

## ARTICLES

# THE FEDERAL MARRIAGE AMENDMENT: TO PROTECT THE SANCTITY OF MARRIAGE OR DESTROY CONSTITUTIONAL DEMOCRACY?\*

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## INTRODUCTION: THE CALL FOR A MARRIAGE AMENDMENT

Throughout 2004 President Bush called upon Congress to “promptly pass and to send to the States for ratification an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife.”<sup>1</sup> He claimed that the sanctity of marriage—a fundamental, cherished institution—is under attack and subject to annihilation if same-sex couples are allowed to join.<sup>2</sup> The President said he was forced to resort to the constitutional process in order to protect this institution because “activist” judges were seeking to redefine marriage without regard to the voice of the people.<sup>3</sup> One may agree or disagree with court decisions that provide equality for gay couples—like the Massachusetts gay marriage decision in *Goodridge v. Department of Public Health*—but courts that act to foster equality are within their authority and within accepted principles of constitutional democracy.<sup>4</sup>

The Federal Marriage Amendment (“FMA”) was introduced in Congress on May 21, 2003.<sup>5</sup> However, it was not until the Massachusetts Supreme Judicial Court ruled that the state must grant marriage licenses to same-sex couples<sup>6</sup> that President Bush publicly endorsed the FMA and Congress actively pushed to pass it.<sup>7</sup> In 2004, the House of Representatives failed to approve the FMA, garnering less than the two-thirds vote required to pass.<sup>8</sup> Nevertheless, those in favor of the FMA were in the clear majority by a vote of 227 to 186.<sup>9</sup> The Senate, in contrast, voted to stop the debate on the FMA by a vote of 50 to 48.<sup>10</sup>

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1. Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 40 WEEKLY COMP. PRES. DOC. 276, 277 (Feb. 24, 2004) [hereinafter Remarks].

2. *Id.*

3. *Id.*; see The President’s Radio Address, 40 WEEKLY COMP. PRES. DOC. 1253, 1254 (July 10, 2004) (

The union of a man and woman in marriage is the most enduring and important human institution, and the law can teach respect or disrespect for that institution . . . . If courts create their own arbitrary definition of marriage as a mere legal contract and cut marriage off from its cultural, religious, and natural roots, then the meaning of marriage is lost and the institution is weakened.

); *The Courts, The Legislature, and the Executive: Separate and Equal? Questions from the Audience*, 87 JUDICATURE 208, 218 (2004) [hereinafter *Questions*] (“Politicians use the word ‘activist’ when they’re upset with judges.”).

4. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that the Massachusetts state constitution forbids the denial of full legal marriage rights to same-sex couples).

5. H.R.J. Res. 56, 108th Cong. (2003) (proposing an amendment to the United States Constitution that would define marriage as “the union of a man and a woman” and would prohibit any federal or state law from requiring “that marital status or the legal incidents thereof be conferred upon unmarried couples or groups”).

6. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004).

7. See Remarks, *supra* note 1, at 277.

8. 150 CONG. REC. H7898, H7934 (daily ed. Sept. 30, 2004).

9. *Id.* at H7933-34.

10. 150 CONG. REC. S8090-91 (daily ed. July 14, 2004) (defeating the motion with six

The fight is not over. The FMA was reintroduced in early 2005 after President Bush was reelected.<sup>11</sup> Some Americans attribute President Bush's reelection to the same-sex marriage controversy that divides the country,<sup>12</sup> citing the many states that have amended their constitutions to deprive same-sex couples of the same right to marry as opposite-sex couples.<sup>13</sup> In fact, immediately following the election, the Human Rights Campaign (HRC), a national gay rights organization, announced a change in strategy to temper efforts to obtain marriage rights in light of the dramatic backlash.<sup>14</sup>

Article V provides for amendments to the Constitution.<sup>15</sup> "Amendments" are generally intended to provide sufficient flexibility such that a document will survive over time and adjust to changing circumstances.<sup>16</sup> Thus, amendments to the Constitution should promote the

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Republicans and all but three Democrats); Press Release, National Gay and Lesbian Task Force, Justifications, Obfuscations and Wave of State Anti-Marriage Constitutional Amendments Cloud Defeat of Federal Marriage Amendment (July 15, 2004), at <http://www.thetaskforce.org/media/release.cfm?releaseID=710> (on file with the American University Law Review).

11. H.R.J. Res. 39, 109th Cong. (2005).

12. See Anne E. Kornblut, *GOP to Press for Gay-Marriage Ban: Democrats Facing Reelection Pressure*, BOSTON GLOBE, Nov. 14, 2004, at A25; Kate Zernike, *Groups Vow Not to Let Losses Dash Gay Rights*, N.Y. TIMES, Nov. 14, 2004, § 1, at 30; Gary M. Segura, *A Symposium on the Politics of Same-Sex Marriage—An Introduction and Commentary*, 38 PS: POL. SCI. & POLITICS 189, 189 (2005) ("[T]he emergence of the analytically vague phrase 'moral values' from the exit polls and some arm-chair analysis by the pundits had already raised to the level of conventional wisdom the assertion that Senator John Kerry had lost because of the issue of same-sex marriage."), available at [http://www.apsanet.org/imgtest/CJFX002-Segura\[001-004\].pdf](http://www.apsanet.org/imgtest/CJFX002-Segura[001-004].pdf).

13. See Statement by Matt Foreman, Executive Director of the National Gay and Lesbian Task Force, Press Release, National Gay and Lesbian Task Force, Justifications, Obfuscations and Wave of State Anti-Marriage Constitutional Amendments Cloud Defeat of Federal Marriage Amendment (July 15, 2004), at <http://www.thetaskforce.org/media/release.cfm?releaseID=710> (on file with the American University Law Review) (noting that the vote defeating the amendment "was far from a ringing endorsement for equal rights for lesbian, gay, bisexual and transgender (LGBT) people . . . [O]ver one dozen states . . . will have State Constitutional amendments on the ballot this November [2004]."); Unitarian Universalist Association, *States Facing Constitutional Amendments Banning Same-Sex Marriage*, at [http://www.uua.org/news/2004/freedomtomarry/state\\_ballot\\_initiative\\_s.html](http://www.uua.org/news/2004/freedomtomarry/state_ballot_initiative_s.html) (last visited July 9, 2005) (on file with the American University Law Review) (listing states with constitutional amendments on the 2004 ballot, including Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah).

14. See Stefen Styrsky, *Changes at Top of Human Rights Campaign: Winnie Stachelberg Moves to Educational Foundation; David Smith Quietly Returns*, GAY CITY NEWS (Feb. 10, 2005), at [http://www.gaycitynews.com/gcn\\_359/changesatthetop.html](http://www.gaycitynews.com/gcn_359/changesatthetop.html) (on file with the American University Law Review); John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1; Joe Crea, *HRC Restructures: Rosen Denies Jacques' Departure Related to November Election*, N.Y. BLADE ONLINE (Dec. 10, 2004), at <http://www.newyorkblade.com/2004/12-10/news/national/hrc.cfm> (on file with the American University Law Review).

15. U.S. CONST. amend. XV.

16. See Sanford Levinson, *How Many Times Has the United States Constitution Been*

primary purposes of the Constitution and be consistent with three of the most basic principles articulated in the original document—individual rights, separation of powers, and federalism.<sup>17</sup> Although, currently, only the Massachusetts Supreme Judicial Court has held that same-sex couples have a state constitutional *right* to marry, the ability to enter into the marital relationship is a very significant *liberty* interest, even if it does not rise to the level of a federal constitutional right.<sup>18</sup> The FMA tramples upon basic notions of liberty and justice by expressly creating a secondary class of citizens and depriving them of that fundamental interest to marry—*infringing* on both equality and liberty principles. Only one amendment in history, the Eighteenth Amendment, limited the liberty interests of the people.<sup>19</sup> Needless to say, it also is the only amendment to be repealed.<sup>20</sup> Moreover, while there have been several proposed amendments that would have limited the rights or liberty interests of individuals, these amendments have uniformly failed.<sup>21</sup>

This Article will demonstrate that the FMA is not only strikingly similar to these unsuccessful amendments that attempted to deprive citizens of fundamental interests and rights, but is even more destructive of separation of powers and federalism principles. The FMA is designed to overrule a state supreme court decision in which the court, as the sole protector of minority interests, acted consistently with principles of individual rights to protect minority interests.<sup>22</sup> While the constitutional amendment process is the only “check” on the power of the judiciary to interpret the Constitution, the process should be used to overrule the courts only in cases where the judiciary abuses its power or decides a case in a manner clearly inconsistent with constitutional principles.<sup>23</sup>

History supports this view. The Constitution has been amended only

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*Amended?: Accounting for Constitutional Change, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 3 (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION] (discussing the importance of a living, evolving Constitution).

17. See *infra* Part II.

18. Throughout this Article the term “right” will be reserved for those individual interests that the Supreme Court has recognized as a constitutional right. The term liberty encompasses many interests, not all of which the Court has or likely will interpret as covered expressly by the Constitution. However, when evaluating the propriety of a constitutional amendment, an amendment that limits an important, even if not fundamental, liberty interest should be considered suspect. Of course an amendment that infringed upon a liberty interest found to be fundamental, for example an amendment banning abortion nationwide, would be highly suspect.

19. U.S. CONST. amend. XVIII (repealed 1933) (prohibiting the movement and exchange of liquor within the United States).

20. U.S. CONST. amend. XXI (repealing the Eighteenth Amendment).

21. See *infra* Part III.

22. See *infra* Part V (detailing how the Federal Marriage Amendment would undermine the ability of the states to administer their own affairs).

23. See *infra* Part II.A.

four times to overturn Court precedent.<sup>24</sup> Each time the amendment was in harmony with constitutional principles and represented a proper exercise of the authority of the people as the ultimate sovereign to correct a court decision inconsistent with these principles. In fact, the Supreme Court itself has often suggested that the amendment process was the proper means of addressing the question before it, because the Court noted that it did not have the authority to decide the question properly.<sup>25</sup> In contrast, the FMA violates separation of powers principles by prematurely overruling a state supreme court decision that is in harmony with our democratic constitutional principles and depriving the U.S. Supreme Court of jurisdiction to address the issue.<sup>26</sup>

Finally, the FMA flagrantly violates federalism principles by legislating in an area left primarily to the states. The federal government is one of limited powers. The Constitution grants the federal government no power over marriage; the states have the exclusive power to define marriage within their territories.<sup>27</sup> Of course, the federal government has the power to protect individual rights consistent with notions of due process and equal protection.<sup>28</sup> Thus, even in an area left exclusively to the states, the federal government may legislate to *protect* individual rights and establish a federal *floor* for such rights. However, the FMA deprives individuals of significant liberty interests and establishes a federal *ceiling* on constitutional rights.<sup>29</sup> This clearly violates federalism principles and forecloses the opportunity for progressive state experimentation, an important aspect of our dual federal and state system.<sup>30</sup>

In sum, the FMA is itself constitutionally suspect and is more destructive, on balance, of the three basic democratic constitutional principles than any amendment previously adopted or proposed. The amendment violates every tenet of constitutional democracy by: (1)

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24. See *infra* Part IV (discussing the Eleventh Amendment, which limited the federal judiciary's authority over suits brought by citizens against a state; the Thirteenth and the Fourteenth Amendments, which abolished slavery and granted citizenship to slaves; the Sixteenth Amendment, which permitted the federal government to collect income taxes; and the Twenty-Sixth Amendment, which extended voting rights to all citizens eighteen years or older).

25. See *infra* note 206 and accompanying text (noting Justice Taney's suggestion in *Dred Scott v. Sandford*, 60 U.S. 393, 405-06 (1856), that former slaves could only gain citizenship through a constitutional amendment because the Court could not in good faith read a provision into the Constitution that the legislature never intended it to include).

26. See *infra* Part IV.

27. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Maynard v. Hill*, 125 U.S. 190 (1888), for the proposition that the states retain the primary authority to regulate marriage).

28. See *id.* at 7 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942), for the proposition that state regulation of marriage must comport with the Fourteenth Amendment).

29. See *infra* Part V.

30. See *infra* Part V.

expressly limiting the due process and equality interests of a minority group; (2) precluding the Supreme Court from fulfilling its role as the protector of individual rights; and, (3) foreclosing the states from experimenting with progressive laws designed to promote equality within an area uniquely reserved to the state governments. By violating these tenets of constitutional democracy, the FMA is unlike any other amendment in our history<sup>31</sup> and must be rejected.

This Article proceeds as follows. Part II discusses Article V of the Constitution and the limits placed on the constitutional amendment process, specifically, whether the Court may find an amendment substantively unconstitutional or require that the people, through convention, adopt amendments that infringe on individual liberties. Part III analyzes the Eighteenth Amendment and proposed amendments that have historically threatened individual interests or rights, drawing parallels with the FMA. Part IV analyzes the four amendments designed to overrule Supreme Court decisions and contrasts these with the FMA to demonstrate that the use of the amendment process here is inconsistent with these past amendments. Finally, Part V discusses how the FMA flagrantly violates federalism principles by limiting individual liberties in an area left exclusively to the states, thereby depriving the nation of the opportunity to experiment with progressive laws.

## I. CONSTITUTIONAL AMENDMENT

### A. *Limits on Constitutional Amendments*

Article V of the Constitution grants Congress the power to propose an amendment to the Constitution whenever two-thirds of both houses shall deem it necessary; and such amendment shall become valid when ratified by the Legislatures or Conventions of three-fourths of the states.<sup>32</sup> While thousands of constitutional amendments have been proposed since the founding, only seventeen amendments have been added to the original Bill of Rights.<sup>33</sup> The Constitution is deemed a higher law than ordinary

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31. The FMA also appears to conflict with more constitutional principles than did other proposed amendments. See *infra* note 122 (listing briefly categories of proposed amendments, especially those related to marriage). See generally M.A. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION, H.R. DOC. NO. 551 (2d Sess. 1929) (listing amendments proposed to Congress since 1889); PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. NO. 163 (2d Sess. 1963) (listing all amendments submitted to Congress from 1926-1963).

32. See U.S. CONST. art. V.

33. See Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in RESPONDING TO IMPERFECTION, *supra* note 16, at 37, 49-50 ("Although more than ten thousand amendments have been proposed, only seventeen were adopted . . . Only the Seventeenth Amendment, providing for the direct election of senators, changed a key

legislation; thus the amendment process requires a super-majority consensus for passage by Congress and the states. The purpose of requiring a slow and deliberate process is to limit the number of amendments to those that truly reflect the will of the people.<sup>34</sup> James Madison explained that in a large republic “it [should be] less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”<sup>35</sup> The “people” are granted the ultimate authority over government with the power to redefine the scope of its power by modifying the document that establishes such power.<sup>36</sup>

Whether the Constitution provides for substantive limits on amendments is hotly debated.<sup>37</sup> There are strong arguments that some substantive limitations do exist.<sup>38</sup> The word “amendment” itself suggests limits. “[T]he power to ‘amend’ [does not] include the power to ‘destroy.’”<sup>39</sup> “Amendment” implies change to the original document that respects its foundational principles, those “in harmony” with the “general spirit and purpose[s]” of the original document.<sup>40</sup> Radical alteration to the foundational principles is not intended.<sup>41</sup> The Constitution contains “an

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element of the framer’s design.”); John R. Vile, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995*, 48, 251 (1996) (detailing that six amendments have been submitted to the states but have not been ratified, with the most recent addressing child labor, submitted in June 1924 to the states for ratification. Interestingly, “the amendments that have been adopted are concentrated in just a few periods in our history. The first ten amendments were ratified in 1791; two more were added in 1798 and 1804, respectively . . . . After that, however—except for the three Civil War Amendments, which obviously arose from extraordinary circumstances—no amendments were adopted for almost 110 years. Then, beginning in 1913, the Constitution was amended four times in seven years.” David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457, 1489-90 (2001).

34. Griffin, *supra* note 33, at 39 (describing the uniquely American preference that constitutional amendments be written and approved by the people).

35. THE FEDERALIST NO. 10, at 60 (James Madison) (New York, J. & A. McLean, 1788).

36. See William L. Marbury, *The Limitations Upon the Amending Power*, 33 *HARV. L. REV.* 223, 232 (1919) (“The government proceeds directly from the people . . . .”) (quoting *McCulloch v. Maryland*, 4 U.S. 316, 402 (1819)); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-2, at 2 (2d ed. 1988) (“That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American Constitutionalism.”).

37. See, e.g., Marbury, *supra* note 36; Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 *FORDHAM L. REV.* 1487 (2004); John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, in *RESPONDING TO IMPERFECTION*, *supra* note 16, at 191, 198.

38. See generally Kelbley, *supra* note 37 (outlining the arguments for implicit limitations to the amendment process including: (1) the definition of “amend” as limited to correction, not revolution; (2) justifications based on the text, natural law, and normative arguments; and (3) the need to interpret the Constitution holistically).

39. Marbury, *supra* note 36, at 225.

40. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 *MICH. L.J.* 109, 118 (1893).

41. *Id.*

inner unity' and a commitment to 'certain overarching principles and fundamental decisions to which individual provisions are subordinate.'"<sup>42</sup>

The preamble of the Constitution establishes the primary purposes of the Framers—to maintain a union of independent states and secure justice and liberty for all individuals throughout the nation.<sup>43</sup> The body of the Constitution creates a framework for government to achieve these principles by defining a federal government of limited powers, dividing power among three separate branches—the legislature, the executive, and the judiciary—and protecting individuals from government abuse.<sup>44</sup>

This framework is founded upon three substantive principles that define our constitutional democracy: federalism, separation of powers, and individual rights. These rights are more important than the democratic procedures provided in Article V to secure them.<sup>45</sup> Thus, the use of proper procedures to amend the Constitution in a manner that contradicts fundamental constitutional principles should be invalid.

Nevertheless, the generally accepted legal view derived from the plain language of Article V is that the Court has no authority to question the substance of constitutional amendments. If the procedural requirements of Article V are properly followed, the amendment is valid.<sup>46</sup> The reason for this is simple. The amendment process is the *sole* check on judicial power to interpret the Constitution. Thus, if the judiciary could review the substance of constitutional amendments, it would wield unchecked ultimate power.<sup>47</sup> This is particularly problematic because its members are not

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42. Vile, *supra* note 37, at 197 (citing Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 755-56 (1980), which quotes the Federal Constitutional Court in Germany).

43. See U.S. CONST. pmbl. ("We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.").

44. See *Gregory v. Ashcroft*, 501 U.S. 452, 457-60 (1991) (discussing how both the creation of separate and independent branches of the government and a federalist system that balances the power between the federal and state governments reduces the risk of tyranny and protects the rights of the individual); *Myers v. United States*, 272 U.S. 52, 25 (1926) (explaining the division of power among the three branches as a means to devise a more secure government); *TRIBE*, *supra* note 36, § 1-2, at 2-3 (relating the conceptual understanding of the Founding Fathers that centralized power would lead to tyranny, whereas divided power would lead to liberty).

45. Vile, *supra* note 37, at 197 (citing Walter Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 755-57 (1980)).

46. See, e.g., JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 173 (1992) (arguing that Article V was well-designed to ensure that constitutional amendments truly reflect the will of the people); WALTER FAIRLEIGH DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 236 (1910); Rhode Island v. Palmer, 253 U.S. 350 (1920). Article V specifically describes two substantive limits: one expired in 1808 and thus is no longer applicable; the second required that each state have the same number of representatives in the Senate. These two enumerated substantive limits suggest that no other substantive limits were intended. Kelbley, *supra* note 37, at 1535.

47. See Vile, *supra* note 37, at 198.

elected but rather are appointed and serve for life.<sup>48</sup> The judiciary, in fact, is designed to be counter-majoritarian and is not well-suited to express the will of the “majority.”<sup>49</sup> Therefore, it is generally understood that the Supreme Court has no power to determine the content of the Constitution, but only the power to interpret that which the Constitution does contain.<sup>50</sup>

The arguments supporting substantive limits on constitutional amendments are useful in analyzing which amendments are constitutionally suspect, even if the Court would be unwilling to enforce substantive limits. Thus, an amendment is constitutionally suspect when it is in direct conflict with the governing principles embodied in the original constitution, for example when the value at stake is both expressly embodied in its text and has strong ties to other constitutional values.<sup>51</sup>

The express purposes of the Constitution “to form a more perfect union, establish justice . . . and secure the blessings of liberty”<sup>52</sup> establish two fundamental principles necessary to our constitutional system of democracy: the “union” of individual states and individual interests in justice and liberty. Amendments that would effectively eliminate or destroy the states would be invalid as there would no longer remain a “union.”<sup>53</sup> Similarly, amendments that destroy individual interests in liberty and justice would be invalid as incoherent and destructive to the very purposes of establishing justice and securing liberty. It is unlikely that any single amendment would eliminate the states or destroy all fundamental interests necessary to maintain justice and liberty. Such dramatic “amendments” would likely be the result of a revolution.<sup>54</sup> However, it is plausible to imagine successive amendments that would deprive the states of sufficient legislative powers such that over time the

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48. U.S. CONST. art. II, § 3, art. III, § 1.

49. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986); see also *Questions*, *supra* note 3, at 217. Of course, in creating the judiciary, the Founders recognized that an interest of the “majority” was to provide a branch that, in fact, would protect minority interests. Thus, the role the courts play are in the interests of the “majority.” BICKEL, *supra*, at 16.

50. See *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (“[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument.”) (emphasis in original). While this power is quite broad—as “interpretation” itself involves defining what is contained—principles of “interpretation” do impose limits on delineating that power from the power to, in effect, “create” the Constitution. Nevertheless, as one noted commentator said many years ago, “the choice then presented to the American people [between allowing judicial review of constitutional amendments or not] may be one between an imperfect Constitution and no Constitution at all.” *Marbury*, *supra* note 36, at 234.

51. See Mark E. Brandon, *The “Original” Thirteenth Amendment and the Limits to Formal Constitutional Change*, in *RESPONDING TO IMPERFECTION*, *supra* note 16, at 215, 235.

52. U.S. CONST. pmbl.

53. *Marbury*, *supra* note 36, at 228.

54. *Cooley*, *supra* note 40, at 118.

states would cease to exist in any real sense, having been deprived of their primary powers.<sup>55</sup> Moreover, one could imagine successive amendments that chip away at individual liberty interests such that, over time, the people would lack sufficient protections to maintain individual justice and liberty.

The FMA is constitutionally suspect. First, individual interests in liberty and equality are expressly enumerated in the Constitution.<sup>56</sup> The United States Supreme Court has held that marriage is a fundamental liberty right of the people.<sup>57</sup> The Court has *not* held that same-sex couples have a right to marry: that is the debate.<sup>58</sup> Nevertheless, the FMA expressly creates an unequal system that deprives only same-sex couples of the legal right to marry, which, even if not a federal constitutional right to liberty,<sup>59</sup> is a significant liberty interest. Second, values of liberty and equality, and specifically marriage, invoke other fundamental enumerated interests of expression, assembly, and religion.<sup>60</sup> Third, the power to define marriage lies primarily with the states.<sup>61</sup> Setting a national standard for marriage that denies individual liberty interests is a move toward eliminating both state sovereignty and individual justice and liberty. In sum, the FMA should be invalidated as it impinges upon the substantive limits of “amendment.”

### B. *Constitutional Amendment by Convention*

While it may be improper to give the judicial branch ultimate authority over the content of the Constitution, *no* branch should have such authority alone. To give any one branch this authority violates the basic structure of

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55. Marbury, *supra* note 36, at 229.

56. U.S. CONST. amends. V, XIV (stating that an individual shall not be “deprived of life, liberty, or property without due process of law”).

57. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that marriage is a fundamental civil right of every person); see Loving v. Virginia, 388 U.S. 1, 12 (1967) (extending the fundamental right of marriage to interracial marriage).

58. The question has been analyzed by scholars for several years and is beyond the scope of this Article. *E.g.*, ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON (1997); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION (1997); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997). In 2003 the Supreme Court held that criminalizing sodomy is unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Scalia, in dissent, argued that the majority decision would inevitably lead to a finding that same-sex couples have a constitutional right to marry. *Id.* at 604-05 (Scalia, J., dissenting). This argument is debatable, but at the very least *Lawrence* offers support for a right for same-sex couples to marry. Had the Court instead upheld *Bowers v. Hardwick*, 478 U.S. 186 (1986), the argument for a right for same-sex couples to marry would have been all but destroyed.

59. Note that the Court has held that two consenting adults have a liberty *right* to engage in sodomy in private. *Lawrence*, 539 U.S. at 567.

60. See, *e.g.*, *Shahar v. Bowers*, 114 F.3d 1097, 1103 (11th Cir. 1997) (en banc) (finding a constitutional violation of a prospective employee’s rights to free speech and association when a government employer withdrew a job offer after learning the employee planned a wedding ceremony to marry her same-sex partner).

61. See *infra* notes 234-236.

checks and balances. Rather, the *people* created our constitutional democratic government during the Philadelphia Convention of 1787 and should alone retain the ultimate authority to substantially alter the document in a manner that is inconsistent with the basic principles defined therein. The people's will is expressed through convention, not by votes of Congress or the state legislatures. "[C]onstitutionalism has one essential quality: it is a legal limitation on government . . . written by a special assembly of citizens and then submitted to the people for approval."<sup>62</sup> Only the people have the authority to approve an amendment that limits the natural interests of the people themselves: the people, not the government, are the ultimate sovereign.<sup>63</sup> This proposition is supported by analogy to the Seventeenth Amendment,<sup>64</sup> and by state courts, scholars, and politicians throughout history who have agreed with this view.<sup>65</sup>

The people elect representatives to the state and federal legislatures. Once elected, these representatives form the "government" and are no longer truly the "people." The Seventeenth Amendment exemplifies this understanding. The Constitution originally provided that "[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislatures thereof, for six Years; and each Senator shall have one vote."<sup>66</sup> The Seventeenth Amendment requires that senators be "elected by the people" of the state rather than "by the Legislatures thereof."<sup>67</sup>

A primary reason for the election of senators by the state legislatures was to protect the interests of the states directly.<sup>68</sup> Madison explained that because "[t]he Senate will be elected absolutely and exclusively by the State Legislatures," it "will owe its existence more or less to the favor of State governments . . ."<sup>69</sup> Thus, the Senate stood as a defense to federal

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62. Griffin, *supra* note 33, at 39 (quoting CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 24 (1940)).

63. See Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1084-85 (1991).

64. Cf. U.S. CONST. amend. XVII (providing the process by which Senators—who would vote to pass constitutional amendments—are elected by the people of the respective states as representatives of the people rather than of the legislatures).

65. See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 516-18 (1997).

66. U.S. CONST. art. I, § 3.

67. U.S. CONST. amend. XVII.

68. See Bybee, *supra* note 65, at 511 (discussing the prevailing philosophies at the Constitutional Convention for allowing state legislatures to elect senators: (1) Elbridge Gerry suggested that the legislatures would elect upper class representatives like themselves, which would benefit the mercantile and commercial classes, and (2) George Mason urged that states needed to guard against the increasingly powerful federal government).

69. THE FEDERALIST NO. 45, at 252 (James Madison) (J.R. Pole, ed., 2004) (

The senate will be elected absolutely and exclusively by the state legislatures. Even the house of representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence

encroachment upon states' rights<sup>70</sup> because the senators, since elected by the state legislatures and not the people directly, would be dedicated to protecting their respective states. Implicit in this rationale is that state legislatures, while representatives of the people, primarily protect the interests of the State and only indirectly those of the people.

The people soon became dissatisfied with the indirect election of their federal senators. The primary justification was the populist and progressive sentiment that the Senate was an aristocratic body, far removed from the people and unresponsive to their needs.<sup>71</sup> Furthermore, the people felt intelligent enough to choose their own representatives.<sup>72</sup> The predominant sentiment among the press, the states, and the legislators was that popular election of senators would strengthen democracy and weaken elitism.<sup>73</sup> Giving the people power to elect their senators directly was thus a victory for democratic forces.

State courts have recognized limits on the power of the government to amend their constitutions. For example, the Supreme Court of Arkansas has held that the Arkansas General Assembly had no power to repeal any aspect of the Bill of Rights of the Arkansas Constitution.<sup>74</sup> The court explained that the Bill of Rights derived from a British statute that declared the true rights of the British subjects. The codification of citizens' rights operated as a limit on the powers of the crown.<sup>75</sup> The court explained that the rights are sacred not only because of their antiquity, but also because our forefathers obtained them as a result of the perpetual struggle for

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over the people obtains for themselves an election into the state legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the state governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.

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70. See Bybee, *supra* note 65, at 517 (explaining the delegates' defensive theory that states could frustrate Congress, if the need arose, by refusing to pay or to send their senators).

71. See *id.* at 545 (recounting the populist argument that senators needed to have a keener sense of responsibility to their constituents); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 708 (1999) (stating that people associated election by legislature with corruption and stalemate, while popular election inspired notions of democracy and progress).

72. See Bybee, *supra* note 65, at 545 (noting that the progressives and populists considered election by legislature anachronistic, as the state legislatures experienced turnover three times during a senator's six-year term).

73. See Rossum, *supra* note 71, at 711-12 (adding that discussion over ratification of the Seventeenth Amendment also focused on eliminating political corruption and freeing states from the burden of election).

74. See *Eason v. State*, 11 Ark. 481, 1851 WL 463, at \*5 (1851).

75. See *id.* at \*6 (explaining that the Bill of Rights protected citizens from all government encroachment into the enumerated rights).

freedom.<sup>76</sup> As part of the original state constitution, the Framers placed these rights beyond the power of the general government to oppress the people.<sup>77</sup> Thus, only a convention of the whole people, not the legislature, could amend the Arkansas Constitution to alter the sacred rights of the people.<sup>78</sup> Similarly, at the federal level, if an amendment will alter sacred rights of the people, the people, by convention, should amend the federal constitution, not the congress and state legislatures.

Scholars have argued that use of the convention method for adoption and ratification is necessary when the proposed amendment makes fundamental changes to the Constitution, especially when the amendment will deprive the people of individual liberty interests. Elai Katz explained his position in this way:

A convention called for the express purpose of amending the Constitution would reflect the will of the people regarding the specific matter at hand better than legislatures that may have been elected before the public became aware of the proposed amendment. While delegates to the convention would be selected based on their position on a single issue, such as the right to an abortion, legislators are rarely elected because of their views regarding a single issue.

In the eighteenth century, conventions were considered to be the highest expression of popular will; they embodied popular sovereignty . . . . Thus, in the eyes of eighteenth century society and possibly present society, a special convention, convened for the purpose of revising the fundamental law, would be the best substitute for an act of pure popular sovereignty. Furthermore, conventions require a longer, more deliberative, and better publicized process. Since constitutional conventions are not permanent, ordinary organizations, their selection and debates are likely to be followed more carefully by the public than regular congressional sessions. Finally, delegates to conventions are elected for one particular issue—to support or propose an amendment; . . . It follows, then, that a principle-altering amendment proposed and ratified by conventions is more *legitimate* than the same amendment proposed by members of Congress who were not elected for the express purpose of making particular changes to the fundamental law.<sup>79</sup>

Furthermore, throughout history, politicians have argued that the use of conventions for approving and ratifying fundamental changes to our

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76. *Id.*

77. See Cooley, *supra* note 40, at 112 (suggesting that the Bill of Rights prevented the government from being able to seriously oppress an individual).

78. *Eason*, 1851 WL 463 at \*7.

79. Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 287-88 (1996) (citations omitted).

Constitution is necessary. For example, President Abraham Lincoln stated that a constitutional amendment that could potentially alter the “character of the Constitution,” should be adopted by convention because “it allows amendments to originate with the people themselves, instead of only permitting them to take, or reject, propositions, originated by others.”<sup>80</sup>

However, the plain text of the Constitution enumerates four procedures for constitutional amendment<sup>81</sup> and thus far the Supreme Court has held all methods equal.<sup>82</sup> For example, in *Sprague*, the Court found that the Tenth Amendment did not require state conventions for ratification of amendments affecting the liberty of citizens.<sup>83</sup> The Court held that the Tenth Amendment reserves powers that are not granted to the federal government to the states *or* the people to protect federalism principles, not individual rights.<sup>84</sup>

Interestingly, Ely Hart has argued that the *Fourteenth* Amendment may grant courts the power to require selection of a specific procedure to amend the Constitution under certain circumstances. Hart’s vision of a representative democracy invokes two features: broad participation of the people in the political process and protection of discrete minorities.<sup>85</sup> According to Hart, the Founders understood the duty of representatives to govern in the interest of the whole people. Representatives could not, therefore, refuse to represent a particular group.<sup>86</sup> Under this theory, the Supreme Court has a right to review the states’ Article V activities to make

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80. *Id.* at 281 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 270 (Roy P. Basler ed., 1953)). President Lincoln was commenting on the proposed Corwin Amendment. *See infra* Part II.D. Also, nineteen resolutions were introduced in Congress between 1917 and 1928 to amend the Constitution requiring a popular ratification of all proposed amendments. *See* MUSMANNO, *supra* note 31, at 199-204. Most recently, during consideration of the flag-burning amendment, critics recognized that only the people retained the power to adopt a constitutional amendment that violated fundamental constitutional norms, arguing that the amendment would have to be approved and ratified by convention, not by Congress or the state legislatures. Eric Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A. L. REV. 535, 599 (1990).

81. *See* Isaacson, *supra* note 80, at 589 (detailing that Article V allows for the following procedures for amending the Constitution: (1) approval by two-thirds of each house of Congress and ratification by three-fourths of the state legislatures; (2) approval by two-thirds of each house and ratification by constitutional conventions in three-fourths of the states; (3) approval by a national constitutional convention and ratification by three-fourths of the state legislatures; and (4) approval by a national constitutional convention and ratification by constitutional conventions in three-fourths of the states).

82. *See* *United States v. Sprague*, 282 U.S. 716, 732 (1931) (relying on the Framers’ silence regarding limitations on ratification procedures as authority for continuing to allow Congress to exercise discretion in choosing how to ratify an amendment).

83. *Id.* at 730.

84. *Id.* at 733.

85. *See* David Castro, *A Constitutional Convention: Scouting Article V’s Undiscovered Country*, 134 U. PENN. L. REV. 939, 945 (1986) (accepting John Ely’s theory of virtual democracy).

86. *Id.*

sure that they comport with the Fourteenth Amendment.<sup>87</sup> Thus, the ratification process used by a state may fall short of Fourteenth Amendment standards, for instance, if the legislators did not adhere to their duty of representation.<sup>88</sup>

The arguments detailing the need for popular approval by convention when an amendment infringes fundamental interests suggests that the FMA should be ratified, if at all, by convention. The FMA limits natural interests that the people have in liberty, freedom, and equality, thus only the *people* by convention, should have the authority to approve it, as they, not the government, are the ultimate sovereign.<sup>89</sup>

Moreover, because a constitutional amendment is by far the most important and substantial legal step this country can take, it should be taken only after serious unbiased consideration and reflection by the electorate. A controversial amendment proposed in a time of political unrest is unlikely to withstand the test of time. Citizens will become dissatisfied with such an amendment once they have an opportunity to reflect upon it,<sup>90</sup> as demonstrated by the Eighteenth Amendment.<sup>91</sup> The FMA was introduced at a time when this country was at war, having been attacked by terrorists, and in the midst of a presidential election. Support for the amendment was fueled by the political fervor of an election where candidates capitalized on the irrational fears and prejudices of the electorate to create a divided polity and gain votes.<sup>92</sup> This is not an appropriate environment for proposing a controversial constitutional amendment since the people have little opportunity in such an environment to reflect carefully on the ramifications of the amendment.

## II. AMENDMENTS AND INDIVIDUAL RIGHTS

Independent of the *procedural* requirements of constitutional amendment, the FMA, unlike any other amendment in our history, *substantively* violates the basic tenets of our constitutional democracy: individual rights, separation of powers, and federalism principles. The Bill

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87. *Id.* at 965.

88. *See id.* (“[I]t could be argued that an amendment repealing the Fifteenth Amendment was invalid on the grounds that the legislators had purposely discriminated against the interests of their minority constituents in ratifying the amendment.”).

89. *See Rosen, supra* note 63, at 1084-85.

90. *See Griffin, supra* note 33, at 39.

91. The Eighteenth Amendment was repealed by the Twenty-First Amendment less than fifteen years after its enactment. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

92. *See Alan Bjerga, Sides Clash Over Same-Sex Marriage Ban, WICHITA EAGLE*, Dec. 29, 2003, at 1A (reporting that critics argue that the FMA would not be an issue but for the 2004 presidential election).

of Rights,<sup>93</sup> and later Amendments adopted by this nation, enumerate fundamental rights and protect these rights from undue government infringement. The Ninth Amendment further protects non-enumerated rights by stating that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>94</sup> The right to “liberty” and the right to “equal protection” under the laws are granted expressly to the people under the Fifth and Fourteenth Amendments<sup>95</sup> and reflect the very principles upon which this nation was founded.

The debate over same-sex marriage raises individual *interests* in both fundamental rights: (1) “liberty”—the right for same-sex couples to have the state recognize a committed monogamous relationship between two individuals and bestow the benefits and obligations of this civil institution upon them; and (2) “equality”—the right for same-sex couples to be eligible for the same benefits and recognition as opposite-sex couples who agree to abide by the obligations imposed by the civil institution of marriage. Amending the federal Constitution to define marriage as between a man and a woman deprives same-sex couples the ability to marry and is antithetical to principles of liberty and equality. Granted, same-sex couples currently have no federal constitutional *right* to marry but the interest in marriage is an extremely important, if not fundamental, one.

#### A. *The Repealed Eighteenth Amendment*

Only one amendment, the Eighteenth, deprived individuals of a liberty interest. The Eighteenth Amendment prohibited the manufacture, sale, or transportation of intoxicating liquors within the United States.<sup>96</sup> Needless to say, it is the only constitutional amendment to be repealed.<sup>97</sup> The Eighteenth Amendment grew out of the efforts of the temperance movement, primarily motivated by religious Christian groups. Temperance urged moderation in the consumption of alcohol so as to reduce its corrupting influence on public and private morals.<sup>98</sup>

The struggle to prohibit alcoholic consumption first targeted the states.<sup>99</sup>

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93. See U.S. CONST. amend. I-X.

94. U.S. CONST. amend. IX.

95. See U.S. CONST. amend. V, XIV.

96. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed”).

97. See U.S. CONST. amend. XXI.

98. See Richard Hamm, *Short Euphorias Followed by Long Hangovers: Unintended Consequences of the Eighteenth and Twenty-first Amendments*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 164, 166 (2000) [hereinafter UNINTENDED CONSEQUENCES].

99. See *id.* at 167.

In fact, the federal courts limited the scope of certain state prohibition laws to protect Congress's power to regulate interstate commerce.<sup>100</sup> By 1912, however, nearly half the states had adopted prohibition laws.<sup>101</sup> In 1914, the movement took the struggle to the national level, proposing a federal constitutional amendment to prohibit the sale and transportation of alcohol nationwide.<sup>102</sup> The amendment was ultimately ratified by the states in 1919, primarily in reaction to World War I.<sup>103</sup> Food shortages had led to conservation and prohibitionists argued that alcohol led to the waste of precious resources.<sup>104</sup> Further, anti-German sentiment was directed, in part, at the brewery industry, which was largely run by those of German descent.<sup>105</sup>

After adoption, the Eighteenth Amendment suffered from several problems.<sup>106</sup> These problems have been explained as a result of an amendment passed by a small, yet highly organized and passionate interest group.<sup>107</sup> Because the Eighteenth Amendment did not appear to reflect true popular sentiment, people were not willing to voluntarily conform to the law and enforcement was very difficult.<sup>108</sup> Moreover, organized crime stepped in to meet the popular demand<sup>109</sup> and drinking, in fact, increased among portions of the polity. For example, women, who had been banned previously from saloons under state law, drank in newly established venues for alcoholic consumption.<sup>110</sup>

The Eighteenth Amendment was criticized by reform movement organizations arguing the amendment "promoted hypocrisy, encouraged law breaking, destroyed the balance of power between state and federal authority, and impaired individual rights."<sup>111</sup> These groups claimed that the

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100. *See id.* at 167-68.

101. *See id.* at 169.

102. *See* STAFF OF SENATE SUBCOMM. ON THE CONSTITUTION, COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY 49-50 [hereinafter AMENDMENTS TO THE CONSTITUTION].

103. *See id.* at 50.

104. *See id.* at 50-51.

105. *See id.*

106. *See generally* Hamm, *supra* note 98, at 173-82 (noting several problems with the Eighteenth Amendment: widespread noncompliance; the rise of criminal racketeering to satisfy the demand for alcohol; increase in alcoholic consumption among women; and the unwillingness of states to appropriate resources to enforce compliance).

107. *See* David Kyvig, *Arranging for Amendment: Unintended Outcomes of Constitutional Design*, in UNINTENDED CONSEQUENCES, *supra* note 98, at 9, 37 (including in its list of interest groups the Prohibition Party, the Woman's Christian Temperance Union, and the Anti-Saloon League of America).

108. *See id.*

109. Hamm, *supra* note 98, at 173.

110. *See* Kyvig, *supra* note 107, at 37 (including nightclubs, cabarets, and speakeasies).

111. Hamm, *supra* note 98, at 183 (listing the leading reform organizations responsible for shaping public debate regarding anti-prohibition: the Association Against the Prohibition Amendment, the Voluntary Committee of Lawyers, and the Women's Prohibition Reform Group).

amendment advanced unsupported social views and invaded the states' sphere of power. The reformers perceived prohibition as a direct threat to state authority and local autonomy.<sup>112</sup> Senator Joseph Weldon Bailey of Texas thought that proposing a national solution to a social problem set dangerous precedent. Bailey worried that such a proposal would lead to national marriage laws, which would ultimately erase state lines and subvert the republic.<sup>113</sup>

Interestingly, the amendment drafters attempted to limit the threat to federalism principles and individual rights by allowing for *concurrent* state and federal enforcement of the laws and not outlawing the *personal* use of alcohol.<sup>114</sup> While the interpretation of "concurrent powers" was controversial, the Court settled the meaning by holding that, while states could not pass laws that conflicted with the federal amendment, there was no requirement for them to enact supplemental prohibition codes.<sup>115</sup> Moreover, strong beliefs in personal liberty and the sanctity of the home supported leaving the personal use of alcohol unaffected by the amendment.<sup>116</sup>

The parallels between the FMA and the Eighteenth Amendment are striking. First, the movement to outlaw same-sex marriage nationwide is primarily led by conservative politicians and Christian religious groups. Like the Eighteenth Amendment, the FMA is meant to protect the "morality" of our society.<sup>117</sup> Admittedly, the marriage amendment is more popular with the polity than was prohibition<sup>118</sup> This is not surprising since

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112. *Id.*; RICHARD HAMM, SHAPING THE EIGHTEENTH AMENDMENT 231 (Univ. of North Carolina Press 1995).

113. *See* Hamm, *supra* note 98, at 230 (detailing that, in particular, the senator was concerned that allowing national laws to set social policy would result in the elimination of state anti-miscegenation laws).

114. *Id.* at 232-33.

115. *Id.* at 250.

116. *Id.* at 223.

117. *See* Matthew Spalding, *In Defense Of Marriage (WebMemo #373)*, at <http://www.heritage.org/Research/Family/wm373.cfm?> (Nov. 19, 2003) (on file with the American University Law Review) (arguing that same-sex marriage will weaken the institution of marriage by raising non-marital unions to the status of marriage and lowering traditional marriage to "merely one form of household"); Robert Benne & Gerald McDermott, *Speaking Out: Why Gay Marriage Would be Harmful*, CHRISTIANITY TODAY (Feb. 19, 2004), at <http://www.christianitytoday.com/ct/2004/107/41.0.html> (on file with the American University Law Review) (citing three negative effects of gay marriage: (1) a scrambling of the definition of marriage; (2) the harming of children; and (3) an introduction of instability into marriage and family life). *See generally* The Heritage Foundation, at <http://www.heritage.org> (last visited Aug. 2, 2005).

118. *See, e.g.*, Charisse Jones, *Gay Marriage Debate Still Fierce Over One Year Later*, USA TODAY, May 16, 2005, available at [http://www.usatoday.com/news/nation/2005-05-16-gay-marriage\\_x.htm](http://www.usatoday.com/news/nation/2005-05-16-gay-marriage_x.htm) (noting that fifty-six percent of those polled are opposed to gay marriage); PollingReport.com, *Law and Civil Rights*, at <http://www.pollingreport.com/civil.htm> (last visited July 19, 2005) (on file with the American University Law Review) (publishing *Boston Globe* poll results finding that fifty percent of those polled

it affects only a small subgroup of the citizenry, a subgroup that has long suffered prejudice by the majority. Second, both amendments establish a national solution to a social problem over which there is no clear agreement. Rather than allow the states to deal with the issue separately as contemplated by the Constitution, the FMA imposes a uniform law on all states without any “concurrent” powers granted to the states. In fact, the marriage amendment is more intrusive of state powers than the Eighteenth Amendment. Whereas the interstate commerce clause grants power to Congress to regulate sales and transportation of alcohol across state lines, there is no similar Congressional power over domestic relations. In fact, Senator Bailey’s concern raised at the time of the Eighteenth Amendment has been realized—the FMA is a national marriage law!

Third, as to personal liberty, the FMA is far more intrusive than the Eighteenth Amendment. Citizens do not have a fundamental right to consume alcohol.<sup>119</sup> In fact, the liberty interest in consuming alcohol is relatively insignificant. Yet the Eighteenth Amendment left personal use unaffected in order to protect personal liberty interests. The Court has held, however, that citizens do have a fundamental right to marry.<sup>120</sup> The FMA defines a class of unpopular individuals and deprives them of the ability to marry another of the same sex. Although same-sex marriage may not rise to a fundamental federal constitutional right, it certainly raises a fundamental interest more important than the interest to consume alcohol.

Finally, while support for the Eighteenth Amendment was largely fueled by hatred for and prejudice against German descendants, it did not target Germans or German descendants specifically. Likewise, the marriage amendment is likely to be largely fueled by prejudice against gay Americans.<sup>121</sup> The FMA is far worse than the Eighteenth Amendment,

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disapprove of same-sex marriage). *But see* Jennifer Harper, *More Americans Oppose Gay 'Marriage,' Poll Finds*, WASH. TIMES, Apr. 2, 2005, at A1 (reporting that sixty-eight percent of people polled think same-sex marriage should not be recognized), available at <http://www.washingtontimes.com/functions/print.php?StoryID=20050401-114205-2153r>.

119. *See, e.g.*, *DFW Vending, Inc. v. Jefferson County*, 991 F. Supp. 578, 598 (E.D. Tex. 1998) (dismissing the right to consume alcohol as fundamental); *Felix v. Milliken*, 462 F. Supp. 1360, 1385 (E.D. Mich. 1978); *Republican Coll. Council of Pa. v. Winner*, 357 F. Supp. 739, 740 (E.D. Pa. 1973).

120. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) (declaring that prison inmates retain the fundamental right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (reaffirming that the right to marry is fundamental); *Loving v. Virginia*, 338 U.S. 1, 12 (1967) (invalidating anti-miscegenation statute on the grounds that it deprived people of one of the “basic civil rights of man, fundamental to our very existence and survival.”).

121. The rhetoric used by the conservatives to support the amendment avoided suggesting their motive was prejudice against gay americans. Paul Varnell, *Changing Rhetoric on Gay Marriage*, CHICAGO FREE PRESS, June 22, 2005, available at <http://www.indegayforum.org/authors/varnell/varnell157.html> (“[O]ne of the most interesting aspects of last year’s Senate debate on the so-called Federal Marriage Amendment was the relative absence of overt criticism of gays and lesbians and their

however, because it specifically targets a discrete subgroup, expressly drafting prejudice in the Constitution.

### B. *The Proposed Anti-Miscegenation Amendment*

There have been several proposed amendments that would have deprived individuals of fundamental constitutional rights or interests; however, no other amendment so flagrantly violates all three basic tenets of our constitution as does the FMA.<sup>122</sup> The most direct parallel with the marriage amendment was the proposed anti-miscegenation amendment. For many years, states outlawed marriage between individuals of different races through anti-miscegenation statutes.<sup>123</sup> Nevertheless, early in the twentieth century, a renowned black boxer named Jack Johnson garnered much publicity when he married a white woman, Lucille Cameron.<sup>124</sup> The thought of “a brutal African prizefighter” marrying a white woman enraged

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relationships. Instead, amendment supporters focused primarily on how the amendment would solidify the association of parenthood with marriage and would benefit children by assuring them an optimal family of two opposite sex parents.”). However, motives may be unstated, especially if they would detract from the message. *See id.* (Varnell suggests that the stated rationale is likely disingenuous stating “[a]s Sen. Orrin Hatch (R-Utah) expressed it, however disingenuously, “This amendment is not about prejudice. It is about safeguarding the best environment for our children.”). Moreover, the stated motives are not adequately supported. In this age of technology, there are a variety of ways for couples to have children, a husband and wife are not necessary, and given that many gay couples are parents, allowing gays to marry would not seriously detract from the purported association of parenthood and marriage. Further, there is little, if any uncontroverted evidence that children are necessarily benefited by opposite-sex parents. *See Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at \*17-18 (Haw. Cir. Ct., Dec. 3, 1996).

122. During a brief review of a compilation of proposed amendments to the Constitution between 1889 and 1929, no single amendment appears to violate all three basic tenets of Constitutional democratic principles as flagrantly as the Federal Marriage Amendment. The author grouped the proposed amendments into various categories. Those affecting the form of government (focusing primarily on procedural changes, term changes, etc.), the powers of the government (the most substantive of the proposed amendments, which focused on various powers including war powers, federal taxation, question of aliens, territorial powers, etc.), and the procedure of constitutional amendments (altering ratification procedures, time for ratification, etc.). *See MUSMANNO, supra* note 31, at vii-x. Those that are most closely on point are those involving marriage, divorce, miscegenation, and prohibition of polygamy. *Id.* at 104-08, 131-35; *see infra* Parts II.B-C.

123. *See Loving*, 388 U.S. at 6 (noting the fifteen states, Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia, which still had anti-miscegenation statutes or constitutional provisions in force in 1967 (citing ALA. CONST. art. 4, § 102, ALA. CODE tit. 14, § 360 (1958); ARK. CODE ANN. § 55-104 (1947); DEL. CODE ANN. tit. 13, § 101 (1953); FLA. CONST. art. 16, § 24, FLA. STAT. § 741.11 (1965); GA. CODE ANN. § 53-106 (1961); KY. REV. STAT. ANN. § 402.020 (1966); LA. REV. STAT. ANN. § 14:79 (1950); MISS. CONST. art. 14, § 263, MISS. CODE ANN. § 459 (1956); MO. REV. STAT. § 451.020 (1966); N.C. CONST. art. XIV, § 8, N.C. GEN. STAT. § 14-181 (1953); OKLA. STAT. tit. 43, § 12 (1965); S.C. CONST. art. 3, § 33, S.C. CODE ANN. § 20-7 (1962); TENN. CONST. art. 11, § 14, TENN. CODE ANN. § 36-402 (1955); TEX. PENAL CODE ANN 492 (Vernon 1952); W. VA. CODE ANN. § 4697 (1961)).

124. Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529, 546 (1999).

Congressman Seaborn Roddenberry of Georgia so much that he proposed a constitutional amendment prohibiting interracial marriages.<sup>125</sup> Roddenberry believed that his amendment was necessary to protect white women because “[n]o more voracious parasite ever sucked at the heart of pure society, innocent girlhood, or Caucasian motherhood than the one which welcomes and recognizes the sacred ties of wedlock between Africa and America.”<sup>126</sup> White Americans lacked the enthusiasm to enact the amendment, and the amendment garnered little support among the black community.<sup>127</sup> The amendment proposed to ban interracial marriage was never enacted into law.

The parallels with the FMA are obvious. The FMA seeks to deprive same-sex couples from marrying in the same manner that the anti-miscegenation amendment sought to deprive individuals of different races from marrying. The support for both amendments is grounded in prejudice and infringes upon the states’ power to define marriage, a state institution.<sup>128</sup> At the time the anti-miscegenation amendment failed, the Court had not yet held that interracial couples had a constitutional right to marry. Instead, the states were left to legislate independently. Several decades later, the Supreme Court in *Loving v. Virginia* held that interracial couples have a constitutional right to marry.<sup>129</sup> Therefore, the FMA also must fail so that the states may retain the freedom to legislate independently, and allow the U.S. Supreme Court to ultimately resolve the debate concerning the individual liberty interests of this minority group.

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125. *See id.* at 549 n.78 (citing 69 CONG. REC. 503 (1912) (statement of Rep. Roddenberry) (stating “[t]hat intermarriage between negroes or persons of color and Caucasians or any other character of persons with the United States . . . is forever prohibited.”)).

126. Morgan, *supra* note 124, at 549. However, because the amendment prohibited both voluntary and coercive interracial relationships, it actually would have constrained a white woman’s free choice of sexual partners and further protected the white man’s exclusive access to them. *Id.*

127. *See id.* at 550-51 (drawing upon the writings of W.E.B. DuBois to summarize the negative opinion of this proposed amendment in the black community). DuBois wrote:

[T]hat anti-miscegenation legislation should be opposed, not because race had no significance, but because such laws treated blackness as if it were a physical taint, because sex out of wedlock was morally repugnant, and because such laws “leave the colored girl absolutely helpless before the lust of white men.”

*Id.* (quoting THE CRISIS, Feb. 1913, at 180).

128. *See Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (holding that a state has an “absolute right to prescribe the conditions upon which the marriage relation . . . shall be created.”). *But see* Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 189, 207-08 (2004) (concluding that the idea that states have control over the definition and control of marriage is no longer accurate given recent Supreme Court decisions that limit states and federal legislation meant to curtail the states’ power in this area).

129. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (describing the decision of whether a person wishes to marry a person of another race as being an individual one upon which the state cannot infringe).

### C. *The Proposed Anti-Divorce Amendment*

The Progressive era bore another social reform movement to change the divorce laws throughout the nation.<sup>130</sup> This movement shared many of the same characteristics of the prohibition movement.<sup>131</sup> In fact, just as the prohibition movement divided society in its time, the issue of divorce created two conflicting movements: one seeking to restrict divorce and one seeking to make divorce more accessible.<sup>132</sup> The traditionalists saw divorce as “an attack on the sacred nature of marriage” and believed that, by making the practice of divorce more difficult, they would be protecting the morality of people.<sup>133</sup> On the other hand, more liberal states expanded upon the grounds for divorce.<sup>134</sup> Due to variations among the states about the acceptable grounds for divorce, however, citizens of a more restrictive state would often migrate to a state with more open divorce laws.<sup>135</sup> The ability of citizens to escape the restrictive divorce law states prompted the divorce reform movement which portrayed divorce as “a danger to American civilization.”<sup>136</sup> One notable reformer, Theodore Woolsey, the first chief officer of the New England Divorce Reform League and former president of Yale University, “compared the U.S. to Rome and warned that the nation would repeat the empire’s fate if it continued to allow ‘connubial unfaithfulness and divorce’ to increase. Keeping ‘family life pure and simple’ was the key to preserving the nation’s ‘present political forms.’”<sup>137</sup>

The reformers introduced the first constitutional amendment in 1884 which resurfaced for the next sixty years although it never passed.<sup>138</sup> Congress was worried about the consequences of allowing the federal government to have authority over marriage relations.<sup>139</sup> Moreover, it was

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130. See Hamm, *supra* note 98, at 257 (contending that, even though it is generally thought of as a regulationist reform movement, the divorce reform shared many characteristics with progressive movements including the fact that it began in the 1880s and continued through the progressive era).

131. See *id.* (concluding that the supporters of both the divorce reform movement and the prohibition movement “came from the same social background and shared fundamental assumptions about society”).

132. See *id.* at 258 (“[b]efore the Civil War, two competing forces, a restrictive tradition that virtually prohibited divorce and a popular desire for easier divorce, pulled the American polity in different directions over the issue . . .”).

133. *Id.*

134. See *id.* (citing cruelty, misconduct, or long imprisonment as some of the newly accepted justifications for divorce in addition to adultery).

135. See *id.* (classifying this practice as “migratory divorce”). Many western states such as Indiana and Nevada were particularly popular for those seeking divorce. In fact, divorce lawyers from these states opened offices in New York to facilitate this process. *Id.*

136. Hamm, *supra* note 98, at 259.

137. *Id.*

138. See *id.* (noting that most of these proposals never even left committee).

139. See *id.* (observing that southern congressmen in particular, despite support for restricting the ability of married couples to divorce, were concerned that any federal legislation on divorce would lead to federal legislation that legitimated interracial

particularly difficult to build a national consensus about what grounds would be proper for granting divorce. The Supreme Court mostly stayed out of the issue of divorce except for allowing the states broad latitude in refusing to accept out-of-state divorces.<sup>140</sup> Although this led to uncertainty, it also led to a proliferation of divorce-mill jurisdictions and, with these jurisdictions available, the movement remained divided and never succeeded in making divorce a national issue.<sup>141</sup>

The parallels with the FMA are apparent. Similar constituencies are claiming the need to protect the institution of marriage and the nation from moral destruction by adopting a federal solution to a state problem about which individuals disagree. The marriage amendment, however, is more egregious in that it targets only a small minority of citizens, unlike the divorce amendment that would have limited all citizens from seeking divorce. Ironically, if saving marriage is the real concern, it seems much more threatening to the marital institution to allow couples to exit easily than it is to allow more couples to enter.

Moreover, this issue of migratory marriage is likely to be more threatening to the conservative “moral majority,” than were migratory divorces at the time of the anti-divorce amendment. This is because the recognition of same-sex couples, even if only by certain states, signals acceptance of homosexual conduct, a concept still repugnant to many people today. For sixty years the Congress was unwilling to expand federal authority over marital relations by setting a national standard for divorce. A principled consistency would inevitably dictate a congressional refusal to expand federal authority over marital relations when the object is to deprive individuals the ability to marry.

#### *D. The Proposed Corwin Amendment*

A third proposed amendment that violated principles of liberty and equality was the Corwin Amendment.<sup>142</sup> The amendment read: “No

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marriages). Furthermore, these congressmen, based on the same fear of the legitimization of interracial marriages, argued that a federal law without an amendment would be unconstitutional. *Id.*

140. See *Haddock v. Haddock*, 201 U.S. 562, 605-06 (1906) (holding that a divorce that was decreed in Connecticut when the wife was a citizen of New York does not need to necessarily be recognized by the state of New York under the full faith and credit clause); see also Hamm, *supra* note 98, at 260 (arguing that this approach produced mixed results since, in theory, as long as a divorced couple did not try to remarry in a restrictive state, there was nothing that a state could do to question whether a divorce in another state was recognized or not).

141. See Hamm, *supra* note 98, at 260 (alleging that, because liberal jurisdictions had created a type of tourist industry with the draw being their divorce laws and more conservative jurisdictions could preserve the strict divorce laws in their states, there was no way to come to a national consensus on the issue).

142. See Norman W. Spaulding, *Constitution as Countermonument: Federalism,*

Amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of that State.”<sup>143</sup> Thankfully, we can look back with the knowledge that the amendment was not enacted (although the Civil War did follow), and today likely all would agree that such an amendment would be considered despicable.<sup>144</sup> However, at the time of the proposed amendment, such an argument was not so apparent.<sup>145</sup>

First, slavery was consistent with the text of the Constitution as it was understood at its adoption and throughout the 1800s. Jefferson himself, at the time of the founding, acknowledged that slavery was protected under the Constitution<sup>146</sup> and while sentiments had changed over time, there still existed a strong commitment among several states to uphold the rights of slaveholders. President Lincoln, who opposed slavery on moral grounds and opposed extending it to new territories, “had never opposed its maintenance in those jurisdictions where it already existed.”<sup>147</sup> In his First Inaugural Address, he commented on the then pending Corwin Amendment. He stated that he did not object to making explicit that the individual states possess control over their domestic institutions, exclusive of federal interference, that he did not object to such a provision being made irrevocable, and that such a provision was probably unnecessary inasmuch as it was already then “implied constitutional law.”<sup>148</sup>

Second, while the language of the amendment referenced state “domestic policy,” slavery was a business. Slave holders argued that slaves were rightfully their property.<sup>149</sup> It follows then, at least under today’s

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*Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2046-47 (2003) (stating that the Corwin Amendment was the original language of the Thirteenth Amendment prior to the start of the Civil War (citing CONG. GLOBE, 36th Cong., 2d Sess. 1284 (1861))).

143. *Id.*

144. *See id.* at 2047 (describing how the Corwin Amendment was the only pre-Civil War proposal dealing with the issue of slavery to pass both houses of Congress). Furthermore, the amendment was signed by President Buchanan, supported by Abraham Lincoln, and sent to the states for ratification. However, the compromise amendment was discarded once the Civil War began. *Id.* at 2047-48.

145. *See generally* A. Christopher Bryant, *Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL. 501, 512-34 (2003) (presenting the historical context and the debate surrounding the Corwin Amendment and describing how this amendment was really an attempt to prevent the secession that eventually occurred and led to the Civil War).

146. Brandon, *supra* note 51, at 233.

147. *Id.* at 234.

148. *Id.*

149. *See Dred Scott v. Sanford*, 60 U.S. 393, 397 (1856) (summarizing the defendant’s plea which contains the allegations that, because the plaintiff was a “negro slave,” he was the “lawful property” of the defendant who therefore has a right to restrain him); *see also* Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 239 (2003) (pointing out that, in North Carolina, South Carolina, Georgia, Virginia,

interpretation, that because the property interests substantially affect interstate commerce, it would be appropriate for the federal government to legislate in this area pursuant to Congress's Commerce Clause powers.<sup>150</sup>

Third, although the amendment clearly violated individual rights, the individuals affected were not then considered citizens of the United States.<sup>151</sup> Fourth, the amendment did comport with basic federalism principles. It did not require all states to conform to one standard, to adopt or reject slavery. Instead it protected the states from federal interference in their domestic affairs, allowing the states to decide how to treat slavery within their borders. Finally, the amendment was consistent with Court doctrine of the day, which upheld slavery, and thus was not an attempt to usurp judicial authority or violate separation of powers principles.<sup>152</sup>

In contrast to the proposed marriage amendment, even the Corwin Amendment—a proposal that we today recognize as deplorable—would have been less destructive of fundamental constitutional principles than the FMA. First, the Constitution is silent on the issue of marriages and therefore it is a power left to the states (and the people), even though at the time of the constitutional convention, same-sex marriages were not contemplated. By contrast, slavery was generally accepted by the Framers and was, in fact, protected by the Constitution.<sup>153</sup> Second, the FMA legislates in an area uniquely left to the states, whereas the Corwin Amendment targeted domestic affairs involving property rights and thus could arguably fall within the federal commerce power.<sup>154</sup> Third, the FMA specifically targets and deprives U.S. citizens of their interests in liberty

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Maryland, and other southern states, property taxes on slaves constituted the largest portion of state property tax income).

150. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1176 (1995) (concluding that the formulation set forth in *Wickard v. Filburn*, 317 U.S. 111 (1942)—where the Court held that Congress's commerce power allowed the Federal Government to regulate the amount of wheat grown for personal use—would surely have placed slavery within the reach of Congress's commerce power). *But see* *Groves v. Slaughter*, 40 U.S. 449, 505-06 (1841) (McLean, J., concurring) (concluding that the federal government had no power under Article I, § 8 to regulate the interstate trade of slaves, but rather states had the exclusive power to regulate the interstate slave trade).

151. See *Dred Scott*, 60 U.S. at 406 (holding that a former slave cannot be made a citizen of Missouri or any other state and, therefore a former slave is not a citizen of the United States and does not have the right to file suit in federal courts).

152. See *Strader v. Graham*, 51 U.S. 82, 93-94 (1850) (holding that the laws of each individual state, and not the laws of other states, determine whether one is a slave); *see also* *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 215 (1836) (affirming that, although slavery may be "contrary to natural right, to the principles of justice, humanity and sound policy," slavery is not contrary to the laws of the nation and thus states are bound to respect each other's slavery laws).

153. See *supra* notes 146-149 and accompanying text.

154. See *supra* note 150 and accompanying text (hypothesizing that, based on the more modern interpretation of the Commerce Clause, federal regulation of slavery would have been within Congress's powers).

and equality, unlike the Corwin Amendment that targeted non-citizens.<sup>155</sup> Fourth, the FMA violates federalism principles by binding all states to one national standard. The Corwin Amendment, on the other hand, limited federal power to interfere with the states and allowed them to make their own decision regarding slavery. Finally, the marriage amendment is fueled by a desire to overturn state judicial precedent expanding individual rights to marry, whereas the Corwin Amendment was consistent with judicial precedent of its day.<sup>156</sup>

Like our modern-day reaction to the Corwin Amendment, it is likely that years from now, our descendants will read about the marriage amendment and be equally surprised and saddened at how an enlightened society could consider drafting such prejudice into such a cherished document, violating the three basic principles for which the Constitution stands.

#### E. *The Proposed Flag-Burning Amendment*

One other proposed amendment that continues to severely threaten individual rights is the flag-burning amendment,<sup>157</sup> designed to overrule two Supreme Court decisions, *Texas v. Johnson*<sup>158</sup> and *United States v. Eichman*.<sup>159</sup> In *Johnson*, the Court reversed the conviction of an individual prosecuted under the Texas flag-desecration statute as a violation of his first amendment right to free speech.<sup>160</sup> In *Eichman*, the Court invalidated Congress's Flag Protection Act as an unconstitutional restraint on free speech.<sup>161</sup> The flag-burning amendment would grant to Congress the power to prohibit the physical desecration of the U.S. flag.<sup>162</sup> The Court has held that even if the desecration of the flag is offensive to a majority of

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155. See *supra* note 151 (concluding, based on the Supreme Court decision in *Dred Scott*, that former or current slaves were not considered U.S. citizens and did not have the rights and privileges that arise from citizenship).

156. See *Strader*, 51 U.S. at 93-94 (holding that state laws alone determine the status of slavery and slaves and thus, once a lower court determines that a state law makes a person a slave, "their judgment upon this point is . . . conclusive upon this court, and we have no jurisdiction over it.").

157. See H.R.J. Res. 10, 109th Cong. (2005) (proposing the addition of an amendment to the Constitution which would state, "[t]he Congress shall have power to prohibit the physical desecration of the flag of the United States"); see also S.J. Res. 12, 109th Cong. (2005). The House approved this language on June 22, 2005, by a vote of 286-130. 151 CONG. REC. H4904, H4927-28 (daily ed. June 22, 2005). As of publication, the bill is currently awaiting consideration by the Senate.

158. 491 U.S. 397 (1989).

159. 496 U.S. 310 (1990).

160. See *Johnson*, 491 U.S. at 420 (holding that neither the state's "interest in preserving the flag as a symbol" nor its "interest in preventing breaches of the peace" justifies a criminal conviction for burning the flag because it is an act of political expression).

161. See *Eichman*, 496 U.S. at 319 ("Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.").

162. See *supra* note 157.

citizens,<sup>163</sup> it is also a powerful tool of expression.<sup>164</sup> Moreover, free expression is a fundamental principle embodied in the Bill of Rights and thus trumps the government's interest in enforcing the moral beliefs of the majority.<sup>165</sup> Justice Kennedy commented that the Court must, occasionally, make a decision that it does not necessarily "like" in order to uphold the basic principles underlying the Constitution.<sup>166</sup>

The flag-burning amendment has not yet been approved by both houses of Congress, although it has come very close and in fact was recently passed by the House of Representatives again.<sup>167</sup> Scholars criticize the proposed amendment as clearly in conflict with the express language of the First Amendment.<sup>168</sup> Furthermore, critics contend that the flag-burning amendment is overly vague, invites unlimited prosecutorial discretion in its application, abridges religious liberty along with free speech, and, ironically, would be ineffective in stopping flag burning as a political protest.<sup>169</sup>

Again, it is productive to compare the flag-burning amendment and the FMA. First, these two amendments are similar in that they both seek to restrict freedoms that are considered fundamental: the freedom of speech and the freedom to marry. Just like the flag-burning amendment infringes upon the right to speech, which lies as the bedrock of our democracy,<sup>170</sup> the

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163. See *Eichman*, 496 U.S. at 318 (acknowledging that Congress purportedly found a national consensus favoring prohibition on flag burning).

164. See *id.* at 315 (observing that the government must, and in fact did, concede that burning the flag constitutes expressive conduct).

165. See *id.* at 318 (rejecting the idea that the government has greater flexibility in suppressing speech as public opposition to that speech grows).

166. See *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (recognizing that this case is a rare time where it is appropriate to recognize personal distaste for a result that is "right" according to the principles of the Constitution).

167. See 151 CONG. REC. H4904, H4927-28 (daily ed. June 22, 2005) (containing the most recent House vote approving the flag-burning amendment by a vote of 296-130); see also Mike Allen, *House Passes Constitutional Amendment to Ban Flag Burning*, WASH. POST, June 23, 2005, at A5 (announcing that the flag-burning amendment was passed in the House of Representatives on June 22, 2005). This was the fifth time that the amendment has passed the House and there is a new chance that the amendment may pass in the Senate where it has narrowly been defeated each of the previous four times. *Id.*

168. See generally Rosen, *supra* note 63, at 1088-92 (concluding that the flag-burning amendment was not only objectionable, but was actually unconstitutional because it would limit otherwise inalienable rights); see also U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

169. See Isaacson, *supra* note 80, at 600 (arriving at the conclusion that the flag-burning amendment would not only restrict freedom, but it would not accomplish its purpose). This conclusion is reached through the reasoning that, because the legally appropriate method of disposing of a torn or soiled flag is to burn it, all that a protester would have to do is find such a flag to burn. *Id.* at 584-87.

170. See *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (stating that freedom of speech is a fundamental personal right and liberty); see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (asserting that the Founding Fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."); TRIBE, *supra* note 36, at 785-89 (describing free

FMA is inconsistent with principles of liberty and equality. It is debatable whether the FMA actually infringes individual rights to liberty and equality because the Supreme Court has not yet ruled on whether same-sex couples have a right to marry.<sup>171</sup> However, the Massachusetts Supreme Judicial Court has already so decided.<sup>172</sup>

Even though the flag-burning amendment and the FMA are similar in one respect, in many others the flag-burning amendment would actually be less destructive of individual liberty interests than the FMA. First, the flag-burning amendment restricts speech in a limited manner. The Supreme Court has held that the right to free speech is *not* absolute; certain types of speech are not protected, such as obscenity,<sup>173</sup> defamation,<sup>174</sup> and fighting words.<sup>175</sup> While the flag-burning amendment would limit citizens' free speech, it would do so in a relatively discrete fashion by targeting speech most citizens reject as unworthy of protection.<sup>176</sup> This is similar to other classes of unprotected speech. In contrast, the FMA completely deprives same-sex couples of the ability to marry and thus is arguably more destructive of an individual interest than the flag-burning amendment.<sup>177</sup> Second, while the flag burning amendment only affects individuals wanting to criticize the government by burning the flag, it does not expressly target a discrete and discernable class of individuals. In contrast, the FMA targets same-sex couples, gay Americans, a class that has long suffered bias and prejudice from the majority.<sup>178</sup> Finally, state interests are not seriously

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speech as a "basic element of our fundamental law" and outlining the basic elements of several theories which support the significance of free speech). These theories included the necessity of free speech in maintaining the "marketplace of ideas," "self-government," and definition of personal and group identity. *Id.*

171. *But see* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

172. *See* *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 968 (Mass. 2003) (holding that limiting marriage to only opposite-sex couples violates "the basic premises of individual liberty and equality").

173. *See* *Roth v. United States*, 354 U.S. 476, 484 (1957) (finding that the history surrounding the adoption of the First Amendment rejects obscenity as "utterly without redeeming social importance.").

174. *See* *Beauharnais v. Illinois*, 343 U.S. 250, 255-57 (1952) (observing that every state has made libel a crime and, like other forms of speech not protected by the Constitution, it is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

175. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

176. *But see* *Isaacson*, *supra* note 80, at 563 (arguing that, because of the vagueness of the term "desecration" and the undetermined scope of that word, the use of the word in the amendment invites limitations on more forms of speech than contemplated).

177. *See supra* notes 168-170 and accompanying text.

178. *See* Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003) (as originally introduced, May 21, 2003) (proposing the initial language of the FMA). The marriage amendment was first drafted as follows:

infringed by the flag-burning amendment since it protects a federal interest. In contrast, the marriage amendment deprives states of the right to establish marriage laws by establishing a national definition of marriage.

### III. AMENDMENTS AND SEPARATION OF POWERS: AMENDMENTS OVERRULING SUPREME COURT DECISIONS

The FMA defies separation of powers principles. The Framers established three branches of government and provided for appropriate checks and balances such that no branch may assume centralized power and threaten the delicate balance created.<sup>179</sup> The legislative branch is granted the power to enact laws.<sup>180</sup> The President is granted the power to enforce those laws.<sup>181</sup> The judiciary is granted the power to adjudicate cases and controversies.<sup>182</sup> The judiciary is the primary protector of individual rights, and the *sole* protector of the rights of the “minority.”<sup>183</sup> This branch is devoted to fairness, respect, and dignity for the individual

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Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

*Id.* Not only would this language deprive same-sex couples of the right to marry but it suggests that any status granted same-sex couples resembling marriage would be unconstitutional as well. The language was then amended to read:

Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Federal Marriage Amendment, H.R.J. Res. 106, 108th Cong. (2004) (as amended, Sept. 23, 2004). This new language defines marriage as the union of a man and a woman but does not prevent other recognition of same-sex couples. Thus, states are free to grant marital benefits to same-sex couples, as Vermont has done, by creating civil unions or domestic partnerships. *See* 1999 Vt. Acts & Resolves 847 (2000) (codified as VT. STAT. ANN. tit. 15, §§ 1201-1207 (2000)) (creating the institution of a civil union and defining civil unions as being between people of the same sex who are otherwise excluded from marriage laws). Under the proposed amendment, states can prevent same sex couples from marrying. The only difference is the name.

179. *See* *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny.”).

180. *See* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *see also* *Questions*, *supra* note 3, at 211-12 (extolling the ability of the legislature to include a large number of individuals and diverse people and thoughts into the lawmaking process, thus maximizing democracy and accountability).

181. *See* U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *see also* *Questions*, *supra* note 3, at 211 (emphasizing that the individual serving as the executive represents the most efficient and rational way to achieve certain objectives and policy outcomes).

182. *See* U.S. CONST. art. III.

183. *See* *Questions*, *supra* note 3, at 218 (noting that the judiciary is “not intended to be accountable to the people,” but rather is the only branch that protects the interests of the minority of the people from discrimination).

and makes decisions “based on normative and practical moral reasoning.”<sup>184</sup> Since 1803, the Supreme Court has been deemed the final interpreter of the Constitution with the ability to review laws enacted by the legislature to ensure they are consistent with constitutional principles.<sup>185</sup>

Because the judicial branch has the ultimate authority over constitutional interpretation and construction, the only “check” on judicial power of constitutional interpretation is the constitutional amendment process. The amendment process should be used to overturn the Court only when it acts beyond its powers or inconsistently with constitutional principles. Otherwise, the careful balance of powers among the branches is compromised.

The history of amending the Constitution to overrule Supreme Court decisions is consistent with this view and is particularly relevant here. While the U.S. Supreme Court is not being overturned by the FMA, the Massachusetts Supreme Judicial Court’s *Goodridge* decision is in jeopardy. *Goodridge* was the catalyst for the fervor behind the proposed marriage amendment. Moreover, the FMA will forever prevent the U.S. Supreme Court from addressing the issue.

Only four constitutional amendments have been adopted to overrule the Supreme Court.<sup>186</sup> They are: (1) the Eleventh Amendment, which overruled *Chisolm v. Georgia*;<sup>187</sup> (2) the Thirteenth Amendment and, most specifically, the first sentence of the Fourteenth Amendment,<sup>188</sup> which overruled *Dred Scott v. Sanford*;<sup>189</sup> (3) the Sixteenth Amendment, which

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184. *Id.* at 212.

185. *See* *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) (“[I]t is emphatically the province and duty of the judicial department to say what the law is.”). Interestingly, several amendments to the Constitution have been proposed to alter the Supreme Court’s authority in this area; not one has succeeded. MUSMANNO, *supra* note 31, at 92-95. Yet another arguably unconstitutional bill in flagrant violation of *Marbury* was introduced in the House in 2004 to allow Congress, if two thirds of each House agree, to reverse the judgments of the U.S. Supreme Court concerning the constitutionality of an Act of Congress. Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108 Cong. (2004).

186. *See* Thomas Baker, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 9 n.37 (2000) (“Three other amendments could be understood to impliedly reject earlier Supreme Court understandings of the Constitution: The Seventeenth Amendment (1913) (direct election of Senators); the Nineteenth Amendment (1920) (women’s suffrage); and the Twenty-Fourth Amendment (1964) (abolition of poll taxes in federal elections).”).

187. 2 U.S. 419 (1793).

188. The Thirteenth, Fourteenth, and Fifteenth Amendments are referred to as the Civil War Amendments and were adopted, at least in part, in response to the *Dred Scott* decision. *See* Baker, *supra* note 186, at 8. The Thirteenth Amendment abolished slavery and the Fourteenth Amendment granted citizenship to the slaves, stating “all persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV.

189. 60 U.S. 393 (1856).

overruled *Pollack v. Farmer's Loan & Trust Co.*;<sup>190</sup> and (4) the Twenty-Sixth Amendment, which overruled *Oregon v. Mitchell*.<sup>191</sup> As we will see, each amendment was in harmony with the basic principles that underlie the Constitution—individual rights, separation of powers, and federalism. Moreover, in the cases where fundamental liberty interests were at stake, the amendment *reestablished* individual rights in light of the Court's limited interpretation of those rights. Without analyzing the propriety of the individual Supreme Court decisions, the following will demonstrate that, unlike the FMA, the use of the amendment power to overrule these cases was proper and consistent with basic democratic principles.

First, in *Chisolm*, the Court was called upon to interpret the scope of its own jurisdictional power “extend[ing] . . . to Controversies between two or more States;”<sup>192</sup> specifically, whether such power authorized suits against a State by a private citizen of another State.<sup>193</sup> The Court held it had such power.<sup>194</sup> The anti-federalists were outraged by this decision, viewing it as a direct threat to state sovereignty.<sup>195</sup> Four years later the Senate introduced the Eleventh Amendment to reverse the decision.<sup>196</sup> The Eleventh Amendment was a proper use of constitutional amendment procedures to reign in the Court. In *Chisolm*, the Court broadly interpreted its *own* authority pursuant to Article III in finding that federal courts had jurisdiction to adjudicate cases brought by individuals against a state. A decision by one branch to broadly construe its own powers<sup>197</sup> is problematic and thus using the amendment process to reign in the Court's authority is consistent with separation of powers principles. Moreover, the Court's decision directly threatened state sovereignty by allowing federal courts to entertain suits by individuals against the state itself. Thus, the Eleventh Amendment's restraint of federal judicial power over the states enforced federalism principles.

In contrast, the FMA is designed to overrule the *Goodridge* decision which expanded the rights of individual citizens as against the state

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190. 158 U.S. 601 (1895).

191. 400 U.S. 112 (1970).

192. U.S. CONST. art. III, § 2.

193. *Chisolm v. Georgia*, 2 U.S. 419, 432 (1793) (“A general question of great importance here occurs. What controversy of a civil nature can be maintained against a State by an individual?”).

194. *Id.* at 455 (finding that a state is much like a person in that it can be bound by contract, incur debts, own property, etc.).

195. AMENDMENTS TO THE CONSTITUTION, *supra* note 102, at 14.

196. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

197. See Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 503 (1987) (defining this phenomenon as the “aggrandizement” problem).

legislature; *Goodridge* did not expand directly the court's jurisdiction. Of course, by finding a statute unconstitutional the court is trumping the legislatures' prerogative and thus arguably does threaten the delicate balance between the judiciary and the legislature. However, as the protector of individual rights as against an overreaching government, this is an appropriate function of the judiciary. The FMA not only limits the rights of individuals and replaces the court's judgment with that of the legislature, effectively expanding legislative authority and the delicate balance among the branches, it threatens state sovereignty by setting a national standard in an area exclusively retained by the states and is inconsistent with federalism principles.

Second, in *Dred Scott*, the Court held that a federal court in Missouri had no jurisdiction to hear Scott's suit to win his freedom because Scott, as a slave, was not a citizen of the United States, as "citizen" was understood at the time the Constitution was ratified.<sup>198</sup> Chief Justice Taney labored to explain that there was no way to read the Constitution to interpret African-Americans as citizens, largely because many founders themselves were slave holders.<sup>199</sup> The Court tirelessly canvassed the history of blacks brought to this country as slaves and the views of the "people" toward the slaves during colonial times, at the adoption of the Constitution, and during the expansion of the territories. Justice Taney concluded that slaves were never intended to be included under the word "citizens" in the Constitution.<sup>200</sup> He explained that states or territories that outlawed slavery did so because slaves were ill-suited to the local economies and not because the states or territories acknowledged a slave's personhood.<sup>201</sup> The Court, however, invited an amendment to the Constitution stating:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution . . . . If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.<sup>202</sup>

Justice Charles P. Curtis resigned from the Court, in part because he believed that the opinion had significantly damaged the Court's stature.<sup>203</sup>

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198. See *Dred Scott v. Sandford*, 60 U.S. 393, 406-07 (1856).

199. See, e.g., *id.* at 410 (finding that if the Constitution included African-Americans as citizens then many of the slave-owning founders acted in flagrant violation of their own document); *id.* at 416-17 (recognizing that the large southern states could not have possibly meant to include slaves within the meaning of the word "citizen").

200. *Id.* at 404.

201. *Id.* at 438-39.

202. *Id.* at 405.

203. G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L.

Others described Taney's opinion as "an authorized registration of the political heresies of the dominant party of the day" and suggested that the primary effect of *Dred Scott* would be the "loss of confidence in the sound judicial integrity and strictly legal character" of the Court.<sup>204</sup>

As a precedent, *Dred Scott* was remarkably short-lived. In June, 1862, Congress abolished slavery in all the federal territories. Edward Bates, President Abraham Lincoln's Attorney General, issued an opinion late that year declaring that free men of color born in the United States were citizens of the United States. Three years later the Thirteenth and Fourteenth Amendments were passed, obliterating the last vestiges of *Dred Scott*.

The *Dred Scott* decision, perhaps one of the most notoriously "bad" decisions in the Court's history, enshrined the denigration of an entire class of people, finding they were not citizens of this country but rather the property of slave holders. While historically this may have been consistent with the ideals of our ancestors, it clearly was a decision violating the fundamental principles of human dignity, respect, liberty, and equality. The Thirteenth and Fourteenth Amendments corrected this error by abolishing slavery and granting slaves citizenship. Interestingly, even the Court in *Dred Scott* recognized the Constitution was flawed in its protection of slavery but felt itself bound by the document.<sup>205</sup> However, the Court suggested that Congress amend the Constitution to correct for this problem.<sup>206</sup> Thus, the Thirteenth and Fourteenth Amendments were not only consistent with principles of individual liberty and equality, they were consistent with the Justices' desires, if not their "official" decision, and thus did not seriously threaten separation of powers principles. Of course, the Thirteenth Amendment removed the power of the states to allow slavery, and thus is inconsistent with the principle of states' rights. However, the need to establish national standards to protect individual liberty interests and dignity far outweigh federalism concerns in this situation.<sup>207</sup>

Third and similarly, the Twenty-Sixth Amendment, which overruled *Mitchell* and extended the right to vote to all citizens eighteen years or older, expanded individual rights, and infringed slightly on the states' freedom to establish their own voting age standards.<sup>208</sup> In *Mitchell*, the

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REV. 1463, 1510 (2003).

204. *Id.* (quoting Benjamin C. Howard).

205. *See Dred Scott*, 60 U.S. at 426 (noting that African slaves are an "unfortunate race").

206. *Id.*

207. William G. Ross, *Judicial Review: Blessing or Curse? or Both? A Symposium in Commemoration of the Bicentennial of Marbury v. Madison*, 38 WAKE FOREST L. REV. 733, 762 (2003) (stating that people are increasingly reliant on federal power to protect personal liberties involving speech, religion, and sexual orientation).

208. U.S. CONST. amend. XXVI.

Justice Department, several states, and other interested parties challenged the Voting Rights Act Amendments of 1970<sup>209</sup> that, among other things, lowered the minimum age of voters in both state and federal elections from twenty-one to eighteen.<sup>210</sup> Many states refused to comply with the Act on the basis that it “takes away from them the powers reserved to the States by the Constitution to control their own elections.”<sup>211</sup> The Court concluded that Congress could set the age for voters for federal elections but could not dictate such requirements for state or local elections.<sup>212</sup> The Court found that the Framers intended for the states to set their own voting criteria for local and state elections as a means of maintaining a federalist structure of government.<sup>213</sup> Because only three states passed laws to allow eighteen-year olds to vote in state and local elections, *Mitchell* created dual voting age requirements in most all states.<sup>214</sup> The Twenty-Sixth Amendment granting the right to all citizens eighteen years of age and older to vote in all elections was proposed to remedy the anticipated confusion, fraud, and costly administration of such a dual system.<sup>215</sup>

Whenever a federal constitutional amendment is designed to *expand* individual rights of liberty and equal treatment under the law, thereby setting a new *federal floor* for individual rights, the power of the state is confined. For this reason, the Court in *Dred Scott* and *Mitchell*, to protect its legitimacy, refused to interpret individual rights expansively against the states with the expectation that Congress, the states, or the people would act to “correct” its decisions and expand individual rights through a more democratic process—constitutional amendment. It is appropriate and consistent with democratic principles to set a new federal floor for individual rights by a constitutional amendment overruling a Court decision

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209. AMENDMENTS TO THE CONSTITUTION, *supra* note 102, at 90.

210. The Amendments also barred the use of literacy tests in all state and federal elections for a period of five years, which was based on a congressional finding that such tests were used to discriminate against voters based on color. The Amendments further forbade the states from disqualifying voters for presidential and vice presidential elections because they had not met state residency requirements. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285 (1970).

211. *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970).

212. *Id.* at 125 (noting that Congress is the final authority in regulating federal elections).

213. *Id.* (interpreting U.S. CONST. art. I, §§ 2, 4). Justice Douglas, in concurrence, added that the Equal Protection clause of the Fourteenth Amendment supplied additional justification for the holding that it was unfair to deny the right to vote to individuals who could fight in wars. *Id.* at 141-42 (Douglas, J., concurring). Justice Harlan, concurring in part and dissenting in part, argued that the power to set voter qualifications for national elections was expressly committed to the states by article I, §§ 1 and 2 and the Fourteenth Amendment did not grant the federal government the power to alter that without an express constitutional amendment. *Id.* at 201 (Harlan, J., concurring in part and dissenting in part). Justice Harlan criticized the majority for disregarding the express intent and understanding of the Framers and invading the area to which Article V is committed. *Id.*

214. AMENDMENTS TO THE CONSTITUTION, *supra* note 102, at 90.

215. *Id.*

in which the Court felt restrained to expand those rights.

By contrast, the FMA has the opposite effect. It sets a new *federal ceiling* for individual rights nationwide in response to one state court *expanding* individual liberties. The Massachusetts Supreme Judicial Court chose to interpret individual liberty interests more expansively than the U.S. Supreme Court in *Dred Scott* or *Mitchell*, leaving itself open to criticism of being “activist.”<sup>216</sup> As a state court, interpreting the state constitution, and affecting only its citizens, it is understandable why the Massachusetts Supreme Judicial Court would interpret individual rights more expansively than the U.S. Supreme Court, as its decision affects only Massachusetts citizens.

The Massachusetts Supreme Judicial Court in *Goodridge* acted well within its own authority as the final arbiter of its state constitution issuing a very thoughtful, well-supported, rational decision, following the law, setting a policy founded on equality, and protecting the interest of the minority.<sup>217</sup> The court held that the Massachusetts legislature has no legitimate interest in denying two committed individuals a marriage license solely because they are of the same sex.<sup>218</sup> In fact, the court found that such denial places same-sex families in jeopardy by depriving the couples and their children important protections afforded opposite-sex couples.<sup>219</sup> As the only institution devoted to protecting minority interests, its ruling protecting those interests does not deserve to be overruled by constitutional amendment.

The FMA is an inappropriate use of the amendment power designed to prevent any other state court and the U.S. Supreme Court from addressing this issue. Congress is limiting individual interests through a constitutional amendment and substituting its judgment for the courts’ judgment. One could argue that the FMA does no more than codify the current state of the law and thus does not affect liberty interests at all. Because the Court has not held that a federal right to same-sex marriage exists (at least not yet), it is less of an affront on individual liberty than if the amendment removed a

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216. In fact, opponents of gay marriage in Massachusetts filed a bill seeking to remove Supreme Judicial Court Justice Margaret Marshall from the bench after a similar bill targeting all four Massachusetts justices who voted to legalize gay marriage was proposed. *Opponents of gay marriage file bill to remove SJC chief justice*, Associated Press, Boston, May 25, 2004 (on file with the American University Law Review).

217. See Laurence Friedman, *Symposium on Goodridge v. Department of Public Health: The (Relative) Passivity of Goodridge v. Department of Public Health*, 14 B.U. PUB. INT. L.J. 1, 22-25 (concluding that the decision in *Goodridge* is a narrow decision that does not constitute judicial activism). See generally *Goodridge v. Dep’t of Health*, 798 N.E.2d 941 (2003).

218. See *Goodridge*, 798 N.E.2d at 968.

219. See *id.* at 963 (recognizing that, among other things, same-sex couples are denied tax benefits of opposite-sex married couples and must undergo the difficult process of second-parent adoption).

right that the Court has already found to exist. Nevertheless, general notions of liberty are broader than those found as rights in the Constitution; and the more significant the interest at stake, the more suspect is an amendment denying that interest.

Furthermore, while it is true that, historically, marriage has been the union of a man and woman, marriage has changed in many respects over time to accommodate evolving notions of liberty and equality.<sup>220</sup> This evolution generally takes place in the courts as individuals assert their interests under the Fourteenth Amendment.<sup>221</sup> By freezing the current state of the law through a constitutional amendment, such evolution is impossible. Thus, the FMA redistributes the powers of the three branches by denying the courts (as well as the states) the ability to decide this issue.

Through amendment, the legislative branch has the power to enact laws that establish societal standards only so long as the laws enacted do not violate the constitutional rights of individuals.<sup>222</sup> The legislature is not empowered to draft laws to enshrine illegitimate prejudices of the majority. Allowing the legislature, with the endorsement of the executive, to amend the Constitution to expressly overrule a decision of the judiciary, which acted consistently with democratic principles by protecting the rights of a minority of the people, destroys the delicate balance of power among the branches.

Finally, in *Pollock*,<sup>223</sup> the Court struck down an income tax amendment to the Wilson Tariff Act adopted by Congress in 1894.<sup>224</sup> Designed to help solve the severe economic troubles of the late nineteenth century, those who had opposed the income tax believed it to be socialistic and hostile to free enterprise.<sup>225</sup> The Court held the income tax was not apportioned and thus unconstitutional in violation of art. I, sec. 9, cl. 4 of the Constitution, which limits Congress's power to impose a tax "unless in proportion to the Census or Enumeration herein before directed to be taken."<sup>226</sup> The Court stated that whether the income tax was desirable or not was a question for the political branches and suggested that the political branches amend the Constitution to allow for such a tax if politically desirable.<sup>227</sup> In the early

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220. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring that Virginia's anti-miscegenation statutes violated the Twenty-Fourth Amendment).

221. *Id.*

222. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution." (quoting *Williams v. Rhodes*, 393 U.S. 23 (1968))).

223. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

224. *Id.* at 634-35.

225. AMENDMENTS TO THE CONSTITUTION, *supra* note 102, at 42.

226. U.S. CONST. art. I, § 9, cl. 4.

227. *Pollock*, 158 U.S. at 635.

twentieth century, Congress followed the Court's suggestion and in 1913 the Sixteenth Amendment was enacted, stating: "The Congress shall have the power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."<sup>228</sup>

Unlike the income tax, same-sex marriage is not a political question better left to the majoritarian branches. Rather, it presents a question of discrimination against a targeted minority, the type of question expressly suited to the courts. The court in *Goodridge*, as the sole protector of minority rights, protected the minority. The FMA is an illegitimate use of the constitutional amendment process to overrule a court decision and threatens separation of powers principles.

#### IV. AMENDMENTS AND FEDERALISM

Federalism principles define the allocation of power between the federal and state governments. The federal government is one of "limited" powers; the articles of the Constitution enumerate those powers.<sup>229</sup> While certain powers lie within the exclusive domain of the federal government, most of the enumerated powers are shared with the states.<sup>230</sup> The Tenth Amendment reserves all powers not expressly delegated to the federal government to the states or to the people.<sup>231</sup>

Federalism principles serve a very important function by allowing the experimentation of developing ideals at the state level without affecting the entire union.<sup>232</sup> In this manner, "new" ideals are tested before they are adopted nationwide or refuted, and individuals have the choice to live in a state that protects the liberty interests important to them.<sup>233</sup> The states, of course, may not reduce individual liberties below the floor established by the federal government,<sup>234</sup> but they are free to expand upon them.<sup>235</sup> In

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228. U.S. CONST. amend. XVI.

229. See U.S. CONST. art. I, § 8 (delineating the specific powers of Congress); U.S. CONST. art. II, § 2 (delineating the specific powers of the President); U.S. CONST. art. III, § 2; U.S. CONST. amend. X (delineating the specific powers of the Judiciary).

230. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (noting that the Constitution created a system of dual sovereignty).

231. See U.S. CONST. amend. X.

232. See *New State Ice. Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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.").

233. See Peter A. Lauricella, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1381 (1997) ("[B]ecause the geographical area of a state is smaller than that of the federal government, people who find state policies and regulations burdensome could 'vote with their feet,' and move to a different state.").

234. U.S. CONST. art. VI (highlighting the Supremacy Clause).

235. See *Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to

fact, once there is sufficient “experimentation” within the states, the federal government may step in and provide all citizens of the United States the liberties granted by the “experimenting” states by establishing a new *federal floor* for individual rights.<sup>236</sup>

An amendment that infringes on fundamental state powers is highly destructive of state sovereignty and inconsistent with federalism principles. Domestic relations are traditionally an exclusive state power.<sup>237</sup> The authority to define “marriage” falls exclusively with the states as perhaps the most central aspect of domestic relations.<sup>238</sup> The Constitution grants no power to the federal government to define marriage or grant marriage licenses to the people. State civil marriage is exactly that, a *state* (not federal) *civil* (not religious) institution. All couples are married pursuant to state authority, and the federal government merely agrees to acknowledge those marriages for federal purposes.<sup>239</sup> Moreover, while there are separate institutions for religious marriage, civil institutions are not dependent upon, nor should they be influenced by, religious tenets.<sup>240</sup>

The FMA would force all states to define marriage as the union of a man and a woman; depriving any state of the ability to deviate from that definition independent of the state’s interest or policy. This power is outside the scope of any existing power granted to the federal government.

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interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”).

236. See *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O’Connor, J., concurring in part and dissenting in part) (citing numerous incidents in which states have pioneered policies, like the minimum wage in Massachusetts, that eventually became national policy).

237. See *In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.”); see also Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1467 (1997).

238. See *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) (“With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.”); *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”). Interestingly, in 1884 the first attempt to give Congress the power to make uniform marriage and divorce laws was made, followed by fifty-nine proposed amendments toward that end. Edwin Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 637, 666 app. (2004). All, of course, have failed, as an extreme encroachment on states’ powers. *Id.* at 638, 664-65.

239. See generally Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419 (1999) (concluding that Congress does not have the power to impose its definition of marriage on the states).

240. See *Goodridge v. Dep’t of Health*, 798 N.E.2d 941, 954 (2003) (distinguishing civil and religious marriages); see also Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2704-05 (2004) (stating that the government’s ability to regulate marriage is limited to civil, as opposed to religious, marriages).

Because the FMA is designed to limit rather than protect individual liberties, the use of federal power here is illegitimate and infringes upon a fundamental power of the states. Moreover, by trumping state authority in this way, the benefit of having states experiment with new laws is nullified.<sup>241</sup>

#### A. *State Experimentation*

States have experimented with the definition of marriage over the years, demonstrating the usefulness of such experimentation. The most obvious parallel to the same-sex marriage debate is the history of anti-miscegenation statutes in this country. Long ago citizens began challenging state anti-miscegenation laws, which outlawed the marriage between individuals of different races.<sup>242</sup> In 1852, Maine became one of the first states to uphold the constitutionality of an anti-miscegenation statute and declare interracial marriages null and void.<sup>243</sup> It was not until 1948 that California became the first state to declare its anti-miscegenation statute unconstitutional.<sup>244</sup> During the next twenty years, cases were brought in other states challenging similar anti-miscegenation statutes and several successfully invalidated them.<sup>245</sup> However, it was not until 1967, when the U.S. Supreme Court held in *Loving v. Virginia* that no state could deny two people a marriage license merely because they were of different races. The Court held that this denial violated *federal* constitutional principles of liberty and equality.<sup>246</sup> *Loving* thus set a new federal floor for individual rights throughout the nation. Interestingly, these events never would have transpired had the proposed anti-miscegenation amendment been ratified.<sup>247</sup>

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241. See Letter from Dennis W. Archer, President, American Bar Association, to U.S. Senators (July 9, 2004) (on file with the American University Law Review) (“If the Constitution is to continue to embody the spirit of liberty for future generations, we must not seek to use it to enshrine still-evolving societal views.”), available at <http://www.abanet.org/poladv/letters/108th/cam070904.pdf>.

242. See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (naming the fifteen states which still had anti-miscegenation statutes or constitutional provisions in force in 1967).

243. See *Bailey v. Fiske*, 34 Me. 77, 77 (1852) (nullifying a fifty-nine year marriage between a white woman and a mulatto); see also Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 592-97 (2000) (describing the history of courts upholding the constitutionality of anti-miscegenation statutes prior to 1967).

244. See *Perez v. Sharp*, 198 P.2d 17, 29 (Cal. 1948) (finding the statute unconstitutional under the California state constitution); see also Sealing, *supra* note 243, at 593 n.239 (noting that the Alabama Supreme Court was actually the very first to overturn an anti-miscegenation statute in *Burns v. State*, 48 Ala. 195 (1872), but the decision was overruled in *Green v. State*, 58 Ala. 190 (1877)).

245. See *Loving*, 388 U.S. at 6 n.5 (“Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.”).

246. See *id.* at 12 (finding that the state statutes violated the Due Process and Equal Protection clauses of the Fourteenth Amendment).

247. For a more detailed discussion of the proposed amendment, see *supra* Part III.B.

A similar history with regard to same-sex marriage is developing in our lifetime. The very first challenge to state marriage laws that deprived same-sex couples of a right to marry was brought in Minnesota.<sup>248</sup> In 1971, the Minnesota Supreme Court dismissed the challenge and the U.S. Supreme Court declined to hear the appeal.<sup>249</sup> For many years, same-sex couples challenged similar statutes in other states and lost.<sup>250</sup>

However, in 1993, the Supreme Court of Hawaii held that denying same-sex couples a right to marry amounted to sex-based discrimination and violated the Equal Rights Amendment of the Hawaii Constitution unless the state could justify the discriminatory treatment.<sup>251</sup> On remand, the Hawaii trial judge found that the state failed to justify the discriminatory treatment and held the state statute violated the equal rights of same-sex partners.<sup>252</sup> The case was appealed to the Supreme Court of Hawaii for a second time<sup>253</sup> and, while on appeal, the state legislature passed two laws: (1) a Reciprocal Beneficiaries Act—granting couples ineligible to marry, certain basic benefits,<sup>254</sup> and (2) a proposed constitutional amendment stating that the Hawaii legislature shall have the power to reserve marriage for opposite-sex couples.<sup>255</sup> In 1998, the citizens of Hawaii approved the state constitutional amendment.<sup>256</sup>

Meanwhile, same-sex couples in the state of Vermont were challenging the Vermont marriage laws, which denied same-sex couples marriage licenses. The challengers argued that the Vermont marriage laws violated the Common Benefits Clause of the Vermont Constitution.<sup>257</sup> In 1999, the

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248. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 1064 (2d ed. 2004).

249. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

250. *See, e.g.*, *Dean v. Dist. of Columbia*, 653 A.2d 307, 308 (D.C. 1995) (affirming denial of marriage license to two gay men); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (holding that two women are “incapable” of being married); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. 1974), *review dismissed*, 84 Wash.2d 1008 (1974) (denying marriage license to same-sex couple).

251. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

252. *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

253. *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997).

254. HAW. REV. STAT. ANN. § 572C (2004).

255. Brad K. Gushiken, *The Fine Line Between Love and the Law: Hawaii's Attempt to Resolve the Same-Sex Marriage Issue*, 22 U. HAW. L. REV. 149, 165 (2000).

256. HAW. CONST. art. I, § 23. This constitutional amendment is arguably suspect for many of the same reasons articulated in this Article. Of course, federalism principles are not invoked when dealing with a state statute but individual rights and separation of powers principles clearly are. The political branches in Hawaii used the amendment process to overturn a judicial decision that had protected the interests of a small minority and enshrined prejudice in the state constitution. *See generally* David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 18, 70-82 (2000) (detailing the legislative action leading to the approval of the 1998 Marriage Amendment).

257. *See Baker v. State*, 744 A.2d 864, 869-70 (Vt. 1999) (noting that the marriage laws “effectively exclude[d] them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse’s medical, life, and disability insurance,

Vermont Supreme Court agreed and held that same-sex couples in Vermont are entitled to the same benefits and protections afforded by Vermont law to married opposite-sex partners.<sup>258</sup> The Court did *not* find that the denial of a *marriage license* violated the constitution but rather the denial of the *benefits* associated with a marriage license did.<sup>259</sup> The court instructed the Vermont legislature to craft an appropriate means for granting the same marital benefits to same-sex couples as enjoyed by opposite-sex couples.<sup>260</sup> In April 2000, the Vermont Legislature created civil unions for such couples.<sup>261</sup>

The *Goodridge* decision of the Massachusetts Supreme Court in November, 2003 is the most recent attempt by a state appellate court to expand the rights of same-sex couples.<sup>262</sup> That court held that same-sex couples have a right to marry (not just a right to benefits), and that any separate but equal solution would be unconstitutional under the Massachusetts Constitution.<sup>263</sup> In other words, the court held that a civil union recognizing same-sex couples and granting identical benefits is not constitutionally adequate in Massachusetts.<sup>264</sup> The court directed the Massachusetts legislature to begin issuing marriage licenses to same-sex couples on May 17, 2004.<sup>265</sup> The Governor of Massachusetts requested a stay from the Court while the legislature attempted to pass an amendment to the Massachusetts Constitution, but the request was not granted.<sup>266</sup> The first same-sex couples were married in Massachusetts on May 17, 2004.<sup>267</sup>

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hospital visitation and other medical decisionmaking privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.”).

258. *Id.* at 867.

259. *See id.* at 886 (leaving the issue of a same-sex couple’s right to a marriage license for another day).

260. *Id.*

261. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004).

262. Recently California and New York trial courts have held their state marriage laws depriving same-sex couples a marriage license unconstitutional under their state constitutions. *See In re* Coordination Proceeding, Special Title [Rule 155(c)], 2005 WL 583129 (Cal. Sup. Ct, 2005); *Hernandez v. Robles*, 7 Misc.3d 459 (N.Y. Sup. Ct. 2005). *But see* *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005) (“the limitation of marriage licenses to opposite sex couples does not violate the plaintiff’s constitutional rights”).

263. *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 343-44 (2003).

264. *See In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (finding that there was no rational basis for distinguishing between “civil marriages” and “civil unions” where the only difference between the licensure programs was the sexual orientation of the recipients).

265. *Id.* at 568.

266. *See* Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban: Romney to Seek Stay of SJC Order*, BOSTON GLOBE, Mar. 30, 2004, at A1 (explaining that the Attorney General of Massachusetts refused to take the Governor’s request to the Supreme Judicial Court because he believed it lacked legal merit). Moreover, some citizens requested an injunction in federal court and were also denied. *Largess v. Supreme Judicial Court for State of Mass.*, 313 F. Supp. 2d 77 (D. Mass. 2004), *aff’d*, 373 F.3d 219 (1st Cir. 2004).

267. *See* Fred Bayles, *Mass. to Allow Gay Marriage Today*, USA TODAY, May 17, 2004,

When the federal government attempts to step in and cut-off the debate among the states, by setting a *federal ceiling* on individual rights nationwide, it destroys a central purpose of our dual state and federal system and, worse, enshrines inequality and prejudice into our Constitution.<sup>268</sup>

*B. Protecting States from Activist Sister States*

The federal government has an interest in protecting the states from each other. In other words, each state is a separate sovereign, and no state can infringe the sovereignty of the other states.<sup>269</sup> The proponents of the marriage amendment claim there is a legitimate need to amend the federal constitution to protect states from the “activist” judges of other states, like those in Massachusetts. They also argue that to allow individual states to issue marriage licenses to same-sex couples will place all other states in the position of having to recognize those marriages and to grant benefits to the couples in violation of their public policy.<sup>270</sup>

This claim is misleading and unrealistic. The *Goodridge* decision and the marriage licenses granted in Massachusetts affect no other state nor the federal government directly.<sup>271</sup> Albeit indirectly, each state’s laws affect

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at A1 (reporting that thousands of homosexual couples in Massachusetts were expected to apply for marriage licenses).

268. Justice Brandeis stated many years ago that to deny the states the right to experiment with social institutions is “fraught with serious consequences to the Nation.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also SECTION OF FAMILY LAW WORKING GROUP ON SAME-SEX MARRIAGES AND NON-MARITAL CIVIL UNIONS, AMERICAN BAR ASSOCIATION, A WHITE PAPER: AN ANALYSIS OF THE LAW REGARDING SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS *passim* (2004) (analyzing the issues surrounding same-sex unions throughout the country and contending that the states are best suited to vigorously address the issues); Dennis Archer, *Why Congress Should Back Off Gay Marriage Law: It Tramples on the Traditional Authority of Each State to Establish its Own Laws*, CHI. SUN-TIMES, Op-ed, July 14, 2004 (providing a warning of the dangerous impact a constitutional amendment on same-sex marriage would have on the federalist structure of our government), available at <http://www.suntimes.com>.

269. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down . . . that the laws of one State have no operation outside its territory, except so far as is allowed by comity . . .”).

270. See Susan Milligan, *Lawmakers Voice Concerns for States’ Rights*, BOSTON GLOBE, Feb. 25, 2004 (“Many senators and House members said they are distressed about the domino effect of the Massachusetts Supreme Judicial Court decision requiring the state to sanction same-sex marriages, and worried aloud that ‘activist judges’ would demand that all states recognize gay unions made in Massachusetts beginning in May and others licensed recently in San Francisco and Bernalillo, N.M., contrary to state laws.”), available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2004/02/25/lawmakers\\_voice\\_concern\\_for\\_states\\_rights/](http://www.boston.com/news/specials/gay_marriage/articles/2004/02/25/lawmakers_voice_concern_for_states_rights/).

271. In fact, a 1913 Massachusetts statute is being used to prevent out-of-state couples from getting married in Massachusetts. See MASS. GEN. LAWS ch. 207, § 12 (1913) (“Legal ability of non-residents to marry; duty of licensing officer to ascertain: Before issuing a license to marry a person who resides and intends to continue to reside in another state, the

every other state and the federal government.

The Full Faith and Credit (“FF&C”) Clause of the Constitution defines the credit that each state must grant to other states’ legal acts and protects the states from overreaching sister states.<sup>272</sup> The FF&C Clause was drafted to reconcile the desire for diversity among the states with mutual respect for differences of opinion.<sup>273</sup> While the clause states that each state must give FF&C to the public acts, records, and judicial proceedings of the other states,<sup>274</sup> it is not absolute. The Supreme Court recognizes various exceptions to the generalized requirement of mutual respect, most notably when recognizing a judgment by a sister state that the home state finds fundamentally objectionable.<sup>275</sup> In fact, it was common during the period when the anti-miscegenation statutes were being challenged for states not to recognize interracial marriages granted in other states on the basis that those marriages were odious, against the will of God and public policy, and an attempt by citizens to avoid their home state’s restrictive marriage laws.<sup>276</sup> Thus, there is precedent to support the idea that states need not recognize same-sex marriages granted in sister states if they are deemed contrary to that state’s public policy.<sup>277</sup>

Moreover, the federal legislature has already acted to protect states from sister states that have decided to permit same-sex marriages. In 1996, after the Hawaii Supreme Court decision on same-sex marriage was announced, the federal government enacted the Defense of Marriage Act (“DOMA”) granting the states the power to refuse recognize a same-sex marriage entered into in another state.<sup>278</sup> Many states followed suit and enacted their

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officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.”).

272. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

273. *See, e.g.*, Johnson v. Muelberger, 340 U.S. 581, 584-85 (1951) (stating that the Full Faith and Credit clause gives states power over their own courts, but demands that they respect the decisions of courts in other states).

274. U.S. CONST. art. IV, § 1.

275. *See, e.g.*, Pac. Employers Ins. Co. v. Indus. Accident Comm’n, 306 U.S. 493, 501 (1939) (making an exception for employee compensation statutes); *see generally* Barbara J. Cox, *Same-sex Marriage and the Public Policy Exception in Choice-of-Law: Does it Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996) (discussing whether same-sex marriages should fit into the public policy exception).

276. *See* Barbara J. Cox, *Same-Sex Marriage and Choice-Of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1110-16 (comparing choice-of-law treatment with regard to anti-miscegenation statutes to the potential treatment of legalized same-sex marriages).

277. *See, e.g.*, *Developments in the Law, The Law of Marriage and Family, Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2029, 2039-42 (2003) (evaluating the merit of the argument that states may categorically refuse to recognize same-sex marriages consummated in other states based on the public policy exception to the Full Faith and Credit clause).

278. 28 U.S.C. § 1738C (2000) (“No State, territory, or possession of the United States,

own statutes refusing to recognize same-sex marriages.<sup>279</sup> These state statutes are designed to support states' claims, under the FF&C Clause, that recognition of same-sex marriages would violate a fundamental state policy interest.

There are strong arguments that the federal DOMA statute is unconstitutional.<sup>280</sup> The primary argument for challenging DOMA is that the Act "is the antithesis of a full faith and credit measure which lacks sufficient generality and, without adequate justification, encroaches upon an area traditionally reserved for state regulation."<sup>281</sup> In mid-July 2004, the first suit challenging a state's power to refuse recognition of a valid Massachusetts same-sex marriage was filed in Florida.<sup>282</sup> The plaintiffs

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or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

279. See, e.g., FLA. STAT. ANN. § 741.212 (West 2004) ("Marriages between persons of the same sex . . . are not recognized for any purpose in this state."); 750 ILL. COMP. STAT. ANN. § 5/212 n.4 (West 1996) ("[S]ame sex marriage is contrary to the public policy of this state.") (internal quotations omitted); 23 PA. CONS. STAT. ANN. § 1704 (West 2001) ("A marriage between persons of the same sex . . . even if valid where entered into, shall be void in this Commonwealth."); TEX. FAM. CODE ANN. § 6.204 (Vernon 2003) ("A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state."). For a particularly far-reaching statute, see Virginia's recent amendment to its marriage statutes which reads in pertinent part:

The General Assembly finds that the United States Supreme Court has acknowledged that "A husband without a wife, or a wife without a husband, is unknown to the law." (*Atherton v. Atherton*, 181 U.S. 155, (1901), reversed on other grounds under *Haddock v. Haddock*, 201 U.S. 562, (1906)). The General Assembly further recognizes that both the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. \_\_\_, 123 S. Ct. 2472, (2003), and the Massachusetts Supreme Court in *Goodrich v. Department of Health*, SJC 08860, March 4, 2003-November 18, 2003, failed to consider the beneficial health effects of heterosexual marriage, as contrasted to the life-shortening and health compromising consequences of homosexual behavior, and this to the detriment of all citizens regardless of their sexual orientation or inclination.

The General Assembly hereby concludes that the Commonwealth of Virginia is under no constitutional or legal obligation to recognize a marriage, civil union, partnership contract or other arrangement purporting to bestow any of the privileges or obligations of marriage under the laws of another state or territory of the United State unless such marriage conforms to the laws of this Commonwealth.

H.B. 751, 2004 Sess. (Va. 2004).

280. See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 18 (1997) (arguing that DOMA should be struck down because it violates the Full Faith and Credit clause of the Constitution); see also Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 307-08 (1998) (asserting that DOMA is unconstitutional).

281. Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 279 (1997).

282. *Wilson v. Ake*, No. 8:04-CV-1680-T-30TBM, 2004 WL 3142528 (M.D. Fl. July 20, 2004), *argued*, *Wilson v. Ake*, 354 F. Supp. 2d 1298 (2005) (granting defendants' motion to dismiss); see Graham Brink, *Couple Sues to Recognize Gay Wedding*, ST. PETERSBURG TIMES, July 21, 2004, at 1A.

sought declaratory judgment that Florida's and the federal government's refusal to recognize their Massachusetts marriage license violated their fundamental rights of equal protection and due process, the FF&C Clause, the Privileges and Immunities Clauses, and the Commerce Clause of the U.S. Constitution.<sup>283</sup> Although the court granted defendants' motion to dismiss, proponents of the FMA use the possible success of such suits to strengthen their contention that the marriage amendment is necessary. If DOMA is struck down as unconstitutional, it is incapable of protecting states from the acts of sister states. However, even if DOMA were held unconstitutional, the FF&C clause arguably allows states to decline to recognize marriages that are against their states' public policy, providing sufficient protection to state sovereignty.<sup>284</sup>

### C. *Protecting the Federal Government from Activist States*

Although the federal government has no direct power over the marital institution, the federal government recognizes state marriages and grants many federal benefits to spouses as defined by state law.<sup>285</sup> Thus, the federal government does have an interest in the definition of state-sanctioned marriages. DOMA was enacted to protect this federal interest by denying federal recognition to same-sex marriages recognized in any state.<sup>286</sup> DOMA is arguably unconstitutional as "the Act unreasonably restricts interstate travel and is motivated by a desire to impose an undeserved burden on a disfavored group."<sup>287</sup> If found unconstitutional by

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283. *Wilson*, 354 F. Supp. 2d at 1302.

284. *See Nevada v. Hall*, 440 U.S. 410, 424 (1979) (holding that the Full Faith and Credit Clause does not require a forum state to apply another state's laws if such laws violate a legitimate public policy of the forum state); *see also Vanderbilt v. Vanderbilt*, 354 U.S. 416, 426 (1957) (Frankfurter, J., dissenting) ("It is true that the commands of the Full Faith and Credit Clause are not inexorable in the sense that exceptional circumstances may relieve a State from giving full faith and credit to the judgment of a sister State because 'obnoxious' to an overriding policy of its own"); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 264 (1998) ("If Congress does not provide for the substantive effect that state statutes should have in other states, the states would determine these matters for themselves under common-law, conflict-of-laws rules reflecting accepted relationships between independent sovereigns.").

285. *See* U.S. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004) (stating that the U.S. General Accounting Office has counted "1,138 federal statutory provisions . . . in which marital status is a factor in determining or receiving benefits, rights, and privileges"); *see also* Religious Tolerance.org, *Legal and Economic Benefits of Marriage*, at [http://www.religioustoleranc e.org/mar\\_bene.htm](http://www.religioustoleranc e.org/mar_bene.htm) (last visited July 17, 2005) (on file with the American University Law Review) (discussing some of the many federal legal rights and benefits currently unavailable to same-sex couples).

286. 28 U.S.C. § 1738C (2000).

287. Strasser, *supra* note 281, at 279; *see* Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 342 (1997) (concluding that both sections of DOMA are unconstitutional under the equal protection component of the Fifth Amendment's Due Process clause in light of *Romer v.*

the Supreme Court, a constitutional amendment is likely the only mechanism to overrule the Court's finding.

The House, fearful of this possibility, voted to approve "The Marriage Protection Act of 2004,"<sup>288</sup> which would strip federal courts of jurisdiction to hear challenges to DOMA and introduced the Congressional Accountability for Judicial Activism Act of 2004,<sup>289</sup> to allow Congress, if two thirds of each House agree, to reverse the judgments of the U.S. Supreme Court concerning the constitutionality of an Act of Congress. Opponents claim both statutes are unconstitutional as a direct violation to the jurisdictional authority granted the federal courts by the Constitution and in opposition to the centuries old Supreme Court case of *Marbury v. Madison*<sup>290</sup> and *Ex parte McCardle*.<sup>291</sup>

In sum, amending the federal constitution to set a ceiling on individual liberty and equality interests and to dictate to every state of the union that a marriage must be defined as between a man and a woman infringes upon a power exclusively retained by the states. Moreover, it prevents the states from serving their unique function of experimentation, and defies the principle of federalism. The very same conservatives who rally for states' rights<sup>292</sup> when it suits their political agenda now demand that all states treat

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*Evans*, 517 U.S. 620 (1996)).

288. See Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) (amending 28 U.S.C. § 1632 to read "[n]o court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of section 1738C of this section.").

289. H.R. 3920, 108th Cong. (2004).

290. See 5 U.S. 137, 177 (1803) (declaring that it is "emphatically the province and duty of the judicial department to say what the law is"); see also Press Release, Alan Hirsch, Williams Project, Off the Court (July 15, 2004), at <http://www.law.ucla.edu/williamsproj/press/offthecourthirsch071504.html> (on file with the American University Law Review) (noting that proponents of the bill argue that it is constitutional under Article III as the federal courts' jurisdiction is subject to "such exceptions, and under such regulations as the Congress shall make" while opponents argue that the "exceptions clause was never intended to permit stripping all federal courts of authority to hear cases arising under the Constitution or federal law, especially where fundamental rights are concerned."). See generally William G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733 (2003) (commenting on the failure of most legislative attempts to curb judicial review as reason for the heated controversies in the judicial appointments process judicial antagonists); Wilfred Feinberg, *Constraining the "Least Dangerous Branch": The Tradition of Attacks on Judicial Power*, 59 N.Y.U. L. REV. 252 (1984) (discussing legislative attempts to limit the jurisdiction of federal courts and noting that nearly all have failed).

291. 74 U.S. 506, 513-14 (1868) (detailing the first Supreme Court case interpreting Congress's power to limit the jurisdiction of the Supreme Court). See generally Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995) (examining the constitutionality of laws limiting the jurisdiction of the federal courts).

292. See CONG. REC. S7998-99 (daily ed. July 13, 2004) (statement of Sen. McCain on Senate floor during the 2004 debate over the Federal Marriage Amendment) ("The constitutional amendment we're debating today strikes me as antithetical in every way to the core philosophy of Republicans. It usurps from the states a fundamental authority they have

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gay citizens unfairly and inequitably. Moreover, every attempt by Congress to achieve the same result short of a constitutional amendment is itself arguably unconstitutional.

## CONCLUSION

The U.S. Constitution is an amazing and versatile document and has served this country well for over 200 years. The Constitution has been amended since its adoption, but successful amendments have been consistent with the spirit of the Constitution and the Framers' purposes. The FMA is not: the FMA is in direct conflict with fundamental principles for which our democracy stands: individual rights, separation of powers, and federalism. Moreover, the FMA will not protect the marital institution, instead it will enshrine bigotry and inequality in the Constitution.

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always possessed and imposes a Federal remedy for a problem that most states do not believe confronts them . . .”).