appears, Mr. President, that this is your primary argument in favor of the Federal Marriage Amendment. As you expressed in the January 2004 State of the Union address: “If judges insist

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gress).

39. Mae Kuykendall, *The President, Gay Marriage, and the Constitution: A Tangled Web*, 13 WIDENER L. REV. 799, 810, 813 (2004).

40. BLAKE, *supra* note 3, at 173–78; MUSMANNNO, *supra* 3, at 104–05; HALEM, *supra* note 23, at 37–39.

41. Kuykendall, *supra* note 39, at 813.

42. *Id.*

43. *Id.* at 810 n.26; *see* 150 CONG. REC. S7871, S7872 (daily ed. July 9, 2004) (statement of Sen. Allard) (“Any redefinition of marriage has been driven entirely by the body of government that remains unaccountable and unelected – the courts.”); 150 CONG. REC. H7898, H7910 (Sept. 30, 2004) (statement of Rep. Smith) (“[J]udicial activism in America has reached a crisis. Judges routinely overrule the will of the people, invent so-called rights and ignore traditional values. Recently, judges have even changed the definition of marriage. Most Americans simply do not want judges to dictate a new kind of marriage that is so different from the one that has served so many so well for so long.”).

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on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.”<sup>44</sup> Members of the Senate and the House of Representatives have echoed this concern of judge-imposed change against the will of the people.<sup>45</sup> For example, in September 2004, Representative Jo Ann Davis of Virginia decried:

[A]ctivists in the judiciary, as evidenced by the Massachusetts Supreme Judicial Court deciding that there is no rational reason for restricting the benefits of marriage to heterosexual couples, seem bent on redefining marriage for an entire Nation in direct opposition to the wishes of the vast majority of Americans and with a flagrant disregard for the millennia-old institution of marriage that has been responsible for the successful propagation of the human race.<sup>46</sup>

Representative Pence of Indiana emphasized his concern with the judiciary’s abuse of power:

The United States Supreme Court . . . has in recent decisions signaled a willingness to extend the right of privacy to certain types of behavior which could very well . . . recognize gay marriage. . . . Activist lawyers and their allies in the legal academy over the last decade have devised a strategy to override the public opinion. . . . The activists have, . . . literally plotted a State-by-State strategy to increase the number of judicial decisions mandating same sex marriage. The goal is to force the same sex marriage issue on the Nation piecemeal and then to demand the United States Supreme Court order the holdout States to accept and do the same.<sup>47</sup>

A Federal Marriage Amendment does indeed block judicial action as intended. However, it also produces the negative consequence of blocking democratic experimentation of the local community as it grapples with social issues in the name of pro-

44. 2004 State of the Union Address, *supra* note 1.

45. *See e.g.*, 150 CONG. REC. S7871 (July 9, 2004) (statement of Sen. Allard); 150 CONG. REC. S7876 (July 9, 2004) (statement of Sen. Hatch); 150 CONG. REC. S7883 (July 9, 2004) (statement of Sen. Frist); 150 CONG. REC. H7895 (Sept. 30, 2004) (statement of Rep. Musgrave); 150 CONG. REC. H7898, H7900 (Sept. 30, 2004) (statement of Rep. Feeney); 150 CONG. REC. H7898, H7902 (Sept. 30, 2004) (statement of Rep. Carter); 150 CONG. REC. H7898, H7904 (Sept. 30, 2004) (statement of Rep. Gingrey); 150 CONG. REC. H7898, H7906 (Sept. 30, 2004) (statement of Rep. Neugebauer); 150 CONG. REC. H7898, H7910 (Sept. 30, 2004) (statement of Rep. Smith); 150 CONG. REC. H7898, H7910 (Sept. 30, 2004) (statement of Rep. Akin).

46. 150 CONG. REC. H7825, H7827 (daily ed. Sept. 29, 2004) (statement of Rep. Davis).

47. *Id.* at H7826 (statement of Rep. Pence).

gress. In 1932, some years after my death, Justice Brandeis emphasized the national danger in prohibiting such experimentation:

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, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>48</sup>

Such experimentation in legal reform at the state level is a cornerstone of our American democracy and, as I argued, should not be eliminated by a constitutional amendment.

#### *The Constitutional Straightjacket*

I addressed the concerns of states' rights in countering the federal marriage amendment in two important articles, *Divorce Versus Domestic Warfare* (1890) and *Are Homogeneous Divorce Laws in All the States Desirable?* (1900):

*There is a demand just now for an amendment to the United States Constitution that shall make the laws of Marriage and Divorce the same in all the States of the Union. As this suggestion comes uniformly from those who consider the present divorce laws too liberal, we may infer that the proposed National Law is to place the whole question on a narrower basis, rendering null and void the laws that have been passed in a broader spirit, according to the needs and experiences in certain sections, of the sovereign people. And here let us bear in mind, that the widest possible law would not make divorce obligatory on anyone, while a restricted law, on the contrary, would compel many living perhaps at one time under more liberal laws, to remain in uncongenial relations.*<sup>49</sup>

It is clear that a constitutional amendment that restricts the power of states to recognize marriages does not in fact preserve all states' rights. Instead, it discriminates between the states in favor of the conservative states that seek to restrict marriage.<sup>50</sup> States with a broader spirit of inclusiveness, such as Iowa and

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48. *New State Ice Co. v. Liebman*, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting).

49. ECS, *Divorce Versus Domestic Warfare*, *supra* note 4, at 560; ECS, *Homogeneous Divorce Laws*, *supra* note 4, at 407.

50. ECS, *Several States*, *supra* note 4.

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Wyoming in my time or Massachusetts and Vermont today, are confined by the constitutional straightjacket that denies respect to their state actions both inside and outside their borders. The creation of such second-class states does not promote federalist concerns of states' rights, but instead promotes certain states ahead of others. Simply examine the evidence.

*Democracy and Local Experimentation*

In 1890, I argued repeatedly against the federal marriage amendment in articles appearing in several journals and newspapers.<sup>51</sup> My opposition focused on the amendment's squelching of democratic experimentation in the state laboratories of progress:

*There are many advantages in leaving all these questions, as now, to the States. Local self-government more readily permits on mooted questions, which are the outcome of the needs and convictions of the community. The smaller the area over which legislation extends, the more pliable are the laws. By leaving the States free to experiment in their local affairs, we can judge of the working of different laws under varying circumstances, and thus learn their comparative merits. The progress education has achieved in America is due to just this fact – that we have left our system of public instruction in the hands of local authorities. How different would be the solution of the great educational question of manual labor in the schools, if the matter had to be settled at Washington! The whole nation might find itself pledged to a scheme that a few years would prove wholly impracticable. Not only is the town meeting, as Emerson says, “the cradle of American liberties,” but it is the nursery of Yankee experiment and wisdom.<sup>52</sup>*

In the nineteenth century, the local experimentation with marital issues focused on divorce. Legislatures across the country experimented with the appropriate fault grounds for divorce, testing out each new idea as circumstances required. Some states like Indiana experimented with liberal use of fault grounds for divorce including cruelty, desertion, and intemperance.<sup>53</sup> Others, like my home state of New York, permitted divorce only for

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51. ECS, *Divorce Versus Domestic Warfare*, *supra* note 4; ECS, *Women's Tribune*, *supra* note 4; ECS, *Homogeneous Laws*, *Boston*, *supra* note 4.

52. ECS, *Divorce Versus Domestic Warfare*, *supra* note 45, at 561; ECS, *Women's Tribune*, *supra* note 4; ECS, *Homogeneous Laws*, *supra* note 4, at 408.

53. REMINISCENCES, *supra* note 16, at 215; ECS, *Several States*, *supra* note 4.

adultery.<sup>54</sup> I went before the New York legislature in 1860 asking that law be enacted granting divorce for drunkenness, licentiousness and incompatibility of temper, but I failed.<sup>55</sup> *You would have thought that I had made a violent attack upon the foundation of the National Government.*<sup>56</sup> South Carolina prohibited all divorce and was proud to say it had never granted a divorce since the time of the Revolution.<sup>57</sup> Judge Robert Grant of South Carolina boasted: “What! Model our marriage and divorce laws, the safeguards of the ‘home,’ to suit the idiosyncrasies of ‘highbrows’ or ‘visionaries’ in New York, Massachusetts, or elsewhere?”<sup>58</sup>

However, just as the states were beginning to work through the issues of divorce, conservative foes intervened seeking to curtail this democracy in action by promoting a national law restricting divorce. In proposing an amendment to the national constitution, *to make the laws homogeneous from Maine to Texas, the question naturally suggests itself, on what basis should this general law be enacted? On the progressively freer laws of divorce that the true American sovereign of the West will surely demand, or on more restrictive legislation?*<sup>59</sup> It is evident that the proponents were inclined to the latter.

Yet the most conservative rule is not always the best. While South Carolina is proud of its history as the only State in the Union where a divorce has not been granted since the Revolution, the marriages there are not necessarily models of marital peace and harmony. For example, South Carolina had a statute regulating the portion of a husband’s property that may be given at death to his concubine.<sup>60</sup> In another example, the South Carolina court was called upon in the case of *Jelineau v. Jelineau* to resolve the legal issues of maintenance and support raised by the unharmonious cohabitation of a husband, his wife, their child, his female slave, and her child by the husband.<sup>61</sup>

54. REMINISCENCES, *supra* note 16, at 215; ECS, *Several States*, *supra* note 4.

55. ECS, *Several States*, *supra* note 4; see Elizabeth Cady Stanton, Address on the Divorce Bill Before the Judiciary Committee of the New York Senate (Feb. 8, 1861), in STANTON PAPERS, *supra* note 4, at 9:1101.

56. ECS, *Several States*, *supra* note 4.

57. ECS, *Liberal Divorce Laws*, *supra* note 4, at 237.

58. Judge Robert Grant, *A Call to a New Crusade*, GOOD HOUSE. 42, 143 (Sept. 1921).

59. ECS, *Liberal Divorce Laws*, *supra* note 4, at 237.

60. *Id.*

61. *Id.* Cady Stanton incorrectly reported that the court compelled this extended family to live on in “peace, purity, and felicity.” *Id.* at 238. Instead, the court rejected its precedents requiring the resumption of the marital home, and remanded the case for

Moreover, South Carolina cannot hope to preserve its peaceful state of mandated marital unity by way of a federal amendment. For a uniform law creating divorce on *any* ground threatens the power of that state to prohibit absolute divorce within its own borders. And some incarnations of the federal marriage law would have permitted divorce for adultery, desertion, neglect, and cruelty.<sup>62</sup>

State experimentation is just as pronounced in today's issue of same-sex partnerships. The quick reactions at the state level to this important issue have exhibited a range of responses from the local community that are far from unidirectional. For example, Massachusetts now permits gay marriage.<sup>63</sup> Vermont provides all the legal benefits of marriage under an alternative legal construct of the civil union.<sup>64</sup> Massachusetts considered this civil union option, but rejected it finding that the civil union status perpetuated the second class citizenship of gay partners.<sup>65</sup> California has domestic partnerships with enumerated rights of partners to inherit, make medical decisions, and sue for wrongful death.<sup>66</sup> Hawaii has reciprocal beneficiaries providing limited legal rights for same-sex partners and other dependents such as elderly parents.<sup>67</sup> Alaska has a constitutional amendment banning gay marriage.<sup>68</sup> Ohio has a constitutional amendment prohibiting gay marriage, civil unions, and domestic partnerships.<sup>69</sup> Thus, clearly, there is a diversity of opinion in the United States among the citizens as to what legal status should be given to gay partners. It is simply too early to end the experimentation which began in earnest only at the turn of the millennium.

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award of maintenance and child support for the wife's establishment of a separate home. See *Jelineau v. Jelineau*, 2 Des. 45 (S.C. App. 1801), available at 1801 WL 333, \*4.

62. MARRIAGE AND DIVORCE, *supra* note 23, at 5 (reporting on proposed bill of 1923).

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

64. VT. STAT. ANN. tit. 15 §§ 1201, 1204 (adopted 1999); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that failure of state to provide equal benefits of marriage to same-sex partners violated equality clause of state constitution).

65. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

66. CAL. FAM. CODE § 297 (West 2006).

67. HAW. REV. STAT. ANN. §§ 572C-1 to -7 (adopted 1998).

68. ALASKA CONST. art. 1, § 25 (adopted 1999); see Kevin G. Clarkson, et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999).

69. OH. CONST. amend. XV, § 11 (adopted December 2, 2004).

*Religious Amendment Without Ecclesiastical Consensus*

The religious fervor that has fueled the call for a federal amendment proceeds despite the absence of ecclesiastical consensus as to the proper substance of the amendment, as I argued for more than a decade beginning in 1890:

*Moreover, as we are still in the experimental stage on this question, we are not qualified to make a perfect law, that would work satisfactorily, over so vast an area as our boundaries now embrace. I see no evidence in what has been published on this question of late by statesmen, ecclesiastics, lawyers, and judges, that any of them have thought sufficiently on the subject, to prepare a well-digested code or a comprehensive amendment to the National Constitution.*<sup>70</sup>

The lack of consensus demonstrated by the various state laws of domestic partnerships is replicated in the debate today within the Protestant church over gay marriage and homosexuality. For example, the Unitarian Church performs and supports same-sex unions.<sup>71</sup> The United Church of Christ permits commitment ceremonies for gay partners, and opposes the Federal Marriage Amendment.<sup>72</sup> The Episcopal Church endorsed a gay bishop, but then saw part of its national congregation secede and continue under the international umbrella of the more conservative Anglican Church.<sup>73</sup> Individual Methodist ministers in Chicago, Nebraska, and San Francisco have performed celebration ceremonies for gay partners.<sup>74</sup> I am not surprised by the Methodists, as they were the first to recognize the inherent equality of partners in marriage by eliminating the word “obey” from the traditional marriage ceremony, as I did in my own wedding ceremony in 1840.<sup>75</sup> The Lutheran Church recently conducted a

70. ECS, *Divorce Versus Domestic Warfare*, *supra* note 4, at 560–61; ECS, *Homogeneous Laws*, *supra* note 4, at 407.

71. See Unitarian Universalist Association, <http://www.uua.org> (last visited Feb. 16, 2006).

72. United Church of Christ, Executive Council, Call to Action and Invitation to Dialogue on Marriage (April 26, 2004), available at [www.ucc.org/news](http://www.ucc.org/news).

73. *Bishops Approve Robinson*, EPIS. NEWS SERV., Aug. 6, 2003, available at [www.episcopalchurch.org](http://www.episcopalchurch.org).

74. See United Methodist Church Web Site, [www.umc.org](http://www.umc.org) (last visited Feb. 16, 2006).

75. Elizabeth Cady Stanton, Address at the Anniversary of the National Woman Suffrage Association, REVOL., May 19, 1870, in STANTON PAPERS, *supra* note 4, at 22:363; Mrs. Elizabeth Cady Stanton’s Address at the Decade Meeting, on Marriage and Divorce, Report of the Proceedings of the Twentieth Anniversary Celebration of the Inauguration of the Woman’s Rights Movement, New York, Oct. 20, 1870, in STANTON PAPERS, *supra* note 4, at 14:1031, 1035; Elizabeth Cady Stanton, *Reminiscences*, Bishop

nationwide study of its lay members' opinions on blessing same-sex relationships and ordaining gay clergy.<sup>76</sup> As a result of that study, the Lutheran Church decided not to alter current church policy permitting ordination of celibate gay clergy, yet prohibiting gay marriage.<sup>77</sup> However, it recommended that the church refrain from disciplining conscious objectors in local congregations who approve partnered gay clergy or bless same-sex unions.<sup>78</sup>

Thus, ecclesiastical as well as judicial and legislative authorities are still experimenting with social responses to the reality of gay partners. A federal amendment stops such experimentation in democracy and self-governance and halts social progress in its tracks.

#### DECONSTRUCTING THE TRUE RELATION OF MARRIAGE

Underlying the pretext of the concern over states' rights and democratic will, however, is the desire through the Federal Marriage Amendment to "protect marriage and the family" against their purported demise.<sup>79</sup> You made clear, President Bush, in your 2005 State of the Union Address that you supported a constitutional amendment to protect the institution of marriage "because marriage is a sacred institution and the foundation of society."<sup>80</sup> Our national representatives in the House promise through their "Marriage Protection Act" to "continue to defend one of the most basic institutions of our Nation: the traditional family."<sup>81</sup>

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*Janes and the Word Obey*, WOMEN'S TRIB., Nov. 8, 1890, in STANTON PAPERS, *supra* note 4, at 28:725; BANNER, *supra* note 19, at 22.

76. Report and Recommendations from the Task Force for Evangelical Lutheran Church in America Studies on Sexuality (Jan. 13, 2005), available at <http://elca.org/faithfuljourney/tfreport.html> (last visited Feb. 16, 2006).

77. *Id.*

78. *Id.* The larger legislative assembly of the ELCA rejected this proposal in August 2005. It extended the committee's timeline until 2009 to develop a social statement on human sexuality so that they could "get [their] minds around a very complex topic" given that "the history of sexual ethics is marked by continuity and change." *ELCA Task Force on Human Sexuality Begins Anew* (Feb. 10, 2006), available at <http://elca.org>.

79. See, e.g., Press Release, *supra* note 1; 150 CONG. REC. H7898, H7898 (daily ed. Sept. 30, 2004) (statement of Rep. Chabot); *id.* at H7902 (statement of Rep. Carter); *id.* at H7904 (statement of Mr. Gingrey).

80. 2005 State of the Union Address, *supra* note 1.

81. 150 CONG. REC. H 7741 (daily ed. Sept. 29, 2004); see also 150 CONG. REC. H7895 (daily ed. Sept. 30, 2004) (statement of Rep. Musgrave); see Kuykendall, *supra* note 39, at 812.



In my day, similar rally cries warned that without such a constitutional amendment on marriage “our homes, our fire-sides, our sacred family altars, are all about to be swept away.”<sup>82</sup> Yet I would argue that neither same-sex marriage nor divorce is the foe of marriage. Rather, *adultery, intemperance, licentiousness are its foes. One might as well speak of medicine as the foe of health.*<sup>83</sup> Indeed, same-sex marriage today is advocated as a cure for marital dissention due to its power to infuse the marital construct with notions of equality and reciprocity.<sup>84</sup>

As Professor Nan Hunter explains, same-sex marriage has the broad potential to dismantle the structure of gender at the heart of marriage law.<sup>85</sup> It could fundamentally disrupt the gendered social hierarchy and the dependent roles assigned to partners based on their gendered designation of “husband” or “wife.”<sup>86</sup> “What is most unsettling to the status quo about the legalization of lesbian and gay marriage is its potential to expose and denaturalize the historical construction of gender at the heart of marriage.”<sup>87</sup> Professor Susan Appleton agrees, suggesting that the prospect of true gender equality is “precisely the consequence that makes same-sex marriage so threatening.”<sup>88</sup> I recognized a similar threat to the accepted gender norms of marriage in the nineteenth century when women seeking divorce challenged the assigned sex roles of the family. I advanced this point in my address, “Marriage and Divorce,” given in 1870 at the twentieth anniversary celebration of the inauguration of the woman’s rights movement:

*John Stuart Mill says the generality of the male sex cannot yet tolerate the idea of living with an equal at the fireside, and here is the secret of the opposition to woman’s equality in the State and the Church; men are not ready to recognize it in the home. . . . Conservatism cries out we are going to destroy the family. Timid reformers answer, the political equality of woman will not change it. They are both wrong. It will entirely revolutionize it. When woman is man’s equal the marriage relation cannot stand on the basis it is on today. But this change*

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82. ECS, *Divorce Versus Domestic Warfare*, *supra* note 4, at 567.

83. ECS, *Liberal Divorce Laws*, *supra* note 4, at 236.

84. Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97 (2005); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 12, 16 (1991).

85. Hunter, *supra* note 84, at 12.

86. *Id.* at 12–19.

87. *Id.* at 18.

88. Appleton, *supra* note 84, at 126.

*will not destroy it. As human statutes and state constitutions did not create conjugal and maternal love, they cannot annul them. . . . Change is not death, neither is progress destruction.*<sup>89</sup>

### *Gender Discrimination in Marriage*

Deconstructing the protection of marriage mantra reveals, at essence, an ideology of gender.<sup>90</sup> As Professor Mae Kuykendall explains in her recent paper, *The President, Gay Marriage, and the Constitution*, these traditional gender roles today tout the importance of opposite gendered male and female role models in the family.<sup>91</sup> The underlying assumption, of course, is that women are significantly different than men in the familial hierarchy.<sup>92</sup> The Vatican recently reaffirmed these sexual differences and questioned modern tendencies to “make homosexuality and heterosexuality virtually equivalent” thereby threatening the family and “its natural two parent structure of mother and father.”<sup>93</sup> Similar sex role arguments were made in the prior national movement for a restrictive standard of marriage and divorce to confine women to their traditional, subjugated role in the family.<sup>94</sup>

The gender ideology essential to the marriage amendment movements can be traced to biblical precepts of traditional gender roles in marriage. The use of the Bible to endorse gender discrimination has been the bane of my existence. Indeed, the culmination of my career was the writing of my book, *The Woman’s Bible*, in which I interpreted the original Greek text of

89. ECS, Twentieth Anniversary Address, *supra* note 75, at 1032.

90. Kuykendall, *supra* note 39, at 812.

91. *Id.*; see 150 CONG. REC. H7825, H7826 (daily ed. Sept. 29, 2004) (statement of Rep. Pence); *id.* at H7827 (statement of Rep. Davis); 150 CONG. REC. H7898, H7916 (daily ed. Sept. 30, 2004) (statement of Rep. Garrett) (“Mothers are better able to provide certain lessons than fathers can, and fathers in turn can provide role models in ways that moms simply cannot.”); 150 CONG. REC. H7898, H7916 (daily ed. Sept. 30, 2004) (statement of Rep. Johnson) (“Men and women were created to complement each other, and that is most obvious in successful parenting.”).

92. Kuykendall, *supra* note 39, at 812; Appleton, *supra* note 84, at 130–32 (interpreting the gender talk of opposite gendered parents as striving to preserve traditional family patriarchy, perpetuate difference acts and self-presentations of the gendered role models, and eliminate all gender norms and the indispensability of men).

93. Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World, from the Offices of the Congregation for the Doctrine of Faith (May 31, 2004), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html).

94. See, e.g., Felix Adler, *Marriage*, in MARRIAGE AND DIVORCE, *supra* note 23, at 62, 67 (opposing divorce for married women who should sacrifice individual vocation for the true vocation of motherhood).

the Bible using a feminist lens.<sup>95</sup> *When those who are opposed to all reforms can find no other argument, their last resort is the Bible. It has been interpreted to favor intemperance, slavery, capital punishment, and the subjection of women.*<sup>96</sup> As I explained, the teachings of Jesus,

*all pointing to the complete equality of the human family, were too far in advance of his age to mould its public opinion. The Church that sprung up at that time took his name, but not his spirit or his principles. We must distinguish between Jesus and the Christian Church—one represents the ideal the race is destined to attain, the other the popular sentiment of its time.*<sup>97</sup>

*The fundamental principles of Bible and Constitution alike favor the complete liberty and equality of all the human family, irrespective of sex, color, caste, class, or condition.*<sup>98</sup> An attempt to restrict marriage to a traditional patriarchal construct that perpetuates inequality based on gender counter to this command of equality, therefore, must be cause for alarm.

#### *The True Relation of Marriage*

Ultimately, federal regulation of marriage turns upon a proper understanding of the true relation of marriage and its construction under the law. “Marriage is, after all, a complete creation of the law, secular or ecclesiastical.”<sup>99</sup> The widespread disagreement as to the proper legal construction of marriage countenances against constitutional enshrinement of a single standard. As I expressed in my article, *Divorce Versus Domestic Warfare*, some view marriage as a civil contract, though not governed by the laws of other contracts; some view it as a religious ordinance, a sacrament; some think it a relation to be regulated by the State, others by the Church, and still others think it should be left wholly to the individual. With this wide divergence of opinion among our leading minds, it is quite evident that we are not pre-

95. ELIZABETH CADY STANTON, *THE WOMAN’S BIBLE* (1896); see also KATHI KERN, *MRS. STANTON’S BIBLE* (2001) (analyzing the political impact of Stanton’s Bible and placing it in historical context).

96. ECS, *Liberal Divorce Laws*, *supra* note 4, at 242; Elizabeth Cady Stanton, *A Woman on Divorce*, OMAHA REP., Feb. 24, 1889, in STANTON PAPERS, *supra* note 4, at 27:114.

97. Elizabeth Cady Stanton, *Woman’s Position in the Christian Church*, BOSTON INV., May 18, 1901 (reprinting speech delivered in London in Sept. 1882), in STANTON PAPERS, *supra* note 4, at 23:263.

98. Elizabeth Cady Stanton, Letter to the Editor, *The Subjection of Woman*, N.Y. TIMES, Mar. 9, 1873, in STANTON PAPERS, *supra* note 4, at 17:5.

99. Hunter, *supra* note 84, at 13.

pared for a national law.<sup>100</sup> My own view is that marriage should be transformed from covenant to contract in accordance with my liberal feminist theory of individual autonomy.<sup>101</sup>

I began my attack on the existing legal construct of marriage by debunking the judicial myth of “marriage as a contract” to reveal its conservative underpinnings.<sup>102</sup> The judicial rhetoric that “marriage everywhere is regarded as a civil contract” failed to match the legal treatment of such relations.<sup>103</sup> The courts did not permit the modification of marital contracts between husband and wife, nor did they allow for termination of marital contracts by divorce. Courts did not follow the basic doctrinal requirements for entering a contract, recognizing contracts in the absence of voluntary consent. Thus, my critique of the judicial language of marriage-as-contract, first crafted in an 1854 speech, “focused not on the abstract construct of marriage as a civil contract, but rather on the contradictions inherent in the ways that courts used the construct.”<sup>104</sup> For the long-term effect of such pseudo-contractual reasoning trapped women in marital relations that deprived them of property and self-sovereignty, and from which they could not legally exit.<sup>105</sup>

For these reasons, I opposed judicial endorsement of common-law marriages that recognized marriage apart from the public intent of such parties to legally solemnize such relations.<sup>106</sup> I argued that marriage should be treated the same as all other contracts:

*If you regard marriage as a civil contract, then let it be subject to the same laws which control all other contracts. Do not make it a kind of half-human, half-divine institution, which you may build up but cannot regulate. Do not, by your special legislation for this one kind of contract, involve yourselves in the grossest absurdities and contradictions.*<sup>107</sup>

100. ECS, *Divorce Versus Domestic Warfare*, *supra* note 4, at 561; *see also* ECS, *Homogeneous Laws*, *supra* note 4, at 408.

101. Clark, *supra* note 9, at 26.

102. Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L. J. 1885, 1889, 1912 (1998).

103. *Meister v. Moore*, 96 U.S. 76, 78 (1877); *Jewell v. Jewell*, 42 U.S. (1 How.) 219 (1843).

104. *See* Dubler, *supra* note 102, at 1909.

105. *Id.* at 1908–11.

106. *Id.* at 1909–10.

107. Elizabeth Cady Stanton, Address to the Legislature of New York, Feb. 14, 1854, in STANTON PAPERS, *supra* note 4, at 9:976.

I supported stricter laws regulating the age of consent for entry into marriage above the common law of the nineteenth century allowing a girl of twelve and a boy of fourteen to consent to marriage.<sup>108</sup> *On what principle, I would ask, should the party on whom all the inevitable hardships of marriage must fall, be the younger to enter the relation? Girls do not get their full growth until twenty-five, and are wholly unfit at fifteen for the trials of maternity.*<sup>109</sup>

In 1888, the United States Supreme Court clarified the hazy misimpression created by the marriage-as-contract language in endorsing the status construct of marriage.<sup>110</sup> In *Maynard v. Hill*, the Court cited with favor state court opinions explaining the extra-contractual nature of marriage: “The statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word ‘contract’ employed in the common law or statutes.”<sup>111</sup> The Supreme Court held that marriage is “more than a mere contract”; it is an “institution subject to the sovereign power of the state to maintain the morals and civilization of society.”<sup>112</sup> In so holding, the Court affirmed the state’s ability to control the marital institution, thereby enhancing support for proponents of nationalized control over marriage.<sup>113</sup>

However, in the one hundred years since *Maynard*, the dominant trend in the law has been towards conceptualizing marriage as contract rather than status. “The rise of the marriage contract, with its recognition of some power of personal choice and some right of individual liberty accorded to women, is the suggestive clue to the course of social evolution which in any given era outlines the terms of legal marriage.”<sup>114</sup> Today, the

108. ECS, *Liberal Divorce Laws*, *supra* note 4, at 234.

109. *Id.*; Elizabeth Cady Stanton, *Girls and Maturity*, PIONEER, July 9, 1870, in STANTON PAPERS, *supra* note 4, at 15:85; *Review of Stanton’s Speech “Our Girls,”* WASH. COUNTY PRESS (IA), Feb. 21, 1880, in STANTON PAPERS, *supra* note 4, at 21:110.

110. *Maynard v. Hill*, 125 U.S. 190 (1888).

111. *Id.* at 212–13.

112. *Id.* at 211.

113. *Cf.* 150 CONG. REC. H7898, H7903 (daily ed. Sept. 30, 2004) (statement of Rep. Brady) (“I believe the institution of marriage is a sacred union. It predates Congress and the constitution. Marriage is not simply a legal contract. For all its flaws, it is a covenant that truly binds individuals and families to each other and has, for centuries, provided social stability, not only for our country but for our culture.”).

114. Anna Garlin Spencer, *Problems of Marriage and Divorce*, in MARRIAGE AND

construct of marriage as a contract is clearly evidenced by the uniform acceptance of no-fault divorce, prenuptial contracts, and separation agreements.<sup>115</sup> Given this significant legal evolution, it would seem that the government's ability to continue to control the marriage relation and its attendant privileges is more tenuous than ever. For in the absence of an institutional status for marriage, the state is divested of its power to restrict the individual freedoms and privileges of the partners choosing the marital relation.<sup>116</sup>

I have argued since 1860 that marriage should be considered *a contract made by equal parties to lead an equal life, with equal restraints and privileges on either side.*<sup>117</sup> As I repeated thirty years later, *the question of Divorce, like Marriage, should be settled as to its most sacred relations, by the parties themselves, neither the State nor the Church having any right to intermeddle therein. As to property and children, it must be viewed and regulated as a civil contract.*<sup>118</sup> Thus, I departed from the contemporaneous pronouncements of the U.S. Supreme Court in constructing the true relation of marriage as one of individual contract rather than governmental status.

I have been accused of saying “the State has nothing to do with either marriage or divorce.”<sup>119</sup> But that is not the argument I make. *I have recognized the wisdom of laws governing the marriage relation—any person of common sense must see the necessity of laws.*<sup>120</sup> I argue, however, *that marriage should be regarded as a civil contract, entirely under the jurisdiction of the State. The less latitude the Church has in our temporal affairs, the better.*<sup>121</sup> The state retains a role in regulating the marriage relationship in the same manner as all contracts, ensuring that the contract is created based on the clear intent of the parties and providing for

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DIVORCE, *supra* note 23, at 39.

115. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 124–28 (2004); Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 201, 203 (F. H. Buckley, ed. 1999).

116. Cf. FINEMAN, *supra* note 115, at 135–36.

117. Elizabeth Cady Stanton, Address at the Tenth Annual National Woman's Rights Convention (May 11, 1860), in STANTON PAPERS, *supra* note 4, at 9:629–49.

118. ECS, *Divorce Versus Domestic Warfare*, *supra* note 4, at 566.

119. Elizabeth Cady Stanton, Letter to the Editor, *Mrs. Stanton's Views on Marriage and Divorce*, NATION, May 26, 1898, in STANTON PAPERS, *supra* note 4, at 38:548; Diary Entry of Elizabeth Cady Stanton, Jan. 1, 1898, in Stanton & Blatch, *supra* note 19, at 330–31.

120. ECS, *Views on Marriage and Divorce*, *supra* note 119.

121. ECS, *Homogeneous Laws*, *supra* note 4, at 407.

the consequences of the breach of that contract.<sup>122</sup> As I have said, *marriage should be subject to the restraints and privileges of all other contracts*. The law properly regulates for the breach of marital contracts *governing the rights of property, inheritance, support, and alimony*.<sup>123</sup>

My views on the true relation of marriage as one of contract, rather than status or covenant find support today in the scholarship of Professor Martha Fineman.<sup>124</sup> Fineman has asserted that “adults should be free to fashion the terms of their own relationships and rely on contract as the means of so doing, effectively replacing the marital status.”<sup>125</sup> In her view, “there is no reason for the state to be involved in the articulation and imposition of the [marital] terms any more than it would be involved in the enforcement of contracts in general.”<sup>126</sup> Professor Fineman thus takes a page from my book in arguing that the law should substitute the construct of contract for that of status in regulating intimate adult relations such as marriage.

Others have criticized my construct of marriage as a contract, prophesying the doom of marriage as the foundation of civilization and the propagation of meretricious relations.<sup>127</sup> Indeed the accusation of “free love” and the promiscuous relations it implies have often been hurled at women’s rights advocates to discredit the movement seeking equality in intimate relations.<sup>128</sup> *Free love is the greatest of all bugbears to Woman’s Rights. So far as I am concerned I have always been too busy to think about such a thing, and have never found time to love more than one man.*<sup>129</sup> *I have been asked if I believe in “free love.” If by “free love” you mean promiscuity, I do not. I believe in monogamic marriage. If by “free love” you mean freedom in love, then I be-*

122. ECS, *Homogeneous Laws*, *supra* note 4, at 408; Elizabeth Cady Stanton, *Marriage Law*, OMAHA REP., Mar. 3, 1889, in STANTON PAPERS, *supra* note 4, at 27:116; see Clark, *supra* note 9, at 37.

123. ECS, *Views on Marriage and Divorce*, *supra* note 119; ECS, Diary Entry, *supra* note 119.

124. FINEMAN, *supra* note 115, at 121–41.

125. *Id.* at 133–34.

126. *Id.* at 121.

127. ECS, *Divorce Versus Domestic Warfare*, *supra* note 4, at 567; ECS, *Liberal Divorce Laws*, *supra* note 4, at 240; Twentieth Anniversary Address, *supra* note 75, at 1032, 1037; Dubler, *supra* note 102, at 1903–04 (citing statement of Samuel Dike). Similar claims are made today. See Lynn Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 346 (2003).

128. Elizabeth Cady Stanton, *Mrs. Stanton on Woman Suffrage and “Free Love,”* SAN FRAN. CHRON., July 14, 1871, in STANTON PAPERS, *supra* note 4, at 15:698.

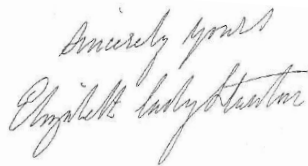
129. ECS, *Free Love*, *supra* note 128.

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lieve.<sup>130</sup> *Whenever compulsion and restraint, whether of the law or of a dogmatic and oppressive public opinion, are removed, whatever results will be free love.*<sup>131</sup>

Clearly then, I do not argue against marriage itself, as demonstrated by my own marriage of over half a century. *Our troubles do not arise so much from marriage in itself, for that seems to be the natural state of the human family, and there is no doubt more happiness in marriage than out of it.*<sup>132</sup> But is marriage a success? *Yes as much of a success as any other human institution. Like government and religion it is an outgrowth of ourselves, imperfect in our present stage of development, but improving as individual men and women grow in knowledge and wisdom. Before we shall have happy marriages we must educate men and women into a clear idea of individual rights; the exact limit of their own and the vital point where they begin to infringe on the rights of another.*<sup>133</sup>

I hope that this recollection of the past has shed some light upon the dark question of denying equality of rights to citizens of the United States in the marriage relation. *From these considerations our wisest course seems to be to leave these questions wholly to the civil rather than to the cannon law, the jurisdiction of the several States rather than the nation.*<sup>134</sup> The drastic mistakes threatened in the past by proposed marriage amendments were averted by the collective wisdom for more than sixty years. It is my hope that such collective wisdom will once again prevail and block attempts to enshrine a single view of marriage into the United States Constitution for all people, for all time.



A handwritten signature in cursive script that reads "Sincerely yours Elizabeth Cady Stanton". The signature is written in dark ink on a light-colored background.

130. Letter from Elizabeth Cady Stanton to Elizabeth Miller (Aug. 11, 1880), in STANTON PAPERS, *supra* note 4, at 21:354.

131. DuBois, *supra* note 9 (reprinting and annotating Stanton's speech on free love entitled "On Marriage and Divorce" from 1870).

132. Elizabeth Cady Stanton, *Is Marriage a Success?*, OMAHA REP., Mar. 24, 1889, in STANTON PAPERS, *supra* note 4, at 27:142; Elizabeth Cady Stanton, *Is Marriage a Success? A Symposium*, UNION SIGNAL, May 2, 1889, in STANTON PAPERS, *supra* note 4, at 27:180; *see also* Twentieth Anniversary Address, *supra* note 74.

133. ECS, *Is Marriage a Success?*, *supra* note 132.

134. ECS, *Homogenous Laws*, *supra* note 4, at 408.