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**NAVIGATING DANGEROUS CONSTITUTIONAL
STRAITS: A PROLEGOMENON ON THE
FEDERAL MARRIAGE AMENDMENT AND THE
DISENFRANCHISEMENT OF SEXUAL
MINORITIES**

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Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.¹

"[P]reserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples.²

In his dissent in *Lawrence v. Texas*, Justice Scalia warned that the majority opinion's reasoning in that case³ effectively established the

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1. President George W. Bush, Address Before a Joint Session of Congress on the State of the Union (Jan. 20, 2004).

2. *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (emphasis in the original).

3. See *id.* at 578–79 ("The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny . . . Their right to liberty under the

legal groundwork for the judicial imposition of same-sex marriage.⁴ Some cultural conservatives, heeding Justice Scalia's warning, have launched a preemptive attack in the "culture war"⁵ against the potential use of the federal Constitution to extend marriage rights to same-sex couples.⁶ A variety of individuals and organizations, notably President George W. Bush and conservative groups such as Focus on the Family, the Christian Coalition, the Traditional Values Coalition, and Concerned Women for America, currently are urging the enactment of a constitutional amendment that would ban same-sex marriage in the United States.⁷ Indeed, some proponents of an amendment would prefer

Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. . . . As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

4. *Id.* at 604 (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."). *See also* Andersen v. King County, 2004 WL 1738447 (Wash. Super.) (stating that *Lawrence* has "obvious significance" to the present challenge of a marriage law that excludes same-sex couples). *But see* Standhardt v. Superior Court, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (rejecting "contention that *Lawrence* establishes entry in same-sex marriage as a fundamental right").

5. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (referring to "Kulturkampf" in the context of the debate over gay and lesbian civil rights); Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 TUL. J.L. & SEXUALITY 271, 299 (2003) ("In the wider American culture, 'culture wars' means something like unrestrained political and cultural combat motivated by moral righteousness, with the understanding that something vital for the survival of society is at stake.").

6. Along with the Court's opinion in *Lawrence v. Texas*, the opinion of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), legalizing same-sex marriage in Massachusetts, has raised alarm among those who oppose same-sex marriage. *See* 150 CONG. REC. S1414 (daily ed. Feb. 12, 2004) (statement of Sen. Frist (R-Tenn.)) ("Beginning on May 17 of this year, Massachusetts will begin issuing marriage licenses to same-sex couples. Once these same-sex couples sue for recognition in their home States, the wildfire will truly begin. Same-sex marriage is likely to spread to all 50 States in the coming years. So regardless of what Massachusetts does today, it is becoming increasingly clear that Congress must act and must act soon.").

7. *See* Alan Cooperman, *Christian Groups Say They Won't Give Up: Amendment's Religious Supporters See Long-Term Fight, Plan to Focus Energy on State-Level Votes*, WASH. POST, July 15, 2004, at A4 (discussing the Arlington Group, "a coalition of 53 religious organizations that have been working together to oppose same-sex marriage" and listing several members of the group and which version of an amendment they favor); Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003, at A29 (reporting that an alliance of conservative advocacy groups would "lobby for efforts already underway for an amendment to the Constitution"); *see also* Elisabeth Bumiller, *What Partisans Embrace, Politicians Fear*, N.Y. TIMES, Nov. 23, 2003, § 4 (Week in Review), at 1 (observing that "[i]n one corner are the social conservatives with their fists raised against gay marriage, girded for a new battle in the cultural wars" while "[i]n the other

a broadly worded amendment that would preclude any legal recognition of same-sex relationships including civil unions or domestic partnerships.⁸ An issue for such proponents is the political calculation that the more complete ban would seem less likely to gain broad support in the Congress and in the states. A Focus on the Family spokesman has explained that “it’s purity versus pragmatism,” with proponents of a complete ban asking “[d]o we go for everything we want, or take the best we think we can get?”⁹

An additional issue for opponents of same-sex marriage is the concern that the less sweeping and explicit the amendment the less likely it will be successful in actually proscribing same-sex marriage while preserving mixed sex marriage. In this Article, we argue that to ban state-sanctioned same-sex marriage effectively while preserving state-sanctioned marriage for mixed-sex couples, a constitutional amendment at a minimum must expressly repeal the Fifth and Fourteenth Amendments’ gender equality protections.¹⁰ The catch-22 for same-sex marriage opponents is that such an amendment, we expect and we hope, would be a political non-starter.

We begin by demonstrating that the leading Federal Marriage Amendment proposal and similar proposals are ill-fitting with our constitutional structure and inconsistent with our constitutional traditions. First, these Federal Marriage Amendments are highly intrusive of state sovereignty in an area of traditional state power and, thus, would undermine important benefits of our federal system. They would preempt state experimentation with respect to an important social and civil rights issue just as an informed national debate on the issue has begun. Second, the Federal Marriage Amendment proposals represent a decided break with the important American constitutional tradition of

corner are gays, lesbians, and their supporters, fists aimed at those who would press a constitutional amendment banning gay marriage”).

8. Cooperman, *supra* note 7 (“Some members of the Arlington Group, such as the Christian Coalition, favor an amendment that would ban same-sex marriage but not civil unions. Others, such as the Traditional Values Coalition and Concerned Women for America, want to ban both.”); Doreen Brandt, *Anti-Gay Amendment Seekers Divided Over Severity*, 365Gay.com, Nov. 29, 2003, at www.365gay.com/newscontent/112903amendment.htm (noting that “[t]wo camps appear to be emerging within the umbrella of organizations that formed to oppose same-sex marriage” and explaining that one camp’s approach would “bar gays and lesbians from marrying but allow same-sex couples to receive some benefits” whereas the “larger and more draconian camp” wishes to place “civil unions and all benefits of marriage . . . beyond the reach of gay couples”); see also Seelye, *supra* note 7 (noting that the Traditional Values Coalition “had agreed that an amendment should ban same-sex marriage, ban same-sex unions, and ban gays from receiving benefits of any such unions”).

9. Brandt, *supra* note 8.

10. See *infra* text and accompanying notes 85–148.

amending and interpreting the federal Constitution in order to draw ever more inclusive lines of equality rather than to disadvantage an unpopular minority.

Next we demonstrate that the United States Supreme Court is likely to interpret narrowly the Federal Marriage Amendment. Because a Federal Marriage Amendment would contravene the deeply embedded constitutional ideals of equal protection and due process, it would invite a narrow interpretation that might undercut its effectiveness at preserving marriage rights for heterosexual relationships only. Moreover, the Supreme Court's historical approach to integrating new amendments into the existing constitutional text suggests that the Court will not imply from the Federal Marriage Amendment the repeal of existing constitutional protections beyond what is expressly called for by the specific text of the amendment. Thus, ratification of any of the leading Federal Marriage Amendment proposals would leave the Court able plausibly to protect same-sex equality utilizing existing constitutional text. We conclude that the most likely avenue for the Court to do so is through the prohibition against invidious sex discrimination embodied in the Equal Protection Clause. For this reason, proponents of "constitutionalizing" discrimination against gay and lesbian couples may guarantee their objective only by expressly repealing the Equal Protection Clause's sex discrimination ban.

In early 2004, President Bush weighed in on the matter of a constitutional amendment with respect to same-sex marriage. In his January 2004 State of the Union address, President Bush decried "activist judges" who "have begun redefining marriage by court order."¹¹ The President called upon the Nation to "defend the sanctity of marriage."¹² Shortly thereafter, in February 2004, he called for a federal constitutional amendment to prevent any state from recognizing same-sex marriage.¹³

11. President George W. Bush, Address Before a Joint Session of Congress on the State of the Union (Jan. 20, 2004).

12. *Id.*

13. Press Release, Office of the Press Secretary, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (decrying "activist judges and local officials [who] have made an aggressive attempt to redefine marriage" and calling for a constitutional amendment limiting marriage to one man and one woman). See also Greg Hitt & Jacob M. Schlesinger, *Bush Backs Constitutional Ban on Gay Marriage*, WALL ST. J., Feb. 25, 2004, at A3. Cf. Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1224-25 (1966) (noting that "[t]he Supreme Court's 1964 decision in *McLaughlin v. Florida* seems to portend the demise in that Court of state laws forbidding interracial marriage" and decrying "the very real possibility that the Court will impose upon the country its own views of what is desirable").

Some members of Congress also have heeded the call for action: members in both the House and Senate introduced legislation proposing a constitutional amendment that would prohibit same-sex marriage as a matter of federal law.¹⁴ This amendment, authored and introduced by Representative Marilyn Musgrave (R-CO) in the House and by Senator Wayne Allard (R-CO) in the Senate (the "Musgrave/Allard Amendment"), would ban any federal or state judicial or legislative recognition of same-sex marriage and would purport to preclude judicial interpretation of the federal or state constitutions in a manner that would require provision of equal treatment between married and same-sex couples.

In relevant part, the Musgrave/Allard Amendment provided that "Marriage in the United States shall consist only 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."¹⁵ Advocates of a broader amendment wished to add a third sentence to the amendment providing that "[n]either the federal government nor any state shall predicate benefits, privileges, rights or immunities on the existence, recognition or presumption of non-marital sexual relationships."¹⁶

In July 2004, the Senate took up debate on a proposed constitutional ban on same-sex marriage. After more than three days of debate, proponents of the Musgrave/Allard Amendment failed to win the

For reasons that he has never explained, President George W. Bush, in the eleventh hour of his re-election campaign, endorsed the concept of civil unions for same-sex couples. "I don't think we should deny people rights to a civil union, a legal arrangement, if that's what a state chooses to do so." *On the Record*, WASH. BLADE, Oct. 29, 2004, at 44, available at www.washblade.com/advertising/eTearsheets/pdf/10-29-2004/044.pdf (reporting and quoting President Bush's comments on ABC's *Good Morning America* program on October 26, 2004). In this regard, "he disagreed with the Republican Party platform, which opposes civil unions." *Id.*

14. See H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003); S.J. Res. 30, 108th Cong. (2004).

15. S.J. Res. 30, 108th Cong. § 2 (2004). On March 22, 2004, the key sponsors of the version of the Federal Marriage Amendment then pending before Congress announced that they had decided to replace the pending version with a reworded proposed amendment in order to clarify that the amendment would not ban states from adopting legislation that would establish civil unions. Alan Cooperman, *Same-Sex Marriage Ban Being Retooled*, WASH. POST, Mar. 23, 2004, at A4; H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003); see also S.J. Res. 30, 108th Cong. (2004). President Bush has endorsed this amending language. See Cooperman, *supra* note 15 (reporting comments of White House spokesperson that President Bush "concurs with the new wording" of the revised Federal Marriage Amendment proposed on March 22, 2004 by Sen. Wayne Allard (R-CO) and Rep. Marilyn Musgrave (R-CO)).

16. Brandt, *supra* note 8.

necessary sixty votes to limit debate and allow a direct vote on the amendment. Indeed, the vote on cloture was 50–48 against forcing a vote.¹⁷

In September 2004, the House of Representatives did vote on the Musgrave/Allard Amendment. The vote was 227–186 in favor of the amendment.¹⁸ Thus, proponents fell well short in the House of the two-thirds majority needed to approve the amendment.

Proponents of a Federal Marriage Amendment have vowed to continue to press for it, just as proponents of same-sex marriage will continue to press for both legislative and judicial recognition of marriage rights for same-sex couples.¹⁹ As Representative Tom Delay (R-TX), the GOP's Majority Leader in the House of Representatives, has vowed: "we will be back. And we will be back. And we will be back. We will never give up. We will protect marriage in this country."²⁰ DeLay suggests that the same-sex marriage issue "is going to be huge" in the future and has promised to bring the proposed amendment up for another vote in 2005.²¹

We suspect that the debate over such an amendment will flare up each time a court rules that a state constitution requires that the state sanction same-sex marriage.²² And we suspect that support for such an

17. 150 CONG. REC. S8090 (daily ed. July 14, 2004). See also Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, Jul. 15, 2004, at A1; Helen Dewar, *Ban on Gay Marriage Fails; Senate Vote on Amendment Is a Defeat for Bush*, WASH. POST, July 15, 2004, at A1.

18. 150 CONG. REC. H7933 (daily ed. Sept. 30, 2004). See also Helen Dewar, *House Rejects Same-Sex Marriage Ban*, WASH. POST, Oct. 1, 2004, at A27.

19. See Cooperman, *supra* note 7 ("Despite a defeat in the Senate yesterday, evangelical Christian groups said they would continue to push for a constitutional amendment to ban same-sex marriage, but some predicted that it would be a 10-year battle."); Dewar, *supra* note 17 (reporting comments of Senate Majority Leader Bill Frist (R-Tenn.) ("This issue is not going away") and Senator Jeff Sessions (R-Ala.) ("We will be back again and again")); Hulse, *supra* note 17 (reporting that after the July 2004 Senate vote "proponents [of a constitutional amendment have] pledged to continue to push the idea, arguing that they have the support of mainstream Americans" and reporting the comments of President Bush: "Activist judges and local officials in some parts of the country are not letting up in their efforts to redefine marriage for the rest of America and neither should defenders of traditional marriage flag in their efforts."); Sheryl Gay Stolberg, *Same-Sex Marriage Amendment Fails in House*, N.Y. TIMES, Oct. 1, 2004, at A12 (reporting that "[t]he measure's supporters vowed to keep up their drive against same-sex marriage" and reporting the comments of supporters suggesting the same).

20. 150 CONG. REC. H7924 (daily ed. Sept. 30, 2004) (statement of Sen. DeLay). See also Carolyn Lochhead, *Gay Republican Castigates Party Over Marriage Vote*, S.F. CHRON., Oct. 1, 2004, at A3.

21. *We Don't*, U.S. NEWS & WORLD REP., Oct. 11, 2004, at 14.

22. See Dewar, *supra* note 17 (quoting the president of the "Alliance for Marriage" as stating "Our amendment will continue to gain ground so long as activists continue to strike down our marriage laws in court.").

amendment will greatly increase when and if a federal court rules that the federal Constitution requires that a state must sanction a same-sex marriage contracted within its borders or must grant recognition to a same-sex marriage contracted within a sister state.²³

Of great concern to some with respect to the Musgrave/Allard Amendment and similar amendment proposals that are being bandied about is the incursion on state sovereignty in an area of traditional state power that these Federal Marriage Amendment proposals would represent.²⁴ The Musgrave/Allard Amendment is remarkably intrusive

23. See Tom Curry, *Gay Marriage Vote Appears Doomed: Senate Leaders Unable to Agree on Procedure*, MSNBC, July 13, 2004, at <http://msnbc.msn.com/id/5416297> (quoting Senator Susan Collins (R-ME) as stating "I support the federal Defense of Marriage Act, which protects the traditional right of states to determine for themselves what constitutes marriage. . . . As long as this law is on the books, I see no need for a Constitutional Amendment.").

On July 22, 2004, the House of Representatives approved (233 to 194) a bill (the Marriage Protection Act) that would strip federal courts of jurisdiction to consider the constitutionality of the portion of the Defense of Marriage Act that provides that states may choose not to recognize a same-sex marriage contracted in a sister state. 150 CONG. REC. H6612 (daily ed. July 22, 2004). See also Richard Simon, *House OKs Bill to Limit Federal Court Rulings on Gay Marriage; The Legislation Would Protect States' Right to Decide Whether to Accept Out-of-State Unions*, L.A. TIMES, July 23, 2004, at A18. Cf. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1402 (1953) (expressing strong reservations about the use of jurisdiction-stripping measures to limit federal courts from effectively enforcing disfavored constitutional rights); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 131-33 (1981) (describing constitutional theory behind jurisdiction stripping schemes and questioning whether these approaches comport with either *Marbury* or traditional understandings of the separation of powers).

24. See e.g., Christopher Cox, *The Marriage Amendment Is a Terrible Idea*, WALL ST. J., Sept. 28, 2004, at A22 (opinion article of U.S. Representative Christopher Cox (R-CA) voicing concerns about the Federal Marriage Amendment as a federal intrusion into family law and related areas: "For Republicans, who believe in federalism, the FMA is an uncomfortable fit. . . . [T]his principle must be observed if our system of government is to function properly."); Hulse, *supra* note 17 (reporting comments of Senator John McCain (R-AZ) in opposing the Musgrave/Allard Amendment that the amendment is "'antithetical in every way to the core philosophy of Republicans' because it interfered with states rights" in an area traditionally thought of as a state function).

We suspect and readily concede that some of those making federalism-based arguments in the same-sex marriage context are result-oriented rather than being motivated by doctrinal purity. See Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999) (arguing that "federalism will be selectively invoked by courts only when ideologically convenient, so that it has no authentic restraining power of its own"); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429 & 474 n. 302 (2002) (arguing that the Rehnquist Court "has moved aggressively to advance federalism . . . [yet] it frequently proves more substantively conservative than it does pro-federalism when deference to state processes would shield liberal outcomes from federal reversal" and also noting that "judicial liberals' invocation of constitutional federalism tends to be comparably strategic or result-oriented"); R. Randall

in an area of traditional state sovereignty.²⁵ It would not merely constitutionalize the Defense of Marriage Act ("DOMA"),²⁶ but also would partially displace the traditional role of the states in regulating marriage. DOMA defined marriage for all federal purposes (such as, for example, for social security benefits)²⁷ and attempted to ensure that no state would be forced under the Full Faith and Credit Clause against its will to recognize a same-sex marriage legally contracted in a sister state.²⁸ In contrast, the Musgrave/Allard Amendment would preclude any state from voluntarily recognizing as valid a same-sex marriage contracted within its own borders and in accordance with its own marriage laws. And, as noted earlier, some variations of the proposed Federal Marriage Amendment go even further and seek to preclude *any* legal recognition, at the federal or state level, of same-sex relationships.

Since the framing of the federal Constitution in 1787 and continuing to the present, substantive family law matters have been reserved largely to the states.²⁹ An amendment removing from the states the power to

Kelso, *A Post-Conference Reflection on Federalism, Toleration, and Human Rights*, 40 S. TEX. L. REV. 811, 811-812 (1999) (commenting that "the political losers at the national level often advocate and support the value of federalism" but conversely that "[t]he winners at the national level typically like centralized authority" and citing examples from Mexico, South Africa, Serbia, the United States, and the former Soviet Union). We think this does not detract from the force of our state-sovereignty-centered arguments.

25. Indeed, former Senator Alan Simpson (R-WY) has publicly argued against the Musgrave/Allard Amendment, suggesting that "it would unnecessarily undermine one of the core principles I have always believed the GOP stood for: federalism." See Alan Simpson, *Missing the Point on Gays*, WASH. POST, Sept. 5, 2003, at A21. Simpson notes that "[i]n our system of government, laws affecting family life are under the jurisdiction of the states, not the federal government, which is as it should be." *Id.*

26. See The Defense of Marriage Act, 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2000).

27. See 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife.").

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

29. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (noting that "domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States"); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."). But see Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541 (1998) (discussing ways in which family law has become increasingly federalized); Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 227 (asserting that "[i]ncreasingly, for publicly governed families, the laws being applied are generated by the national government" and that "[t]he shift toward national control

include same-sex couples within their marriage laws would be a radical departure from this traditional respect for state sovereignty.

As the Rehnquist Court has frequently reminded us, our federal system of government is a bulwark of liberty.³⁰ The Framers created discrete spheres of power for the federal and state governments to protect citizens from arbitrary or tyrannical government; they achieved this objective by dividing and separating government power and by providing for laboratories of experimentation in the states. As Professor John Yoo has argued, our federal system creates a kind of market for law that encourages the states to “bid” for citizens by enacting a particular basket of positive rights and duties.³¹ Consistent with this position, Professor Yoo has urged rejection of a federal marriage amendment because “[b]y nationalizing marriage policy, the FMA undermines the benefits of federalism, such as decisionmaking by local governments closer to the people and competition among jurisdictions offering a diversity of policies.”³²

A meaningful commitment to federalism necessarily implies that different states will reach different outcomes on various questions of public and private morality. Do you desire access to legalized prostitution? Well, Nevada is the place for you!³³ How about corporate laws that minimize shareholder input and maximize management’s de facto control over the corporate entity? Delaware can handle it!³⁴

is most notable in the elaborate new federal mandates concerning child support enforcement”).

30. See *New York v. United States*, 505 U.S. 144, 168 (1992) (noting that “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished”); see also *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.”).

31. See John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 *IND. L. REV.* 27, 31–32, 36–37, 42–43 (1998); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 *S. CAL. L. REV.* 1311, 1392–1404 (1997).

32. John C. Yoo & Anntim Vulchev, *The Conservative Case Against the Federal Marriage Amendment*, *ISSUES IN LEGAL SCHOLARSHIP*, Aug. 2004, at <http://www.bepress.com/ils/iss5/art3/>.

33. See *NEV. REV. STAT. ANN.* §§ 201.310 et seq. & 244.345 (Michie 1995); see also Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 *YALE J.L. & FEMINISM*, 69, 84–90 (1998) (discussing history and legal regime governing state-sanctioned prostitution in Nevada); Owen D. Jones, *Sex, Culture, and the Biology of Rape*, 87 *CAL. L. REV.* 827, 928 n.352 (1999) (noting existence of legalized prostitution in Nevada).

34. See *Del. Code Ann. tit. 8* §§ 101 et seq. (2003 & supp. 2005); see also William L. Carey, *Federalism & Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663, 663–64 (1974); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 *NW. U. L. REV.* 913, 915 (1982); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 *TEX. L. REV.* 469, 474, 476 (1987); Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 *HARV. L. REV.* 1480,

Would you like the option of physician assisted suicide should you become terminally ill? Oregon permits this practice.³⁵

In short, states can and do adopt different sorts of police power laws that regulate to protect the public health, safety, and morals. The regulation of marriage is a classic police power issue that, as an historical matter, has been vested with the states.³⁶ To federalize the regulation of this area of family law would create a troubling precedent. If the national government's newly discovered interest in protecting the sanctity of marriage is sufficient to preempt state freedom to offer same-sex marriage, this argues in favor of national preemption in other areas of family law (such as divorce or child custody) and potentially in a host of other areas traditionally left to state control—such as education, gambling, or corporate law.³⁷

What troubles us most about the proposed Federal Marriage Amendment, however, is not simply that it would remove from state control an issue traditionally reserved to the states. We are not troubled, for example, by *Loving v. Virginia*, in which the Supreme Court in essence held that the Fourteenth Amendment's Due Process and Equal Protection Clauses removed from state control the issue of whether or not to allow interracial marriage.³⁸ Rather, what we find particularly troubling with respect to the Federal Marriage Amendment as it concerns state sovereignty is that it seeks to preempt states from expanding same-sex equality before there has been an extended national debate on this

1481 n.14 (2002).

35. See The Oregon Death with Dignity Act, OR. REV. STAT. 127. 800 (2003); see also Patrick M. Curran, Jr., Note, *Regulating Death: Oregon's Death With Dignity Act and the Legalization of Physician-Assisted Suicide*, 86 GEO. L.J. 725, 729 (1998); Joseph Cordaro, Note, *Who Defers to Whom? The Attorney General Targets Oregon's Death with Dignity Act*, 70 FORDHAM L. REV. 2477, 2478 (2002).

36. See *U.S. v. Morrison*, 529 U.S. 598, 615–16 (2000) (“Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy is undoubtedly significant.”); *Maynard v. Hill*, 125 U.S. 190, 205, 210–11 (1888) (“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”); Reva B. Siegal, “*The Rule of Love*”: *Wife Beating as Prerogative*, 105 YALE L.J. 2117, 2201–05 (1996) (discussing the history and justifications for state control over family law, including the rules regulating marriage, and noting that “[t]he conviction that marriage is a matter for states to regulate can also be traced to efforts to protect the common law of marital status from reform in the aftermath of the Civil War, an era when Congress was first beginning to exercise its new power to regulate race discrimination in the states”); Note, *American Wedding: Same-Sex Marriage & the Miscegenation Analogy*, 73 B.U. L. REV. 93, 95 (1993) (“Marriage regulation is traditionally the province of state legislatures.”).

37. See *supra* text and accompanying notes 32–34.

38. See *Loving v. Virginia*, 388 U.S. 1, 2, 11–12 (1967).

issue and before an informed national consensus on this issue has formed.³⁹

More generally, and to us more importantly, the Federal Marriage Amendment (in whatever ultimate form) would represent a decided, and we think unfortunate, break with our constitutional traditions in that the U.S. Constitution historically has developed, both by amendment and by judicial interpretation, in ways that draw ever more inclusive lines of equality⁴⁰: since the Constitutional Convention in 1787, efforts to amend

39. See Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 743 (2003) (arguing that "perhaps the greatest risk to dissident progressive interests is the possibility of national action precipitously and uniformly repudiating those interests on a preemptive, nationwide basis before they gain a foothold anywhere"). The United States Supreme Court's several decisions addressing the United States Constitution's impact on state laws regulating the right to marry complicate the argument that the Federal Marriage Amendment should be rejected because it represents a federal intrusion into a traditional sphere of state sovereignty. See *Loving*, 388 U.S. at 12-13 (1967) (holding that Virginia statutes criminalizing and voiding interracial marriage violated Equal Protection and Due Process Clauses of United States Constitution); *Zablocki v. Redhail*, 434 U.S. 374, 375-77 (1978) (holding that Wisconsin statute prohibiting certain individuals who owed child support from marrying violated Equal Protection Clause of United States Constitution); *Turner v. Safley*, 482 U.S. 78, 81, 82, 97-99 (1987) (holding that Missouri regulation prohibiting a prison inmate from marrying without approval of prison superintendent impermissibly burdened the constitutionally protected right to marry). Moreover, the state sovereignty argument might be used to undermine same-sex equality if and when a federal court holds that the federal Constitution compels the states to recognize same-sex marriage. For a debate on the wisdom of progressives utilizing states' rights arguments to advance progressive causes, compare Marc Spindelman, *A Dissent from the Many Dissents from Attorney General Ashcroft's Interpretation of the Controlled Substances Act*, 19 ISSUES L. & MED. 3, 41 (2003) ("Those familiar with the political lineage of states' rights should not be taken aback by the idea that defending Oregon's assisted suicide law in the name of the states' authority to control medical practice doesn't bode well for liberal goals.") with Clark, *supra*, at 723 (arguing that "[t]he success of the gay rights movement in certain regions, and serious vulnerability at the national level, suggests that support for a strong central government and opposition to federalism or local control might be contrary to the cause" of gay and lesbian equality); see also *id.* at 757 ("From the perspective of gay dissident progressives seeking safe harbor amid alternating national impulses toward tolerant indifference and pointed hostility, a conventionally progressive call for broad national power and increased centralization of public policy may have little appeal. A theory of progressive federalism may suit our needs for havens where we can organize a life around our own values and beliefs, however dissident.").

40. Indeed, one of the most powerful contemporary justifications for the power of judicial review rests on promotion of the equality project. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Professor Ely posits "representation reinforcement" as both a justification for and a substantive goal of judicial review of executive and legislative actions. See Ely, *supra*, at 75-77, 87-88, 101-103. See generally *id.* at 135-79 (explaining the operation of a process-oriented review wherein courts fix the system/democratic process when it malfunctions). Because one cannot reasonably rely on the democratic process routinely to protect the interests of "discrete and insular" minorities, federal courts should scrutinize enactments or actions burdening such minorities with particular care. See *id.* at 116-17; see also John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 469 (1978) (stating that before *Carolene Products*, the Supreme

the Constitution have been based on the notion that the document was insufficiently protective of basic human rights. Most importantly, beginning with the post-Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), the citizenry expanded the nation's core notions of equality to prohibit the use of race as a basis for withholding citizenship or extending only a second class form of citizenship to persons on account of race.

The project of defining equality, however, remained incomplete. Authoritative interpretations of the Equal Protection Clause excluded women—and gender-based classifications—from the sphere of equality protected by the concept of “equal protection of the laws.” The Nineteenth Amendment, ratified in 1920, partially remedied this omission, and subsequent Justices came to understand the Equal Protection mandate more broadly. Beginning in the 1970s and certainly by the early 1980s, the Fourteenth Amendment itself came to be generally understood to protect citizens against invidious discrimination based on gender.⁴¹

Court suggested that “at least in some situations judicial intervention becomes appropriate when this expectation appears to have been betrayed and the existing processes of representation seem inadequately fitted to the protection of deserving minority interests”). In *Carolene Products*, the Supreme Court itself noted that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” 304 U.S. at 153 n.4. All of this helps to establish the primacy of equality as both a principal objective of the Constitution and also as an important theoretical justification for the power of judicial review. The federal courts should use the Constitution, and the promise of equal protection in particular, to correct the structural failure of democratic self-government to ensure that minorities receive fundamentally fair treatment.

41. The Supreme Court first applied the Equal Protection Clause to invalidate a gender-based government classification in *Reed v. Reed*, 404 U.S. 71 (1971). Writing for a unanimous Court, Chief Justice Burger applied a standard of rationality to an Idaho statute that categorically preferred men over women for appointment as estate administrators: “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” *Id.* at 76–77 (quoting *Royster v. Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The *Reed* Court found that Idaho’s absolute preference for male administrators “is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.” *Id.* at 76. Two years later, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), Justice Brennan, in a plurality opinion, argued that gender-based classifications are inherently suspect and, accordingly, merit strict judicial scrutiny. *Id.* at 688. After detailing the pervasive and deep-seated use of gender stereotypes to subordinate women socially, politically, and economically, Justice Brennan opined that “we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.” *Id.* at 688; see *id.* at 684–87. Justice Stewart merely concurred in the judgment, “agreeing that the statutes before us work an invidious discrimination in violation of the Constitution.” *Id.* at 691 (Stewart, J., concurring). Similarly, Justice Powell, joined by Chief Justice Burger and Justice

Other amendments, less dramatic and sweeping in scope, also have expanded the domain of constitutionally protected equality. The Twenty-Third Amendment, for example, extended voting rights in

Blackmun, concurred, objecting specifically to Justice Brennan's proposed standard of review. *Id.* at 691–92 (Powell, J., concurring) (“It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding.”). Accordingly, Justice Brennan was unable to garner a majority for his preferred standard of review (i.e., strict scrutiny).

In subsequent cases during the 1970s, the Justices fought a protracted and inconclusive battle over the proper standard of review for gender-based classifications. For example, in *Craig v. Boren*, 429 U.S. 190 (1976), Justice Brennan proposed an intermediate scrutiny standard for such classifications: “[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* at 197. Although four members of the Court joined Brennan's opinion, three of them, Justices Powell, Stevens, and Stewart, all concurred specially and rejected intermediate scrutiny as the appropriate standard. *See id.* at 210 (Powell, J., concurring) (expressing “reservations as to some of the discussion concerning the appropriate standard for equal protection analysis” and endorsing *Reed*'s “more critical examination” approach); *id.* at 211–12 (Stevens, J., concurring) (arguing that “[t]here is only one Equal Protection Clause” and that “[i]t requires every State to govern impartially”); *id.* at 214–15 (Stewart, J., concurring) (declaring that the Oklahoma statute “amounts to total irrationality” and therefore “amounts to invidious discrimination” under *Reed*). Cases decided in the late 1970s and early 1980s failed to follow the intermediate scrutiny standard reliably. *See, e.g.,* Michael M. v. Superior Court, 450 U.S. 464, 468 (1981) (plurality opinion) (noting that “[a]s is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications” and applying an enhanced rationality test); *id.* at 489 n.2 (Brennan, J., dissenting) (“None of the three opinions upholding the California statute fairly applies the equal protection analysis this Court has so carefully developed since *Craig v. Boren*, 429 U.S. 190 (1976).”); *Parham v. Hughes*, 441 U.S. 347, 352, 354 (1979) (plurality opinion) (arguing that prior cases establish “the principle that a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class” and describing proper standard of review as whether “the varying treatment of different groups of persons [based on gender] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational”); *cf. id.* at 359 (Powell, J., concurring) (rejecting plurality's standard of review and positing that “[t]o withstand judicial scrutiny under the Equal Protection Clause, gender-based distinctions must ‘serve important governmental objectives and must be substantially related to achievement of those objectives’”) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). In 1982, however, a clear majority of the Court, led by Justice O'Connor, endorsed the intermediate scrutiny standard of review. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–26 (1982) (holding that Equal Protection Clause requires government to justify use of gender-based classifications by establishing that classification bears a substantial relationship to an important government interest). Since *Hogan*, the Supreme Court routinely has applied intermediate level scrutiny to gender-based classifications. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 531–33 (1996) (characterizing government's burden when attempting to justify a gender-based classification as duty to proffer an “exceedingly persuasive” justification and stating that this requires establishing that the classification bears a substantial relationship to an important government interest); *see generally* Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1 (1976) (discussing justifications for applying heightened scrutiny to gender-based classifications).

presidential elections to citizens of the District of Columbia; the Twenty-Fourth Amendment abolished the use of poll taxes for federal elections; and the Twenty-Sixth Amendment lowered the voting age for state and federal elections to eighteen (thereby making it correspond to the age at which young men could be drafted into the military service and sent to fight in Vietnam). Although the relative importance of these amendments pales in comparison to the significance of the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments, they reflect a continued and virtually unbroken practice of expanding—not contracting—the scope of the Constitution's guarantee of equal treatment.

The Eighteenth Amendment, which established Prohibition, is the single counter-example to this overall trend.⁴² Ratified in 1919, it survived for less than fifteen years before being repealed by operation of the Twenty-First Amendment in 1933. Because of its relatively quick demise (to say nothing of the widespread non-compliance with Prohibition while it was in force), the Eighteenth Amendment provides a poor precedent for the Federal Marriage Amendment proposals. More importantly, the Eighteenth Amendment did not aim to contract liberty in matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”⁴³ It cannot be used comfortably as precedent, therefore, for the Federal Marriage Amendment proposals, which seek to contract the protections

42. To be sure, other constitutional amendments arguably curtailed liberty, albeit in a significantly less direct fashion than the Eighteenth Amendment. For example, the Sixteenth Amendment, ratified in 1913, which permits Congress to lay and collect direct taxes on personal income, without apportionment among the states, U.S. CONST. amend. XVI, facilitated the loss of property (i.e., the property used to meet personal income tax obligations). *See id.* Similarly, the Eleventh Amendment, which limited the jurisdiction of the Article III courts by excluding “suit[s] in law or equity” if brought against a state by “Citizens of another State, or by Citizens or Subjects of any Foreign State,” precluded would-be federal court litigants from bringing suits in federal, as opposed to state, court. U.S. CONST. amend. XI; *see also* *Hans v. Louisiana*, 134 U.S. 1, 9–11, 21 (1890) (extending state sovereign immunity to include suits brought against a state by its own citizens, notwithstanding the lack of a textual predicate for such an extension). Neither of these amendments, however, directly established a particular social policy or purported to resolve a specific question of social morality—which the Eighteenth Amendment, by way of contrast, attempted to accomplish. One also could posit that the Civil War Amendments curtailed liberty—the liberty of slave owners and those who directly benefited from the practice of human chattel slavery. But these amendments, the Thirteenth, Fourteenth, and Fifteenth Amendments, did so by directly expanding the liberty of the Freedmen. By way of contrast, the Eighteenth Amendment did not expand anyone's liberty—teetotalers were free to abstain before ratification of the Eighteenth Amendment and remained so after its repeal through ratification of the Twenty-First Amendment; only the liberty of tipplers was at issue.

43. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

of the federal and state constitutions for intimate family relations.⁴⁴

We begin, then, with the observation that the Federal Marriage Amendment proposals represent a break with both the American tradition of expanding the scope of protected equality and with the tradition generally respecting state control over domestic relations. Suppose, however, that neither of these objections proves persuasive to proponents of the Federal Marriage Amendment. Suppose that the amendment's proponents value prohibiting formal legal recognition of same-sex unions more highly than respecting traditions of expanding equality and traditions of reserving police power questions to the states. Would a Federal Marriage Amendment actually have the desired effect of preserving heterosexual marriage while precluding any meaningful judicial recognition of same-sex relationships? In our view, arguably it would not.

The ideals of equal protection of the laws and due process are deeply embedded in the Constitution, from the initial insistence on inclusion of the Bill of Rights through subsequent expansion of the meanings of equality and due process. An amendment that would challenge the substance of existing constitutional protections and the process of flexible expansion of such rights both flies in the face of the substantive tradition of constitutional amendment and invites narrow interpretations that would undercut the purposes of such an amendment in order to incorporate it into the large body of constitutional interpretation. Precisely because such an amendment would conflict with likely interpretations of such basic rights as equal protection and due process without expressly repealing the Equal Protection Clause or Due Process Clause, it would pose unique challenges for constitutional interpretation.

In Part I of this Article, we explore the Supreme Court's approach to integrating new amendments into the existing constitutional text. Some general principles suggest that the most prominent Federal Marriage Amendment proposals, as written, would not necessarily achieve their objectives. For example, the Supreme Court has refused to imply from later amendments the repeal of constitutional rights absent express language calling for that result. In addition, the adoption of an

44. It bears emphasis that the Eighteenth Amendment represents the only constitutional amendment that sets out to restrict or repeal pre-existing legal rights. As former Senator Alan Simpson has argued, "it is surely not the tradition in this country to try to amend the Constitution in ways that restrict liberty." Simpson, *supra* note 25. As he has noted, "[a]ll of our amendments have been designed to expand the sphere of freedom, with one notorious exception: prohibition" and "[w]e all know how that absurd federal power grab turned out." *Id.*

amendment directly addressing a particular subject has not precluded the Court from using another amendment to expand rights beyond the limits of the more specific amendment. Finally, there are such broad, open-ended clauses in the federal Constitution that precluding recognition or protection of same-sex couples would require the adoption of a much more broadly worded amendment than any current version of the Federal Marriage Amendment represents.

In Part II of this Article, we apply these principles to a discussion of the effect of two proposed versions of the Federal Marriage Amendment. We conclude that these principles suggest that when confronted with an amendment that discriminates on the basis of gender, the Supreme Court plausibly might interpret the amendment narrowly so as to harmonize the amendment to the greatest extent possible with a Constitution that calls for equal protection and due process. We also conclude that these principles of constitutional interpretation suggest that a future Supreme Court, when so inclined, would be able to utilize the Equal Protection Clause to ensure equality for same-sex couples despite adoption of either version of the Federal Marriage Amendment.

With respect to the Musgrave/Allard Amendment, for example, a future Court, when confronted with an amendment that purports to proscribe judicial compulsion of same-sex marriage or the incidents thereof, would still be free to order that the state choose between providing the incidents of marriage to all couples regardless of sex and providing the incidents of marriage to none. Note that this remedy does not, as a technical matter, require that the state confer the legal incidents of marriage on same-sex couples. The state would be free to stop discriminating by withdrawing the incidents of marriage from mixed-sex married couples.

Alternatively, the Court might hold that a separate but equal scheme in which the state sanctions mixed-sex marriage but bans same-sex marriage is inherently unequal and in violation of the Fourteenth Amendment's Equal Protection Clause, regardless of whether or not the state offers the incidents of marriage under a different name to same-sex couples. The principles of constitutional interpretation that we discuss in Part I suggest that the Court, when confronted with an amendment that expressly defines marriage in the United States as only between one man and one woman, could then order the state out of the business of sanctioning marriage.⁴⁵

45. Between August and November 2004, thirteen states amended their constitutions to ban state recognition of same-sex marriages. See Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39; Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16. The states include Arkansas,

In order for those opposed to equal rights for same-sex couples to ensure that the state continues to sanction mixed-sex marriage and only mixed-sex marriage, they must do more than establish a prohibitory amendment targeting “marriage” for special protection. Indeed, in Part III of the Article, we argue that in light of the principles of constitutional interpretation we discuss, nothing short of an amendment that expressly repeals in part the Equal Protection and Due Process Clauses of the Fourteenth Amendment might do. This drastic step—repealing the protections of the Equal Protection and Due Process Clauses—is, of course, what the proponents of a Federal Marriage Amendment implicitly have proposed.

To be clear, we do not wish to see any repeal of the Fourteenth Amendment’s Equal Protection and Due Process Clauses. And we believe that any attempt to expressly repeal in part the Fourteenth Amendment’s Equal Protection and Due Process Clauses would be wildly unpopular politically. We urge a truth-in-amending approach because we believe the American people should know what, at its essence, the proponents of a Federal Marriage Amendment really hope to achieve. And we believe that absent such truth-in-amending, the Supreme Court would be entirely justified in reading a Federal Marriage Amendment as narrowly as possible to leave intact the full force of the Fourteenth Amendment’s guarantees of due process and equal protection.

Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. Cooperman, *supra*. Eight of these state constitutional amendments also banned state recognition of civil unions or domestic partnerships. See Liptak, *supra* (“Eight of the 11 new state amendments address both gay marriage and civil unions.”); Cooperman, *supra* (“The wording of amendments varies widely. In four states—Montana, Mississippi, Missouri, and Oregon—the language applies only to same-sex marriage. In the rest of the states [Arkansas, Georgia, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, and Utah], it also could bar civil unions or domestic partnership arrangements that confer health insurance, hospital visitation rights and other benefits on same-sex couples.”). These states join Alaska and Nevada, which previously had adopted state constitutional amendments banning state recognition of same-sex marriage, and Nebraska, which previously had adopted a state constitutional amendment banning both same-sex marriage and civil unions and domestic partnerships. Although the tradition of interpreting a particular state constitution might well depart from the federal example, the same judicial responses to a state amendment banning same-sex marriage might still be available: a constitutional ban on same-sex marriage might not preclude arguments premised on provisions in state constitutions guaranteeing due process, equal protection, or protections against sex discrimination.

I. INTEGRATING CONSTITUTIONAL AMENDMENTS INTO EXISTING CONSTITUTIONAL TEXT

The Supreme Court's approach to the interpretive task of integrating new amendments into the nation's Foundational Document reveals that new amendments must be very specific to ensure that the Justices construe them to repeal pre-existing constitutional rights. Moreover, the presence of a specific amendment addressing a particular topic does not appear to invalidate claims related to that topic arising under other, more general constitutional provisions.

Why this should be so as a matter of constitutional interpretation is far from clear. As a general rule of statutory interpretation, an enactment later in time, addressing a specific question, should control over an older enactment, treating the subject matter more generally.⁴⁶ Regardless of whether the Supreme Court's approach is the most logical one (at least from a statutory interpretation point of view), this methodology has held true with respect to the effects of several amendments. Below we illustrate this methodology with the cases of the Twenty-First, Nineteenth, and Twenty-Fourth Amendments.

A. The Case of the Twenty-First Amendment

The Supreme Court has a history of reading new amendments

46. See HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 53, at 116–18 (1896) (stating canon that specific statutes control over more general statutes); *id.* at § 135, at 363–64 (stating that statutes should be harmonized when possible, but “if there is an irreconcilable repugnancy between different parts or sections, that which was last adopted or enacted must prevail”); EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 137, at 196–97 (1940) (explaining that when statutory texts conflict, the last enacted provision should control “on the ground that the last expression of the legislative will should prevail”); *id.* at § 230, at 429–30 (stating that when statutes conflict, the more specific statute should govern over the more general statute, because “the specific statute more clearly evidences the legislative intent than the general statute does”); see also WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 43, 229, 232 (1994) (stating rule that specific statute controls over more general statute and critiquing cases applying the rule); *id.* at 278–79 (describing and characterizing canons of statutory construction as being textual, substantive, or related to the treatment of extrinsic sources); KENT GREENAWALT, STATUTORY INTERPRETATION: 20 QUESTIONS 201–11 (1999) (describing and critiquing the canons of statutory interpretation); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1991) (Scalia, J., concurring in part and concurring in the judgment) (stating and applying canons). For a classic and trenchant critique of the canons of statutory construction, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are to Be Construed*, 3 VANDERBILT L. REV. 395, 401–406 (1950). For a more sympathetic treatment of the canons of statutory interpretation, see JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY 24–29, 44–47 (1996).

narrowly. Take, for example, the Twenty-First Amendment. The Twenty-First Amendment repealed Prohibition, but authorized states to regulate alcoholic beverages: “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”⁴⁷ On its face, this language seems to authorize broad state regulation of the use and consumption of alcoholic beverages.

Yet, in *Bacchus Imports, Ltd. v. Dias*,⁴⁸ the Supreme Court found that Hawaii could not favor locally-produced alcoholic beverages over those produced in other states or nations. “State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.”⁴⁹ The dormant Commerce Clause, a function of Article I, § 8, cl. 3, prohibits taxes or regulations that facially discriminate against interstate or international commerce.⁵⁰ The most logical interpretation of the Twenty-First Amendment, which was enacted in 1933 (almost 150 years after Article I, § 8, cl. 3), would be that it empowers states to regulate alcoholic beverages comprehensively. But the Supreme Court has not seen it that way.

Similarly, in *44 Liquormart, Inc. v. Rhode Island*,⁵¹ the Supreme Court roundly rejected the suggestion that states could regulate alcohol advertising more aggressively than other kinds of advertising because of the Twenty-First Amendment. Justice Stevens, writing for the Court, declared that the Twenty-First Amendment did not work a pro tanto repeal of the First or Fourteenth Amendments: “the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.”⁵² In other words, the scope of state authority under section two of the Twenty-First Amendment has been read narrowly—it is modified by other, pre-existing constitutional provisions, rather than controlling over

47. U.S. CONST. amend. XXI, § 2.

48. 468 U.S. 263 (1984).

49. *Id.* at 276.

50. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574–77 (1997) (invalidating, on dormant Commerce Clause grounds, a Maine property tax scheme that favored Maine charities serving in-state, rather than out-of-state, residents); *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988) (invalidating, on dormant Commerce Clause grounds, an Ohio tax scheme that granted tax benefits based on state of origin of ethanol); *Bacchus Imports, Ltd.* 468 U.S. at 268 (invalidating, on dormant Commerce Clause grounds, a discriminatory excise tax exemption that favored alcoholic beverages produced in state over those produced out-of-state).

51. 517 U.S. 484 (1996).

52. *Id.* at 512.

them.⁵³

B. The Nineteenth Amendment and Gender Equality

In a series of cases decided in the 1870s, the Supreme Court rejected the idea that the Fourteenth Amendment protected women as a class against gender-based discrimination. Suffragettes who attempted to vote in violation of local laws in states like New York were arrested, tried, and convicted of voting fraud.⁵⁴ Although West Virginia could not

53. One should note that the Supreme Court currently has pending before it a case that could implicate the continuing validity of *Bacchus Imports*. See *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *cert. granted in part by, sub nom. Granholm v. Heald*, 124 S. Ct. 2389 (2004) and *cert. granted in part by, sub nom. Michigan Beer & Wine Wholesalers Ass'n. v. Heald*, 124 S. Ct. 2389 (2004). The Sixth Circuit, applying *Bacchus Imports*, invalidated a Michigan state law that permitted the direct shipment of Michigan-produced beers, wines, and liquors to individual consumers, but prohibited the direct shipment of such beverages to Michigan residents from out-of-state producers. *Id.* at 520–21; *cf. Beskind v. Easley*, 325 F. 3d 506, 509–10, 517 (4th Cir. 2003) (invalidating, on dormant Commerce Clause grounds and over North Carolina's invocation of the Twenty-First Amendment, a North Carolina statute permitting local producers of alcoholic beverages to ship directly to North Carolina residents while prohibiting such direct shipments from out-of-state producers). The Justices limited their grant of certiorari in the Michigan case to a single question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant commerce clause in light of Sec. 2 of the Twenty-First Amendment?" See 124 S.Ct. at 2389. In the 1970s and 1980s, the Supreme Court invoked the Twenty-First Amendment to sustain restrictions on nude or erotic dancing in establishments serving alcohol. See *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 715–18 (1981); *California v. LaRue*, 409 U.S. 109, 114–15, 118–19 (1972); *but cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272–76 (1984) (refusing to extend *Bellanca* and *LaRue* to case raising a dormant Commerce Clause challenge to Hawaii law favoring local producers of alcoholic beverages, on theory that Hawaiian law did not implicate "core concerns" of the Twenty-First Amendment). In the late 1990s, however, the Justices squarely rejected the notion that the power to regulate alcohol worked a pro tanto repeal of the First Amendment. See 44 *Liquormart*, 517 U.S. at 514–16 (disavowing rationale of *Bellanca* and *LaRue* and applying First Amendment principles to state law prohibiting advertising featuring prices for alcoholic beverages). 44 *Liquormart* endorsed the *Bacchus Imports* approach to the Twenty-First Amendment: the Twenty-First Amendment would not be read to repeal, by implication, other provisions of the Constitution. See *id.* (rejecting broad reading of the Twenty-First Amendment, in an opinion by Justice Stevens, where state attempted to invoke Twenty-First Amendment to override free speech rights protected under the First Amendment). *Cf. Bacchus Imports, Ltd.*, 468 U.S. at 274–76 (rejecting State's argument that its violation of the Commerce Clause was "saved" by the Twenty-First Amendment, noting that the "central purpose" of the Amendment "was not to empower States to favor local liquor industries by erecting barriers to competition"). *But see id.* at 286–87 (Stevens, J., dissenting) (arguing that Twenty-First Amendment should be read to give states wide discretion to regulate the sale and importation of alcoholic beverages without regard to other, pre-existing, provisions of the Constitution, including the Commerce Clause). It is possible, though not likely, that the Supreme Court will revisit its current approach to the Twenty-First Amendment in the *Granholm/Michigan Beer & Wine Wholesalers Ass'n* litigation.

54. Over a dozen women, including Susan B. Anthony, were arrested after attempting to

bar African-American men from sitting on juries,⁵⁵ New York could condition voting rights on being male.⁵⁶ Similarly, Illinois could prohibit women from joining the bar because “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.”⁵⁷ This interpretation of the Fourteenth Amendment precipitated a sustained national effort to amend the Constitution again, this time to convey expressly the right of suffrage on women as a class.

In 1920, the states ratified the Nineteenth Amendment, which expressly prohibits withholding voting rights on the basis of gender: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”⁵⁸ The clear implication of the adoption of the Nineteenth Amendment is that the Fourteenth Amendment’s Equal Protection Clause has nothing to say about gender-based classifications; moreover, the need for the Nineteenth Amendment suggests a settled understanding that, absent an amendment, a state would be perfectly entitled to limit voting rights to men.

Even the Warren Court, generally considered to have held a remarkably broad commitment to enforcing equal protection principles,⁵⁹ generally failed to question gender-based discriminations. *Hoyt v. Florida*⁶⁰ provides an instructive example. Florida privileged its female citizens by providing a categorical exemption from jury service.⁶¹ The Warren Court sustained this facial gender-based discrimination against an equal protection challenge as an appropriate gender-based “privilege.”⁶²

Yet, beginning in the early 1970s, the Supreme Court revisited the

vote in the 1872 presidential election in New York. See BARBARA A. BABCOCK, ET AL., *SEX DISCRIMINATION & THE LAW* 8–9 (1975); Justice Sandra Day O’Connor, *The History of the Women’s Suffrage Movement*, 49 VAND. L. REV. 657, 661–62 (1996). The Supreme Court of the United States, in a case originating in St. Louis, Missouri, subsequently held that the Fourteenth Amendment did not proscribe gender-based discrimination or convey universal suffrage to all persons. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875) (upholding, against equal protection challenge, state laws restricting suffrage to men); see also *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 138–39 (1873) (upholding, against equal protection challenge, state law prohibiting women from becoming attorneys).

55. See *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 305–10 (1879) (invalidating, on equal protection grounds, West Virginia law that facially excluded African American men from jury service based on their race).

56. See *Minor*, 88 U.S. (21 Wall.) at 170–72, 176–78.

57. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

58. U.S. CONST. amend. XIX.

59. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

60. 368 U.S. 57 (1961).

61. See *id.* at 58.

62. See *id.* at 60–65.

issue of gender-based classifications. Starting with *Reed v. Reed*,⁶³ and progressing through *Mississippi University for Women v. Hogan*,⁶⁴ the Justices began to review gender-based classifications under the Equal Protection Clause for rationality.⁶⁵ Over time, the rationality review became more demanding, and this more demanding standard of review morphed into intermediate scrutiny review.⁶⁶

Today, to survive challenge, a gender-based classification must bear a substantial relationship to an important government interest.⁶⁷ The government's burden is a heavy one; the standard presupposes the existence of "an exceedingly persuasive justification" for the use of the gender-based shorthand.⁶⁸

If one applies standard canons of statutory interpretation, the Supreme Court's gender cases make no sense. The authoritative interpretation of the Fourteenth Amendment, rendered within a few years of its ratification, categorically rejected the idea that it imposed any limits whatsoever on gender-based classifications—even gender-based classifications affecting a fundamental right (suffrage). The enactment of the Nineteenth Amendment in 1920 should have resolved any doubts about the continuing validity of this interpretation of the Equal Protection Clause. Had substantial doubts existed regarding the scope of the Equal Protection Clause, a simple revision in case law, rather than a constitutional amendment, would have enfranchised women.

The lesson here is quite clear: the Supreme Court does not hold itself bound to traditional canons of statutory interpretation when interpreting constitutional text. Events subsequent to 1920 greatly expanded the scope and meaning of the Equal Protection Clause. Most

63. 404 U.S. 71 (1971).

64. 458 U.S. 718 (1982).

65. For a discussion of these cases and the evolution of the Supreme Court's standard of review for gender-based classifications, see *supra* note 41.

66. Some commentators touted *Reed v. Reed* almost immediately as in fact a greater-than-rationality review of sex-based classifications. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33-34 (1972) (arguing that "[o]nly by importing some special suspicion of sex-related means from the new equal protection area can the result [in *Reed v. Reed*] be made entirely persuasive"). In fact, the Justices failed to reach a settled consensus regarding the precise standard of review applicable to gender-based classifications for almost a decade after *Reed*. Individual Justices advocated various standards, from strict scrutiny, to intermediate scrutiny, to some form of enhanced rationality review. See *supra* note 41. By the early 1980s, however, the Supreme Court had settled on intermediate scrutiny as the applicable standard of review: to survive judicial scrutiny, a gender-based classification must bear a substantial relationship to an important government interest. See *id.*

67. *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982).

68. See *United States v. Virginia*, 518 U.S. at 524.

importantly, the *Brown v. Board of Education* decision read the clause to prohibit invidious forms of racial discrimination.⁶⁹ The language of the desegregation cases rejected racism, but also rejected irrational government action that denigrates or oppresses classes of citizens without reason.⁷⁰

To the extent that gender classifications attempted to denigrate and disempower women simply on the basis of their gender, it seemed odd to hold that the Equal Protection Clause had no impact at all. If one generalized the promise of equal protection into a freedom from irrational government classifications,⁷¹ then the use of gender represented a problematic means of granting or withholding benefits. Over time, the notion of equal protection became more generalized and de-coupled from its core animating purpose (eradication of race-based classifications). The broader, more generalized understanding of equal protection made it difficult, if not impossible, for the Supreme Court to cast a blind eye on invidious gender-based classifications.⁷²

The expansion of equal protection principles in the 1970s was remarkable in another sense too: contemporaneously with the Supreme Court's expansion of equal protection principles to disallow gender classifications, the states were considering whether to ratify the Equal Rights Amendment ("ERA").⁷³ The ERA said directly that equal rights

69. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

70. See *id.* at 494–95; see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."); *Korematsu v. U.S.* 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."); *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) ("We think the attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.").

71. See *Bush v. Gore*, 531 U.S. 98, 104–09 (2000); see also Ronald J. Krotoszynski, Jr., *An Epitaph for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2121–23 (2002).

72. See generally WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 176–78 (1996) (arguing that sexual orientation discrimination reflects irrational prejudice that is every bit as deep seated as race and gender bias).

73. See *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) ("There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in a manner prescribed by the Constitution.

could not be denied or abridged on the basis of sex—it generalized the equality guarantee contained in the Nineteenth Amendment.⁷⁴

At least to some extent, the Supreme Court preempted the amendment process by interpreting the Equal Protection Clause to disallow invidious gender-based classifications. Viewed most charitably, perhaps the Justices saw that a social consensus against invidious gender-based classifications had come into existence, making such classifications inherently suspect.⁷⁵

Title VII prohibits employment discrimination based on sex,⁷⁶ two-third majorities of both the House and Senate had adopted the ERA, and many states quickly ratified the amendment.⁷⁷ In defining “irrational” or “arbitrary” government action, the Justices could logically look to the ERA and Title VII as empirical support for the idea that gender-based discrimination no longer enjoyed general support with the citizenry. As Professor Laurence Tribe stated almost two decades ago, “[t]he concept of equality before the law regardless of gender has simply become too much a part of our culture for the ultimate outcome to be much in doubt.”⁷⁸

By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment.”).

74. In relevant part, the ERA provided that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” H.R.J. Res. 208, 92nd Cong. § 1 (1971).

75. Note that some commentators take a broader view of the Court’s motivation. See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1478 (2001) (arguing that “[w]hat ‘ratified’ the ERA, in effect, was . . . insistent pressure from society as a whole. . . . Instead of saying that the courts imposed an agenda on society, it is probably more accurate to say that the opposite occurred: because of developments in society, the Court would have found it very difficult to continue treating gender classifications as unproblematic”). See also Reva B. Siegel, *Social Movements and Law Reform: Text in Context: Gender and the Constitution From a Social Movement Perspective*, 150 U. Pa. L. Rev. 297, 308 (2001) (“But if we widen our angle of vision, we might view mobilization of women for constitutional change as the source of the new understanding that informed judicial interpretation of the Constitution in the 1970s.”).

76. See 42 U.S.C. § 2000e-2(a)(1) (2000) (providing that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . or otherwise to discriminate . . . because of such individual’s race, color, religion, sex, or national origin”) (emphasis added).

77. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 16–30, at 1586–87 (2d ed. 1988) (discussing the legislative history and subsequent ratification debates surrounding the ERA); see also Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 393 (1983) (discussing ratification process surrounding ERA and uncertain legal effects of attempted rescissions of state ratifications).

78. TRIBE, *supra* note 77, § 16–30, at 1587.

Although Tribe predicted that “this ERA, or its functional equivalent, will one day be passed by Congress and ratified by the states,”⁷⁹ the Supreme Court’s expansive interpretation of the Equal Protection Clause has effectively achieved the ERA’s objectives.⁸⁰

The contemporary consensus that gender-based discrimination represents a fundamental injustice displaced the original understanding of the Equal Protection Clause and both the text and the legislative history of the Nineteenth Amendment.⁸¹ Even an amendment that assumed the continuing validity of a limited reading of an earlier amendment was not sufficient to stop the Supreme Court from re-interpreting the earlier amendment to expand and advance the equality project.

C. The Twenty-Fourth Amendment and Poll Taxes

In 1964, the states ratified the Twenty-Fourth Amendment, which prohibits poll taxes as a precondition to voting in federal elections. The amendment is entirely silent about the legal status of poll taxes for state and local elections; in order to secure easier ratification of the amendment, its framers elected to limit its effect to federal elections.

A scant two years later, in 1966, the Supreme Court used the Equal Protection Clause to invalidate poll taxes in state and local elections.

79. *Id.*

80. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that government must offer an “exceedingly persuasive justification” to adopt and enforce a gender-based classification and effectively requiring state to admit any woman capable of completing Virginia Military Institute’s program to that program without regard to gender).

Some commentators have argued that there is still a need for a federal equal rights amendment. See, e.g., Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002) (stating that “the sex discrimination paradigm remains limited, in constitutional legitimacy and critical acuity, by the ahistorical manner in which the Court derived it from the law of race discrimination”); Patricia Thompson, *The Equal Rights Amendment: The Merging of Jurisprudence and Social Acceptance*, 30 W. ST. U. L. REV. 205, 215 (2003) (discussing “credible attacks” on “piecemeal legislative reform” because of its vulnerability to “subjective interpretation”); Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, 44 B. B.J. 10, 11 (2000) (arguing that “[t]his ‘piecemeal’ approach to equal rights via legislation and state constitutional provisions stands in contrast to the wide-spread, national impact which would likely result from a federal equal rights amendment. Most significantly, such an amendment would create a federal standard of strict scrutiny for gender classifications, which almost inevitably evolve into a uniform state standard as well”).

81. See generally Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2, 6–18, 21–23 (1996) (arguing that the Supreme Court generally does not make grossly counter-majoritarian decisions, but rather tends to ratify developing social trends that enjoy substantial support among the nation’s citizens).

Harper v. Virginia Board of Elections,⁸² under the rubric of equal protection, accomplished precisely what the Twenty-Fourth Amendment did not do.⁸³ Voting rights are fundamental and a state may not withhold the fundamental right to vote without a compelling reason; a desire to raise revenue does not meet this burden.

In the absence of the Twenty-Fourth Amendment, this interpretation of the Fourteenth Amendment might be tenable. Even if the original understanding of the Equal Protection Clause did not disallow poll taxes (unless imposed on a facially racial basis), subsequent changes might have justified a reevaluation of this question. The enactment of the Nineteenth Amendment, for example, suggests a growing commitment to equal suffrage. Voting rights laws, passed initially in the Reconstruction Era, took on new importance in the 1950s. Moreover, Congress legislated in the 1950s and 1960s to safeguard voting rights.⁸⁴ The Supreme Court could have made an argument that against this background, states could no longer justify the imposition of poll taxes as a precondition to voting.

The Twenty-Fourth Amendment, however, changes the situation quite considerably. When Congress and the states act to amend the Constitution, but limit the amendment to a particular aspect of a larger problem, the Supreme Court arguably should not expand the scope of the amendment under the rubric of a pre-existing amendment. If poll taxes for state and local elections violate the Fourteenth Amendment, so too did poll taxes as applied to federal elections violate constitutional equal protection principles. Congress and the states were evidently mistaken in their belief that an amendment was really necessary to abolish poll taxes as applied to federal elections. As with the ERA and gender-based classifications, the Supreme Court was more interested in advancing the twin causes of equality of citizenship and racial justice than with hewing carefully to traditional rules of statutory interpretation.

The pattern seems very clear indeed: as an historical matter, the Supreme Court has established a very consistent practice of declining to interpret new constitutional amendments broadly to repeal or limit the scope of prior amendments. If the Justices come to believe that a particular practice, once viewed as constitutional, is no longer so, the history of subsequent amendments will not affect their willingness to

82. 383 U.S. 663 (1966).

83. *Id.* at 665–69.

84. See, e.g., The Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973p (2000); see also Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1412–13 (1995) (discussing history surrounding enactment of the Voting Rights Act).

announce and enforce the broader interpretation of the pre-existing right. So it is that gender classifications can be seen as equal protection violations; so it is that state power to regulate alcohol remains limited by Article I, § 8, the Bill of Rights, and the Fourteenth Amendment; so it is that a limited repeal of poll taxes can be expanded to abolish poll taxes comprehensively.

II. THE FEDERAL MARRIAGE AMENDMENT AND CONSTITUTIONAL DISSONANCE

In this Part, we consider two versions of a Federal Marriage Amendment, each at opposite ends of the spectrum concerning respect for state sovereignty in matters of domestic relations. The first version of the Federal Marriage Amendment is respectful of state sovereignty and purports merely to affirm constitutionally the Defense of Marriage Act. The second version, at the other end of the spectrum, is maximally intrusive on state sovereignty.⁸⁵ It not only constitutionalizes a definition of marriage for all purposes as between only one man and one woman but also precludes any state from enacting any marriage statute that differs from that definition. We then analyze how the Supreme Court might interpret these proposed amendments in light of the existing Constitution. We conclude that neither version of the Federal Marriage Amendment would preclude a future Supreme Court from holding that a state's failure to recognize same-sex marriage while recognizing mixed-sex marriage constitutes invidious sex discrimination in violation of the Equal Protection Clause.

We evaluate and find unpersuasive arguments that discrimination against same-sex couples is not impermissible sex discrimination because such discrimination applies equally to men and to women, and because such discrimination is not animated by hostility directed at either sex. We further argue that, depending on the version of the Federal Marriage Amendment under consideration, the Court might then order the state to offer the incidents of marriage to same-sex couples, might

85. We do not consider an even more extreme version of the Federal Marriage Amendment that would ban any federal or state legislative or judicial recognition or protection of any same-sex relationship. Although such an amendment is the preferred alternative for some movement conservatives, we think it completely beyond the realm of political possibilities. See Alan Cooperman, *Same-Sex Marriage Ban Being Retooled*, WASH. POST, Mar. 23, 2004, at A4 (reporting on a press conference given by key sponsors of a proposed Federal Marriage Amendment in which the sponsors announced that they would revise the pending amendment to make clear that it would allow states to enact civil unions for same-sex couples).

order the state to choose between offering marriage to both same-sex couples and mixed-sex couples on equal terms and offering marriage to no one, or might order the state to cease recognizing marriage altogether.

A. The Federal Marriage Amendment, Sex Discrimination, and Equal Protection

A version of the Federal Marriage Amendment that is respectful of state control of domestic relations might attempt to ensure that no federal court would hold the Defense of Marriage Act unconstitutional. DOMA provides that for federal purposes the definition of marriage is only a marriage between one man and one woman.⁸⁶

DOMA further purports to exercise Congress's power to enforce the Full Faith and Credit Clause by providing that no state shall have to recognize a same-sex marriage contracted in another state.⁸⁷ This latter portion of DOMA could be considered pro-states' rights in that it protects the rights of a state to make its own decision on the same-sex marriage issue.

To guard against the possibility that a federal court might invalidate the Defense of Marriage Act, a Federal Marriage Amendment might provide: "Congress shall have the authority to define marriage for federal purposes. Moreover, Congress shall have the power under the Full Faith and Credit Clause to regulate the extent to which a state must recognize a same-sex marriage contracted in another state." A virtue (or shortcoming, depending on one's point of view) of this version of the constitutional amendment is that it would not require a repealing amendment for Congress to recognize same-sex marriage or for Congress to require one state to recognize a same-sex marriage contracted in another state should Congress decide to so require at some

86. Under the DOMA:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2000).

87. Accordingly,

No State, territory, or possession of the United States, 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.

28 U.S.C. § 1738C (2000).

time in the future. It allows the "people's voice [to] be heard,"⁸⁸ not just today, but for generations to come. This flexible approach is essentially the avenue taken by the people of Hawaii in amending their state constitution in 1998 to prevent the Hawaii Supreme Court from interpreting the Hawaiian constitution as requiring the state to provide for same-sex marriage.⁸⁹

An amendment that merely purports to allow the federal government to define marriage for federal purposes and to prescribe the effect of the Full Faith and Credit Clause, however, will not affect the continuing validity of substantive due process, equal protection, or other state constitutional rights (such as a right of privacy).

For example, although the amendment would likely preclude courts from ordering the federal government to recognize same-sex marriage per se, the amendment would not necessarily preclude the courts from ordering the states to recognize same-sex marriage, both those contracted within their own borders and those contracted in a sister state, under the Equal Protection Clause, rather than the Full Faith and Credit Clause.

Even if one interpreted the amendment more broadly as having the effect of precluding the courts from ordering the federal government or the states to recognize "same-sex marriage," the amendment probably would not prevent federal and state courts from demanding equal treatment for same-sex couples on a program-by-program or across-the-board basis. Thus, if the military provides a stipend upon the death of a service member to a surviving spouse, it is entirely conceivable that equal protection principles might require either that the benefit be provided to a domestic partner or that no benefit be provided at all.

We believe an entirely plausible vehicle for circumnavigating the DOMA amendment would be the Equal Protection Clause's ban on invidious sex discrimination. A compelling argument exists that allowing mixed-sex marriage but not allowing same-sex marriage is sex discrimination. The argument begins with the assertion that a marriage law that limits marriage to one man and one woman classifies according to sex.⁹⁰

88. President George W. Bush, Address Before a Joint Session of Congress on the State of the Union (Jan. 20, 2004) (stating that "[o]n an issue of such great consequence [marriage], the people's voice must be heard").

89. See HAW. CONST. art. 1, § 23 (providing that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples.").

90. See generally Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994) ("As a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex."); Sylvia A. Law, *Homosexuality*

The effect of such a sex-based classification is that an individual is prohibited from entering into a particular marriage because of her sex. That the legal limitation doubly classifies according to sex does not negate the sex-based classification:⁹¹ that the prohibition is dependent also on the sex of her proposed marriage partner does not alter the fact that the individual is subject to a prohibition that she would not be subject to were she of the other sex.⁹² If one cannot tell whether a statute prohibits a particular behavior by an individual until one knows the sex of that individual, the statute classifies according to sex.⁹³

This argument has gained some acceptance in the recent trilogy of state supreme court opinions advancing the cause of gay marriage.⁹⁴ The plurality opinion in *Baehr v. Lewin*, and concurring opinions in *Baker v. State*, and *Goodridge v. Department of Public Health* adopted the view that limiting marriage to mixed sex couples constitutes discrimination on the basis of sex.⁹⁵ The recent concurring opinion of Justice Greaney in

and the Social Meaning of Gender, 1988 WIS. L. REV. 187, 230 (labeling this argument "powerful"). See also Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 205 n. 7 (1996) (noting that "a ban on gay marriage requires formal sex labeling" just as "[a] ban on interracial marriage requires formal race labeling").

91. See Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L. J. 107, 140-142 (2002) (arguing that discrimination against same-sex couples is "sex-plus" discrimination); see also ESKRIDGE, *supra* note 72, at 162-82 (making equal protection argument premised on *Loving*).

92. Clark, *supra* note 91, at 138 ("Whenever a discriminator targets a couple for disfavored treatment because the two people comprising the couple are the same or different in terms of a protected trait, the discrimination is based on that protected trait."); see ESKRIDGE, *supra* note 72, at 161 ("A classification-based attack on bars to same-sex marriage is straightforward because the bars classify according to sex. I am a man. Therefore, I am barred from marrying another man while permitted to marry a woman.").

93. See Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L. J. 145, 151 (1988) ("McLaughlin stands for the proposition (which should be obvious even without judicial support) that if a statute defines prohibited conduct by reference to a characteristic, then the statute is not neutral with respect to that characteristic.").

94. Social conservatives might find a silver lining to this cloud of judicial acceptance of the argument that the ban on same sex marriage is sex discrimination: this avenue for judicial protection of the right to gay marriage provides something of a limiting principle. Some opponents of same-sex marriage have argued that recognition of a same-sex marriage right is but the first step down the slippery slope leading to a parade of horrors including judicial protection for polygamy, pedophilia, and bestiality. Unlike sex, however, class size (polygamy), minority (pedophilia), and animal origin (bestiality) are not suspect or quasi-suspect classifications. Thus, equal protection for gay marriage is distinguishable and need not lead us down that slippery slope.

95. See *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) ("It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of . . . the Hawaii Constitution."); *id.* at 64 (Hawaii's marriage statute "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex . . . [and a]s such, [the statute] establishes a sex-based

Goodridge, for example, reasons

[t]hat the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. . . . Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man.⁹⁶

Two principal counter-arguments have been advanced that the ban on same-sex marriage, although it classifies according to sex, is not invidious sex discrimination.⁹⁷ The first argument asserts that the ban on same-sex marriage is not sex discrimination because it applies equally to both men and women. No one, regardless of his or her sex, may marry another person of the same sex. In this way, one might argue, the ban does not discriminate at all on the basis of sex.⁹⁸

This counter-argument has several problems: the Equal Protection Clause provides that no State shall "deny to any *person* within its

classification."); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) ("Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists only of a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry."); *Baker v. State*, 744 A.2d 864, 905–06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (finding that Vermont's marriage statutes provide that marriage consists only of a union between a man and a woman, and concluding that "[t]hus, the statutes impose a sex-based classification"). See also *Li v. State*, No. 0403-03057, 2004 WL 1258167, at *6 (Or. Cir. Ct. Apr. 20, 2004) (concluding that Oregon statute limiting marriage to opposite-sex couples "impermissibly classifies] on the basis of gender").

96. *Goodridge*, 798 N.E.2d at 971.

97. See *Clark*, *supra* note 91, at 111 (commenting that the "strongest" of the challenges to the sex discrimination argument are the "equal application" argument and the lack-of-animus argument).

98. See *Baehr*, 852 P.2d at 71 (Heen, J., dissenting) (arguing that Hawaii's marriage statute "does not establish a 'suspect' classification based on gender because all males and females are treated alike. A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female."); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 2391114, at *22 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (noting that New Jersey "makes the same benefit, mixed-gender marriage, available to all individuals on the same basis" and reasoning that "[i]t is the availability of the right [to mixed-gender marriage] on equal terms, not the equal use of the right [by gay people as contrasted with non-gay people] that is central to the constitutional analysis"); *Baker*, 744 A.2d at 880 n.13 ("The difficulty here is that the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex."); see also *State v. Walsh*, 713 S.W.2d 508, 510 (Mo. 1986) (en banc) (holding that a state law prohibiting sexual intercourse with a person of the same sex applies "equally to men and women because it prohibits both classes from engaging in sexual activity with members of their own sex. Thus, there is no denial of equal protection on [the] basis" of sex).

jurisdiction the equal protection of the laws.”⁹⁹ It does not speak of laws that disadvantage a *group* relative to another group.¹⁰⁰ The Supreme Court has repeatedly set forth and relied upon the basic principle that “the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.”¹⁰¹ When a person is disadvantaged because of her sex, therefore, it is not constitutionally adequate to argue that the discrimination all comes out in the wash as members of other groups get theirs.

Assume that the government prohibits the employment of law clerks who are of the same sex as their judge: no female may clerk for a female judge, and no male may clerk for a male judge. And let us anticipate the specious argument that this ban on same-sex clerking can be distinguished from the ban on same-sex marriage in that it will disadvantage men as a group because most of the judiciary is male: let us assume a constitutional challenge by a female applicant who wishes to clerk for Supreme Court Justice Ginsberg, who wishes to hire her.¹⁰² A strong argument can be made that this statutory ban on same-sex clerking is sex discrimination even though the prohibition on same-sex clerking applies to all regardless of sex. A person is denied the opportunity to clerk for the Justice of her choice for no other reason than her sex.

Neither the fact that the law does not prohibit her from clerking for Justice Scalia (who may or may not want to hire her and for whom she may or may not want to clerk), nor the fact that the law prohibits her male colleague from clerking for Justice Scalia, transforms this sex

99. U.S. CONST. amend. XIV (emphasis added).

100. See *Perez v. Lippold*, 198 P.2d 17, 20 (Cal. 1948) (striking down, as violating the federal Constitution’s Equal Protection Clause, California’s ban on interracial marriage and reasoning that the right at issue was the right of an individual to marry rather than the right of a racial group to be treated equally, given that “[t]he equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals”).

101. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). See also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) (noting that “the Constitution’s focus [is] upon the individual,” not groups, arguing that “under our Constitution there can be no such thing as either a creditor or a debtor race,” and citing with emphasis the Fourteenth Amendment’s dictate that no State shall “deny to *any person* the equal protection of the laws”).

102. In any event, the ban on same-sex marriage arguably disadvantages men as a group relative to women in that there are in absolute numbers significantly more gay men than lesbian women. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 283–320 (1994) (analyzing a survey of a representative sample of American adults between the ages of eighteen and sixty, conducted by the National Opinion Research Center at the University of Chicago, and finding that twice as many men identify themselves as gay compared to women who identify as lesbian).

discrimination into a neutral law in compliance with the Constitution's mandate that the state shall deny no person the equal protection of the laws. Similarly, the argument goes, neither the fact that the same-sex marriage ban does not prevent a woman who wants to marry another woman from marrying a man, nor the fact that the law prevents a man from marrying a man undoes the sex discrimination inherent in this prohibition based on sex.¹⁰³ Indeed, the constitutional injury is magnified in the case of the same-sex marriage ban as the decision for whom to clerk pales in significance in comparison to the decision as to whom to marry.

Moreover, any sex-based discrimination can be neutralized if abstracted to a sufficient level of generality and applied to both sexes. For example, a statute that prohibits females from becoming pilots and males from working as flight attendants can be generalized as a requirement that airline employees work in positions traditionally occupied by persons of their gender.¹⁰⁴ That this statute applies to all persons irrespective of sex does not mean that the statute can be applied irrespective of sex. And surely it is little comfort to the female who wants to fly a plane that her brother cannot serve as a stewardess.

The equal-application counter-argument also flies in the face of the Supreme Court's holdings and reasoning in the landmark case of *Loving v. Virginia*,¹⁰⁵ in which the Supreme Court held that a ban on inter-racial marriage discriminated on the basis of race.¹⁰⁶ The Court rejected Virginia's argument that

the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree.¹⁰⁷

Rather, the Court concluded that because the ban on interracial marriage "proscribe[d] generally accepted conduct if engaged in by members of different races," the ban classified according to race.¹⁰⁸ The

103. *Baker*, 744 A.2d at 906 (Johnson, J., concurring) (making this argument).

104. See Clark, *supra* note 91, at 143–44 (calling such an argument "little more than a semantic shell game designed to make the but-for reliance on sex less conspicuous").

105. 388 U.S. 1 (1967).

106. See *id.* at 7–8; see also *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (rejecting the equal application argument and reasoning that "[s]ubstitution of 'sex' for 'race' and [the relevant provision of the Hawaii constitution] for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached").

107. *Loving*, 388 U.S. at 7–8.

108. *Id.* at 11 ("There can be no question but that Virginia's miscegenation statutes rest

Court could not have been more clear in holding that “we reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations. . . .”¹⁰⁹ The ban on same-sex marriage “proscribe[s] generally accepted conduct if engaged in by members of” the same sex. The reasoning of *Loving* suggests that the ban classifies according to sex despite its “equal application.”

The second principal counter-argument that the ban on same-sex marriage is not impermissible sex discrimination asserts that the ban does not impermissibly discriminate based on sex because it is not animated by a hostility toward either sex.¹¹⁰ The argument seeks to distinguish the ban on same-sex marriage from Virginia’s proscription of inter-racial marriage, which the Supreme Court noted in *Loving* was motivated by a desire to maintain white racial supremacy, clearly a form of race-based animus. The argument may or may not concede that a hostility toward gay people animates the ban. The concession is premised on the view that sexual orientation is divisible from a person’s sex. Either version is subject to compelling attack.

First, it is essential to avoid conflating the predicate issue of whether there is a classification based on sex with the very separate issue of whether there is a sufficient justification for the classification.¹¹¹ For illustrative purposes, recall the example of the ban on same-sex clerking, discussed above. Assume further that the government enacted this ban to address what it believed to be a grave danger posed by the possibility of

solely upon distinctions drawn according to race.”); see ESKRIDGE, *supra* note 72, at 154–65 (applying *Loving* to support an equal protection-based argument for legal recognition of same-sex marriage).

109. *Loving*, 388 U.S. at 8; see also *id.* at 9 (“In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”).

110. See *Baker v. State*, 744 A.2d 864, 880–81 n.13 (Vt. 1999) (arguing that “[t]he test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law ‘can be traced to a discriminatory purpose’”; finding no evidence in the record of such a discriminatory purpose, and concluding “[a]ccordingly, we are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs’ rights under the Common Benefits Clause” of the Vermont constitution); *Lawrence v. State*, 41 S.W.3d 349, 357–58 (Tex. App. 2001) (distinguishing the discrimination at issue in *Loving* from discrimination against same-sex couples and noting that the latter is not motivated by a desire to preserve or promote any hostility or bias based on gender), *rev’d*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

111. See *Clark*, *supra* note 91, at 150–151 (noting that the Supreme Court in *Loving v. Virginia* subjected the race-based prohibition on inter-racial marriage to heightened scrutiny in order to determine whether the classification was invidious, *not because* it was invidious).

predatory gay judges sexually harassing their law clerks of the same sex. Assume also for the moment and for the sake of argument that a person's sexual orientation is separable from a person's sex. Thus, it can be said that the government acted to protect law clerks from what it perceived to be a particularly pernicious type of sexual harassment and without hostility toward or an intent to discriminate against anyone because of their sex. Still, the ban on same-sex clerking on its face classifies on the basis of sex.

A court reviewing any state sex-based classification should subject the classification to heightened scrutiny.¹¹² The classification is permissible only if the state can demonstrate an "exceedingly persuasive justification."¹¹³ "The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."¹¹⁴

This "skeptical scrutiny" of all sex-based classifications is a response to our nation's "long and unfortunate history of sex discrimination."¹¹⁵ The purpose of heightened scrutiny "is to 'smoke out' illegitimate uses of [sex-based classifications] by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."¹¹⁶ "Absent searching judicial inquiry into the justification for such [sex]-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions"¹¹⁷

Thus, intentional, differential treatment based on gender represents an essential element of gender-based equal protection claims. Affirmative legislative hostility, or animus, toward a particular gender is not essential.¹¹⁸ A facially neutral law with a disparate impact based on gender might not trigger heightened scrutiny;¹¹⁹ but this result obtains

112. *United States v. Virginia*, 518 U.S. 515, 531–33 (1996).

113. *Id.* at 531.

114. *Id.* at 533 (internal quotations omitted).

115. *See id.* at 531 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

116. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (discussing strict scrutiny of classifications on the basis of race).

117. *Id.* at 493 (discussing strict scrutiny of classifications on the basis of race); *see also* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

118. *Cf. Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (holding that facially neutral law does not trigger heightened scrutiny absent showing of intentional discrimination based on race); *Washington v. Davis*, 426 U.S. 229 (1976) (same).

119. *See Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (upholding Massachusetts veterans preference on theory that preference did not constitute a facial gender-based classification and disparate impact based on gender was not sufficiently pervasive to

because the plaintiff has failed to show intentional discrimination on the basis of gender. In the case of state or federal laws limiting the right to marry on the basis of sex, a facial gender-based classification exists and the plaintiff's case meets the required showing of intentional discrimination.¹²⁰

Of course, the government's justification for its sex-based classification would be relevant to whether the classification can survive the heightened scrutiny required by the Equal Protection Clause (or, in the case of the federal government, by the Fifth Amendment's Due Process Clause). The justification, however, no matter how "exceedingly persuasive," no matter how divorced from sex-based animus, does not determine the level of scrutiny to which the classification is subjected.¹²¹ The state's proffered benign purpose, therefore, cannot be a reason for determining that the state has not classified according to sex or for subjecting the ban on same-sex marriage to anything less than heightened scrutiny.¹²²

Second, the argument that a ban on gay marriage is not animated by a sex bias itself overlooks the role that gender stereotyping plays in support of the ban and the role that discrimination against gays and lesbians plays in reinforcing sex inequality.¹²³ The ban on same-sex

support inference of intentional discrimination).

120. Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (applying strict scrutiny to school board official policy prohibiting African American students from attending "white only" schools in Topeka, Kansas), and *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303 (1879) (applying strict scrutiny to state law that expressly prohibited African American men from serving on juries in state courts) with *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating Alabama constitutional provision denying voting rights to convicted felons, even though facially neutral, because legislative history of provision established discriminatory purpose in establishing rule) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a pattern of discriminatory enforcement could establish necessary showing of intentional discrimination where minorities prohibited from operating wooden laundries but non-minorities permitted to operate such facilities). For a thoughtful and comprehensive examination of the problem of showing discriminatory intent, see Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643 (2001).

121. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) ("[Strict scrutiny review] evaluates carefully all governmental race-based decisions in order to decide which are constitutionally objectionable and which are not.").

122. See *Croson*, 488 U.S. at 493-94 ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."). See also *Craig v. Boren*, 429 U.S. 190 (1976) (holding that effort to benefit women by permitting them to purchase 3.2% beer at an earlier age than men constitutes intentional discrimination against men and violates Equal Protection Clause, even though law did not reflect any sort of invidious animus toward men either individually or as a class). But see *id.* at 217-28 (Rehnquist, J., dissenting) (arguing that laws that benefit women and burden men should not receive any heightened judicial scrutiny).

123. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-*

marriage evidences a belief that there are certain roles that a woman should not play (among them spouse of a woman) and that men should not play (among them spouse of a man).¹²⁴ As Professor Andrew Koppelman has argued:

The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading. Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male. . . . Lesbianism, on the other hand, is a form of insubordination: it denies that female sexuality exists, or should exist,

American Law and Society, 83 CAL. L. REV. 1, 26 (1995) (“[G]ender discrimination cannot be fully combated so long as sexual orientation provides a loophole for gender atypicality discrimination.”); Koppelman, *supra* note 90, at 199 (“[D]iscrimination against lesbians and gay men reinforces the hierarchy of males over females and thus is wrong because it oppresses women.”); Law, *supra* note 90, at 187–88 (“[C]ontemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender. . . . [L]egal censure of homosexuality violates constitutional norms of gender equality.”). See also Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 617–49 (1992) (“[A] primary reason for [anti-gay] discrimination . . . is concern about violation of gender-role norms. . . . [T]he psychological literature and the experiences of individual lesbians and gay men also support the thesis.”); *id.* at 617–49 (discussing concerns and advantages of gender-based arguments for legal protection of gay men and lesbians); Koppelman, *supra* note 93, at 159–60 (“Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male.”).

Feminists have been particularly vocal in their insistence that discrimination against homosexuals is related to gender stereotyping. See, e.g., Law, *supra* note 90, at 187–88 (arguing that “contemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender” and stating that “the persistence of negative social and legal attitudes toward homosexuality can best be understood as preserving traditional concepts of masculinity and femininity as well as upholding the political, market and family structures premised upon gender differentiation”). Law argues that “homosexuality is censured because it violates the prescriptions of gender role expectations.” *Id.* at 196. “Lesbians and gay men pose a formidable threat to the classic gender script. They deny the inevitability of heterosexuality.” *Id.* at 210.

124. See Koppelman, *supra* note 90, at 219 (“Laws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex. Such laws therefore flatly violate the constitutional prohibition on sex discrimination as it has been interpreted by the Supreme Court.”); Amar, *supra* note 90, at 205 n.7 (“[T]he social meaning of sexual orientation discrimination is the legal enactment of chauvinism: real men sleep with real women. Heterosexism is a form of sexism that perpetuates traditional gender roles and chauvinism just as miscegenation laws were a form of racism that perpetuated traditional race roles and white supremacy.”).

only for the sake of male gratification.¹²⁵

Some would argue that any such bias is focused on homosexuality or sexual orientation and not gender. The implicit assumption of such an argument is that such bias on the basis of homosexuality or sexual orientation is less constitutionally suspect. We need not address that argument directly here.¹²⁶

125. Koppelman, *supra* note 90, at 235–36. Many feminist commentators have discussed the way in which heterosexual intercourse reinforces male dominance and female subordination. Prohibiting homosexual relationships perpetuates this pattern of male dominance. See, e.g., Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605 (2004) (“In a society in which marriage is the only officially sanctioned forum for sexuality and in which heterosexual marriage and the family are essential to maintaining the sex-gender system, the proliferation of other expressions of sexuality poses a genuine threat to those institutions and, perhaps, to the sex-gender system itself.”); Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 STETSON L. REV. 701, 730 (1994) (“One could, within a dominance framework, go on to note that biases against same-sex relationships are part of a system of compulsory heterosexuality, a system which requires that if women want sexual intimacy, and the emotional and economic sharing and support that often accompany such intimacy, they must seek such intimacy only with men on the terms worked out by and for men. Bans on same-sex relationships are designed to ensure male access to women for sex and reproduction. Were women free to seek partnerships with women in a society which gave equal respect and equally favorable treatment to lesbian relationships, women would have the option to avoid the subordinating heterosexuality that pervades our culture and to find more equal relationships with women.”).

126. One of us has argued elsewhere that sexual orientation classifications merit heightened equal protection scrutiny because gays and lesbians have suffered a long history of discrimination despite the fact that their sexual orientation bears no relationship to their ability to contribute to society. See E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598–620 (1996). Cf. *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) (holding that sexual orientation is a suspect class under Oregon case law because sexual orientation “is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice”); *Castle v. Washington*, No. 04-2-00614-4, 2004 WL 1985215, at *11 (Wash. Super. Ct. 2004) (“[H]omosexuals . . . constitute[] a suspect class under the [Washington] state constitution”). The Supreme Court has never addressed this issue. Rather, in recent cases involving state discrimination specifically targeting gay people and same-sex relationships, the Supreme Court has applied a rational basis review with bite in striking down such discrimination. See *Romer v. Evans*, 517 U.S. 620 (1996) (finding no rational basis for and striking down on equal protection grounds a provision of the Colorado Constitution that prohibited legislative, executive, or judicial protection of gay people as gay people); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (overruling *Bowers v. Hardwick* and holding unconstitutional on due process grounds a Texas statute that criminalized same-sex sodomy, and concluding that the “statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”). See also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (concluding that Massachusetts had failed to set forth a rational basis for denying civil marriage to same-sex couples while providing it to mixed-sex couples); *Baker v. State*, 744 A.2d 864, 907 (Vt. 1999) (Johnson, J., concurring) (concluding that Vermont had

Rather, we argue that a court would be justified in finding that any discrimination on the basis of sexual orientation is itself a species of sex discrimination.¹²⁷ This is so because a person's sexual orientation cannot be disaggregated from a person's sex. Sexual orientation, as we construct it today, is a product of an individual's sex and the sex of the person to whom they are sexually or romantically attracted. As such, sexual orientation cannot be defined or assigned without reference to sex. (In the same way, miscegenation cannot be separated from race.) Thus, sexual orientation discrimination is properly thought of as sex discrimination based on sexual orientation.¹²⁸

In sum, a Federal Marriage Amendment that merely purports to limit marriage for federal purposes to only a union between one man and

failed to offer a rational basis for denying same-sex couples the right to marry); *Castle*, 2004 WL 1985215, at *16 (holding that Washington statutes limiting marriage to mixed-sex couples "do not even bear a rational relationship" to interest of promoting family stability); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. 2004), at *11 ("[T]he exclusion of same-sex partners from civil marriage and the privileges attendant thereto is not rationally related to any legitimate or compelling state interest . . ."). Justice O'Connor has stated: "When a law exhibits such a desire to harm a politically unpopular group, we [the Court] have applied a more searching form of rational basis review." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). We think it likely that this rational basis review with bite will evolve over time into an explicit heightened scrutiny for sexual orientation classifications. *See id.* at 586, 599, 604 (Scalia, J., dissenting) (chastising the majority for "apply[ing] an unheard-of form of rational-basis review that will have far-reaching implications beyond this case" and for "having laid waste the foundations of our rational-basis jurisprudence"). There is precedent for such an evolution: as we noted earlier, starting with *Reed v. Reed* and progressing through *Mississippi University for Women v. Hogan*, the Supreme Court began to review sex-based classifications under the Equal Protection Clause for "rationality." Over time, the rationality review became more demanding, and this more demanding standard of review morphed into "intermediate scrutiny" review. *See supra* note 41 and accompanying text.

127. *See* Koppelman, *supra* note 90, at 203 (arguing that "stigmatization of gays in contemporary American society functions as part of a larger system of social control based on gender"); Amar, *supra* note 90, at 204-05 (setting forth an argument that "sexual orientation discrimination is like—indeed is itself a form of—sex discrimination").

128. *See* Clark, *supra* note 91, at 116 (labeling such discrimination "sexual sexism" and pointing out that such discrimination "uses an individual's sex to prescribe and restrict individual opportunities"). In the same way, same-sex activity ("homosexuality") cannot be disaggregated from the sex of the participants. Thus, discrimination on the basis of homosexuality is properly thought of as sex discrimination on the basis of homosexuality. *Cf.* E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 75-80 (1997) (discussing the failure of courts to treat sexual orientation discrimination as sex discrimination under Title VII of the Civil Rights Act of 1964 and positing that, with little legislative history to guide them in interpreting the meaning of "sex" as used in Title VII, "[c]ourts have gazed into this void . . . and they have seen a reflection of their own heterosexism and homophobia: because a presumptively heterosexist and homophobic Congress did not expressly address employment discrimination against gay people *qua* gay people, it must not have intended to protect gay people from such discrimination").

one woman, and to authorize Congress to prescribe the effect of the Full Faith and Credit Clause with respect to interstate recognition or non-recognition of a same-sex marriage would not effectively limit the Supreme Court's ability to interpret the Constitution as requiring the states to grant same-sex marriage rights and recognition, and as requiring the federal government to grant the incidents of marriage to same-sex couples.

The Court's traditional approach to integrating new amendments into existing constitutional text strongly suggests that the Court might interpret such an amendment narrowly. Notwithstanding such an amendment, the Court, in time, might plausibly hold that a state's refusal to allow a same-sex marriage to be contracted within its borders is invidious sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. So too, the Court might plausibly hold that a state's refusal to recognize a same-sex marriage contracted in a sister state (or a foreign nation) because of the sex of the union's partners is invidious sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. And finally, the Court might plausibly hold that the federal government's refusal to grant all of the incidents of marriage to same-sex marital partners (as recognized under state law, even if only by the Constitution's compulsion) itself violates the Fifth Amendment's ban on invidious sex discrimination. Thus, the Court would order the federal government to extend the incidents it extends to mixed-sex marital partners to same-sex marital partners notwithstanding the constitutionally enshrined federal definition of marriage.

B. No Justice, No Piece (of the Pie)

If opponents of same-sex equality wish to preclude "activist" judges from ordering the states to allow and recognize same-sex marriages and ordering the federal government to extend the incidents of marriage to same-sex couples, they will need to take a more aggressive approach. Representative Marilyn Musgrave (R-CO) and Senator Wayne Allard (R-CO) have proposed and introduced in Congress a Federal Marriage Amendment that would expressly preclude any federal or state court from ordering same-sex marriage or same-sex civil union benefits. Their proposed amendment reads: "Marriage in the United States shall consist only 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.”¹²⁹

The practical problem with the Musgrave/Allard Amendment is that it paints the courts into a corner, but leaves open a window for escape for “activist” judges intent on seeing a Constitution under which no person may be denied the equal protection of the law. If the Constitution requires equal treatment of same-sex and mixed-sex couples (as we have argued a majority of Supreme Court justices might reasonably conclude),¹³⁰ and if Congress and the states amend the Constitution to forbid judicial or legislative recognition of same-sex marriage or judicial compulsion of the incidents of marriage to same-sex couples, then we foresee the possibility of one of two alternate results of litigation challenging unequal treatment of same-sex couples.

One approach that the federal courts might take would be to order the state to make a choice between (1) offering all of the incidents of marriage to same-sex couples and (2) offering such incidents to no one, not even mixed-sex married couples. Under such an approach, the Court is merely compelling the state to make a choice, rather than compelling the choice the state must make.¹³¹ Thus, the Court has not violated the Musgrave/Allard Amendment’s directive that no court shall require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

A second approach the Court might take would be to hold that neither the federal government nor any state government may constitutionally recognize marriage nor any rights arising from marriage (for mixed-sex or same-sex couples): if the Constitution requires the state to treat person A and person B equally, and if the Constitution forbids the state from giving person B a piece of the pie, then the Constitution compels that there shall be no state-given pie for A either. Thus, if the Constitution requires that the state treat same-sex couples and mixed-sex couples equally, and if the Constitution forbids the state from sanctioning same-sex marriage, then the Constitution forbids the state from sanctioning mixed-sex marriage. In this way, the Musgrave/Allard Amendment would drive the state out of the business of sanctioning marriage. The state would remain free to sanction civil unions or domestic partnerships on a sex-neutral basis.

129. S.J. Res. 30, 108th Cong. (2004).

130. See *supra* text and accompanying notes 90–128.

131. But cf. Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1191–1207, 1207 (2004) (arguing “that the constitutional right to marry has a positive component to it that places on the state, at the very least, the obligation to recognize some relationships as marital”).

Indeed, the end of state-sanctioned marriage might be the result even under the more light-handed DOMA-type amendment discussed above.¹³² We have argued above that when confronted with such a DOMA-type amendment, in time the Court still might find that the same-sex marriage ban is sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.¹³³ Given this holding, the court will have two choices: (1) order the state to provide civil unions that are equivalent to marriage or (2) because it finds that a separate but equal civil unions scheme is a badge of inferiority which itself would violate the Equal Protection Clause, order the state to stop sanctioning marriage altogether.¹³⁴

The establishment of civil unions and the granting of the incidents of marriage to civil union partners is a very significant step in the direction of equal treatment for same-sex couples. Nevertheless, arguably a badge of inferiority arises from the message implicit in a scheme which grants all the rights of marriage to same-sex couples but refuses them the right to use the term "marriage," which the government reserves for the exclusive use of the dominant political and social class—heterosexuals.¹³⁵

132. See *supra* text accompanying notes 86–89.

133. See *supra* text accompanying notes 86–128.

134. See Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (advising the Massachusetts Senate that a proposed bill that would grant to same-sex couples the right to enter into a civil union with all the incidents of marriage, but would limit marriage to mixed-sex couples would violate the equal protection and due process protections of the Massachusetts Constitution); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (ordering the Vermont legislature to provide the benefits of marriage the state offers to married couples to same-sex couples and noting that "[w]hile some future case may attempt to establish—that notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today"). See also *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (holding that segregation of school children by race violated the Equal Protection Clause "even though the physical facilities and other 'tangible' factors may be equal").

135. Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 156, 231, 242, 257 & n.547 (2000) (discussing *Baker v. Vermont* and arguing that "denying committed same-sex couples the right to marry, while at the same time giving them the same bundle of legal rights associated with marriage, stamps them with an unmistakable badge of inferiority"); see also Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 134 (2000) (arguing that "the heterosexism inherent in restricting same-sex couples to civil unions is reminiscent of the racism that relegated African-Americans to separate railroad cars and separate schools and of the sexism that relegated women to separate schools. Our society's experiences with 'separate but equal' have repeatedly shown that separation can never result in equality because the separation is based on a belief of distance necessary to be maintained between those in the privileged position and those placed in the inferior position."); *Brown*, 347 U.S. at 494 (finding that "[t]o separate [black school children] from others of similar age and qualifications solely because of their

Thus, the dual marriage/civil union system is analogous to a state requirement for dual separate but equal accommodations, such as water-fountains, one each reserved respectively for whites and non-whites. Many would agree it is better to have water than to not have water. Yet, even when the water fountains draw their water from the same source and are identical except for their labeling, the separating itself sends a message at odds with our constitutional notions of equality.¹³⁶ A reasonable interpretation of the separate but equal scheme set up by the dominant class is that there is something unclean or unhealthy about the non-dominant people from which the dominant people must be protected.¹³⁷

One might reasonably conclude that the message is the same when the state limits marriage to only mixed-sex couples and establishes otherwise equivalent civil unions for same-sex couples: as Justice Scalia argued in his dissent in *Lawrence v. Texas*, “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s moral disapproval of same-sex couples.”¹³⁸ When President Bush speaks of defending the sanctity of marriage, he gives voice to the belief that the act of allowing same-sex couples to marry devalues marriage precisely because it allows a morally, biologically, and socially inferior relationship to be labeled “marriage.” This is somewhat analogous to the argument that to graduate all members of a class with honors is to diminish (indeed, destroy) the value of graduating with honors.

In the case of marriage and civil unions that provide all the incidents of marriage, the very fact that there is no other practical consequence arising from the separation compounds the message of inferiority that the dominant class sends. In such a case, the only reason for the distinct label is to protect the sensibilities of the dominant class—which would be offended by allowing members of the non-dominant class to utilize an institution that the dominant class cherishes. The Equal Protection Clause condemns this motivation.¹³⁹ *Romer v. Evans* teaches that a classification for the purpose of making one group unequal to another

race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”).

136. See *Brown*, 347 U.S. at 494.

137. See *id.* (endorsing the view of a lower court that “the policy of separating the races is usually interpreted as denoting the inferiority of the negro group”). See also *Amar*, *supra* note 90, at 224 (positing that “the laws at issue in both *Plessy* and *Romer* are about untouchability and uncleanness: *they* are not like *us*.”). Cf. *id.* at 233 (asserting that “revulsion or untouchability” is a “key sociological concern of both the Attainder and Equal Protection Clauses”).

138. *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

139. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (stating that the Equal Protection Clause does not permit “a classification of persons undertaken for its own sake”).

violates the Constitution's equal protection guarantees.¹⁴⁰ "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."¹⁴¹

In February 2004, the Supreme Judicial Court of Massachusetts advised the Massachusetts Senate of the inequality inherent in a proposed scheme which would reserve to mixed-sex couples the right to marry while granting to same-sex couples the right to enter into a civil union with all of the "benefits, protections, rights and responsibilities under law as are granted to spouses in a marriage".¹⁴²

The bill's absolute prohibition of the use of the word "marriage" by "spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. . . . For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.¹⁴³

The Federal Marriage Amendment would add to the Constitution a provision that marks and separates for the purpose of excluding. It is a provision born of intolerance, likely to breed and to be used as justification for more hate and even violence.¹⁴⁴ It is a provision reminiscent of the Jim Crow South replacing "Whites only" and "Colored" with "Heterosexuals only" and "Homosexual." It defiles the notion of equal protection enshrined in the Constitution while it stigmatizes those it would exclude.

Thus, a Court may find that if the state cannot provide marriage for

140. *Id.* (holding unconstitutional on equal protection grounds a state constitutional amendment that "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

141. *Id.* at 634 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (alteration in original).

142. *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004). See also Charles Lane, *Mass. Court Backs Gay Marriage*, WASH. POST, Feb. 5, 2004, at A1.

143. *Opinions of the Justices to the Senate*, 802 N.E.2d at 570.

144. *Cf. Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?").

same-sex couples, it may not provide it to mixed-sex couples. In short, the attempt to limit constitutional protection for the equality and dignity of same-sex couples is likely to prove somewhat akin to trying to compact a puddle by stomping on it; like the puddle, judicial protection will be simply displaced outward, rather than destroyed. As we will now explain, considerably broader amending language would be needed to ensure that same-sex couples may be subjected to invidious forms of discrimination.

III. THE FEDERAL MARRIAGE AMENDMENT PROBABLY DOES NOT REPEAL ALL THAT IT NEEDS TO REPEAL AND WOULD LACK SUFFICIENT POLITICAL SUPPORT IF WRITTEN COMPREHENSIVELY TO ACCOMPLISH ITS BROADER OBJECTIVES

Opponents of same-sex equality appear to face a kind of catch-22. Perhaps in order to save marriage for only one man and one woman, opponents of same-sex marriage will have to destroy marriage—or at least destroy the state-sanctioned variety. In this Part, however, we consider a means for opponents of same-sex marriage to avoid the pitfalls of equal protection. We suggest that to ensure it is effective, a Federal Marriage Amendment must expressly authorize state discrimination on the basis of sexual orientation and gender. We think it unlikely that such an amendment would gain the support necessary for ratification. Nevertheless, we further set out prudential objections to such an amendment that apply also with full force to the current leading Federal Marriage Amendment proposals.

For the reasons set forth above, an amendment that merely purports to disallow the legislative or judicial recognition or creation of “same-sex marriage” will probably not affect the continuing validity of substantive due process, equal protection, or other state constitutional rights (such as a right of privacy). The amendment would have the effect of precluding same-sex marriage, but might well not prevent federal and state courts from demanding equal treatment for same-sex couples on an across-the-board or program-by-program basis. Thus, for example, if the military provides a stipend upon the death of a service member to a surviving spouse, it is entirely conceivable that equal protection principles might require either that the benefit be provided to a domestic partner or that no benefit be provided at all.

Considerably broader amending language would be needed to ensure that government may subject sexual minorities to invidious forms of discrimination. Merely protecting marriage does not have the effect of turning government loose to harass, oppress, or otherwise persecute

sexual minorities in ways that would transgress core notions of equal protection, substantive due process, and privacy. As Professor Tribe has noted, "each amendment will later be construed by courts in ways calculated to reconcile it with the parts of the Constitution that it was not clearly designed to destroy."¹⁴⁵ Moreover, "one can neither favor nor oppose an amendment without at least paying attention to how it either accords or clashes with basic constitutional postulates—postulates that a given amendment might, after all, be construed to displace."¹⁴⁶

Amending language providing something like "Nothing in this Constitution, nor in the constitutions of any of the Several States, shall be read or understood to prevent government discrimination on the basis of sexual orientation" would be more likely to preclude judicial recourse to equal protection, due process, or privacy principles to disallow invidious forms of discrimination against same-sex couples. This language would go a very long way toward "turning off" the application of other constitutional provisions when government classifies on the basis of sexual orientation.

Nevertheless, some interpretive discretion would still remain. Even if the American people amended the Constitution to authorize expressly overt discrimination based on sexual orientation, a sufficiently creative judge could avoid the amendment's application by simply recharacterizing the discrimination as gender-based, rather than based on sexual orientation. As we explained in Part II, a strong argument exists that discrimination against same-sex couples, at least in the context of marriage rights, constitutes a form of gender discrimination.¹⁴⁷

Although the matter is not free from doubt, a serious risk would exist that rules governing gender-based discrimination might be deployed in aid of gay men and lesbians. So, a person or organization committed to making America safe for heterosexuality must soldier on, seeking after a more perfect means of disenfranchising the human rights of sexual minorities (a kind of "Holy Grail" of constitutionalized discrimination).

A truly dedicated opponent of "special rights" for same-sex couples should consider advocating even broader amending language. For example: "Nothing in this Constitution, nor in the constitutions of any of the Several States, shall be read or understood to prevent government discrimination on the basis of sexual orientation *or gender*." This formulation of the Federal Marriage Amendment would work a profound (and, to be very clear, wholly unwarranted) change in the domestic

145. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 439 n.29 (1983).

146. *Id.*

147. See Part II, *infra*.

human rights law of the United States.

Even the most committed federal or state judge would have difficulty eluding an express authorization of government discrimination based on sexual orientation or gender. Of course, the amendment also would have the broader effect of reducing judicial scrutiny of any gender-based classification to a mere rationality level (as all social or economic legislation may be challenged as irrational¹⁴⁸). If the proposition that authorizing explicit gender-based discrimination seems unthinkable, so should an effort to authorize overt discrimination based on sexual orientation. As a philosophical matter, discrimination based on sexual orientation is effectively a subset of gender discrimination.

It may well be true that contemporary social norms run against drawing a material equivalency between same-sex and opposite-sex couples. But this is an argument that proves too much. As recently as the 1960s, the Warren Court sustained state laws that, as applied, effectively barred women from jury service as a "convenience" to homemakers.¹⁴⁹ The degree of gender equality that exists today was utterly and completely unthinkable in the eighteenth and nineteenth centuries—certainly for most men, and almost equally certainly for most women, too.¹⁵⁰

148. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 845–47 (1998); *Hodel v. Indiana*, 452 U.S. 314, 331–33 (1981); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487–89 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109–10 (1949); *Royster v. Guano Co. of Virginia*, 253 U.S. 412, 415 (1920).

149. See *Hoyt v. Florida*, 368 U.S. 57, 60–65 (1961).

150. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (noting that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator."). Indeed, under the doctrine of coverture, women lost all legal personality upon marrying. As Justice Bradley explained the matter:

So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

We would hope that the comprehensive-repealing version of the Federal Marriage Amendment would represent a complete non-starter, both in Congress and in the state legislatures. Gender-based classifications are unjust because they relegate individuals to opportunities based on preconceived notions of appropriate gendered behavior: men should not raise children; women should not pursue careers. It is fundamentally unjust to deny individuals an equal right to pursue their own educational, social, political, and professional lives because government believes that it knows best. But, if the proposition that authorizing explicit gender-based discrimination seems unthinkable, so should an effort to authorize overt discrimination against same-sex couples. Such discrimination is effectively a subset of gender discrimination.

There are reasons to believe such a proposed amendment is not politically possible. Polling data from February 2004 shows that although Americans favor preserving rights—here traditional marriage—they do not favor discrimination or taking away rights. For example, when a pollster asked the question, “Would you favor or oppose an amendment to the U.S. Constitution that would allow marriage only between a man and a woman?” (the preserving-a-traditional-right option), fifty-nine percent were in favor, and thirty-three percent were opposed. When, however, the pollster restated the question as “Would you favor or oppose an amendment to the U.S. Constitution saying that no state can allow two men to marry each other or two women to marry each other?” (the discrimination option), forty-nine percent opposed the amendment and only forty-two percent favored it.¹⁵¹ Therefore, Congress should have to make clear that what it is doing is repealing the Fourteenth Amendment to take away equal protection rights from gay people and same-sex couples. If it does so, however, adoption and ratification of the Federal Marriage Amendment seems very unlikely.

Id. See also NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA (1985); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1645–48, 1654–55 (2003).

151. See ANNENBERG PUBLIC POLICY CENTER, PRESS RELEASE: AMERICAN PUBLIC OPPOSES BOTH SAME-SEX MARRIAGES AND CONSTITUTIONAL AMENDMENT TO PROHIBIT THEM, NATIONAL ANNENBERG ELECTION SURVEY SHOWS (Feb. 9, 2004), at http://www.annenbergpublicpolicycenter.org/naes/2004_03_gay-marriage-after-court_02-09_pr.pdf (giving survey results by gender, geographic area, age, political affiliation, and education level). See also Mike Allen & Alan Cooperman, *Bush Plans to Back Marriage Amendment*, WASH. POST, Feb. 11, 2004, at A1.

Thus, the “super” Federal Marriage Amendment sketched above would almost certainly never obtain the assent of two-third majorities in both chambers of Congress, much less ratification in three-fourths of the states. But the core objection to a fail-safe Federal Marriage Amendment relates not to constitutional politics, but rather to the survival of American constitutionalism itself.

Other, prudential objections exist to the proposed Federal Marriage Amendment. Professor Tribe has argued that “[t]he resort to amendment—to constitutional *politics* as opposed to constitutional *law*—should be taken as a sign that the legal system has come to a point of discontinuity, a point at which something less radical than revolution but distinctly more radical than ordinary legal evolution is called for.”¹⁵²

Tribe strongly suggests that some amendments, because of their subject matter, do not rise to the dignity of a constitutional interest. “Far from being a mere assortment of unconnected rules and standards, the Constitution can surely be understood as unified, although not rendered wholly coherent, by certain underlying political ideals,” including “representative republicanism, federalism, separation of powers, equality before the law, individual autonomy, and procedural fairness.”¹⁵³ These norms animate our very notions of constitutionalism and, although “[w]e may choose to reject some or all of these ideals, to override them, or to recast them,” Tribe urges that “we cannot simply ignore [the Constitution’s] fundamental norms.”¹⁵⁴

In light of these considerations, “[h]ighly specific and controversial substantive restrictions . . . seem out of place in the [Constitution] regardless of the desirability of the substantive policies they codify.”¹⁵⁵ Enshrining very specific social policies, such as Prohibition, “renders them dangerously resistant to modification.”¹⁵⁶ Moreover, amendments of this sort “trivialize the Constitution and diminish its educative and expressive force as part of our political and legal culture.”¹⁵⁷ If a matter is not generally considered to be “fundamental” to our system of self-government, Tribe suggests it has no place in the Constitution itself.

Given the 200-year period during which many states have maintained a variety of laws regarding marriage, it is difficult to see why, at this juncture, a federal amendment, much less one that repeals equal protection and due process protections for all citizens based on gender, is

152. Tribe, *supra* note 145, at 436.

153. *Id.* at 439.

154. *Id.*

155. *Id.* at 441.

156. *Id.* at 441–42.

157. *Id.* at 442.

needed to suspend state control over this issue. The subject matter itself has little to do with the processes of government, but rather addresses a very specific legal question. "The value of the Constitution as an evolving repository of the nation's core political ideals . . . depends significantly on the limitation of its substantive content to what all (or nearly all) perceive to be fundamentals; a document cluttered with regulatory specifics could command no such respect."¹⁵⁸

Professor Jeff Rosen, while a law student at Yale, took Tribe's arguments even further and suggested that constitutional amendments transgressing "inalienable" rights were themselves unconstitutional. He posited a flag burning amendment as a possibly "unconstitutional" constitutional amendment.¹⁵⁹ Rosen identifies, among possible candidates for inclusion in the set of "inalienable" human rights "pursuing and obtaining happiness and safety"¹⁶⁰ and "life, liberty, property, and happiness."¹⁶¹

Obviously, seeking and obtaining the incidents of marriage—including rights to visit a significant other in a hospital, to help make medical decisions if a loved one becomes incapacitated, to have the state recognize the existence of parental rights—all directly relate to the "happiness and safety"¹⁶² of same-sex couples. Accordingly, under Rosen's theory, the Federal Marriage Amendment might itself be objectionable as undermining inalienable "natural rights" protected under the Ninth Amendment.¹⁶³

As Rosen puts the matter, "[a]n amendment purporting to grant a power that violates a retained natural right presents a special case" and "[b]y striking down an enumerated power on the basis of a Ninth Amendment natural right, the Supreme Court would not necessarily entrench its own decisions and thwart the will of the sovereign people."¹⁶⁴ Rosen suggests that an initial invalidation of an amendment

158. *Id.*

159. See Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1073–74, 1084–86, 1088–92 (1991).

160. *Id.* at 1078–79.

161. *Id.* at 1082–83.

162. *Id.* at 1079.

163. See *id.* at 1086–89.

164. *Id.* at 1088. Rosen's argument arguably represents the flip side of the coin represented by the extra-textual amendment theories advocated by scholars like Akhil Amar and Bruce Ackerman. Both have argued that "we the people" retain an independent ability to amend the Constitution, independent of the formal Article V processes. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 54 (1991) (arguing that popular sovereignty implies the ability of extra-textual amendment of the federal Constitution); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1056 (1988) (arguing same); Akhil Reed Amar, *The Consent of the Governed: Constitutional*

transgressing inalienable natural rights “would ‘remand’ the amendment back to the people or their Article V delegates and ask them if they really believe the right to be natural and retained.”¹⁶⁵

On remand, the citizenry could override the Supreme Court’s objection by using express language indicating an intention to abrogate the natural right at issue. “In this way, judicial review of the substance of an amendment does not thwart popular sovereignty, but merely ensures that it is deliberately exercised as the Founders intended—within the boundaries of natural law, as defined by the people themselves.”¹⁶⁶ Rosen argues that this theory does not impose new limits on the scope of Article V, but rather “merely makes explicit the limitations already implicit in the history and theory of Article V.”¹⁶⁷

To be clear, we do not endorse the broader implications of Rosen’s argument.¹⁶⁸ In our view, Article V establishes no substantive limitations on the scope of the amending power. As Professor Walter Dellinger has observed, “[j]udicial review of the merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments.”¹⁶⁹ “Congress is constitutionally free to propose, and the states to ratify, any

Amendment Outside Article V, 94 COLUM. L. REV. 457, 458–59, 462–87 (1994) (arguing, for example, that a majority of the citizenry should be able to force constitutional change, outside the formal structures of Article V); see also Amar, *Consent of the Governed*, *supra*, at 458–59 (arguing that concurrence of a simple majority of the electorate should be a sufficient predicate for constitutional change); but see Henry Paul Monaghan, *We the People[s], Original Understanding and Constitutional Amendment*, 96 COLUM. L. REV. 121, 126–73 (1996) (arguing that Amar’s theory of extraconstitutional amendment is unwarranted by the text, history, or original understanding of Article V and would undermine the project of American constitutionalism). Just as “we the people” can amend the Constitution without formal recourse to Article V, the Supreme Court can protect “we the people” from amendments supported by the federal and state governments that restrict or abrogate “inalienable rights.”

165. *Id.* at 1088–89.

166. *Id.* at 1089.

167. *Id.*

168. Indeed, one wonders whether Professor Rosen still endorses his theory. Cf. Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, §6 (Magazine), at 48 (strongly suggesting that the Supreme Court’s *Lawrence* decision would ignite a political backlash that would impede the progress of sexual minorities in obtaining full and equal treatment). If Rosen questions the viability of a decision like *Lawrence*, it seems doubtful that he would now support a Supreme Court decision that purported to invalidate an amendment passed by two-thirds majorities in Congress and ratified by thirty-eight states because it transgresses an unenumerated “natural right.” See *id.* at 50 (criticizing *Lawrence* because “its roots in the Constitution are not self-evident” and “[t]aken to its logical conclusion, Kennedy’s argument would seem to invalidate all moral restrictions on intimate associations that, it could be said, cause no harm to others”).

169. Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 447 (1983).

amendment whatsoever.”¹⁷⁰ Moreover, it bears noting that the Supreme Court itself has proven remarkably resistant to the argument that it should attempt to police the amendment process itself,¹⁷¹ much less superintend the substantive content or legitimacy of proposed and enacted amendments.¹⁷² All that said, however, we agree with Professor Rosen on at least one main point: an amendment should directly reference other, pre-existing amendments, if the amendment’s framers intend for it to override or abolish the rights existing under those amendments.

In the case of flag burning, Rosen suggests language stating that “[f]reedom of speech shall not be construed as a natural right retained by the people and protected by the First and Ninth Amendments.”¹⁷³ We believe that, in the context of same-sex marriage or the extension of incidents of marriage to same-sex couples, similarly specific language would be necessary to ensure that the amendment actually achieved its core purposes. Indeed, to be fail safe, the amendment should repeal due process and equal protection scrutiny of any gender-based classification. Only by repudiating the ideal of rational government treatment without regard to gender could the proponents of the Federal Marriage Amendment rest easy that the amendment would absolutely shut the door on any and all formal legal recognition of same-sex couples. Of course, the implications of such an amendment are shocking and, we believe, make congressional adoption of such an amendment virtually unthinkable.

The relative paucity of successful attempts at constitutional amendment provide yet another consideration mitigating against the submission of an effective Federal Marriage Amendment to the state legislatures. For a period of over 200 years, Congress has submitted only a handful of proposed constitutional amendments to the states for their consideration.¹⁷⁴ Notwithstanding the deeply felt and sincere concerns

170. *Id.* at 448.

171. *See* *Coleman v. Miller*, 307 U.S. 433 (1939).

172. *See, e.g.,* *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (rejecting challenge to validity of Nineteenth Amendment); *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (rejecting challenges to validity of Eighteenth Amendment). Scholarly commentators suggested that both the Eighteenth and Nineteenth Amendments might be invalid because of their subject matters. *See* *Everett V. Abbot, Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183 (1920); *William L. Marbury, The Nineteenth Amendment and After*, 7 VA. L. REV. 1, 14 (1920). Even Rosen acknowledges this adverse history, although he does not find it to be dispositive. *See* Rosen, *supra* note 159, at 1084 & 1084 n.71, 1087–89.

173. Rosen, *supra* note 159, at 1092.

174. *See* Dellinger, *supra* note 169, at 427–29 (noting that, of over five thousand bills proposing amendments to the federal Constitution, “only thirty-three received the necessary two-thirds vote of both houses of Congress”). *See also* ALAN P. GRIMES, *DEMOCRACY AND*

surrounding the issue of same-sex marriage, at the end of the day, the question for federal and state legislators should (indeed must) be: is this subject sufficiently pressing to justify establishing a permanent rule barring any legal change regarding the legal regime governing same-sex couples? To borrow a turn of phrase from Professor Tribe, we believe that we have not reached “a point of discontinuity, a point at which something less radical than revolution but distinctly more radical than ordinary legal evolution is called for.”¹⁷⁵ We share and endorse Tribe’s view that a Constitution “cluttered with regulatory specifics” will not endure.¹⁷⁶

Although the matter is not free from doubt, we hope that the American people and their elected representatives will choose to defend the sanctity of the Constitution and to avoid the creation of a dangerous precedent of amending the Constitution in response to a particular, state law issue.¹⁷⁷ The amending process will have the effect of *ending* rather than *facilitating* debate over the proper legal response to the social fact of non-traditional families. As former Senator Alan Simpson has argued, “[t]o reach the best understanding, the debate over gay men and women in America should not focus on what drives us apart but on how to make all of our children—straight and gay—feel welcome in this land, their own American home.”¹⁷⁸

CONCLUSION

The Federal Marriage Amendment represents a clear and unjustified break with our constitutional traditions, transgresses core principles of our federal system, and will do nothing to advance the vitality of families in the United States. Moreover, as we have argued, there is good cause to question whether the Federal Marriage Amendment will effectively constrain the federal and state judiciaries’ ability to afford various legal protections—perhaps including marriage itself—to same sex couples. In light of all of these considerations, Congress would be wise to leave the

THE AMENDMENTS TO THE CONSTITUTION (1978) (providing a historical overview of the amendment process).

175. Tribe, *supra* note 145, at 436.

176. *Id.* at 442.

177. See Lea Brilmayer, *Full Faith and Credit*, WALL ST. J., Mar. 9, 2004, at A16 (discussing the opinion of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health* and the efforts to overturn it by federal constitutional amendment, and noting that “[i]n our 200-year constitutional history, there has never yet been a federal constitutional amendment designed specifically to reverse a state’s interpretation of its own laws”).

178. Simpson, *supra* note 25.

question of what constitutes a valid marriage to the states and decline to set a dangerous and unwarranted constitutional precedent.¹⁷⁹

179. See Tribe, *supra* note 145, at 445 (suggesting that “remembering that it is an *amendment* to the Constitution we are considering may be almost as important as remembering that it is a *Constitution* we are, in the end, amending”).