

2007

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### Recommended Citation

Lynn D. Wardle, *Lessons from the Bill of Rights about Constitutional Protection for Marriage*, 38 Loy. U. Chi. L. J. 279 (2007).

Available at: <http://lawcommons.luc.edu/lucj/vol38/iss2/5>

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# Lessons from the Bill of Rights About Constitutional Protection for Marriage

Lynn D. Wardle\*

## I. INTRODUCTION: RIGHTS, STRUCTURES, AND THE CONSTITUTIONAL SIGNIFICANCE OF MARRIAGE

This paper considers the possible correlations between the Bill of Rights and constitutional protection for the institution of marriage. It begins by noting similarities between the general objections to adopting a Bill of Rights in 1787–91, and the general objections to adopting marriage amendments (especially a federal marriage amendment) today.<sup>1</sup> It reviews and confirms the obvious—that one of the primary purposes of constitutional provisions and amendments is to establish and protect deeply cherished human rights and relationships that are considered to be central or essential to human happiness and social order. Constitutional identification and protection of basic rights and institutions is especially needed and appropriate when those rights and relationships are deemed threatened by governmental organizations, socioeconomic, or political forces, which can be effectively controlled by appropriate government regulation. Thus, the global acceptance of the practice of protecting marriage in national constitutions is described and explained.

Next, this paper highlights the similarity between the Founders' specific arguments for and against including a Bill of Rights in the Constitution, and the current arguments for and against proposed federal

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\* Professor of Law, J. Reuben Clark Law School, Brigham Young University. An earlier version of this article was presented at the Loyola University Chicago Law Journal's Annual Conference, *The Constitution and Legal Issues Presented by Same Sex Relationships*, March 31–April 1, 2006. I express appreciation to my co-panelists, Professor Andrew Koppelman and Professor Carlos Ball, and to other participants, whose comments and questions helped me to refine this work. The helpful and timely research assistance of my law students Zachary Starr, Kevin J. Fiet, and Evie Brinkerhoff is also gratefully acknowledged.

1. See *infra* Part II (recounting the objections to including a Bill of Rights in the Constitution and those against adopting a marriage amendment).

and state marriage amendments.<sup>2</sup> The significance of adopting a Bill of Rights as a method of cultivating the essential republican quality of “virtue” is compared to the significance of adopting an amendment protecting marriage as a means of fostering “republican virtue” in people today. Subsequently, this paper discusses the particular significance of protecting conjugal marriage<sup>3</sup> to reinforce the limited nature of the government established by the Constitution—one of the major concerns of the advocates of the Bill of Rights.<sup>4</sup> Likewise, the difference between “liberty” (which the Bill of Rights was designed to protect) and autonomy (which advocates of same-sex marriage demand, and complain is infringed by marriage amendments protecting the institution of marriage), is discussed in this Part.

Part III of this paper addresses several related structural issues of constitutional and family law.<sup>5</sup> Just as the Bill of Rights had and continues to have structural significance, adoption of a marriage amendment would have structural significance. This paper attempts to show that there is a correlation between the structure of marriage and the structures of our constitutional government—that both those governmental structures and the structure of marriage are designed to foster the fullest enjoyment, expression, and protection of individual liberty. It also attempts to show in Part III that the adoption of a Federal Marriage Protection Amendment would not be inconsistent with the structure of our constitutional government, but would reinforce it by including the vertical structural principle of federalism in family law. Likewise, Part IV attempts to show that marriage amendments reinforce the horizontal structural principle of separation of powers.<sup>6</sup> Part V summarizes in conclusion.

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2. See *infra* Part II (presenting arguments against a Bill of Rights, and those against marriage amendments).

3. What the Founders called “republican” marriage.

4. See *infra* Part II (arguing that the institution of marriage ensures limited government).

5. See *infra* Part III (discussing the parallel structural functions of the Bill of Rights and marriage amendments).

6. I have discussed some of these and related questions in previous writings about other dimensions of federalism in family law and the proposed Federal Marriage Amendments. See generally Lynn D. Wardle, *Tyranny, Federalism and the Federal Marriage Amendment*, 17 *YALE J. L. & FEMINISM* 221 (2005) [hereinafter *Tyranny, Federalism*]; Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 *UNIV. ST. THOMAS L.J.* 137 (2004) [hereinafter *The Proposed FMA*]; Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents, and Significance*, 7 *FLA. COASTAL L. REV.* 403 (2005) [hereinafter *SMA*s]; and Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 *B.Y.U. J. PUB. L.* 439 (2006) [hereinafter *Federal Constitutional Protection*].

## II. LESSONS FROM THE BILL OF RIGHTS ABOUT CONSTITUTIONAL PROTECTION FOR MARRIAGE

### A. *The Bill of Rights Settled the Question Whether It Is Proper to Adopt Constitutional Amendments to Protect Basic Rights, Relationships, and Institutions*

It is appropriate—indeed essential—to adopt constitutional provisions or amendments for the purpose of identifying certain human rights, relationships, or social institutions as fundamental, and to insure their protection by and from the government, especially when they are in danger. That was settled conclusively in 1787–1791, when the Constitution of the United States was written and the first amendments (known as the Bill of Rights) were considered, rejected, debated, reconsidered, and adopted with overwhelming support of a great constitutional superconsensus of the people of America.<sup>7</sup>

Initially, few substantive individual rights or procedural protections for individual rights were explicitly identified in the Constitution. At the Convention in Philadelphia, that silence provoked some discussion and controversy. For example, George Mason, the drafter of the Virginia Declaration of Rights,<sup>8</sup> urged the addition of a Bill of Rights to the Philadelphia Constitution of 1787.<sup>9</sup> Mr. Gerry of Massachusetts and several other delegates also wanted to see specific rights spelled out in the Constitution.<sup>10</sup> But the motion to draft a Bill of Rights was unanimously rejected.<sup>11</sup> Ultimately, Mr. Mason and Mr. Gerry declined

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7. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 91 (1992).

8. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 409–10 (1968) (noting that the Virginia Declaration of Rights was quickly embraced and similar bills of rights adopted by Massachusetts, New Hampshire, Vermont, Pennsylvania, Delaware, Maryland, and North Carolina.). See also LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 1–44 (1999) [hereinafter *ORIGINS*] (outlining the adoption of bills or declarations of rights by states); BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 340–44 (1971) (providing the text of the Massachusetts Declaration of Rights); Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 *CARDOZO L. REV.* 821 (1997).

9. “Col: Mason . . . wished the plan had been prefaced with a Bill of Rights, and would second a Motion if made for the purpose. It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.” JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 630 (W.W. Norton & Co. 1966, first published in 1840) [hereinafter *MADISON’S NOTES*] (reporting debate of Sept. 12, 1787).

10. *Id.* Mr. Williamson wanted a provision establishing procedure for civil trials. *Id.* Mr. Gerry wanted the right to trial by jury included. *Id.* at 630. Mr. Pinckney, on August 20, 1787, proposed that several specific rights be denominated in the Constitution including “liberty of the Press,” “the Writ of Habeas corpus,” no troops in peace time, no quartering troops in private homes, no religious qualification or oath for any federal office, etc. *Id.*

11. *MADISON’S NOTES*, *supra* note 9, at 630. Only Massachusetts abstained; all the other

to sign the Constitution—two of only three delegates in Philadelphia on September 17, 1787, who refused to sign the Constitution. Lest there be any question about the importance of the lack of a Bill of Rights in motivating their refusal to sign, Mr. Gerry specifically mentioned the absence of explicit protection for several specific rights as one of the reasons for his declining to sign the Constitution.<sup>12</sup>

The absence of a Bill of Rights was one of the strong objections the Anti-Federalists raised against ratifying the Constitution.<sup>13</sup> The Federalists responded that they were unnecessary because the states already had such provisions.<sup>14</sup> They argued that the Constitution “is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS” because it defines some immunities and guarantees political liberty.<sup>15</sup> They argued that it was structurally improper to adopt amendments to the national constitution protecting individual rights because the matter should be dealt with by the states who already had such amendments.<sup>16</sup> They reasoned that to add a Bill of Rights “would even be dangerous”<sup>17</sup> because the Constitution gives the federal government no power to invade individual rights, and to spell out some rights specifically that could not be invaded might be construed as

states rejected the motion. *Id.* The short shrift given Mason’s and Gerry’s motion probably had to do with the fact that the delegates had been in convention for over four months, had a semifinal draft of the Constitution before them, and were anxious to get home. *Id.*

12. *Id.* at 652 (Mr. Gerry, speaking on Sept. 15, 1787).

13. See BRUTUS, ANTI-FEDERALIST NO. 84, ON THE LACK OF A BILL OF RIGHTS, available at <http://www.utulsa.edu/law/classes/rice/constitutional/AntiFederalist/84.htm> (last visited July 7, 2006) (arguing that a bill of rights was necessary to protect personal rights).

14. MADISON’S NOTES, *supra* note 9, at 630 (Mr. Sherman responded to Mason and Gerry’s motion for a Bill of Rights on September 12, 1787, arguing that “[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.”). Similarly, one federalist writing under the pseudonym of Alfredus “contended, for example, that a bill of rights was not necessary because the Constitution was a compact not between individuals but between sovereign and independent societies.” HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 64, 65 (1981) [hereinafter STORING, ANTI-FEDERALISTS].

15. THE FEDERALIST No. 84. Judge McKean told the delegates to the Pennsylvania ratifying convention that “the whole plan of government is nothing more than a bill of rights . . .” William A. Aniskovich, *In Defense of the Framers’ Intent: Civic Virtue, the Bill of Rights, and the Framers’ Science of Politics*, 75 VA. L. REV. 1311, 1327 (1989).

16. As Mr. Sherman told the delegates in the Philadelphia convention, responding to Gerry’s and Mason’s motion to draft a Bill of Rights, “The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.” MADISON’S NOTES, *supra* note 9, at 630.

17. James Wilson argued that to specify human rights would be dangerous because “it would imply that whatever is not expressed was given, which is not the principle of the proposed constitution.” STORING, ANTI-FEDERALISTS, *supra* note 14, at 67. Benjamin Rush “considered it ‘an honor to the late convention, that [the proposed Constitution] ha[d] not been disgraced with a bill of rights . . . .’” *Id.* at 68. Randolph told his fellow Virginia delegates that “in a republic [a bill of rights] is useless if not dangerous.” *Id.*

suggesting that the federal government had the authority to invade other individual rights not specifically mentioned in the Bill of Rights.<sup>18</sup> The Federalists noted that proposing a Bill of Rights would take congressional time and attention away from more important projects critical to establishing the new national government.<sup>19</sup> Additionally, both proponents and opponents of a Bill of Rights in 1787–91 were concerned that it could prove to be a mere “parchment barrier”—ineffective and easily ignored.<sup>20</sup>

But support for adopting a Bill of Rights grew, and key Federalists began to realize that it would contribute to the stability and security of the new government to include a Bill of Rights. Thomas Jefferson, writing to James Madison from France, strongly urged the inclusion of a Bill of Rights.<sup>21</sup> In the state ratifying conventions, backers of the Constitution soon recognized that the lack of a Bill of Rights was a major obstacle, and faced with the unpleasant alternatives of possible rejection of the Constitution, or convening a second convention, agreed to consider and propose a Bill of Rights after the Constitution was ratified.<sup>22</sup> “To get a majority in the [Massachusetts and several other state ratifying] convention[s] it was necessary to recommend certain ‘conciliatory propositions’ or amendments . . . .”<sup>23</sup> Ultimately, eight of the states recommended nearly 200 “conciliatory” proposals, which

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18. THE FEDERALIST No. 84. In his famous State House speech of October 4, 1787, James Wilson argued that because the national government was a limited government of enumerated powers only, and had only positively granted powers, it would be “absurd” to spell out individual rights and say that the people “should enjoy those privileges of which [they] are not divested . . . .”

19. STORING, ANTI-FEDERALISTS, *supra* note 14, at 65. See also Herbert J. Storing, *The Constitution and the Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 15, 22–24 (Robert Goldwin & William Schambra eds., 1985) (recounting the argument that a bill of rights was unnecessary because the federal government had only enumerated powers, and expressly forbidding specific government actions may imply more federal powers).

20. STORING, ANTI-FEDERALISTS, *supra* note 14, at 69.

21. The felicitous phrase “parchment barrier” comes from Madison. THE FEDERALIST No. 48. “Despite all their rhetorical emphasis on a bill of rights, however, the Anti-Federalists were typically quite doubtful about the practical utility of this kind of provisions in the new Constitution.” STORING, ANTI-FEDERALISTS, *supra* note 14, at 67.

22. ORIGINS, *supra* note 8, at 25–27 (citing Jefferson’s letter to Madison stating his criticism of the proposed Constitution—“First, the omission of a bill of rights.”); see also Price Marshall, “A Careless Written Letter”—*Situating Amendments to the Federal Constitution*, 51 ARK. L. REV. 95, 105 n.46 (1998) (citing correspondence between Madison and Jefferson).

23. For example, James Madison wrote to Jefferson on March 29, 1789, and explained that conciliatory amendments which were being proposed by the state ratifying conventions would either “extinguish opposition to the system, or at least break the force of it, by detaching the deluded opponents from the designing leaders.” Storing, *The Constitution and the Bill of Rights*, *supra* note 18, at 21.

23. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966).

Congressman James Madison (one of the original Federalist opponents of a Bill of Rights) laboriously distilled into eight amendments, and which committees and Congress transformed into twelve proposed amendments that Congress then approved and sent to the states on September 25, 1789.<sup>24</sup> Support for these amendments was very strong in most states, and ratification moved very quickly. Within six months, nine states had ratified, and it took a total of only twenty-seven months for the requisite three-fourths of the states to ratify ten of the proposed amendments which have become known as the Bill of Rights.<sup>25</sup>

Passage of the Bill of Rights “had a great healing effect . . . [and] it did, as Mason originally proposed, ‘give great quiet’ to people. The opposition to the Constitution, Jefferson informed Lafayette, ‘almost totally disappeared’ . . . .”<sup>26</sup> Over the 215 years since the ratification of the Bill of Rights, that explicit declaration of basic human rights and the protections for them has served as a beacon not only to American citizens and state constitutions, but has been a model, template, and inspiration for literally all of the constitutional provisions and amendments recognizing and protecting human rights included in the written national constitutions of virtually all nations of the world.<sup>27</sup>

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24. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE BILL OF RIGHTS AND BEYOND 6 (1987) (Every state ratifying convention which followed Massachusetts proposed conciliatory amendments until over 200 recommendations had been made by the states); Jeffrey Rogers Hummel & William Marina, *Did the Constitution Betray the Revolution?*, The Independent Institute, <http://www.independent.org/newsroom/article.asp?id=1400> (last visited July 7, 2006) (“Madison culled through the more than 200 state proposals”). See generally DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 221–45 (1990) (recounting the process of ratifying the Bill of Rights); Richard G. Wilkins, *The Structural Role of the Bill of Rights*, 6 B.Y.U. J. PUB. L. 525, 527–39 (1992) (reviewing history of conciliatory proposals en route to adoption of Bill of Rights).

25. See generally BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1167 (1980) (chart of various provisions proposed by various states); FARBER & SHERRY, *supra* note 24, at 219–45 (recounting the history of the Bill of Rights from English antecedents through Philadelphia debate and state conciliatory amendments, and finally to ratification); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 S. CT. REV. 301 (1991) (reviewing Madison’s ironic role as Father of the Bill of Rights); Richard G. Wilkins, *The Structural Role of the Bill of Rights*, 6 B.Y.U. J. PUB. L. 525 (1992) (reviewing historical, judicial, and social “structural” role of Bill of Rights); Leonard W. Levy, *Bill of Rights*, in 2 ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 104 (Jack P. Greene, ed. 1984) (recounting the history of drafting and enacting the Bill of Rights); James H. Hutson, *The Drafting of the Bill of Rights: Madison’s “Nauseous Project” Reexamined*, 3 BENCHMARK 309 (1989) (discussing Madison’s reluctance and political motivation). While Federalist opposition blocked ratification in Georgia, Connecticut, and Massachusetts, it was, ironically, Anti-Federalist opposition that delayed ratification in Virginia until December 1791. FARBER & SHERRY, *supra* note 24, at 226–27, 243–44.

26. Leonard W. Levy, *Bill of Rights*, in ESSAYS ON THE MAKING OF THE CONSTITUTION 258, 289 (2d ed. 1987).

27. The American Constitution is the oldest national constitution still in operation in the

Despite plausible objections to adopting a federal Bill of Rights that were very cogently asserted by the very group of capable and influential individuals who had the dominant hand in proposing, drafting, and promoting the Constitution of the United States, the Bill of Rights was nevertheless adopted. The clear and unmistakable consensus—the constitutional consensus—of the people and of the states in the founding era was that it was very important to include in constitutions—by original provision or by constitutional amendment—provisions that identified cherished fundamental human rights, relationships, and social institutions, and to guarantee (at least in the way that a written charter of government can guarantee) their protection. Moreover, it is clear from the history of the adoption of the Bill of Rights that constitutionalizing the identity and fundamental status of cherished rights is especially important when they are considered to be in danger.

Claims by opponents of state and federal marriage amendments that it is fundamentally and conceptually improper to include protections for human rights, relationships, and institutions such as marriage in constitutions generally, or in an American national or state constitution in particular, are factually erroneous as a matter of constitutional history and conceptually meritless as a matter of constitutional principle. That argument was settled in 1791 against the position of the opponents of marriage amendments. The history of the adoption of the Bill of Rights unequivocally established that it is proper, and indeed indispensable, for a political society to include in the foundational charter of its government, and to later add thereto by amendment, explicit recognition of and protection for any and all foundational human rights, relationships, and institutions when they are deemed threatened.

Thus, the movement toward adopting marriage amendments to state and federal constitutions clearly has a long and honorable genealogy going back to the drafting and adoption of the first amendments to America's Constitution. The marriage amendments proposed today are proposed for the same reasons and to serve the same critical purpose as the twelve amendments submitted to the states in 1789, ten of which were approved within sixteen months and became the Bill of Rights.

### *B. Constitutional Protection for Marriage Is the Global Standard Today*

The cornerstone principle emerging from the history of the Bill of Rights has been confirmed, embraced by and included in virtually every



national constitution that has been adopted since 1787, and is validated by the texts of nearly all national constitutions in effect in the world today. Constitutional provisions for the purpose of identifying and providing protection for fundamental human rights, relationships and institutions *including marriage* are simply an undeniable norm in international and comparative constitutional law today.

The national constitutions of most of the nations of the world contain express, explicit protection for family and/or marriage in the text of their constitutions.<sup>28</sup> The United Nations recognizes 192 independent sovereign nations in the world.<sup>29</sup> At least 137 national constitutions contain provisions addressing protection for marriage and/or families—substantive language protecting or procedural provisions allocating power to protect families and/or family relations.<sup>30</sup> That is over seventy-one percent of the 192 sovereign nations recognized by and belonging to the United Nations. Some constitutional provisions are extremely eloquent, many very full and robust, others very simple, and a few merely structural or procedural; but it can hardly be said that protection of marriage as a basic human right in the fundamental charter or constitution of a state is unusual.

As the Appendix indicates, the national constitutions of 134 nations, more than two-thirds (actually, over 70%) of the countries of the world, contain substantive provisions defining, protecting, or expressing a commitment to the institution of marriage, family or families, parenting, motherhood, and/or family rights and relationships.<sup>31</sup> For example, Article 54 of the Constitution of Afghanistan provides:

- (1) Family is a fundamental unit of society and is supported by the state.
- (2) The state adopts necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam.<sup>32</sup>

Likewise, Article 5 of the Constitution of Bahrain provides:

- a. The family is the basis of society, deriving its strength from religion, morality and love of the homeland. The law preserves its

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28. *See infra* Appendix (listing a table of 137 national constitutions with provisions relating to family and marriage).

29. United Nations, List of Member States, *available at* <http://www.un.org/Overview/unmember.html> (last visited July 23, 2005). The UN does not recognize the Holy See as a nation, but the Vatican has Permanent Observer status.

30. Appendix.

31. *Id.*

32. CONST. OF AFGHANISTAN, art. 54, <http://www.af/resources/aaca/constitution/FinalDraftConstitutionEnglish.pdf> (last visited Nov. 19, 2006).

lawful entity, strengthens its bonds and values, under its aegis extends protection to mothers and children, tends the young and protects them from exploitation and safeguards them against moral, bodily and spiritual neglect. The State cares in particular for the physical, moral and intellectual development of the young.

b. The State guarantees reconciling the duties of women towards the family with their work in society, and their equality with men in political, social, cultural, and economic spheres without breaching the provisions of Islamic canon law (Shari'a) . . .<sup>33</sup>

Article 6 of the German Constitution also provides:

(1) Marriage and family are under the special protection of the state.

(2) Care and upbringing of children are the natural right of the parents and primarily their duty. The state supervises the exercise of the same . . .<sup>34</sup>

The former Constitution of Serbia contained explicit protection for family relations in Articles 28 and 29. The latter provision explicitly protected marriage: "The family shall enjoy special protection. Marriage and matrimonial and family relations shall be regulated by law. Parents shall have the right and duty to care for the raising and upbringing of their children. . . ."<sup>35</sup>

At least seventy-eight national constitutions—representing fifty-seven percent of the national constitutions that refer to families or marriage, and governing more than forty percent of the sovereign nations of the world—contain explicit, substantive provisions identifying *marriage* as a fundamental and protected relationship, defining marriage, or providing protection for marriage.<sup>36</sup>

Provisions in the national constitutions of at least thirty-two nations explicitly define marriage as the union of man and woman,<sup>37</sup> or very

33. CONST. OF BAHRAIN, art. 5, [http://confinder.richmond.edu/admin/docs/Constitution\\_of\\_the\\_Kingdom\\_of\\_Bahrain\\_-\\_2002.pdf](http://confinder.richmond.edu/admin/docs/Constitution_of_the_Kingdom_of_Bahrain_-_2002.pdf) (last visited Nov. 19, 2006).

34. BASIC LAW OF GERMANY, art. 6, <http://www.psr.keele.ac.uk/docs/german.htm> (last visited Nov. 19, 2006).

35. CONST. OF SERBIA, art. 29, [http://www.serbia-info.com/facts/constitution\\_2.html](http://www.serbia-info.com/facts/constitution_2.html) (last visited Nov. 19, 2006).

36. Appendix.

37. See CONST. OF BRAZIL, art. 226, <http://pdba.georgetown.edu/Constitutions/Brazil/brazil.html> (follow link to unofficial version in English) (last visited Nov. 19, 2006); CONST. OF BULGARIA, art. 46, [http://www.oefre.unibe.ch/law/icl/bu00000\\_.html](http://www.oefre.unibe.ch/law/icl/bu00000_.html) (last visited Nov. 19, 2006); CONST. OF BURKINA FASO, art. 23, [http://www.chr.up.ac.za/hr\\_docs/constitutions/docs/Burkina%20FasoC%20\(englishsummary\)\(rev\).doc](http://www.chr.up.ac.za/hr_docs/constitutions/docs/Burkina%20FasoC%20(englishsummary)(rev).doc) (last visited Nov. 19, 2006); CONST. OF CAMBODIA, art. 45, [http://www.cambodian-parliament.org/english/constitution\\_files/constitution.htm](http://www.cambodian-parliament.org/english/constitution_files/constitution.htm) (last visited Nov. 19, 2006); CONST. OF COLOMBIA, art. 42, *available at* <http://pdba.georgetown.edu/Constitutions/Colombia/col91.html>; CONST. OF ECUADOR, art. 33, <http://pdba.georgetown.edu/constitutions/Ecuador/ecuador98.html> (last visited on Nov. 19, 2006); CONST. OF HONDURAS, art. 112, [http://www.honduras.net/honduras\\_constitution.html](http://www.honduras.net/honduras_constitution.html) (last

strongly indicate that marriage is the union of a man and a woman.<sup>38</sup> Thus, one-sixth of the sovereign nations of the world appear to clearly protect the institution of conjugal (male-female) marriage.

The national constitutions of nearly ten percent of nations explicitly define marriage as the union of man and woman. For example, the Constitution of Japan provides that: “Marriage shall be based only on the mutual consent of *both sexes* . . . .”<sup>39</sup>

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visited Nov. 19, 2006); KENPŌ, art. 24, para. 1 (Japan), [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html) (last visited Nov. 19, 2006); CONST. OF LITHUANIA, art. 38, [http://www.oefre.unibe.ch/law/icl/lh00000\\_.html](http://www.oefre.unibe.ch/law/icl/lh00000_.html) (last visited Nov. 19, 2006); CONST. OF MOLDOVA, art. 48, <http://www.e-democracy.md/en/legislation/constitution> (last visited Nov. 19, 2006); CONST. OF NICARAGUA, art. 72, <http://www.leftjustified.com/leftjust/lib/sc/ht/wtp/nicaragu.html> (last visited Nov. 19, 2006); CONST. OF PARAGUAY, arts. 49, 51, 52, [http://www.oefre.unibe.ch/law/icl/pa00000\\_.html](http://www.oefre.unibe.ch/law/icl/pa00000_.html) (last visited Nov. 19, 2006); CONST. OF POLAND, art. 18, [http://www.oefre.unibe.ch/law/icl/pl00000\\_.html](http://www.oefre.unibe.ch/law/icl/pl00000_.html) (last visited Nov. 19, 2006); CONST. OF TAJIKISTAN, art. 33, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan003670.htm> (last visited Nov. 19, 2006); CONST. OF TURKMENISTAN, art. 25, <http://www.uta.edu/cpsees/TURKCON.htm> (last visited Nov. 19, 2006); CONST. OF UGANDA, art. 31, [http://www.parliament.go.ug/index.php?option=com\\_wrapper&Itemid=78](http://www.parliament.go.ug/index.php?option=com_wrapper&Itemid=78) (last visited Nov. 19, 2006); CONST. OF UKRAINE, art. 51, <http://www.rada.kiev.ua/const/conengl.htm> (last visited Nov. 20, 2006); and CONST. OF VENEZUELA (art. 77), <http://pdba.georgetown.edu/Constitutions/Venezuela/ven1999.html> (last visited Nov. 20, 2006).

38. See CONST. OF ARMENIA, art. 32, [http://www.oefre.unibe.ch/law/icl/am00000\\_.html](http://www.oefre.unibe.ch/law/icl/am00000_.html) (last visited Nov. 20, 2006) (declaring that “[w]omen and men enjoy equal rights when entering into marriage, during marriage, and in the course of divorce”); CONST. OF AZERBAIJAN, art. 34, [http://www.oefre.unibe.ch/law/icl/aj00000\\_.html](http://www.oefre.unibe.ch/law/icl/aj00000_.html) (last visited Nov. 20, 2006) (referencing husband and wife when discussing the right to marriage); CONST. OF BELARUS, art. 32, [http://www.oefre.unibe.ch/law/icl/bo00000\\_.html](http://www.oefre.unibe.ch/law/icl/bo00000_.html) (noting that husband and wife shall be equal in a relationship of marriage); XIAN FA art. 49, §2 (1982) (China) [http://www.oefre.unibe.ch/law/icl/ch00000\\_.html](http://www.oefre.unibe.ch/law/icl/ch00000_.html) (stating that husband and wife have a duty to their family stemming from marriage); CONST. OF CUBA, art. 36, [http://www.cubanet.org/ref/dis/const\\_92\\_e.htm](http://www.cubanet.org/ref/dis/const_92_e.htm) (stating that “[m]arriage is the voluntarily established union between a man and a woman”); CONST. OF ERITREA, art. 22, [http://www.oefre.unibe.ch/law/icl/er00000\\_.html](http://www.oefre.unibe.ch/law/icl/er00000_.html) (last visited Nov. 20, 2006) (discussing men and women constituting the familial unit); CONST. OF ETHIOPIA, art. 34, [http://www.oefre.unibe.ch/law/icl/et00000\\_.html](http://www.oefre.unibe.ch/law/icl/et00000_.html) (last visited Nov. 20, 2006) (noting the rights of men and women in marriage); CONST. OF MONGOLIA, art. 16, [http://www.oefre.unibe.ch/law/icl/mg00000\\_.html](http://www.oefre.unibe.ch/law/icl/mg00000_.html) (last visited Nov. 20, 2006) (stating that men and women have the right to marry); CONST. OF NAMIBIA, art. 14, [http://www.oefre.unibe.ch/law/icl/wa00000\\_.html](http://www.oefre.unibe.ch/law/icl/wa00000_.html) (discussing men and women in referring to family and marriage); CONST. OF PERU, art. 5, <http://pdba.georgetown.edu/Constitutions/Peru/per93reforms05.html> (last visited Nov. 20, 2006) (stating that a union is between a man and a woman); CONST. OF SOMALIA, art. 2.7, (draft), [http://www.civicwebs.com/cwvlib/africa/somalia/1995/reunification/appendix\\_1.htm](http://www.civicwebs.com/cwvlib/africa/somalia/1995/reunification/appendix_1.htm) (last visited Nov. 20, 2006) (providing rights for men and women in marriage, divorce, and raising children); CONST. OF SURINAME, art. 35, <http://www.constitution.org/cons/suriname.htm> (last visited Nov. 20, 2006) (protecting the family and protecting the equality of husband and wife); and CONST. OF VIETNAM, art. 64, [http://www.oefre.unibe.ch/law/icl/vm00000\\_.html](http://www.oefre.unibe.ch/law/icl/vm00000_.html) (last visited Nov. 20, 2006) (“Marriage shall conform to the principles of free consent, progressive union, monogamy and equality between husband and wife.”).

39. KENPŌ, art. 24, para. 1 (Japan), *supra*, note 37 (emphasis added).

Similarly, the Constitution of Brazil contains a dual-gender definition of marriage that is quite extensive:

0. The family, the foundation of society, enjoys special protection from the state.
1. Marriage is civil and the marriage ceremony is free of charge.
2. Church marriage has civil effects according to the law.
3. For purposes of State protection, *a stable union between a man and a woman* as a family unit shall be recognized and the law shall facilitate conversion of such unions into marriage.
4. The community formed by any parent and his/her descendants is also considered a family unit.
5. The rights and duties of matrimonial society shall be exercised equally by men and women.
6. Civil marriage may be dissolved by divorce, after legal separation for more than one year in the cases foreseen in the law, or after “de facto” separation for more than two years.<sup>40</sup>

Likewise, the specific composition and definitional requirements of marriage are described in Article 46 of the Constitution of Bulgaria:

- (1) *Matrimony is a free union between a man and a woman*. Only a civil marriage shall be legal. (2) Spouses shall have equal rights and obligations in matrimony and the family. (3) The form of a marriage, the conditions and procedure for its conclusion and termination, and all private and material relations between the spouses shall be established by law.<sup>41</sup>

The Constitution of Cambodia provides that “Marriage shall be . . . based on the principle of mutual consent between *one husband and one wife*.”<sup>42</sup> Likewise, the Constitution of Colombia declares that the family “is formed . . . by the free *decision of a man and woman* to contract matrimony . . . .”<sup>43</sup> Poland’s Constitution declares that: “Marriage, *being a union of a man and a woman* . . . shall be placed under the protection and care of the Republic of Poland.”<sup>44</sup> The Constitution of Ukraine also explicitly provides: “Marriage is based on the free consent of *a woman and a man*.”<sup>45</sup> These are just some of many clear examples of national constitutional provisions that unequivocally define marriage as the union of a man and a woman.

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40. CONST. OF BRAZIL, *supra* note 37 (emphasis added).

41. CONST. OF BULGARIA, art. 46, *supra* note 37 (emphasis added).

42. CONST. OF CAMBODIA, art. 45, *supra* note 37 (emphasis added).

43. CONST. OF COLOMBIA, art. 42, *supra* note 37 (emphasis added).

44. CONST. OF POLAND, art. 18, *supra* note 37 (emphasis added).

45. CONST. OF UKRAINE, art. 51, *supra* note 37 (emphasis added).

While not explicitly declaring that marriage is only a union between a man and a woman, many other national constitutions clearly indicate that both sexes are included in marriage. For example, Article 32 of the Constitution of Armenia provides:

The family is the natural and fundamental cell of society. Family, motherhood, and childhood are placed under the care and protection of society and the state.

Women and men enjoy equal rights when entering into marriage, during marriage, and in the course of divorce.<sup>46</sup>

Similarly, Article 32 of the Constitution of Belarus spells out protection of marriage as follows:

(1) Marriage, the family, motherhood, fatherhood, and childhood shall be under the protection of the State.

(2) On reaching the age of consent, women and men shall have the right to enter into marriage on a voluntary basis and start a family. A husband and wife shall be equal in family relationships. Parents or persons *in loco parentis* shall be entitled and required to raise their children and to take care of their health, development, and education . . .<sup>47</sup>

Many of these provisions refer to “husband and wife,” suggesting dual-gender marriage. For example, the Constitution of China provides that “(1) Marriage, the family, and mother and child are protected by the State. (2) *Both husband and wife* have the duty to practice family planning.”<sup>48</sup> The Constitution of Cuba declares that “[m]arriage is the voluntary established union between a man and a woman . . . based on full equality of rights. . . .”<sup>49</sup> In Namibia, the Constitution declares that “[m]en and women of full age . . . shall have the right to marry and to found a family.”<sup>50</sup> The Constitution of Somalia provides that “[m]en and women have equal rights and responsibilities. This includes equal rights and responsibilities *in marriage* . . . .”<sup>51</sup>

Additionally, many national constitutions (some without an explicit dual-gender definition of marriage) contain provisions referring to, and thus incorporating, the dual-gender nature of the family—such as expressing protection for and commitment to motherhood, parenting, or

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46. CONST. OF ARMENIA, art. 32, *supra* note 38.

47. CONST. OF BELARUS, art. 32, *supra* note 38.

48. XIAN FA art. 49, §2 (China), *supra* note 38 (emphasis added).

49. CONST. OF CUBA, art. 36, *supra* note 38 (emphasis added).

50. CONST. OF NAMIBIA, art. 14, *supra* note 38.

51. CONST. OF SOMALIA, art. 2.7 (draft), *supra* note 38.

parent-child rights and relationships.<sup>52</sup> For instance, Article 41 of the Constitution of Slovakia provides:

- (1) Marriage, parenthood, and the family are under the protection of the law. The special protection of children and minors is guaranteed.
- (2) Special care, protection in labor relations, and adequate working conditions are guaranteed to women during the period of pregnancy.<sup>53</sup>

Likewise, Article 51 of the Constitution of Ukraine provides:

Marriage is based on the free consent of a woman and a man. Each of the spouses has equal rights and duties in the marriage and family. Parents are obliged to support their children until they attain the age of majority. Adult children are obliged to care for their parents who are incapable of work. The family, childhood, motherhood and fatherhood are under the protection of the State.<sup>54</sup>

Thus, it is hardly novel for the citizens of a nation to include protection for marriage and family in the country's foundational constitution. Marriage is protected in the constitutions of Catholic nations and Protestant nations, Muslim nations, Buddhist nations, Shinto nations, secular nations, and communist nations. Constitutional protection for marriage and family is clearly the norm in the constitutions of the nations of the world.

### *C. Déjà Vu: The Inadequacy of the Specific Arguments Against Adoption of Marriage Amendments*

The similarity between opposition to the Bill of Rights and opposition to marriage amendments extends beyond the general conceptual objections that were rejected 220 years ago through the adoption of the Bill of Rights. The specific arguments made in 1787–91 against a Bill of Rights echo eerily today in some of the specific arguments against adopting state and federal marriage protection amendments. For the same reasons that those arguments against the Bill of Rights were rejected by the founding generation in 1787–91, they should also be rejected today when made by opponents of state and federal marriage amendments.

For example, like the failed opponents of the Bill of Rights, opponents of marriage amendments today argue that it is unnecessary to

52. See *infra* Appendix (referencing provisions noting the dual gender nature of the family).

53. CONST. OF SLOVAKIA, art. 41, [http://www.oefre.unibe.ch/law/icl/1o00000\\_.html](http://www.oefre.unibe.ch/law/icl/1o00000_.html) (last visited Nov. 3, 2006).

54. CONST. OF UKRAINE, art. 51, *supra* note 37. See also *The Doha Declaration*, U.N. Doc. A/59/592 (Nov. 30, 2004) (convention declaration reaffirming the commitment to the family and the vital role of marriage in nurturing the development of children).

adopt the proposed amendments.<sup>55</sup> Just as Federalist opponents of the Bill of Rights said there were ample protections in the State Declarations of Rights and that the limited nature of the national government made a Bill of Rights unnecessary, today's opponents of marriage amendments argue that various statutes (like federal or state Defense of Marriage Acts) and case law doctrines render marriage amendments unnecessary.<sup>56</sup> Just as advocates of the Bill of Rights in 1787 noted that the national government had broad power to legislate and regulate matters pertaining to "life, liberty, and property," necessitating constitutional protection of basic human rights, advocates of marriage amendments today note that without constitutional protection for marriage, those DOMA statutes and marriage doctrines can be easily changed by mere legislative and judicial majorities.

Like the failed opponents of the Bill of Rights, opponents of marriage amendments today also argue that it would be dangerous to individual liberties to adopt the proposed amendments.<sup>57</sup> Just as opponents of the Bill of Rights thought that individual liberties would be threatened because enacting the Bill of Rights would validate an enlarged (not

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55. Compare, e.g., American Civil Liberties Union, Marriage Amendment: Oppose Writing Intolerance Into the Constitution, <http://www.aclu.org/lgbt/relationships/11820res20030528.html> (May 28, 2003) [hereinafter ACLU Oppose] (arguing that America has not defined marriage by amendment and now is not the time to begin writing discrimination into the Constitution), and Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist and Anti-Democratic*, 570 POL'Y ANALYSIS 1, 2 (2006), available at <http://www.cato.org/pubs/pas/pa570.pdf> (arguing that such an amendment is unnecessary because other federal and state laws bar same-sex marriage), and Letter from Leadership Conference on Civil Rights et al., to Senator, <http://www.civilrights.org/issues/enforcement/details.cfm?id=30115> (April 12, 2005) [hereinafter LCCR Opposition] (letter to congressional representatives stating that the federal marriage amendment is "dangerous and unnecessary" as it is divisive and not a concern of the federal government), with *supra* Section II.B (noting constitutional provisions of foreign countries that have incorporated marriage amendments).

56. See, e.g., 1 U.S.C. § 7 (2000) (defining marriage as "a legal union between one man and one woman" and defining spouse as "a person of the opposite sex").

57. Compare ACLU Oppose, *supra* note 55 (presenting the ACLU's argument that a FMA would allow the Constitution to discriminate among Americans, thus destroying the history and tradition of protecting individual liberties), and American Civil Liberties Union, NAACP Testimony in Opposition to the Federal Marriage Amendment, <http://www.aclu.org/lgbt/relationships/11922res20040304.html> (Mar. 4, 2004) [hereinafter NAACP Testimony] ("Adoption of this so-called [FMA] . . . would mark the first time that a constitutional amendment has denied or diminished, rather than established or expanded, civil rights for groups of individuals"), and Letter from Alliance of Baptists et al., to Representative, [http://www.hrc.org/Template.cfm?Section=Federal\\_Constitutional\\_Marriage\\_Amendment&CONTENTID=19603&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.hrc.org/Template.cfm?Section=Federal_Constitutional_Marriage_Amendment&CONTENTID=19603&TEMPLATE=/ContentManagement/ContentDisplay.cfm) (June 2, 2004) [hereinafter HRC Opposition] (stating that national religious groups see the FMA as a violation of an individual's civil rights and an interference with matters that are held close to an individual's core beliefs and values), with *supra* Section II.B (discussing constitutional provisions that have incorporated marriage within the text).

limited and enumerated) scope of power of the national government, opponents of marriage amendments today claim that the right to marry the person of one's choice would be lost or the right to live a fulfilled life as a homosexual would be frustrated. Supporters of the Bill of Rights won that argument by noting that the Bill of Rights would limit and reinforce boundaries on, not increase, the power of the national government; supporters of the marriage amendments likewise note that marriage amendments will add constitutional protection for the understanding of marriage that has been in place for millennia, thus expanding the list of human rights and reinforcing limits on government power to invade, intrude into, and redefine that basic right, relationship, and unit of society.

Like the failed opponents of the Bill of Rights, opponents of marriage amendments today also argue that it would distort the role and structure of the Constitution to adopt the proposed amendments.<sup>58</sup> Then, opponents said it was inappropriate for the federal government to adopt such amendments because the federal government had no authority to regulate in areas protected by the proposed Bill of Rights. Likewise, opponents of the proposed marriage amendments argue that it is not the federal government's role to get involved in protecting marriage. Then, the argument was rejected because the federal government, though limited, had the power to potentially effect the enjoyment of rights that were deemed fundamental and basic, so a constitutional declaration of rights and institutions upon which the government could not infringe was deemed critical. It is undeniable that the federal government through its many branches and agencies holds and has exercised the power to regulate marriage in many profound ways.<sup>59</sup> Even the Supreme Court of the United States, which historically has manifested

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58. Compare Carpenter, *supra* note 55 (arguing that the FMA would be a "radical intrusion" on the concept of federalism, wielding an unprecedented amount of control over state legislatures and courts, and ending the democratic process by foreclosing any debates or legal battles over the subject), and ACLU Oppose, *supra* note 55 (arguing that enacting the FMA would end the constitutional protection of individual rights and restrict the main purpose of the Constitution), and NAACP Testimony, *supra* note 57 (asserting that the Bill of Rights and its amendments have been created to protect individual rights, while the FMA would limit individual rights), and LCCR Opposition, *supra* note 57 (stating that the FMA is antithetical to the Constitution and the Bill of Rights as it discriminates against rather than promotes individual rights), with *supra* Section II.B (presenting evidence that regardless of opposition, many countries have still adopted marriage provisions). The federalism arguments are discussed in greater detail below. See *infra* note 59 and accompanying text (discussing the FMA's basis in federalism).

59. See Tyranny, *Federalism*, *supra* note 6, at 237–38 (discussing that congressional power in regulating family and marriage is evidenced by such things as the FMA); *The Proposed FMA*, *supra* note 6, at 142–43 (noting that one example of this exercise is the congressional introduction of the FMA).



its distaste for deciding questions of family law, which it considers to be within the “virtually exclusive province of the States,”<sup>60</sup> has decided many cases establishing federal constitutional, statutory, and common law limits and boundaries on state regulation of marriage.<sup>61</sup>

Like the failed opponents of the Bill of Rights, opponents of marriage amendments today also argue that if amendments are needed, the matter should be left to the states.<sup>62</sup> Then, and now, opponents of the Bill of Rights and marriage amendments, respectively, argue that the matter should be dealt with by states, and not by a federal amendment because the states are the proper jurisdiction to protect those rights and relationships. Then, and now, supporters of the Bill of Rights and marriage amendments respond by agreeing that state constitutional protections for these human rights, relationships, and institutions are valid and necessary, but are not sufficient. State constitutional law can prevent violations of basic rights and institutions by the state and its agencies. However, state constitutional law is inadequate to prevent violations of and intrusion upon freedom of speech, press, religion, assembly, petition, homes, jury trial by the federal government and its agencies and officers (then), and of the institution of marriage (now).

Like the failed opponents of the Bill of Rights, opponents of marriage amendments today also argue that adopting such amendments would divert attention from more important matters.<sup>63</sup> Then, the opponents of

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60. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). See generally *The Proposed FMA*, *supra*, note 6, at 160 (quoting Judge Bork to effect that federalism in family law is a dead letter); *Tyranny, Federalism*, *supra* note 6, at 240–49 (tracing erosion of federalism in family law in Supreme Court decisions).

61. See, e.g., *Turner v. Safley*, 482 U.S. 78, 96–98 (1987) (holding that a prison regulation forbidding prisoners to marry unless prison superintendent found “compelling reason” to allow marriage is unconstitutionally unrelated to legitimate penological interests and infringes upon the constitutionally protected right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 388–89 (1978) (holding that a requirement of judicial approval for support-obligor to obtain a marriage license is an unconstitutional violation of Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that antimiscegenation laws violate Equal Protection Clause and due process right to marry). See generally Lynn D. Wardle, *Loving v. Virginia and The Constitutional Right to Marry, 1790–1990*, 41 *How. L.J.* 289, 291–336 (1998) (describing dozens of Supreme Court decisions deciding various legal issues concerning marriage and marital incidents).

62. Compare Carpenter, *supra* note 55 (marriage is a part of family law which is an area traditionally left to the states to regulate), HRC Opposition, *supra* note 57 (arguing that since the Constitution does not contain a provision on marriage that regulatory power has been left to the states), and Senator John McCain, Statement on the Federal Marriage Amendment to President, [http://online.logcabin.org/news\\_views/reading-room-back-up/news\\_07132004.html](http://online.logcabin.org/news_views/reading-room-back-up/news_07132004.html) (July 3, 2004) (“If a constitution is to be amended, it should be a state constitution.”), with *supra* Section II.B (providing examples of foreign nations that have incorporated marriage amendments in their constitutions).

63. Compare Amy Worden, *Pa. moves to ban same-sex marriage*, THE PHILADELPHIA INQUIRER, June 6, 2006, at A01, (quoting Dan Frankel, a Democratic lawmaker, as stating “I am

the Bill of Rights were concerned with building a new national government from scratch, and admittedly, the First Congress was almost a second constitutional convention because the institutions, procedures, and policies it established set powerful precedents, many of which survive to this day. Today, opponents of marriage amendments argue that government business concerning the war in Iraq, illegal immigration, education, social security, and myriad other political issues deserve priority. The supporters of the marriage amendments, like the supporters of the Bill of Rights, readily admit the importance of other issues, but insist that protection of the foundational rights and institutions (then the institutions of the press, religion, homes, and today the institutions of marriage) are so foundational for individual happiness and social order that their protection is a matter of priority over the claims for attention to economic, military, and other interests.

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stunned we are talking about this issue today when we need to be dealing with substance; we need to talk about minimum wage, we need to talk about property tax. George Bush wants to divert attention [from other issues]. I would suggest that is why the majority party wants to proffer this legislation.”), and The BRO Blog, Call Senator Smith Today! Denounce his support of the federal Marriage Amendment, [http://basicrights.blogspot.com/2006\\_06\\_01\\_basicrights\\_archive.html](http://basicrights.blogspot.com/2006_06_01_basicrights_archive.html) (last visited Nov. 21, 2006) (stating, in opposition to a state marriage amendment, that “[t]hey are using fear and misunderstanding to divert attention from the issues that are actually important to working Americans, while at the same time denigrating, demonizing and defaming gay and lesbian people and our families.”), and Christian Legal Society, Senator Position List for the Constitutional Amendment to Protect Marriage, <http://www.clsnet.org/clsPages/lobbying/fma/SenPositionList.php?mode=print&PHPSESSID=608258e0630ab465f52ccdb7fb70f56f> (last visited Nov. 10, 2006) (reporting that Senator Durbin opposed the FMA because the “Republicans are trying to divert attention away from other election issues w/the FMA” and that Senator Mikulski opposed it because the “FMA is an election year ploy”), and Lou Dobbs, *Dobbs: Gay marriage amendment sheer nonsense*, CNN.COM, June 7, 2006, <http://www.cnn.com/2006/US/06/06/dobbs.june7/index.html>

We’re fighting a war against radical Islamist terrorists with ongoing campaigns in Iraq and Afghanistan, we’re drowning in debt from our growing record trade and budget deficits and we’re watching our public education system fail a generation of students. Congress has yet to act on an effective solution to our illegal immigration crisis as millions of illegal aliens flood our borders every year, and our nation’s borders and ports are still woefully insecure, four and a half years after the September 11 attacks. I believe most Americans are far more concerned about their declining real wages and the lack of real creation of quality jobs than the insulting insertion of wedge issues into the national dialogue and political agenda.

and LCCR Opposition, *supra* note 55 (arguing that FMA would alter many political traditions and social ways of life), with *supra* Section II.B (providing examples of foreign nations that have incorporated marriage amendments into their constitutions), and Edward B. Winslow, *Same-sex marriage being used to divert attention from Iraq, torture and Bush’s power grab*, ONLINE JOURNAL, June 13 2006, [http://www.onlinejournal.com/artman/publish/article\\_899.shtml](http://www.onlinejournal.com/artman/publish/article_899.shtml) (“President George W. Bush’s pandering to right-wing zealots in his support for the Federal Marriage Amendment, which the U.S. Senate correctly refused to pass, is his attempt to change the nation’s focus from the rising death toll of the Iraq war and his illegal policies of torture and NSA wiretaps.”).

Like the failed opponents of the Bill of Rights, current opponents of marriage amendments argue that it would be futile to adopt such amendments.<sup>64</sup> Then, as now, the concern is the degree to which persons exercising the powers of government would feel bound by, or be checked by, other government officials motivated by the “parchment barriers.”<sup>65</sup> Then, the argument was that both history and experience had shown that political majorities almost invariably (and always eventually) trampled the rights of minorities when it suited them to do so, regardless of rules and parchments. Today, opponents raise a different historical argument: that marriage has changed throughout history.<sup>66</sup> The experiential argument is that social and sexual mores and

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64. Compare William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 662 (2000) (“Urbanization and associated developments are pressing the industrialized world toward same-sex marriage or its functional equivalent, and traditionalist resistance is either futile or counterproductive.”), and Commentary From Bruce Wilson, *Marriage Amendment: We Don’t Need Senate Approval* (June 19, 2006), <http://brucewilson.blogspot.com/2006/06/marriage-amendment-we-don-t-need-senate.html> (discussing the difficulty of passing a marriage amendment given the “nearly impossible task of converting or replacing eighteen senators,” and noting that efforts to do so are “futile”), and Transgender Law Center et al., *Transgender People And The Federal Marriage Amendment, Frequently Asked Questions*, <http://www.transgenderlaw.org/resources/transmarriagefaq.pdf> (last visited Nov. 10, 2006) (“Why don’t legislators understand that it is futile to legislate that marriage is between one man and one woman, given the fluidity of gender and sex?”), with *supra* note 62 and accompanying text (showing that opponents’ futility argument is ineffective because many other countries have adopted marriage amendments).

65. One difference is noteworthy—In the founding generation, the concern was about the executive and legislative branches; today the concern is about the imperial judiciary.

66. See, e.g., STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* 247–80 (2005) [hereinafter *MARRIAGE*] (Chapter 15 on “Winds of Change: Marriage in the 1960s and 1970s” and Chapter 16, “The Perfect Storm: The Transformation of Marriage at the End of the Twentieth Century”); STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992 / 2000); STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA’S CHANGING FAMILIES* (1997); NANCY F. COTT, *PUBLIC VOWS, A HISTORY OF MARRIAGE AND THE NATION* *passim* (2000) (noting many changes in marriage). To this list can be added various feminist historical claims about the trajectory from oppression to liberation, and quasi-Marxist historical progression notions. See generally STEPHANIE COONTZ, *THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES* (1988); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 23 (1995) (“The patriarchal family is an ‘assumed institution’ with a well-defined, socially constructed form complete with complementary roles—husband/head of household, wife/helpmate, child. The significant family tie is the sexual affiliation that, when legally sanctified, creates marriage. The assumed inevitability and primacy of this form of intimate connection reinforces patriarchy in that it defines male presence as essential and dominant within the family.”); *MARRIAGE*, *supra* note 66, at 34–43, 79–82, 170, 176, 195, 236–39 (2005) (arguing that marriage was invented as, and has long functioned as, an oppressive, patriarchal institution); CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* (1984) (marriage is an oppressive, patriarchal institution); Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 587 (2006) (“The ‘tenders years’

practices have changed and those changes cannot be stopped by mere laws or amendments (which should accommodate rather than oppose such changes).

Of course, then, as now, there is no guarantee or certainty that the amendments identifying and protecting basic rights and institutions would be respected. Now, as then, the supporters of the proposed amendments rest upon a belief in the rule of law and in the general commitment of the people (including officials) of the nation to abide by the rule of law.

The similarity of the arguments against marriage amendments and the Bill of Rights is remarkable. Today, arguments against marriage amendments attempt to revive the failed arguments and overturn long-settled constitutional policy precedents established by the Founders and the overwhelming majority of the founding generation when they rejected the arguments against and insisted upon the adoption of a Bill of Rights. The rejection of those arguments in 1787–91 should foreshadow a rejection of those arguments today if our generation has the same character, judgment, and wisdom as the founding generation.

#### *D. Virtue and Adoption of the Bill of Rights and Support for Marriage Amendments*

If one political principle was universally accepted in the founding generation, it was the belief that a republican form of government could not exist (or long survive) unless the people were “virtuous.” “The idea of virtue was central to the political thought of the Founders of the American republic.”<sup>67</sup> *Virtue* was understood to be the indispensable

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presumption, while departing from the *couverture*-based paternal presumptions that were dominant prior to the latter part of the nineteenth century, still enforced a patriarchal view of women’s role in marriage and in the family.”); Michael Naughton, *The Corporation as a Community of Work: Understanding the Firm within the Catholic Tradition*, 4 AVE. MARIA L. REV. 33, 64 (2006) (“While many people recognize the male/female complementarity, too often a wife’s contribution is seen as complementing the husband, as his helper. While husbands and wives are to serve each other, the purpose of marriage and the family cannot be collapsed to the service of either husband or wife; otherwise an oppressive hierarchy is established.”); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & L. 167, 167–76 (1999) (suggesting that the institution of marriage for both opposite-sex and same-sex couples should not be recognized as a legal category because marriage is inherently oppressive); Julie Shapiro, *Reflections on Complicity*, 8 N.Y. CITY L. REV. 657, 660–61 (2005) (“[E]choing earlier feminists, adherents [of lesbian and gay anti-assimilationist position] saw the very institution of marriage as a negative rather than a positive social force. They identified it as a patriarchal and oppressive institution that has historically limited the rights of women and would narrow the meaning of liberty in the future.”).

67. RICHARD VETTERLI & GARY BRYNER, *IN SEARCH OF THE REPUBLIC, PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT* 1 (rev. ed. 1996). The Founders believed virtue to be a precondition for republican government and individual liberty. *Id.* Virtue and religion were

prerequisite for republican government; or what we today call democratic self-government.<sup>68</sup>

The importance of cultivating civic or republican virtue was one of the strongest reasons for adopting a Bill of Rights, and the ability of supporters of the Bill of Rights to tap into the large reservoir of commitment to protecting and fostering “civic virtue” in the new republic was one of the reasons for the success of the movement for a Bill of Rights. As Herbert J. Storing posited: “The fundamental case for a bill of rights is that it can be a prime agency of that political and moral education of the people on which free republican government depends . . . . [A] well-formed bill of rights, remind[s] citizens of the beginning and therefore of the end of civil government.”<sup>69</sup> The Bill of Rights was thought to foster *virtue* in the people.

The Founders also understood that certain non-governmental institutions—family, school, churches—are, in fact, the primary sources of the development and fostering of virtue. They are the first schoolrooms of democracy.<sup>70</sup> They are the institutions in which virtue is inculcated.<sup>71</sup> In the prevailing political theory of the founding era, the family was considered one of the essential “pillars of republican virtue,”<sup>72</sup> and it not only needed to be nurtured, but also protected from the tyranny of the government. John Adams wrote:

The foundation of national morality must be laid in private families . . . How is it possible that Children can have any just Sense of the sacred Obligations of Morality or Religion if, from their earliest

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in both the public and private spheres in the founding era. *Id.* at 47–48. *See also* DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 86–87 (1988) (Founders’ idea of virtue had a religious base, and connected morals and prudence); Gordon S. Wood, *Interests and Disinterestedness in Making the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND NATIONAL IDENTITY* 69, 83–87 (Richard Beeman et al. eds., 1987) (virtue was a matter of character and leadership and was deemed to be rare).

68. *See generally* *Tyranny, Federalism*, *supra* note 6, at 249 (describing virtue as “essential” and an “indispensable quality upon which rested the superstructure of republican constitutional government”).

69. STORING, *ANTI-FEDERALISTS* *supra* note 14, at 70.

70. *See generally* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1796, 1835–51 (1995) (discussing that virtues of citizenship are found through human relationships, such as parent and child, and noting that schools are an important place for children to acquire values); Gerald J. Russello, *Liberal Ends and Republican Means*, 28 SETON HALL L. REV. 740, 755–56 (1997) (critiquing PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997) for failing to recognize that “two significant pillars of republican virtue” were religion and the family).

71. Dailey, *supra* note 70, at 1835–51.

72. Russello, *supra* note 70, at 755–56.

Infancy, they learn their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers?<sup>73</sup>

Likewise,

George Mason argued that republican government was based on an affection ‘for altars and firesides.’ Only good men could be free; men learned how to be good in a variety of local institutions—by the firesides as well as at the altar . . . [The Founders believed that] [i]ndividuals learned virtue in their families, churches, and schools.<sup>74</sup>

In this view, the Founders were merely reflecting widely held republican precepts. For instance, Montesquieu, the most frequently cited political writer in America in the founding decade of 1780–89, suggested “that marriage and the form of government were mirrors of each other.”<sup>75</sup> Accepting Montesquieu’s perspective, “American revolutionaries and their descendants understood marriage and the family to be schools of republican virtue.”<sup>76</sup>

Marriage was closely linked to the cultivating and protecting of virtue in Republican theory, in both practical and symbolic ways.<sup>77</sup> Practically, as noted, the marital family was the schoolroom of democracy. Symbolically, the Founders had a clear political theory of marriage and family life as critical components of Republican society, and as essential to the preservation of the new Republican form of government that they had created. Professor Nancy Cott has observed that “[i]n the beginning of the United States, the founders had a political theory of marriage. So deeply embedded in political assumptions that it was rarely voiced as a theory, it was all the more important. It occupied the place where political theory overlapped with common sense.”<sup>78</sup> Thus, the Founders deliberately provided “legal supports for the family . . . [which were] important elements in the stability of marriage.”<sup>79</sup>

73. JOHN ADAMS, 4 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 123 (L.H. Butterfield, et al. eds. 1962).

74. Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 946–47 (1995).

75. Mary Lyndon Shanley, *Public Values and Private Lives, Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 LAW & SOC. INQUIRY 923, 926 (2002).

76. *Id.* See also COTT, *supra* note 66, at 10 (noting that marriage paralleled a republican form of government, which gave rise to a relationship that shaped self-understanding and a new republican nation’s identity).

77. COTT, *supra* note 66, at 10. See also Dailey, *supra* note 70, at 1866 (families were seen by Founders as the primary cultivators of civic virtue).

78. COTT, *supra* note 66, at 9. “The republican theory of the United States g[a]ve marriage a political reason for being.” *Id.* at 10.

79. THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 176 (1997).

Shortly after the founding of the American Republic, the perceptive French social commentator, Alexis de Tocqueville, observed that “the feeling [a citizen] entertains towards the State is analogous to that which unites him to his family. . . .”<sup>80</sup> He also declared: “There is certainly no country in the world where the tie of marriage is so much respected as in America, or where conjugal happiness is more highly or worthily appreciated . . . . [T]he American derives from his own home that love of order which he afterwards carries with him into public affairs.”<sup>81</sup>

Linda Kerber has written:

The Republican Mother’s life was dedicated to the service of civic virtue; she educated her sons for it; she condemned and corrected her husband’s lapses from it. If, as Montesquieu had maintained and it was commonly assumed, the stability of the nation rested on the persistence of virtue among its citizens, then the creation of virtuous citizens was dependent on the presence of wives and mothers who were well informed, “properly methodical,” and free of “invidious and rancorous passions.” . . . To that end the theorists created a mother who had a political purpose and argued that her domestic behavior had a direct political function in the republic.<sup>82</sup>

These common ideas about family “had a dramatic ‘republicanizing’ effect” in society in the founding era.<sup>83</sup> One consequence was unprecedented equality and respect for the roles of women in American society. Historian Jan Lewis reports: “Revolutionary-era writers held up the loving partnership of man and wife in opposition to patriarchal dominion as the republican model for social and political relationships.”<sup>84</sup> Michael Grossberg agrees.

By charging homes with the vital responsibility of molding the private virtue necessary for republicanism to flourish, the new nation greatly enhanced the importance of women’s family duties. . . . At times “it even seemed as though republican theorists believed that the fate of the republic rested squarely, perhaps solely, on the shoulders of its womenfolk.”<sup>85</sup>

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80. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 92 (Alfred A. Knopf ed., 1972) (originally published in 1835).

81. *Id.* at 309.

82. Linda Kerber, *The Republican Mother: Women and the Enlightenment—An American Perspective*, 28 *AM. Q.* 187, 202 (1976).

83. WEST, *supra* note 79, at 103.

84. *Id.* (quoting Jan Lewis). A generation later, de Tocqueville recognized this when, contrasting the roles of women in American and Europe, he observed: “[T]he Americans . . . think of men and women as beings of equal worth, though their fates are different . . . [A]lthough the American woman never leaves her domestic sphere, . . . nowhere does she enjoy a higher station.” *Id.* (alterations in original).

85. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN*

Perhaps the most emphatic connection between the Constitution and family life was described by de Tocqueville's contemporary, Francis Grund, when he observed:

I consider the domestic virtue of the Americans as the principal source of all their other qualities . . . . No government could be established on the same principle as that of the United States, with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions; and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter of the Constitution in order to vary the whole form of their government.<sup>86</sup>

Thus, protection of the institution of marriage aligns with the Founder's belief in the importance of marriage for the perpetuation of "virtue" and for the survival of the Republic. It would reinforce a cornerstone institution that supports our system of constitutional government.

#### *E. Limited Government, the Bill of Rights, and Marriage Amendments*

One of the major aims of the advocates of the Bill of Rights was to insure that the national government would be a limited government of limited powers.<sup>87</sup> They knew that power had a tendency to grow, and to become more abusive as it grew; they wanted a Bill of Rights to help "fence in" the new national government, to restrain it from growing in areas where it was not to intrude.

Marriage is another fence, albeit a nongovernmental fence, that ensures that the government will not need to enlarge. Marriage creates a unit of nongovernmental human regulation. If recent experience has taught us any lesson beyond dispute, it is that when couples cohabit or procreate without marriage, or marriages fall apart or break up, the need for government grows—the need for domestic relations courts, juvenile courts, remedial education, more police, more public health services, more public mental health facilities, more welfare, and more unemployment services. So, if you like big government and want a

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NINETEENTH-CENTURY AMERICA 7–8 (1985).

86. 1 FRANCIS J. GRUND, *THE AMERICANS IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS* 306–07 (Augustus M. Kelley 1971) (1837).

87. See STORING, *ANTI-FEDERALISTS*, *supra* note 14, at 67–68 (explaining the dispute between Anti-Federalists and Federalists in determining how much power the federal government should be granted).



recipe to guarantee the need for more government, you will want to weaken, destabilize, and marginalize marriage. On the other hand, if, like the Founders who adopted the Bill of Rights, you desire less or more limited government, you will want to foster, protect, and support healthy marriages.

*F. Liberty (not Autonomy), Marriage, and  
Constitutional Structures*

Finally, it is important to note that the Bill of Rights aimed to protect *liberty*, not *autonomy*. In the founding generation, liberty was not the same as unfettered autonomy. Liberty was not the right to do whatever one wanted to do. Rather, as Marci Hamilton has explained, it was the right to act as one chooses within the limits of the commonwealth—to do whatever one wanted that did not harm the common good.<sup>88</sup> It was freedom to act in a way to protect the common good. Professors Vetterli and Bryner explain:

The ideal of “liberty” assumed greater importance with each act of Britain . . . . Britain came to be increasingly seen as both corrupt and determined to spread that corruption to America . . . [American clergy and revolutionaries] referred to the American Colonies as a troubled Israel facing a corrupting force, which sought to destroy freedom and virtue. . . . The importance of guarding one’s liberties . . . and . . . warnings against . . . corrupting influence[s] . . . were also discussed in terms of virtue versus corruption, freedom versus slavery.<sup>89</sup>

Thus, Edmund Morgan has declared that “[p]atriotism [liberty] and the Puritan Ethic [virtue] . . . marched hand in hand from 1764 to 1789.”<sup>90</sup> Charles Royster has noted that during the founding era, “[t]he sermons of American ministers repeatedly linked the fight against Britain with the fight against sin.”<sup>91</sup> John Adams famously observed: “Liberty can no more exist without virtue and independence, than the

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88. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1154–58 (2004) (reviewing history of limits on liberty, particularly religious liberty, in founding era); see generally MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005) (reviewing abuses of religious liberty and need for limits); Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES 411 (2004) (describing religious liberty as not unbounded).

89. VETTERLI & BRYNER, *supra* note 67, at 77.

90. *Id.* (quoting Edmund Morgan, *The Puritan Ethic and the American Revolution*, 24 WM. & MARY Q. 3, 42 (1967)) (emphasis omitted).

91. *Id.* (quoting Charles Royster, *The Nature of Treason: Revolutionary Virtue and the American Reactions to Benedict Arnold*, 36 WM. & MARY Q. 163, 165 (1979)) (emphasis omitted).

body can live and move without a soul.”<sup>92</sup> Less well-known is Adams’s distillation of a number of rules for sound, liberty-protecting governments derived from his study of ancient governments, including his “*Eighth Rule*. To use liberty with moderation, lest it turn to licentiousness; which, as it is a tyranny itself, so in the end it usually occasions the corruption and conversion of a free state into monarchical tyranny.”<sup>93</sup>

The founding generation was firmly convinced that certain moral qualities were needed in order to preserve liberty,<sup>94</sup> and because licentiousness was the path to slavery and destruction of individuals and societies, only actions consistent with the public good (virtue) were deemed liberties protected by good governments.<sup>95</sup> Because the Founders were convinced that vice was inconsistent with, and destructive of, liberty, the Bill of Rights did not protect “autonomy” broadly, but carefully protected those liberties that were consistent with preservation of a free society.<sup>96</sup> Thus, even when protecting the sacred right of religious liberty in the First Amendment, the Founders did not mean that anything done in the name of such liberty was permissible, protected, or exempt from law.<sup>97</sup> Teaching and cultivating virtue so that the rising generation would know how to exercise liberty within its moral limits, was considered one of the central responsibilities of education in the founding era.<sup>98</sup>

Thus, the moral chaos of sexual license is not protected by the liberty of the Constitution of the United States of America. The notion that giving immoral relationships the important legal status and protection of

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92. JOHN ADAMS, *Novanglus*, in 4 THE WORKS OF JOHN ADAMS 11, 31 (Charles F. Adams ed., 1851).

93. JOHN ADAMS, *A Defense of the Constitution of Government of the United States of America, Against the Attack of M. Turgot, in his Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778*, in THE POLITICAL WRITINGS OF JOHN ADAMS 108, 286 (2000).

94. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 133 (1967); see generally *id.* at 132–40 (describing numerous writings from “newspapers, pamphlets, and letters” as well as sermons that emphasized the liberty-virtue link).

95. See generally *id.* at 57–59, 79–84, 233–35 (listing and describing a conglomeration of materials written at the time explaining the attitudes of the Founders and the great politicians of the time).

96. See *United States v. Reynolds*, 98 U.S. 145, 164–68 (1878) (rejecting religious liberty defense to polygamy prosecution and describing how such acts have long been deemed immoral by Europeans and have not been protected in American constitutional law).

97. See *supra* note 88 (discussing works by Marci A. Hamilton which address the various limitations on religious liberty deemed to be necessary during the founding era).

98. John A. Nelson, *Adequacy in Education: An Analysis of the Constitutional Standard in Vermont*, 18 VT. L. REV. 7, 36–38 (1993) (reviewing role of education to teach virtue to citizens as understood in founding generation).

institutionalization, such as marriage, is fundamentally at odds with the principles upon which our nation was founded. It goes without saying that claims that the Constitution should be interpreted to mandate the legalization of same-sex marriage flies in the face of the history, context, and the core meaning of that foundational document. By the same token, to adopt an amendment protecting the basic moral institution in our society, marriage, it is completely consistent with the understanding of liberty extant when the Constitution was adopted for the purpose of protecting basic liberties.

### III. THE STRUCTURES OF CONSTITUTIONAL LIBERTY AND MARRIAGE

Like the Bill of Rights, constitutional protection of marriage has a structural as well as a rights-liberties significance.<sup>99</sup> The Bill of Rights has had structural significance for our Constitution in at least three ways. First, the agreement to favorably consider the conciliatory amendments—which became the Bill of Rights—secured the ratification of the Constitution, bringing that structure of government into existence.<sup>100</sup> Second, application of the Bill of Rights to the states through interpretation of the Fourteenth Amendment has effected a vertical reallocation of governmental power to some extent, expanding the scope of authority of the federal government and reducing that of the states.<sup>101</sup> Third, the Bill of Rights has provided a basis, although thin at times, for federal courts to engage in social engineering, effecting another significant shift of policy-making power from both federal and state legislative branches to the judiciary.<sup>102</sup>

Similarly, protection of the institution of marriage by adoption of marriage amendments, particularly a federal marriage amendment, has structural significance as well. It has structural significance in three ways. First, as noted above, a marriage amendment protects the cornerstone of the foundation, the *substructure* upon which rests the superstructure of the formal Constitution and government.<sup>103</sup> Second, it reinforces and strengthens *federalism*—the important “vertical” structure dividing and allocating government powers. Third, as the

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99. See Richard G. Wilkins, *The Structural Role of the Bill of Rights*, 6 *BYU J. PUB. L.* 525, 546 (1992) (describing the modern Supreme Court interpretation of the Bill of Rights as creating a structural foundation for social institutions).

100. *Id.* at 527–38.

101. *Id.* at 539–46.

102. *Id.* at 546–50.

103. See *supra* Part II.D (explaining virtue as an essential element in government and how the Founders relied on marriage and family to foster virtue).

courts have taken the lead in trying to legalize same-sex marriage, it also reinforces and strengthens *separation of powers* between the legislative and judicial branches of government by reinforcing the barrier between and preventing the extremely dangerous combination of those two government powers, and cabining with constitutional text (perhaps a mere “parchment barrier” but better than no barrier at all) the modern tendency of judges to assume superlegislative policy-making prerogatives.

### A. Reinforcing Federalism by Adopting Marriage Amendment

In the past decade, federal constitutional law has witnessed a dramatic revival and reinvigoration of federalism; so dramatic that some have called it a “revolution.”<sup>104</sup> However, the bulk of the Supreme Court decisions revitalizing federalism have focused on limiting the

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104. Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 1 (2003). “It is often said that we are living through a ‘revival’ of federalism. Certainly, the Rehnquist Court has brought back to the public-law table the notion that the Constitution is a charter for a government of limited and enumerated powers, one that is constrained both by that charter’s text and by the structure of the government it creates.” *Id.* “It is difficult in legal and political circles to avoid the observation that we are living through a ‘revival,’ or a ‘revolution,’ of federalism.” *Id.* at 11. For a small sampling of the scholarly debate over the propriety, scope, and value of the “federalism revolution,” see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 75 (2001) (“From 1937 to 1995, federalism was part of a ‘Constitution in exile.’”); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1045 (2001) (explaining the manner in which the Supreme Court is shaping a constitutional revolution and using the decision of *Bush v. Gore* to illustrate this judicial phenomenon); Steven G. Calabresi, “A Government of Limited and Enumerated Powers:” *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (advocating and forecasting the return to a government of limited and enumerated national power); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) (“[T]here has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism.”); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002) (disputing the view that the Rehnquist Court has effectuated a federalism revolution); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2181 (1998) (“The constitutional law of federalism-based constraints on the federal government has risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power.”); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 433 (2002) (concluding that the Rehnquist Court has not been ambitious about achieving a federalist vision); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 511–15 (2002) (describing case law in which the Supreme Court under Justice Rehnquist employed an analysis based on federalism); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 819 (1999) (“In recent years, one of the most important developments in constitutional law has been the resurgence of federalism.”); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27 (1998) (“Federalism is back, with a vengeance.”).

power of Congress.<sup>105</sup> For example, the three leading cases that signaled and energized the return of federalism as a constitutional doctrine of real substance all invalidated popular congressional statutes.<sup>106</sup> This Congress-centric approach to federalism has overshadowed other dimensions of federalism that are just as important at keeping Congress from exceeding its bounds.<sup>107</sup>

*B. Why Old Federalism Doctrine Cannot Solve  
the Same-Sex Marriage Dilemma*

Commitment to the structure of federalism seems to be one of the main reasons for opposition to the Federal Marriage Protection Amendment. Federalism in family law (i.e., regulation of marriage as a matter for the states, not the national Constitution) was explicitly identified as the sole reason, or implied as the one of the main reasons, for opposing the Federal Marriage Protection Amendment by at least twenty-seven United States senators whose offices were surveyed.<sup>108</sup>

The flaw with the federalism argument against a federal marriage amendment is that it is a one-way argument; it ignores the greater threat to federalism in family law of judicial rulings compelling the legalization of same-sex marriage. At the same time federalism is being invoked to justify rejection of a constitutional amendment that would explicitly ban same-sex marriage, that principle is being violated by some advocates of same-sex marriage who demand that courts interpret provisions of the Constitution as compelling the legalization of same-sex marriage.<sup>109</sup>

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105. Garnett, *supra* note 104, at 13:

[The Court] has cabined the power of Congress to employ Section 5 of the Fourteenth Amendment as a means of protecting individual rights and remedying various forms of discrimination or as a vehicle for ameliorative social legislation. The Justices have insisted that there are identifiable and enforceable limits to the subjects Congress may regulate, and the extent to which it may regulate them, pursuant to its authority over "Commerce . . . among the several States."

106. See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (declaring a provision of Gun-Free School Zone Act as an invalid violation of federalism); *Printz v. United States*, 521 U.S. 898, 935 (1997) (finding Brady handgun law invalid because it violates the principles of federalism); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating provisions of the Violence Against Women Act as violative of federalism).

107. Only recently has the doctrine of federalism in family law—recognition that the regulation of domestic relations is the virtually exclusive province of the states—received much attention by the Supreme Court of the United States. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004).

108. Christian Legal Society, *supra* note 63. This number is more than one-half of the senators who voted against the FMPA.

109. See generally *The Proposed FMA*, *supra* note 6, at 158–61 (federalism in family law waning and advocates of same-sex marriage call for constitutional interpretation mandating same-

The same-sex marriage issue is going to be constitutionalized and federalized one way or another—by court decisions or by constitutional amendment. Already it is being constitutionalized by judicial decree. Federalism is better served, and more effectively preserved, by a narrow and specific amendment resolving the issue than by a judicial decision based on the broad, expansive interpretation of some amorphous constitutional doctrine.

Adoption of a Federal Marriage Protection Amendment would set a national floor regarding the meaning of marriage, and allow full state regulation of marriage in all other respects. That was the effect (and arguably the intent) of the Civil War Amendments with regard to fundamental liberties—to establish a national floor and leave it to the states (except as Congress deemed further protection necessary) to protect liberties.<sup>110</sup> That is also how federalism is implemented in some other nations with federal forms of government concerning the regulation of marriage.<sup>111</sup> This form of federalism allows for local variation without the “house-divided” or “patchwork quilt” deviations on the core meaning of the most fundamental social institution of the nation. Given the national unity concerns underlying the Full Faith and Credit Clause of the U.S. Constitution,<sup>112</sup> a national baseline definition of the core constitution of marriage, retaining full state control of all other aspects of marriage and allowing room for significant local variation in marriage law to reflect local mores, more clearly reflects the realities of this time. Since, today, the core meaning of marriage is under great pressure, it makes sense to provide basic constitutional protection and support for the consensus meaning if a constitutional superconsensus of political support can be obtained.

Moreover, the pattern of using the Constitution to provide basic protection for this fundamental social institution is already established by interpretation and application of other provisions of the Constitution and its amendments. We already have a national definition of the core meaning of marriage in some areas. For instance, in *Loving v.*

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sex marriage); *Tyranny, Federalism*, *supra* note 6, at 255–61 (judicial threat to federalism in family law and of constitutionalization of same-sex marriage by judicial interpretation).

110. See generally EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869* (1990) (explaining intent behind drafting of Civil War Amendments to create federal floor on range of rights and maintain control of this limitation).

111. See generally *Federal Constitutional Protection*, *supra* note 6 (reviewing regulation of marriage in ten other nations with federal governments; noting that in Australia, Canada, Germany, Mexico, and Nigeria there is some split regulation of family law, including national baseline and local detail regulation).

112. U.S. CONST. art. IV, § 1.

*Virginia*,<sup>113</sup> the Supreme Court interpreted the “due process” and “equal protection” clauses of the Fourteenth Amendment as defining marriage in regard to interracial marriage—it is unconstitutional for states to bar interracial marriage. This is one clear constitutional boundary on marriage.<sup>114</sup> Likewise, in *Zablocki v. Redhail*,<sup>115</sup> the Court again interpreted the Fourteenth Amendment as prohibiting marriage laws that would restrict and impede, and in some cases possibly bar, persons who failed to provide court-ordered financial support for children (“deadbeat dads,” in the vernacular) from marrying.<sup>116</sup> As a result, *Zablocki* set another “boundary” limit on state regulation of marriage; it “defined” marriage as an institution for which past financial irresponsibility—for children (one common and important “fruit” of the marital relationship)—could not be a disqualifying factor.

Thus, *Loving*<sup>117</sup> and *Zablocki*<sup>118</sup> demonstrate that using national constitutional law to define some of the basic, core dimensions of marriage, and to set some boundary limits to marriage regulation by the states, is already an established part of our constitutional jurisprudence. Moreover, *Loving* and *Zablocki* also demonstrate that providing a narrowly tailored national constitutional definition of one aspect of marriage still leaves enormous room for the states to continue to regulate and restrict marriage. Federalism in family law was not destroyed, or significantly weakened, by *Loving* or *Zablocki*.

Federalism in family law today is, in some critical respects, a feeble, vestigial doctrine.<sup>119</sup> In Supreme Court cases, it has become largely a “makeweight” doctrine, raised when some Justices want to find a structural excuse for not deciding a controversy involving some aspect of family law.<sup>120</sup> It seems disingenuous to insist that federalism requires rejection of the proposed Federal Marriage Protection

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

114. *See id.* at 2 (central meaning of the Fourteenth Amendment runs counter to Virginia’s statutory scheme).

115. *Zablocki v. Redhail*, 434 U.S. 374, 388–89 (1978).

116. *See id.* at 386–87 (finding that the statute was not narrowly tailored and unnecessarily intruded upon the fundamental right to marry).

117. 388 U.S. at 8–11.

118. 434 U.S. at 386–87.

119. *Tyranny, Federalism*, *supra* note 6, at 221.

120. One recent example is *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), in which the Court declined to review a First Amendment challenge to a school policy that teachers lead students in voluntarily reciting the pledge of allegiance because California law gave no standing to the father who had joint physical but no legal custody of his school-child daughter. The concurrence strongly castigated that questionable invocation of federalism in family law. *Id.* at 18–26.

Amendment, while turning a blind eye to regular congressional and federal judicial intrusions upon state regulation of family law.

Federalism is not just achieved by diffusion of power among branches of government, but also by supporting nongovernmental institutions that reduce the need for government. Marriage is a critical nongovernmental institution that reduces the need for government. When marriages fail or become dysfunctional, the burdens on government increase. Protecting the integrity and health of the institution of marriage is one way to reduce the need for big government.

Well-respected Supreme Court precedent has constitutionally thwarted attempts by special interests to capture marriage through its redefinition.<sup>121</sup> Allowing the intrusion of the gay rights movement into family law at the state level by promoting the legalization of same-sex marriage seems to make a mockery of the *Loving* decision. Moreover, it further threatens federalism from the state side by eroding state family law. Same-sex relations are better understood as “private” relations, like cohabitations, friendships, and extended families, rather than public institutions like marriage and nuclear families. Treating those relationships as marriages comes at the cost of diminishing and diluting the social meaning of real marriages. When all adult intimate relations are deemed “marriages” and all types of affection are deemed “family” relations, *marriage* and *family* will have ceased to have any real significance.

Moreover, the movement to legalize same-sex marriage, civil unions, etc., has had the effect of a black hole, sucking up substantial amounts of public, legislative, and political attention. It has absorbed most of the limited interest, energy, and resources available for family law reform in the past decade, and has left stranded and neglected many important efforts to reform family law concerning child custody, foster care, divorce procedures, alimony inequities, and property-division problems, among others.

### *C. Some Institutions Are Already Defined in the Constitution and Amendments.*

One of the arguments against the Federal Marriage Protection Amendment is that the Constitution should not be used to define social institutions.<sup>122</sup> Opponents view such a definitional proposal as

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121. See *Loving*, 388 U.S. at 11 (holding unconstitutional a Virginia statute that prohibited interracial marriage on the ground that it was “designed to maintain White Supremacy”).

122. See Carpenter, *supra* note 55, at 10–12 (arguing that a constitutional amendment would



inconsistent with the purpose of a constitution and the role of constitutional amendments or provisions. However, several provisions of the Constitution and of the Bill of Rights do exactly that—define a particular institution or procedure.

For example, the Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>123</sup>

This amendment contains multiple levels of definitions. First, it is designed to protect a specific institution—the institution of “trial by jury.” This is a historical institution, and the meaning still derives from historical practice in the English common law. Second, it limits the scope of the institution by historical definition—“[i]n Suits at common law”—and by economic definition—“where the value in controversy shall exceed twenty dollars.”<sup>124</sup> Third, it specifically refers to a particular historical standard for measuring how any “fact tried by jury shall be . . . re-examined.”<sup>125</sup> The specific definition of the review of factual decisions made at a jury trial is “according to the rules of the common law.”<sup>126</sup> Thus, the institution of trial by jury is extensively defined in the text of the Seventh Amendment—by reference to historical antecedent, by two specific narrowing limitations of the historical practice, and by clarification that the appellate review of jury factual determinations (which, it might be argued, is outside of the “trial by jury” institution and practice) is also specifically defined by reference to the historical “rules of the common law.”<sup>127</sup>

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violate the principle of federalism by imposing a national definition of marriage).

123. U.S. CONST. amend. VII.

124. *Id.*

125. *Id.*

126. *Id.*

127. See generally William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695 (2001) (discussing the role of appellate courts in reviewing jury verdicts); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) (reviewing historical sources, understandings, practices, and content that inform and define the right to jury trial); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005 (1992) (proposing an interpretation of the Seventh Amendment that would determine whether a civil case required a jury by looking at whether the source of the legal right at issue is the statutory or common law); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407 (1999) (examining historical and modern interpretations of the Seventh Amendment); Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411 (2002) (tracing the rise and fall of the power of the American jury); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (examining historical materials to determine the

Similarly, the Fourth Amendment institutionalizes and constitutionalizes “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>128</sup> But it does not leave that right in the abstract land of rhetoric for judges to erase, ignore, or expand at will. Rather, it defines the right by (1) requiring “Warrants,” (2) issued “upon probable cause,” (3) “supported by Oath or affirmation,” (4) “and particularly describing the place to be searched, and the persons or things to be seized.”<sup>129</sup> This amendment is the very soul of constitutional definition of an institutionalized right. It has textual definition (a four-part definition, at that). It also uses terms and concepts that have historical context and meaning that add further definitional content to the “right . . . to be secure against unreasonable searches and seizures.”<sup>130</sup>

A third example from the Bill of Rights is the Sixth Amendment right to due process in criminal cases:

In all criminal prosecutions, the accused shall enjoy the right to [1] a speedy and public trial, [2] by an impartial jury [3] of the State and district wherein the crime shall have been committed, [4] which district shall have been previously ascertained by law, and [5] to be informed of the nature [6] and cause of the accusation; [7] to be confronted with the witnesses against him; [8] to have compulsory process for obtaining witnesses in his favor, and [9] to have the Assistance of Counsel for his defence.<sup>131</sup>

In this amendment, at least nine different definitional elements of due process of law in criminal cases are spelled out in explicit detail. Again, historical antecedents provide context and meaning for some of the terms.<sup>132</sup>

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“original understanding” of its meaning).

128. U.S. CONST., amend. IV.

129. *Id.*

130. See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (examining an originalist interpretation of “reasonableness” and the Framers’ understanding of warrant authority); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (examining the merits of the Supreme Court’s interpretation of the Fourth Amendment); David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47 (2005) (using an originalist interpretation of the Fourth Amendment to conclude that it was only intended to prohibit warrantless searches of homes); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1061–83 (2004) (also arguing that the Fourth Amendment was intended to prohibit warrantless searches of homes).

131. U.S. CONST. amend. VI.

132. See generally Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1201–09 (2002) (explicating a history of the confrontation right); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993) (discussing the right to counsel); Jennifer L. Hurley, Note, *Has the Supreme Court*

But the practice of defining basic institutions, procedures, and rights is not limited to the amendments to the Constitution. The Constitution of 1787 itself is the model for defining in the text of the great charter the institutions that it seeks to preserve. A national congress was already established by the Articles of Confederation. The Constitution of 1787 redefined that basic institution of government in some detail.<sup>133</sup> The states already existed and functioned as sovereign governments, yet the Constitution defined the nature of state governments in at least one core respect by “guarantee[ing] to every State in this Union a Republican Form of Government.”<sup>134</sup>

#### IV. THE CONSTITUTIONAL STRUCTURE OF SEPARATION OF POWERS AND THE STRUCTURE OF MARRIAGE

##### A. *Structural Separation of Judicial Power from Legislative Powers*

Federalism is intended as a structural protection against the concentration of power which history teaches (and the Founders firmly believed) invited and invariably produced tyranny.<sup>135</sup> It was designed to complement and to be supported by another structural barrier against the concentration and abuse of power—the separation of powers. The Court, in *Brown*, stated:

The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. This “separation of powers” was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of

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“Wrench[ed] the Sixth Amendment From Its Proper Context?”, 24 U. TOL. L. REV. 967 (1993) (discussing right to a speedy trial); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-To-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1637–43 (2003) (discussing the history of the right to counsel).

133. U.S. CONST., art. I (establishing the legislative branch and defining legislative powers); U.S. CONST., art. II (establishing the executive branch and defining executive powers); U.S. CONST., art. III (establishing the judicial branch and defining the jurisdiction of the Supreme Court).

134. U.S. CONST. art. IV, § 4.

135. *Tyranny, Federalism*, *supra* note 6, at 224–34, 263.

tyranny.” The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch.<sup>136</sup>

American courts have been the promoters and implementers of redefinition of marriage in the movement toward same-sex marriage. Courts in Hawaii, Alaska, Vermont, Massachusetts, New York, Washington, California, and Maryland have ruled for, or actually ordered the legalization of, same-sex marriage.<sup>137</sup> They have done so by exceeding their lawful judicial authority and in derogation of the role and responsibility of the democratic branches and processes of government.

The proposed Federal Marriage Protection Amendment protects federalism by revitalizing one important dimension of the separation of powers. By limiting the power of judges to redefine marriage by ordering the legalization of same-sex marriage, it reinforces the separation of powers of the judicial and legislative branches.<sup>138</sup> (By so doing, it also fulfills the guarantee of a republican form of government, another structural promise that has been neglected.) As one of the purposes of the Bill of Rights is to establish some structural restraints upon the tendency of centralized governments toward aggrandizement and abuse of power,<sup>139</sup> the Federal Marriage Protection Amendment will further an important purpose and aspect of the Bill of Rights.

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136. *United States v. Brown*, 381 U.S. 437, 442–43 (1965), citing THE FEDERALIST No. 47, at 373–74.

137. *See generally* *Brause v. Bur. Of Vital Stats.*, No. 3AN-95-6562CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (finding that choice of one’s life partner is a fundamental right and striking down Alaska statutes that prohibited same-sex marriage under strict scrutiny); *Lockyer v. San Francisco* 95 P.3d 459 (Cal. 2004) (declining to decide whether state statute prohibiting same-sex marriage was unconstitutional); *Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding unconstitutional a Hawaii statute that denied marriage licenses to same-sex couples); *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006) (statute permitting marriage only between a man and a woman violated Equal Rights Amendment of Maryland Constitution); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (limitations on civil same-sex marriage lacked rational basis and violated state constitution); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that the state is constitutionally required to extend to same-sex couples the same benefits as married couples); *Anderson v. King County*, 138 P.3d 963 (Wash. 2006) (reversing lower court decisions finding provisions of Washington’s Defense of Marriage Act unconstitutional).

138. *See Tyranny, Federalism, supra* note 6, at 224–26 (discussing the concept of federalism in family law).

139. *See supra* notes 99–102 and accompanying text (discussing the structural significance of the Bill of Rights).

*B. The Bill of Attainder Clauses as Structural  
Separation of Powers Provisions*

The Bill of Attainder clauses of the Constitution of the United States applicable to Congress and the states are structural provisions that embody and are designed to effectuate a separation of the judicial and legislative powers.<sup>140</sup> As the Supreme Court has explained: “The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch.”<sup>141</sup> The Bill of Attainder clauses are examples of the latter—specifying judicial tasks which the legislature is forbidden to perform. The Bill of Attainder clauses have long been recognized as specific constitutional provisions incorporating the separation-of-powers principle.<sup>142</sup> Yet, courts in several states and a few federal courts have defied the separation of judicial and legislative powers by creating and imposing policies favoring same-sex marriages or unions by judicial decree, and invalidating legislative policies giving special protection and preference to conjugal marriage.<sup>143</sup> Remarkably, one federal court even held that a state marriage amendment was an unconstitutional bill of attainder (ignoring the fact that by so ruling the court itself was in serious violation of the separation-of-powers principle upon which the bill of attainder clauses are based).<sup>144</sup>

The long and bloody history of usurpations of judicial functions by English Parliament in passing acts of attainder against the political enemies of the king, as well as disturbing incidents involving legislative bodies in the American colonies (and later in some states) convinced the Founders in 1787 to outlaw bills of attainder as one of the means of preserving the boundary of separation between the legislature and the judiciary. The “Father of the Constitution,” James Madison, emphasized the boundary aspects of the restriction upon states passing bills of attainder when he described Article I, Section 10 as one of the

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140. I was the lead author of an amicus brief filed in the Eighth Circuit Court of Appeals last year that briefly asserted this argument in the course of explaining why a federal district court decision that found the Nebraska state marriage amendment, NEB. CONST. art. I, §29, was an unconstitutional bill of attainder was erroneous. Brief of Thirty-four (34) Law Professors et al., as Amici Curiae Supporting Appellants, *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (No. 05-2604).

141. *Brown*, 381 U.S. at 443.

142. *Id.* at 444.

143. See *supra* note 137 and accompanying text (noting that various courts have found state statutes restricting same-sex marriage unconstitutional).

144. See *supra* notes 155 and 168, and accompanying text (describing *Citizens for Equal Protection, Inc. v. Bruning*).

“additional fences” in the Constitution necessary to protect “every principle of sound legislation.”<sup>145</sup> Legislatures were to legislate, not pass judgment, just as courts were to pass judgments, not act as superlegislatures.

From the Court’s first dicta about the Bill of Attainder clauses to its latest decision concerning selective service registration,<sup>146</sup> the Court has consistently emphasized the separation-of-powers purpose of the Bill of Attainder clauses.<sup>147</sup> As Chief Justice Warren explained for the Court the last time a law was found to violate one of the Bill of Attainder clauses, “the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”<sup>148</sup> In *Brown*, the Court invalidated a federal law preventing Communists from holding union leadership positions, and emphasized that the Bill of Attainder Clause was intended to reinforce separation of powers as well as reflect the Framers’ belief that the legislative branch was not as qualified as politically independent judges and juries to rule on guilt and to levy appropriate punishment. “The Bill of Attainder Clause was regarded as such a barrier.”<sup>149</sup> Thus, the Bill of Attainder Clause was intended to serve as a structural barrier to violations of the principle of separation of powers.<sup>150</sup>

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145. THE FEDERALIST No. 44, at 301 (James Madison).

146. See *Fletcher v. Peck*, 10 U.S. 87, 138 (1810) (stating that the prohibition on bills of attainder restricts the power of the legislature); *Cummings v. Missouri*, 71 U.S. 277, 288 (1866) (stating that the prohibition on bills of attainder is designed to prevent the legislature from punishing individuals without a trial); *Ex parte Garland*, 71 U.S. 333, 378–79 (1866) (stating that the prohibition on bills of attainder protects the discretion of courts); *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 849–51 (1984) (stating that the judiciary must construe legislative acts, where possible, in such a way that they do not violate the prohibition on bills of attainder).

147. See Glenn Willett Clark, *How the Superfund Congress Crafted a Bill of Attainder: Misappropriation of the Judicial Power of the United States—of Unbounded Civil Liabilities, Retroactive Taxes, and Legislative Adjudication*, 4 SETON HALL CONST. L.J. 3, 31–32 (1993) (arguing that separation of powers is crucial impetus for proscription of bills of attainder); Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 481–82 (1984) (noting *Cummings*’ significance); Jane Welsh, Note, *The Bill of Attainder Clause: An Unqualified Guarantee of Process*, 50 BROOK. L. REV. 77, 88, 91 (1983) (tying separation of powers to John Locke and Thomas Paine, and noting Court’s recognition of that principle in *Cummings*).

148. *Brown*, 381 U.S. at 442.

149. *Id.* at 444.

150. See Michael L. Landsman, Note, *From Enemies of the Crown to Regional Telephone Companies: Bills of Attainder Reappraised*, 15 TOURO L. REV. 761, 769–70 (1999) (noting that the Supreme Court’s decision in *Brown* emphasized that the purpose of the Bill of Attainder clauses was to reinforce separation of powers).

Similarly, in *I.N.S. v. Chadha*, Justice Powell, concurring, described the separation of powers foundation of the Bill of Attainder clauses.

One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the “tyranny of shifting majorities.” Jefferson observed that members of the General Assembly in his native Virginia had not been prevented from assuming judicial power, and “[t]hey have accordingly in many instances decided rights which should have been left to *judiciary controversy*.” The Federalist No. 48, at 336 (J. Cooke ed. 1961) (emphasis in original) (quoting T. Jefferson, Notes on the State of Virginia 196 (London edition 1787)) . . . .

It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches. Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause. . . . As the Court recognized in *United States v. Brown*, 381 U.S. 437, 442 (1965) “the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation-of-powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.” This Clause, and the separation of powers doctrine generally, reflect the Framers’ concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.<sup>151</sup>

The last case in which the Court found a violation of the Bill of Attainder clauses was decided forty years ago.<sup>152</sup>

Thus, there is no small irony in the fact that a federal district court in Omaha, Nebraska, in an opinion holding the Nebraska state marriage amendment (approved at the ballot with over 70% popular support from the voters) was a violation of equal protection and the right of association, also held that the marriage amendment was an unconstitutional bill of attainder.<sup>153</sup> The court seemed oblivious to the

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151. *I.N.S. v. Chadha*, 462 U.S. 919, 961–62 (1983) (Powell, J., concurring). See also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 243–45 (1995) (Breyer, J., concurring) (law reopening judgments violates separation of powers, and is possibly an unconstitutional bill of attainder).

152. *United States v. Brown*, 381 U.S. 437 (1965) (federal law that disqualified Communist Party members from holding union positions was a bill of attainder; clause was intended to strengthen separation of powers and to prevent legislative trials because legislators are not as qualified as judges and juries to fairly adjudicate guilt and to levy proper punishment).

153. *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd* 455 F.3d 859 (8th Cir. 2006). Unfortunately, the district court cited the wrong bill of attainder provision, invalidating the marriage amendment as a violation of the prohibition against Congress enacting bills of attainder, “art. I, § 9, cl. 3,” rather than art. I, §10, cl. 6 (“No State shall . . . pass

fact that by overriding the democratic process and imposing its own view of the regulation of domestic relations, it was violating the very “fences” and “boundaries” separating the judicial from the legislative branches that the Bill of Attainder clauses had been enacted to reinforce and preserve.

#### V. CONCLUSION: TEN LESSONS FROM THE BILL OF RIGHTS SUPPORTING THE ADOPTION OF MARRIAGE AMENDMENTS

The lessons from the establishment of the Bill of Rights applicable to our contemporary dispute over whether to adopt marriage amendments to our national and state constitutions are many. Ten lessons can be listed and should be remembered:

First, constitutional amendments matter; the words in amendments matter; the ideas they express matter; those ideas, words, and the constitutionalizing of them have consequences.

Second, the adoption of the Bill of Rights established once and for all that when people believe that their cherished rights, relationships, and institutions are threatened by government action or by forces within the control of government, it is proper and right to adopt constitutional amendments identifying, defining, and protecting those cherished objects. We see that this has become the global standard, as constitutional protection of marriage is widespread.

Third, the arguments against adopting marriage amendments are not new, but are recycled arguments asserted by the opponents of the Bill of Rights in 1787–91, and decisively rejected by the people of America then. They should likewise be rejected today.

Fourth, adopting the Bill of Rights was a method of cultivating the essential republican quality of “virtue” just as adopting an amendment protecting marriage is a way of fostering “republican virtue” in the people today.

Fifth, protecting conjugal marriage (what the Founders called “republican” marriage) would reinforce the core principle of the Bill of Rights that the government established by the Constitution is one of limited rights.

Sixth, there is a difference between “liberty” (which the Bill of Rights was designed to protect) and “autonomy” (which same-sex marriage advocates claim the Bill of Rights was designed to protect).

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any Bill of Attainder . . .”). *Id.* at 1005. It is little wonder that the Eight Circuit summarily overturned this analysis and reversed the district court. 455 F.2d at 869.



Seventh, just as the Bill of Rights has had structural significance, adoption of a marriage amendment would have some structural significance to reaffirm and strengthen the boundaries established by the Constitution.

Eighth, just as adoption of the Bill of Rights (in particular, the final two amendments in the Bill of Rights) helped to establish the principle of federalism in America, adoption of a federal marriage amendment could revitalize the valuable vertical structure of federalism in family law in significant ways, renewing the important constitutional principle of federalism.

Ninth, just as several amendments in the Bill of Rights reinforced divisions of and restraints on horizontal power inherent in the principle of separation of powers,<sup>154</sup> so would the adoption of marriage amendments (state and federal) also reinforce the separation of powers by restraining judicial overreach into policy-making fields that are beyond judicial competence.

Tenth, the Bill of Rights teaches us to be bold and to insist upon addressing realities. Just as the backers of the Bill of Rights wisely recognized that the redesign of the power structure of state and federal governments in 1789 required the adoption of amendments that many thought were unnecessary, so also today the power structure of American political society has shifted significantly and marriage amendment supporters boldly demand that we recognize and address that reality. The growing power of the judiciary to make (not just to apply or to interpret) and impose family policy upon states, including the power to compel states to legalize same-sex marriage or marriage-equivalent unions, poses the most significant threat—not merely to abstract concepts like federalism and separation of powers, but also to the cherished rights and critical social institution of marriage, and to the fundamental power of the people to define and protect their most fundamental social institutions. We must respond to those new challenges.

Thus, adoption of a Federal Marriage Protection Amendment would do much good for America, for its people, for the institution of marriage, and for the principle of federalism. Just as the Founders in 1787–91 adjusted old paradigms of government to accommodate a Bill of Rights, today we must also adjust old paradigms of rights and

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154. For example, the Sixth and Seventh Amendments guarantee the right to a jury trial in civil and criminal cases, and other trial rights and restrictions (including the Fourth, Fifth, and Eighth Amendments) protect the integrity of certain judicial proceedings against legislative violation, thus contributing to the separation of powers.

structures of government as necessary to protect the institution of marriage. If we are faithful to the legacy of the Bill of Rights, we will support state and federal amendments that identify and protect the critical “floor” meaning of the institution of marriage as the union of a man and a woman.

## APPENDIX

137 NATIONAL CONSTITUTIONS WITH PROVISIONS  
RELATING TO FAMILY AND MARRIAGEINCLUDING 78 NATIONAL CONSTITUTIONS WITH  
SUBSTANTIVE PROTECTIONS OF MARRIAGE

*Research compiled initially by Scott Borrowman, J.D. 2005, Kevin J. Fiet, J.D. 2006, & Joseph Wright, J.D. candidate 2007, and edited by Lynn D. Wardle.*

All references are to the Constitution of the respective nation. An asterisk (\*) means that the constitution refers to or protects *both* marriage and family; no asterisk means the constitution refers to family but not explicitly to marriage.

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| <i>Afghanistan</i> Art. 54.                                      | <i>Bulgaria</i> Arts. 14, 46, 47.*                     |
| <i>Albania</i> Arts. 31, 32, 53, 54.*                            | <i>Burkina Faso</i> Art. 23.*                          |
| <i>Algeria</i> Arts. 48, 58, 63.                                 | <i>Cambodia</i> Art. 45.*                              |
| <i>Andorra</i> Art. 13.*   | <i>Cameroon</i> Prmbl.                                 |
| <i>Angola</i> Arts. 29, 30, 31, 40.*                             | <i>Canada</i> Art. VI(91)(26).*                        |
| <i>Barbuda</i> Prmbl., Art. 3.                                   | <i>Cape Verde</i> Arts. 86, 87.                        |
| <i>Argentina</i> Secs. 14(3), 20.                                | <i>Chad</i> Arts. 36, 37, 38.                          |
| <i>Armenia</i> Arts. 20, 31, 32.*                                | <i>Chile</i> Art. 1.                                   |
| <i>Australia</i> Sec. 51.*                                       | <i>China</i> Art. 25.*                                 |
| <i>Austria</i> Art. 10 §8.*                                      | <i>Colombia</i> Arts. 5, 15, 42, 43,<br>44.*           |
| <i>Azerbaijan</i> Arts. 17, 34, 38,<br>127(6).*                  | <i>Congo</i> Prmbl., Arts. 34, 38, 39,<br>40, 41, 58.* |
| <i>Bahrain</i> Art. 5.*  | <i>Costa Rica</i> Arts. 51, 52, 53,<br>54.*            |
| <i>Barbados</i> Prmbl.   | <i>Croatia</i> Arts. 55, 61, 62, 63,<br>64.*           |
| <i>Belarus</i> Arts. 27, 32.*                                    | <i>Cuba</i> Arts. 43, 44, 45.*                         |
| <i>Belize</i> Prmbl., Arts. 3, 14.                               | <i>Cyprus</i> Arts. 22, 111.*                          |
| <i>Belgium</i> Art. 21.*   | <i>Dominica</i> Prmbl.                                 |
| <i>Bolivia</i> Arts. 158, 193, 194,<br>195, 196, 197, 198, 199.* | <i>Dominican Republic</i> Art. 15.                     |
| <i>Bosnia-Herzegovina</i> Art. II<br>§3.*                        | <i>East Timor</i> Secs. 17, 36, 39,<br>58.*            |
| <i>Brazil</i> Art. 226.*   |  |

- Ecuador* Sec. III, Arts. 32, 33, 34, 35, 36, 37, 38.\*  
*Egypt* Arts. 9, 10, 11, 12.  
*El Salvador* Arts. 32, 33, 34, 35, 36.\*  
*Equatorial Guinea* Prmbl., Its. 5, 21, 24.\*  
*Eritrea* Prmbl., Art. 22.\*  
*Estonia* Arts. 21, 22, 24, 26, 27.  
*Ethiopia* Arts. 34, 35, 36.\*  
*Fiji* Prmbl., Art. 29.  
*Finland* Sec. 19.  
*Gabon* Prmbl.\*  
*Georgia* Art. 36.\*  
*Germany* Art. 6.\*  
*Ghana* Art. 28.  
*Greece* Arts. 9, 21, 93.\*  
*Guatemala* Art. 1.  
*Haiti* Arts. 259, 260, 261.\*  
*Hungary* Arts. 15, 66, 67.\*  
*Honduras* Arts. 111, 112, 113, 114.\*  
*Iceland* Art. 71.  
*Indonesia* Art. 33.  
*Iran* Arts. 10, 12, 21, 31, 43.  
*Iraq* Art. 11.  
*Ireland* Art. 41.\*  
*Italy* Arts. 29, 30, 31, 36, 37.\*  
*Jamaica* Art. 31.  
*Japan* Art. 24.\*  
*Kazakhstan* Art. 27.\*  
*Kyrgyzstan* Arts. 26, 39.  
*Kuwait* Art. 9.  
*Laos* Art. 24.  
*Latvia* Art. 110.\*  
*Liberia* Arts. 16, 23.\*  
*Libya* Art. 33.\*  
*Lichtenstein* Art. 15.  
*Lithuania* Arts. 31, 38, 39.\*  
*Lesotho* Arts. 4, 11, 30.  
*Luxembourg* Arts. 11, 21, 108.\*  
*Macedonia* Arts. 25, 40, 41.\*  
*Madagascar* Arts. 20, 21.  
*Malawi* Arts. 13, 22, 23, 24.\*  
*Mali* Art. 6.  
*Malta* Sec. 32.  
*Mauritania* Prmbl., art. 16.  
*Mexico* Art. 3.  
*Moldova* Arts. 28, 48, 49.  
*Mongolia* Arts. 16, 17.\*  
*Mozambique* Arts. 42, 55, 56.\*  
*Namibia* Art. 14.\*  
*Nauru* Prmbl.  
*Nicaragua* Ch. IV, Arts. 70, 71, 72, 73, 74, 75, 76, 77, 78, 79.\*  
*Niger* Art. 18.\*  
*Nigeria* Arts. 17, 262, 272.\*  
*North Korea* Art. 78.\*  
*Oman* Art. 12.  
*Pakistan* Art. 35.\*  
*Panama* Ch. 2, Arts. 52, 53, 54, 55, 56, 57, 58, 59.\*  
*Papua New Guinea* Art. 1 [Prmbl.].  
*Paraguay* Ch. IV, Arts. 30, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 75, 92, 100.\*  
*Peru* Arts. 4, 5, 7, 24.\*  
*Philippines* Art. XV, Secs. 1, 2, 3, 4.\*  
*Poland* Arts. 18, 33, 41, 47, 48, 71.\*

- Portugal* Arts. 26, 36, 65, 67, 68, 69, 70, 71, 72.\*
- Qatar* Arts. 21, 37.
- Romania* Arts. 26, 44.\*
- Russian Federation* Arts. 7, 23, 38.
- Rwanda* Arts. 24, 25.\*
- Saint Lucia* Prmbl., Ch. 1.
- Saint Vincent* Prmbl.
- Saudi Arabia* Arts. 9, 10, 27.
- Senegal* Arts. 17, 18, 19, 20.\*
- Sierra Leone* Art. 15.
- Serbia* Arts. 27, 28, 29.\*
- Slovakia* Arts. 19, 41.\*
- Slovenia* Art. 53.\*
- Somalia* Art. 2.7.\*
- South Africa* Arts. 15, 28.
- South Korea* Arts. 12, 36.\*
- Spain* Arts. 18, 35, 39.
- Sri Lanka* Art. 27 (12).
- Sudan* Art. 15.\*
- Suriname* Arts. 17, 35.\*
- Sweden* Arts. 2, 8, 13, 14, 41, 116, 119.\*
- Syria* Arts. 44, 46.\*
- Tajikistan* Arts. 33, 34.\*
- Thailand* Sec. 80.
- Togo* Art. 31.\*
- Trinidad and Tobago* Prmbl.
- Tunisia* Prmbl., Art. 41, 62.
- Turkey* Arts. 20, 41, 62.
- Turkmenistan* Art. 25.\*
- Tuvalu* Art. 4.
- Uganda* Art. 31.\*
- Ukraine* Arts. 32, 51, 52, 63.\*
- Uruguay* Ch. II, Arts. 41, 42, 43, 49.\*
- Uzbekistan* Arts. 63, 64, 65, 66.\*
- Venezuela* Ch. V, Arts. 75, 76, 77, 78, 79, 80, 81.\*
- Vietnam* Arts. 21, 31.\*
- Yemen* Art. 26.
- Zambia* Prmbl.