



# Guide to the Constitutional Amendment on the Defense of Marriage Act

## September 18, 2004 Ballot

**NOTE:** Several lawsuits contesting the validity of the proposed constitutional amendment on marriage have been filed. State district courts in Orleans and East Baton Rouge parishes have issued contradictory rulings as to whether the proposal will appear on the September 18 ballot. Both decisions have been appealed. No final decision was rendered at the time of publication.

## INTRODUCTION

Marriage has been the subject of intense scrutiny and debate in the nation's legislatures and courts for well over a decade. How marriage and other domestic arrangements will be defined or recognized in state and federal law has become one of the most contentious issues in the United States. In November 2003, the Massachusetts Supreme Court decision recognized a right to same-sex marriage in that state. This decision, combined with the fuel of the presidential and congressional elections in November 2004, ignited a fiery response this spring. Actions taken by Congress, a majority of state legislatures and citizens groups include proposed constitutional amendments, statutory legislation and non-binding resolutions defining marriage as the union of one man and one woman. Lawsuits seeking to have same-sex marriages or civil unions recognized in every state continue to fuel the fire. The final decision on who may marry touches many aspects of law as well as government and private-sector employee benefit programs.

In this context, the Louisiana Legislature passed the Defense of Marriage Act (DOMA), one of five proposed constitutional amendments to be decided upon by voters this fall. DOMA stands alone on the September 18 ballot to separate it from the politics surrounding the

November election for federal offices. The proposed amendment closely follows current state law in many respects, defining marriage as between a man and a woman and prohibiting the recognition of same-sex marriage. However, the proposed amendment may go further by calling into question the validity of certain contracts between unmarried opposite-sex and same-sex partners.

### You Decide

A vote **for** would constitutionally define marriage as the union of one man and one woman and prohibit the recognition of same-sex marriages or civil unions of unmarried opposite-sex and same-sex couples created under any states' laws.

A vote **against** would continue to define marriage statutorily as the union between one man and one woman and prohibit the recognition of same-sex marriages created under other states' laws. State law does not currently address civil unions or domestic partnerships between unmarried opposite-sex and same-sex couples.

## Current Situation

State law currently limits marriage to the union of one man and one woman. Marriage between members of the same sex is prohibited. Louisiana law first referenced marriage as a relationship between a man and a woman in 1975. Until that time, it had not appeared necessary to explicitly define marriage. In 1987, the Legislature amended the Civil Code to prohibit same-sex marriages in the state and in 1999 to refuse recognition of same-sex marriages created under the laws of other states. Although no suit has been filed in Louisiana, some state and federal

courts have addressed how marriage will be defined.

Throughout the 1970s and '80s, the judiciary rejected arguments that same-sex marriage should be recognized. A dramatic shift began in the 1990s, with two state courts finding that same-sex couples should have some or all marital rights. In 2003, the Massachusetts Supreme Court was the first court to expand the definition of marriage to include same-sex couples in the *Goodridge v. Department of Public Health* decision. Unlike earlier courts that all found that marriage was limited to opposite-sex couples based on history, tradition and function, the court found no adequate

reason under its constitution to deny civil marriage to same-sex couples.

State and federal marriage laws, including state constitutional amendments, have been enacted in response to various judicial rulings. In 1996, Congress passed the Defense of Marriage Act (DOMA) limiting marriage to one man and one woman under federal laws and regulations. The law also provides that states may refuse to recognize same-sex marriage. However, the courts have not yet determined whether this provision violates the "full, faith and credit" clause of the U.S. Constitution. As of August 2004, thirty-nine states have similar DOMA legislation that prohibits same-sex marriages and refuses to recognize such marriages granted in other states. A few of the DOMA states go further by refusing to recognize civil unions or civil benefits for same-sex couples. Three other states had already defined marriage by statute as the union of a man and a woman prior to 1996. (See Figure 1.)

Four state constitutions currently define marriage as the union of a man and a woman, as of August 2004. A fifth state reserves to the legislature the right to define marriage. Thirty-two states considered proposals this year to define marriage in their state constitution. Voters in twelve states, including Louisiana, will vote on such a proposal this year. Another five states will likely vote on this issue within the next two years. Fifteen state legislatures considered but did not pass constitutional amendments for a statewide vote. (Most of the states have DOMA statutes.) Citizens in six of these states responded by putting proposals on the ballot through a citizen-initiative process.

## Time Line of Key Laws and Cases

- 1971** The Minnesota Supreme Court was the first state to hear and reject arguments that the U.S. Constitution was violated by denying a marriage license to a same-sex couple.
- 1993** The Hawaii Supreme Court found the denial of marital rights and benefits to same-sex couples could be discriminatory; the state amended its constitution to prohibit same-sex marriage.
- 1996** The federal Defense of Marriage Act (DOMA) prohibited the federal government from recognizing same-sex marriage under federal laws and regulations and allowed the states to do the same. Currently, 39 states have enacted similar DOMAs. (Three other states enacted similar legislation prior to 1996.)
- 1999** The Vermont Supreme Court found that marital rights and benefits may not be denied to same-sex couples. Courts in other states have differed in recognizing those unions.
- 2003** The Massachusetts Supreme Court expanded the definition of marriage to include same-sex couples (*Goodridge v. Department of Public Health*); the legislature began the process of amending its constitution to define marriage as the union of one man and one woman.
- 2004** The first lawsuit seeking nationwide recognition of same-sex couples married in Massachusetts was filed in a Florida federal court.

Same-sex couples have filed suit in Indiana seeking marriage licenses or recognition of their Vermont civil union licenses. Legal challenges are also pending in Oregon, New York, Washington state, California and New Jersey.

## Proposed Change

The amendment would add a provision to the constitution that would:

- Define marriage as the union of one man and one woman.
- Require state officials and courts to recognize only marriages of one man and one woman.
- Prohibit the state from recognizing any legal status that is identical or substantially similar to that of marriage for unmarried individuals.
- Prohibit state public officials and courts from recognizing a marriage, which is not the union of one man and one woman, contracted in any other jurisdiction.

## Comment

A multitude of issues hinge on how marriage is defined and how domestic arrangements are treated

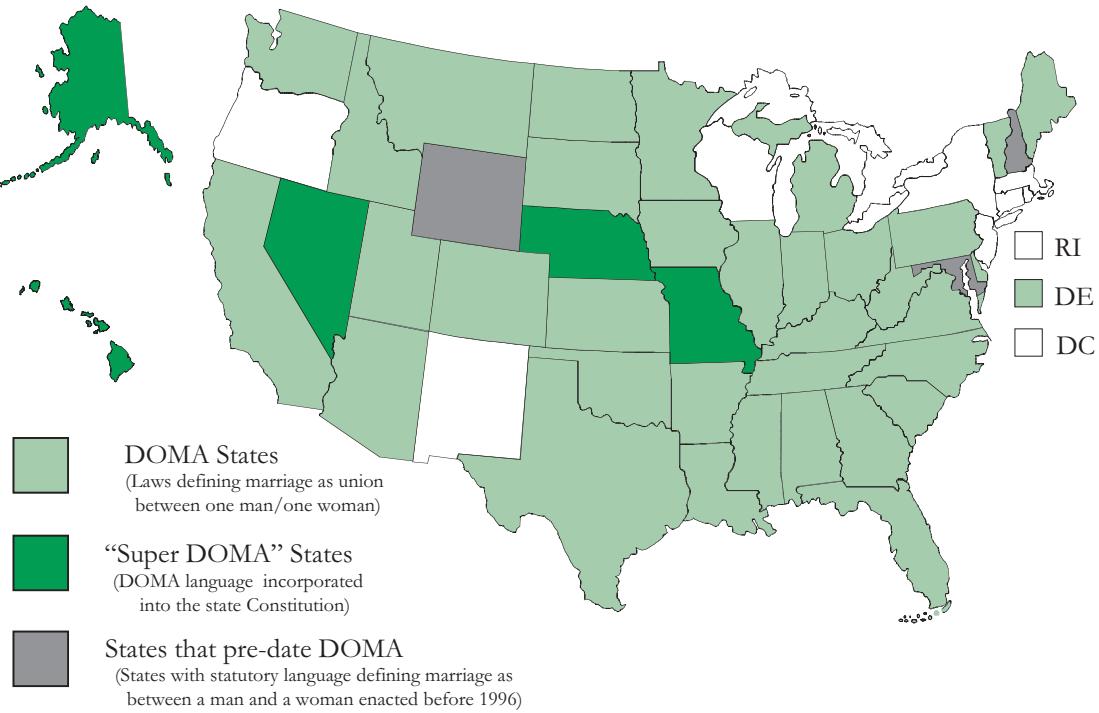
under the law. The definition of marriage impacts family law, healthcare law, succession, torts, taxation, labor law, real estate, bankruptcy, immigration, criminal law, and government and private-sector employee benefit programs. Some of the key issues debated in the Louisiana Legislature include the effect of the amendment on domestic partnership benefits, economic development, the adequacy of current law against the backdrop of litigation outside the state, children, religious beliefs, constitutional rights and the possibility of more radical changes to marriage.

A major area of controversy is the proposed amendment's potential impact on private contracts, including domestic agreements between same-sex couples and unmarried opposite-sex couples or domestic partner benefits offered by private companies in contracts with their employees. Some

rights and benefits may be granted through contractual agreements, such as the right to make medical decisions through a power of attorney or a will stating who will inherit property. Other rights are derived through law, such as the right to sue for wrongful death, and may not be extended through contractual agreement. (See Figure 2.)

State government employees currently are ineligible for domestic partner benefits. The New Orleans City Council established the state's only domestic-partner registry in 1993, and 230 same-sex and opposite-sex couples are currently registered. The city extended healthcare benefits to same-sex partners and their children by executive order in 1997. Tulane University, the largest private employer in New Orleans, also offers domestic partnership benefits to all of its employees.

**FIGURE 1**  
**State Defense of Marriage Acts (DOMAs)**



Legal analysts are split on the potential impact of the amendment on private contracts. The controversy focuses on the interpretation of the phrase "legal incidents" of marriage and what may constitute a "legal status identical or substantially similar to that of marriage." Some legal scholars believe the amendment will not disturb private contracts but makes clear that same-sex couples and unmarried opposite-sex couples are not entitled to marital rights under the constitution or any state law. For example, these couples could not pursue a wrongful death claim for a deceased partner. Other legal experts think private contracts closely paralleling marital rights may be nullified, such as alimony and health-care benefits. Others think the amendment would invalidate all agreements between same-sex and unmarried

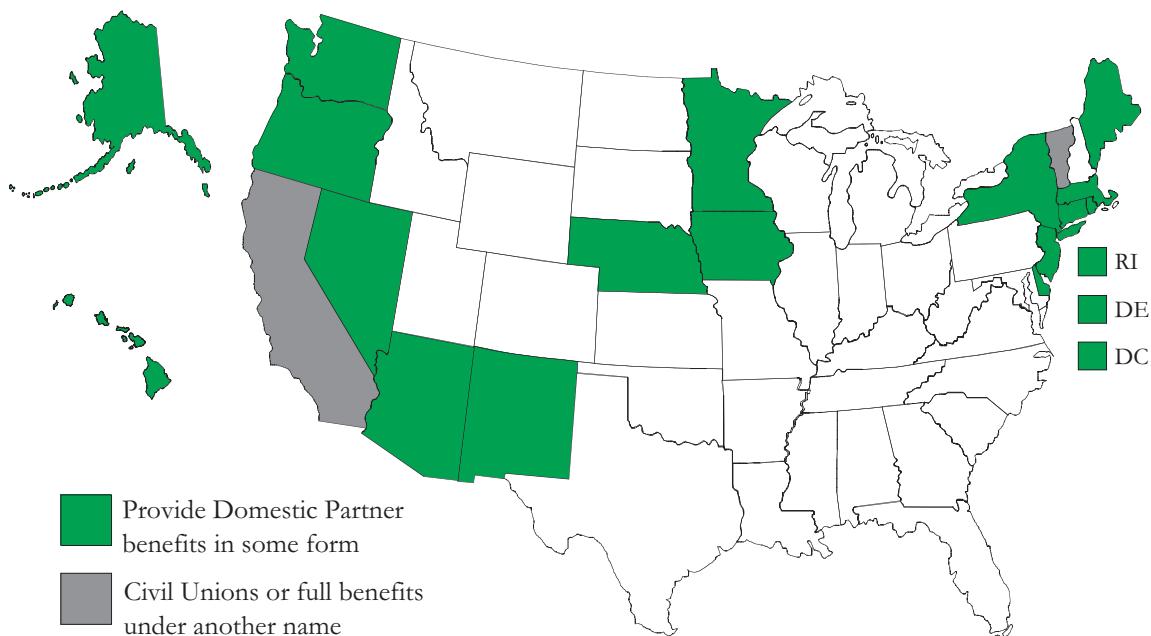
opposite-sex partners, even those that are not marital in nature, such as medical directives.

There is also debate over whether marriage should be defined by the states or federal government. The Federal Marriage Amendment (FMA) to the federal constitution, proposed in Congress this year, would have defined marriage as the union between one man and one woman and rejected any marital benefits to unmarried couples or groups. However, the FMA did not come to a vote this summer. While efforts to promote a federal marriage amendment are likely to continue, the federal judiciary may first determine the issue. A suit recently filed in a Florida federal court is the first to argue that the federal government and other states must recognize a same-sex marriage that occurred in a state

where same-sex marriage is recognized by virtue of the "full, faith and credit" clause of the U.S. Constitution.

In an effort to forestall any judicial action, the U.S. House of Representatives voted to limit the jurisdiction of the federal courts in hearing same-sex marriage cases by passing the Marriage Protection Act in July 2004. However, the Senate has taken no action. The bill would prevent federal courts from ordering states to recognize same-sex marriages that are permitted by other states. Opponents of the bill argue that it violates the constitution's separation of powers among the legislative, executive and judicial branches. Because this question has never been tested, it is unknown if the U.S. Supreme Court would agree that Congress may limit what cases it may hear.

**FIGURE 2**  
**Domestic Partnerships and Civil Unions**



## PROONENTS' ARGUMENTS

### Statute or Constitutional Amendment

Supporters argue that Louisiana should strengthen its definition of marriage to prevent the state's supreme court from finding the current definition of marriage unconstitutional. The climate is especially ripe for state courts to take such action, following the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*. Although the *Lawrence* opinion did not address same-sex marriage explicitly, the decision signals the Supreme Court's willingness to identify private intimate sexual conduct as a fundamental liberty interest under the U.S. Constitution. By finding sodomy laws unconstitutional, it removed one of the explicit public policy arguments against recognizing same-sex unions.

A constitutional amendment sends the strongest message that the state wishes marriage to be limited to one man and one woman. As a state constitutional provision, it is of equal dignity with other provisions (such as the equal protection provision) that have been used to invalidate marriage statutes in other states. Supporters also argue it would be imprudent to wait for a lawsuit to be filed, which would likely result in the calling of a special session of the Legislature and subsequent election at great taxpayer expense. Amending the constitution after a suit is filed is usually complicated by questions over the validity of retroactive enforcement.

### Marital Rights/ Benefits and Domestic Partnerships

Proponents maintain that the amendment only limits access to rights and benefits granted automatically under the law and does not affect private agreements and contracts with private employers. For example, an unmarried opposite-sex couple would not be able to assert a spousal status or its equivalent for the purpose of claiming a right to alimony or filing a wrongful death suit for a deceased partner, as they are rights determined by statute or the constitution. Proponents believe rights and obligations contracted privately would not be impacted by the amendment. For example, same-sex couples would still be able to leave property to their partner through a will.

### Economic Development

Proponents argue that the amendment will have little or no impact on state and local coffers. The state's image as a destination location for uninhibited fun is a nearly permanent fixture. They do not believe the amendment will impact tourism, noting the longevity of gay and lesbian events despite the fact that anti-sodomy laws were only recently overturned in 2003. To the contrary, economic development efforts have been harmed by those outside the state that perceive any type of behavior (e.g., sexual license or corruption) is tolerated. Factors with a more direct impact on the economy, such as public education and the tax structure, are more problematic issues to address.

### Children

Supporters of the amendment argue marriage between opposite-sex individuals provides the best environment for the nurturing and rearing of children. Opposite sex marriage is uniquely designed to assure that any child conceived by a heterosexual couple will be in a more stable environment where they are guaranteed both a mother and a father. Same-sex marriage institutionalizes motherless and fatherless families.

### Religion

Supporters argue that because homosexuality runs contrary to the moral viewpoint of a large number of religious believers, same-sex couples should not be granted marital status. Religious faith has historically played a significant role in the formation of civil laws and continues to be a source in understanding the role that the government serves in maintaining a strong society.

### Slippery Slope

Supporters of the amendment argue that if marriage is redefined to include same-sex couples, then other changes are likely to follow. At the point that marriage involves more than two people, chaos will follow from those desiring various types of group marriage, such as polygamy (marriage between a person of one sex and more than one person of the opposite sex) or polyamory (marriage between multiple parties of both sexes). Deviation from the traditional definition of marriage would erode the basic unit of society and have a lasting, damaging effect on society.

# OPPONENTS' ARGUMENTS

## Statute or Constitutional Amendment

Opponents argue the amendment is unnecessary because state law already clearly bans same-sex marriage and requires opposite-sex couples to marry to enjoy certain marital rights and benefits. They view the constitutional amendment as discriminatory and punitive. Further, opponents argue that there is no need for the amendment, since no lawsuit has been filed to challenge the existing state law. They also argue that if the federal courts do hear a case asking for same-sex marriages to be recognized in every state, it will ultimately be decided by federal courts under the U.S. Constitution.

## Marital Rights/Benefits and Domestic Partnerships

Opponents argue that the amendment would prohibit civil unions and could prohibit certain contracts between all unmarried couples as contrary to state public policy. For example, an alimony agreement could be found by the courts to mirror marriage and be nullified. They argue that language in the proposal may be sufficiently vague to allow a court to invalidate private contractual agreements between unmarried opposite-sex or same-sex couples, leaving them vulnerable to great uncertainty concerning a broad spectrum of issues including medical insurance, disability protection, hospital visitation and property rights.

## Economic Development

Opponents argue that companies will be deterred from considering Louisiana, because domestic partnership benefits may be jeopardized by the amendment. They also argue that young workers are more selective about the desired traits in a community in which they live. They argue that workers in knowledge-based fields, such as information technology, healthcare, the arts and science, prefer communities that embrace a diversity of opinions and lifestyles.

## Children

Opponents of the amendment argue that children raised by unmarried opposite-sex couples and same-sex couples could be disadvantaged compared with those born of marriage. Existing rights and benefits available to their parents such as health-care and medical leave could be vulnerable to a legal challenge. They also argue that children are frequently raised outside of married opposite-sex parent homes with 50% of marriages ending in divorce and 45% of children in the state born to unwed mothers.

## Religion

Opponents argue that religious views are diverse and evolving. The understanding and meaning of many religious texts change with new scholarship. Opponents argue that no one expects religious believers to recognize same-sex marriages or civil unions, although some churches do currently sanction same-sex unions. Others argue that religious beliefs are not an appropriate part of formulating public policy because of the division between church and state.

## Slippery Slope

Opponents view the slippery slope argument as a scare tactic that unfairly lumps separate issues together. They note that marriage is a constantly changing institution within certain limits. For example, divorce was once difficult to obtain and is now relatively easy under no-fault divorce laws beginning in the 1960s. Miscegenation laws once prohibited marriages between different races and were found unconstitutional by the U.S. Supreme Court in 1967. The growing acceptance of homosexuality calls for marriage to include same-sex couples.

## Conclusion

Louisiana would be the fifth state to define marriage in its constitution as the union of one man and one woman should the amendment pass in September. Up to 11 other states may amend their state constitutions by the end of the year. The legal definition of marriage and treatment of other domestic relationships will be the subject of continuing debate, legislation and litigation in this state and others. Congress and the federal courts may also play a critical role in resolving issues from a growing patchwork of state and federal marriage laws.

## Legal Citation

Act 926 (Representative Scalise) of the 2004 Regular Session adding Article XII, Section 15.

### Voting on Louisiana Proposed Constitutional Amendments (1921-2003)

	<u>Number of Amendments Proposed</u>	<u>Number of Amendments Approved</u>	<u>Average Percent of Registrants Voting</u>
<b>1921 Constitution</b>	<b>802</b>	<b>536</b>	--
<b>1974 Constitution (Total)</b>	<b>184</b>	<b>122</b>	--
November 7, 1978	1	1	29.9
October 27, 1979	3	3	37.5
November 4, 1980	4	4	55.7
September 11, 1982	8	4	24.9
October 22, 1983	3	3	44.2
November 6, 1984	5	0	53.7
September 27, 1986	7	2	39.3
November 21, 1987	5	5	32.3
October 1, 1988	1	0	27.5
April 29, 1989	1	0	46.8
October 7, 1989	13	5	28.3
October 6, 1990	15	14	46.9
October 19, 1991	8	5	47.1
October 3, 1992	5	2	29.4
November 3, 1992	7	0	53.7
October 16, 1993	6	6	18.1
October 1, 1994	4	4	30.9
October 21, 1995	15	13	46.9
November 18, 1995	1	1	53.2
September 21, 1996	2	2	36.1
November 5, 1996	3	3	54.4
October 3, 1998	18	15	19.6
November 3, 1998	2	2	26.4
October 23, 1999	10	5	31.9
November 20, 1999	6	6	23.1
November 7, 2000	4	0	51.0
November 5, 2002	12	6	35.7
October 4, 2003	15	11	38.1

SOURCE: Official Promulgation, Secretary of State.

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