Tyranny, Federalism, and the Federal Marriage Amendment

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I. INTRODUCTION: IT'S ABOUT TYRANNY

The principle of "federalism in family law" is long-established and deeply embedded in the United States. It is an essential part of the unique American concept of shared sovereignty and a primary manifestation of the key constitutional organizing principle of federalism. However, judicial respect for and application of the principle of federalism in family law has not been consistent, especially in recent decades. In many decisions during the past thirty years, federal courts (especially) have simply ignored the principle of federalism in family law, and the judicial doctrine of deference to federalism in family law seems to have eroded significantly. In several high-profile decisions involving disputed applications of or controversial references to federalism in family law, however, the Rehnquist Court has begun a modest revival of the doctrine of federalism in family law.[1]

The recent introduction in Congress of the proposed Federal Marriage Amendment (FMA)[2] has intensified the debate about federalism in family law

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1. *See infra* Part III.

2. Unless otherwise indicated by context or expression, the term "Federal Marriage Amendment" includes any of the versions of proposed amendments to the Constitution intended to protect the institution of conjugal marriage against efforts to legalize same-sex marriage (especially by litigation). Advocates of these amendments propose adopting various substantive or structural changes that would have the effect of making the definition of marriage as the union of a man and a woman, and of making

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because one effect of the proposed FMA would be to federalize (and constitutionalize) part of the regulation of marriage, in apparent violation of the principle of federalism in family law.[3] The current versions of the FMA provide:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any state, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and woman.[4]

Some conservatives have expressed criticism of or opposition to the proposed FMA because it would violate the traditional notion of federalism in family law,[5] and liberals, who have little or no track record of concern for preserving federalism in family law generally have rediscovered this principle and espouse it with the passion of religious converts in their opposition to the FMA.

In Part II, this Article examines the history of federalism in the Founding era and explains that federalism is not so much an end in itself as it is a means to an end, and that it was intended as a structural protection against "tyranny." The origins of the American concept of federalism show that federalism was intended to function as a barrier to the concentration and abuse of power. The origins of federalism in general, and federalism in family law in particular, at the time of the founding of the Constitution of the United States is reviewed, the evolution federalism in family law during the nineteenth and twentieth centuries is tracked, and the historic functions and purposes of federalism are noted.

Part III traces the genealogy of federalism in family law in the courts. The principle has a long and distinguished pedigree in Supreme Court decisions and

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the regulation of marriage a matter of federal constitutional law, to some extent. For a review of the history of the Federal Marriage Amendment, see Wardle, *supra* note †.

3. *See generally* Andrew Koppelman, U. ST. THOMAS L.J. (forthcoming 2005) (describing legislative history of the proposed FMA); Wardle, *supra* note 1 (discussing various versions of the proposed FMA introduced in Congress).

4. S.J. Res. 40, 108th Cong. (2004), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:S.J.RES.40 (last visited Mar. 30, 2005). *See also* H.J.Res. 106, 108th Cong. (2004), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:H.J.RES.106 (last visited Mar. 30, 2005). The only difference between the House and Senate versions is that H.J. Res. 106 uses the word "solely" while S.J. Res. 40 uses "only" to describe the legal exclusivity of the institution of conjugal marriage.

5. *See, e.g., Preserving Traditional Marriage: A View from the States: Hearing Before the S. Judiciary Comm.*, 108th Cong., (2004) (testimony of Bob Barr, former representative), *available at* http://judiciary.senate.gov/hearing.cfm?id=1234 (last visited Mar. 30, 2005). Other prominent conservatives have opposed the FMA on federalism grounds. *See, e.g.,* Stephanie Francis Cahill, *Between a Man and a Woman,* 1 A.B.A. J. E-REP. 20, 5 (May 24, 2002) (stating that the head of the A.B.A. Family Law Section opposes FMA on federalism grounds); Jonathan Rauch, *Getting It Right,* NAT. REV. ONLINE, Aug. 7, 2001, *at* http://www.nationalreview.com/comment/comment-rauch080701.shtml (last visited Mar. 30, 2005); Jonathan Rauch, *Give Federalism a Chance,* NAT. REV. ONLINE, Aug. 2, 2001, *at* http://www.nationalreview.com/comment/comment-rauch080201.shtml (last visited Mar. 30, 2005); Charles E. Rice, *A Cultural Tour of the Legal Landscape: Reflections on Cardinal George's Law and Culture,* 1 AVE MARIA L. REV. 81, 109-10 (2003).

is well-established in constitutional doctrine. But in recent years the courts have not been consistent in applying the doctrine. Federalism in family law eroded significantly (by judicial neglect and rejection) for several decades, until a modest revival during the Rehnquist Court. Today, it cannot be said that federalism in family law is a firm barrier against federal court intervention in and regulation of state domestic relations laws.

The principle of federalism goes beyond the structural organization of the formal government and the division of formal government powers; it extends also to the preservation of some nongovernmental institutions which preserve the diffusion and prevent the concentration of power and which foster the commitments and values necessary to resist tyranny. Part IV shows how the institution of conjugal marriage itself is critical to the maintenance and preservation of the republican government the Founders established. That Constitution is a "super-structure" and it rests upon the foundation of a "sub-structure" of nongovernmental institutions which nurture the intangible human qualities and virtues necessary to motivate individuals to make the sacrifices required to fulfill the responsibilities of citizenship, and to willingly forego personal pleasures that are detrimental to the commonwealth. Just as preservation of the sovereignty of the states is a facet of federalism necessary to prevent the abuse of power, so also preservation of conjugal marriage and the marital family is a facet of federalism critical to prevent tyranny. Marriage-based families constitute mediating structures that resist tyranny, and marriage is the foundation of the most important social unit of society in which civic virtues, including the courage and commitment to resist tyranny, are cultivated.

Part V suggests that the institution of marriage is in great danger today, especially from attempts by the judiciary to redefine marriage. Marriage has always been an appealing target for social reform movements because the institution of marriage is so crucial to the organization of society and the transmission of social values. The effort to legalize same-sex marriage is just the latest political movement seeking to remake society by capturing (or redefining) marriage. Indeed, the last vestiges of both the eugenics movement and the White Supremacy movement were only removed in 1967, the latter by the Supreme Court's decision in *Loving v. Virginia*,[6] declaring anti-miscegenation to be unconstitutional, and the former by *Loving* and the post-World War II repudiation of numerous mental qualification laws. The movement to legalize same-sex marriage is the successor to those socio-political movements which sought to promote their ideology by capturing the institution of marriage and reformulating the legal requirements to enter marriage.

The judiciary itself presents this clear and ominous danger of "tyranny" as the legalization of same-sex marriage has been promoted primarily by judicial

6. 388 U.S. 1 (1967).

fiat—by courts interpreting or applying constitutional doctrines based in federal constitutional case law (in the minority of cases) or on state constitutional interpretations that are analogous to and easily transferable to federal constitutional doctrine. The judicial decisions compelling the legalization of same-sex unions, especially the rash of decisions in the past two years, show that the movement to legalize same-sex marriage seriously threatens the principle of federalism in family law. The courts have invoked at least eight different broad constitutional doctrines based on the Constitution of the United States and counterpart state constitutional doctrines which would eliminate federalism in family law. That is why I have changed my own view about the FMA in the past two years from non-support and criticism to strong support.

Part VI concludes that federalism still is about resisting tyranny, and today still functions, and should function, to prevent and restrain it. The proposal of a federal marriage amendment is intended to protect the institution of marriage from being subverted by radical redefinition in the service of a political movement. It also seeks to prevent the imposition of same-sex marriage by judicial fiat. Both purposes are consistent with the principle of federalism in family law and with the goal of resisting and restraining tyranny when it appears.

II. THE FOUNDING OF FEDERALISM IN FAMILY LAW

The answers to the federalism issues regarding the proposed Federal Marriage Amendment turn to a great extent upon whether the doctrine of federalism in family law is historically valid and currently respected. Thus, this Part analyzes the origins of federalism as a structural institution designed to restrain tyranny. It also reviews the historic basis and validity of the doctrine of federalism in family law.

A. Federalism Was Designed by the Founders to Prevent and Restrain Tyranny

Federalism is one of several structural devices designed and established by the Founders to prevent and restrain tyranny.[7] The Founders embraced "the common Whig fear of political power. 'Absolute power should never to trusted to man,' wrote Benjamin Rush in 1777 in terms no good Whig could deny. 'It has perverted the wisest heads, and corrupted the best hearts in the world.'"[8]

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7. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 84-86 (1988) (reviewing Madison's argument that division of power will dilute and cabin tyranny).

8. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1789 at 441 (1969). *See also id.* at 22-23 (describing English Whigs' fierce opposition to tyranny – which they defined as the abuse by the powerful and wealthy and "the government of one man, or a few, over many, against their inclination and interest.") But for English Whigs "tyranny by the people was theoretically

Doctor Rush urged that "the sovereign power should be watched with a jealous eye, and every abuse of it, which infringes the right of the subject, instantly opposed."[9]

The Whigs had generally equated tyranny with abuses of liberty inflicted by a strong monarch. However, the term "tyranny" took on a variety of new meanings for the Founders of the American republic, as they recognized threats to their liberties from branches, agencies, and other forms of government power that were new or unique to the American circumstances.[10] For example, one writer explained in 1777: "We have been so long habituated to a jealousy of tyranny from monarchy and aristocracy . . . that we have yet to learn the dangers of it from *democracy*."[11] Similarly, Madison exclaimed that "[t]he 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 tyranny."[12] As historian Gordon S. Wood notes, "Under the pressure of this transformation of political thought *old words and concepts* shifted in emphasis and *took on new meanings*. Tyranny was now seen as the abuse of power by any branch of the government, even, and for some especially, by the traditional representatives of the people."[13]

Thus, the unique form of federalism that is established in the Constitution was created to respond not only to classic forms of tyranny but to new and potential forms of tyranny which had not been recognized—nor even existed—before.[14] While it is doubtful that many of the founders considered the judiciary, which Hamilton described as the "least dangerous" branch of government,[15] to be a significant potential source of tyranny in 1787, the Constitution was organized to allow the people to respond to tyranny whenever and wherever it arose. That is the principle behind the structural device of federalism.

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inconceivable . . . ." *Id.* at 62. *See also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 33-55 (1967) (describing the Whig writers who influenced the Founders).

9. WOOD *supra* note 8, at 442, citing Benjamin Rush, *Observations on the Government of Pennsylvania*, *in* SELECTED WRITINGS OF BENJAMIN RUSH 57 (Dagobert D. Runes ed. 1947); *Packet* (Phila.), June 2, 1777 & Oct. 8, 1778.

10. *Id.* at 549 (tyranny in the new government feared); *id.* at 559 (Federalists considered the concentration of power in a single body to be "'the very definition of tyranny.'")

11. *Id.* at 442 (quoting an author from the Philadelphia *Packet*).

12. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

13. WOOD, *supra* note 8, at 608 (emphasis added).

14. *See generally* FORREST MCDONALD, NOVUS ORDU SECLORUM 291 (1985) (federalism "reflected the Framers' goal of preventing self-government from degenerating into majoritarian tyranny."). *See also* CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA 358-59 (1986) (describing how the Founders adapted concepts like separation of powers and federalism "to the American situation," and describing the "federal ambiguity" created by the Constitution, in which local and national interests are often at loggerheads in Congress and executive power grows by default).

15. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter, ed., 1961). *See also* THE FEDERALIST NO. 81 (Alexander Hamilton).

The Federalist Papers are peppered with references to tyranny as justification for both the new (1787) Constitution and for specific constitutional provisions, especially the principles of federalism and separation of powers.[16] Strong interest-backed structural restraints such as federalism were necessary, Madison warned, because "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the power of government in the same hands."[17] The Founders transformed the Whig notion of unitary sovereignty into their invented and unprecedented form of federalism in order to check tyranny. As Bernard Bailyn put it:

> [T]he federalist tradition, born in the colonists' efforts to state in constitutional language the qualification of Parliament's authority they had known—to comprehend, systematize, and generalize the unplanned circumstances of colonial life—nevertheless survived, and remains, to justify the distribution of absolute power among governments . . . to keep the central government from amassing "a degree of energy, in order to sustain itself, dangerous to the liberties of the people."[18]

Thus, restraining tyranny by preventing the concentration of despotic power in a central government was the primary purpose of the American Founders' version of federalism.[19]

B. The Founders' Federalism in Family Law

Federalism in family law was intended to check the emergence of national tyranny over family life.[20] The Founders of the Constitution were deeply suspicious of a concentration of governmental power.[21] In fact, "the great principle of the revolution was limited government."[22] Because of the abuses they had experienced under the hands of King George's strong central

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16. *See, e.g.*, THE FEDERALIST, NOS. 1, 9 (Alexander Hamilton) (importance of federalism to restrain tyranny); THE FEDERALIST NO. 28 (Alexander Hamilton & James Madison).

17. THE FEDERALIST NO. 48, at 313 (James Madison) (Clinton Rossiter, ed., 1961).

18. BAILYN, *supra* note 8, at 229 (quoting Anon, *Concise View*, *in* ANNALS 399 (Morse ed.)). *See also id.* at 198-229 (describing the evolution of the Whig notion of sovereignty in America); MCDONALD, *supra* note 14, at 204 (finding that a commitment to prevent tyranny motivated Madison).

19. Martin Diamond, *The Ends of Federalism*, *in* THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 16, 22 (Stephen L. Scheter ed., 1985) (the negative "fear of inevitable 'despotic authority' in the central government of a large country" received more attention in American federalism than the positive principle of cultivating virtue). *See also* Edward C. Banfield, *Federalism and the Dilemma of Popular Government*, *in* HOW FEDERAL IS THE CONSTITUTION? 1, 13 (Robert A. Goldwin & William A. Schambra, eds., 1987) (limiting government was dominant concern of the Revolution).

20. *See generally* Anne C. Dailey, *Families and Federalism*, 143 U. PA. L. REV. 1787, 1871-72 (1995); Wardle, *supra* note †.

21. Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450-51 (1991).

22. Banfield, *supra* note 18, at 13.

government, the Founders were determined to spread and separate government authority in the United States.[23] The states were also jealous of the federal government's authority; indeed, the strong reluctance of the states to agree to relinquishment of power was the primary reason for the weakness of the Articles of Confederation—the "radical infirmity"[24] which precipitated the convening of the Constitutional Convention.

Thus, the Drafters of the Constitution were determined to prevent undue concentration of governmental power and to preserve significant State governmental authority in the new government. They sought to divide roles and authority between the new national government created in 1787 and the existing state governments. Hence, they invented the unprecedented, and still unique, American notion of "dual sovereignty" federalism, with ultimate sovereign authority concerning some subjects granted specifically to the national government, and all remaining authority on other matters retained by the states.[25] "From the earliest days of the Republic . . . family law has unquestionably belonged to the states."[26] The states' control over family law was a core reason for, a basic subject of, and a prime example of the Founders' commitment to federalism.

This scheme is clearly explained in *The Federalist Papers*, the essays written by "Publius" (James Madison, Alexander Hamilton, and John Jay) to provide reasons for ratifying the Constitution. But even earlier, those same ideas about federalism and dual sovereignty were expressed by the delegates to the Philadelphia convention of May to September, 1787, who wrote the Constitution and in the ratifying debates in the several states between September 1787 and March 1789. Even earlier echoes of these principles were manifest in the writings of many of the political thinkers the Founders consulted.

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23. *See* Aaron J. O'Brien, *State's Repeal: A Proposed Constitutional Amendment to Reinvigorate Federalism*, 44 CLEV. ST. L. REV. 551 (1996); Marci A. Hamilton, *"Separation": From Epithet to Constitutional Norm*, 88 VA. L. REV. 1433, 1450 (2002).

24. James Madison, *A Sketch Never Finished nor Applied*, *in* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 7 (1966).

25. Modern federalism was thus born in Philadelphia in 1787. *See* Hans-Peter Schneider, *Federalism in Continental Thought During the 17th and 18th Centuries*, *in* FEDERALISM AND CIVIL SOCIETIES, AN INTERNATIONAL SYMPOSIUM 43 (1999) ("The United States is generally accepted to be the homeland of modern federalism."); Daniel J. Elezar, *A Final Word*, *in* FEDERALISM AND THE WAY TO PEACE 159 (1994) (noting that what most people call federalism today was invented by the Founders in 1787). *See also* Michael Burgess, *Federalism in Anglo-American Political Thought During the 17th and 18th Centuries*, *in* FEDERALISM AND CIVIL SOCIETIES, AN INTERNATIONAL SYMPOSIUM 53 (1999) (distinguishing American federalism from English federalism); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1449 (1987) (describing federalism as a "model that balanced centripetal and centrifugal political forces—a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body").

26. Dailey, *supra* note 20, at 1821.

1. The Federalist Papers and Family Law

The Federalist Papers were written for the purpose of convincing readers, *inter alia*, that the Constitution which had been proposed provided a better basis for good government than the existing Articles of Confederation. The proposed Constitution conformed to "true principles of republican government," and that its adoption would afford "additional security . . . to the preservation of [republican] government, to liberty, and to property."[27] One objection to the proposed Constitution that Publius addressed in several essays was that the strengthened national government would "absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes."[28] The authors were concerned that the federal government might leave impotent as government bodies "the governments of the particular States,"[29] and effect "an abolition of the State governments . . . ."[30] In *The Federalist*, No. 10, James Madison famously declared: "The federal Constitution forms a happy combination . . . ; the great and aggregate interests being referred to the national, the local and particular to the State legislatures."[31] Thus, Madison reassured readers that under the Constitution the states would exercise full sovereign governmental authority over matters of local, domestic concern. In No. 14, he emphasized:

> [T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. *The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.*[32]

Madison's use of the verb "retain" indicates that the states were intended to keep the same full authority over "all those other objects which can be separately provided for" that they historically had exercised. Madison emphasized that the states would be just as supreme in the areas of their retained sovereignty (including the regulation of family relations) as the national government was in its delegated fields of sovereignty.[33] In No. 45, he again explained:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those that remain in the State

27. THE FEDERALIST NO. 1, at 36 (Alexander Hamilton) (Clinton Rossiter ed. 1961).
28. THE FEDERALIST NO. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed. 1961).
29. THE FEDERALIST NO. 45 at 288 (James Madison) (Clinton Rossiter ed. 1961).
30. THE FEDERALIST NO. 9, at 76 (Alexander Hamilton) (Clinton Rossiter ed. 1961).
31. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed. 1961).
32. THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed. 1961) (emphasis added).
33. THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed. 1961).

> governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce .... *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*[34]

This description of state authorities to regulate the "ordinary" affairs "concern[ing] their lives, liberties and ... properties" clearly encompasses the regulation of domestic relations. In the same paper, Madison also noted: "[T]he States will retain under the proposed Constitution a *very extensive portion* of active sovereignty."[35] Family law was to remain subject to state, not national, regulation. While some indirect impact of national laws would undoubtedly be felt in state domestic relations laws, because only the states could directly regulate family law, the "very extensive portion" of such regulation would be under state control.

The avidly nationalistic Alexander Hamilton agreed. In No. 32, he argued that "the whole tenor of... the proposed Constitution" confirms that "all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor,"[36] and characterized the government created by the Constitution as an "equilibrium" between state and federal power.[37] Since the power to regulate domestic relations was not conferred upon the national government, it remained with the State governments, and the separation of power to regulate local matters like family law from the power to regulate national matters like defense, economy, and foreign policy created the critical "equilibrium." Similarly, in No. 17, Hamilton explained that the national government would be primarily concerned with matters of "[c]ommerce, finance, negotiation, and war" while the state governments would have priority in regulating "[t]he administration of *private justice* between citizens of the same State, the supervision of agriculture and of other concerns of a similar nature," and "*regulating all those personal interests and familiar concerns* to which the sensibility of individuals is more immediately awake,"[38] including, presumably, family law.

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34. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961) (emphasis added).

35. *Id.* at 290 (emphasis added).

36. THE FEDERALIST NO. 32, at 201 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

37. *Id.* at 197 (Alexander Hamilton). Likewise, in Federalist No. 31, Hamilton responded to the claim that the national government would encroach upon the powers of the States by arguing that the States were even more likely to (and more likely to successfully) encroach upon the powers of the other level of government, but concluded that "the people ... will hold the scales in their own hands, [and] it is to be hoped will always take care to preserve *the constitutional equilibrium* between the general and the State governments." THE FEDERALIST NO. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

38. THE FEDERALIST NO. 17, at 118-20. (emphasis added). *See also* THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (arguing that, should Congress attempt to

2. *Federalism in Family Regulation in the Debates at the Constitutional Convention and in the Ratifying Conventions*

It seems never to have occurred to any of the delegates to the Constitutional Convention of 1787 that the national government should or would have the power to directly regulate family relations.[39] They believed that they were forming a government that would have power over national interests, primarily in external matters (foreign relations, defense) and internal matters concerning national economic and military concerns (quelling rebellions). The regulation of family matters was never discussed in the Philadelphia convention. However, descriptions of the scope of power of the new national government consistently reflect the common consensus that under the Constitution, the states would retain plenary governmental authority to regulate matters of local concern including family law. These statements were made by both Federalists and Anti-Federalists.[40]

Likewise, in the ratification debates in the various states, the extent of state sovereignty that would remain under the Constitution was highly controversial. Again, there was little discussion of family law. But there are indications that the participants in these debates understood and agreed that the regulation of family relations would remain a matter of state control.[41] Thus Hamilton, the radically pro-central government advocate, "assured [the New York] ratifying convention that the Constitution would *not 'penetrate the recesses of domestic life*, and control, in all respects, the private conduct of individuals.'"[42] Likewise, "Tench Coxe, a . . . Federalist [in Pennsylvania] writing in support of ratification, similarly noted that the states would continue to regulate descents and marriages under the federal Constitution."[43]

The absence of any serious Founding era claims or allegations that the states would be stripped of their power to regulate domestic relations, or that their ultimate and supreme authority to control family law would be

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regulate the law of descent, it would have "exceeded its jurisdiction and infringed upon that of the State" and "be merely acts of usurpation").

39. THOMAS G. WEST, VINDICATING THE FOUNDERS 91 (1997) ("The Founders rarely discussed the virtues of the family because the subject was not controversial.").

40. Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 940 (1995) ("Both sides in these debates argued for a federal form of government; one in which the states would delegate certain powers to a national government.").

41. Forrest McDonald writes, "Broadly speaking, the powers that the states retained fell under the police power: the states had the powers of the *polis*. These included not only the definition and punishment of crimes and the administration of justice but also all matters concerning the health, manners, morals, safety, and welfare of the citizenry." MCDONALD, *supra* note 14, at 288.

42. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297, 1321 n.95 (1998) (emphasis added) (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 268 (photo. reprint 1941) (Jonathan Elliot ed., 1836)).

43. *Id.* at 1321 (quoting Tench Coxe, *A Freeman II*, PA. GAZETTE, Jan. 30, 1788, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 508, 510 (John P. Kaminski & Gaspare J. Saladino eds., 1984)).

significantly curtailed under the Constitution is among the strongest evidence for federalism in family law.[44] Opponents of the Constitution made every conceivable credible argument (and some that were incredible) that under the Constitution the states would lose too much power, but they never claimed that the states would not retain plenary power over and supremacy in the regulation of family relations. Anti-Federalists railed incessantly against the encroachment upon the sovereignty of the states, but never did they complain, suggest, or even hint that the states would be deprived of their plenary authority to regulate domestic relations.[45] That total silence in the historical record convincingly indicates the consensus at the time of the founding that the states would retain full authority to regulate family law.

Of course, the text of the Tenth Amendment explicitly embodies the federalism principle: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, federalism is an express constitutional principle incorporated explicitly in the Bill of Rights,[46] and family law is a prime example of the areas "reserved to the States" for regulation.

3. *Federalism in Regulating Family Relations in the Political Writings the Founders Consulted*

The Founders were deeply influenced by political traditions that emphasized the importance and benefits of local control of issues such as the regulation of family relations.[47] Chief among these political writers was the Baron of Montesquieu, the political writer most frequently cited in America during the founding era,[48] whose *Spirit of the Laws* was a groundbreaking work of both political and sociological theory.[49] The main theme of *The Spirit of the Laws* is that laws should reflect the peculiar values, customs, and balance of political interests of the people who will be subject to the laws.[50] Hence,

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44. *See generally* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 571 (1983) ("The silence of the Constitution on the entire subject of the family does not tell us that marriage and family were unimportant to the Founders; it tells us, rather, that the Founders consciously accepted the regulation of family life [by states] embodied in the civil legislation.").

45. *See generally* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 9-12 (1981).

46. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1466 (1987) ("The language of the Tenth Amendment simply distilled the underlying structural logic of the original Constitution: Wherever authorized by its own state constitution, a state government can enact any law not inconsistent with the federal Constitution and constitutional federal laws.").

47. *See generally* Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1218-30 (1999).

48. LUTZ, *supra* note 7, at 142-46.

49. For a discussion on Montesquieu's impact on the Founders, see *id.* at 139-45.

50. C.L. DE SECONDAT (BARON DE MONTESQUIEU), THE SPIRIT OF LAWS 298 (Thomas Nugent trans., The Colonial Press 1902) (1748). Montesquieu also emphasized the distinction between "manners" or "customs" on the one hand and "laws" on the other, and emphasized that matters of custom and manner were inappropriate subjects for legal regulation. *Id.* (Laws are "institutions of a

Montesquieu rejects the notion of universal or ubiquitous substantive laws which will benefit all people in favor of the notion of localized laws reflecting the spirit of the local people. Montesquieu recognized that communities would differ.[51] Although he greatly admired and supported republican government, he did not believe that a republican form of government was suitable to govern all societies. Instead, he believed that the spirit of the laws should reflect the spirit of the community. Thus, he stated: "[T]he government most conformable to nature, is that which best agrees with the humor and disposition of the people in whose favor it is established .... [Laws] should be adapted in such a manner to the people for whom they are framed ...."[52] Consequently, "[i]t is the business of the legislature to follow the spirit of the nation ...."[53] Montesquieu had an obvious influence on the founders of the United States Constitution, and the system of federalism which they adopted exhibited a belief in the need for the laws to reflect the spirit of local (state) communities. Montesquieu believed that republics would be more suitable for a smaller political community than for a large nation. The dual sovereignty of the American government left substantial authority in the states to reflect local values in matters of family relations.

4. *Federalism in Family Law in the Founding Era Generally*

Federalism in family law emerged from the political theory of the Founding era.[54] Anne Dailey has explained how, "[f]ar from being an anachronistic exception to the general demise of constitutional federalism, state authority over the substantive domain of family life represents an essential and fundamental communitarian aspect of our liberal democratic order."[55] Her theory of "localism" emphasizes that "[i]mplicit in the design of the Constitution is the understanding that the states have responsibility for developing a shared moral vision of the good family life."[56]

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legislator" but manners and customs are the "institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws; this would have too much of the air of tyranny: it would be better to change them by introducing other manners and other customs.") *See also id.* at 294 ("It is the business of nations," Montesquieu continues, "to follow the spirit of the nation, when it is not contrary to the principles of government; for we do nothing so well as when we act with freedom, and follow the bent of our natural genius.").

51. *See generally id.* at 295 (noting the differences between the people of ancient Athens—a democracy—and the people of ancient Sparta). "Montesquieu is a 'relativist' in believing that there is no single 'best' body of laws or pattern of politics" because "laws are not abstractly ordained or agreed upon at any one moment in history: instead, laws slowly grow out of men's experience with one another—out of social customs and habits—as, one may add, the common law of England developed. 'When a people have pure and regular manners, their laws become simple and natural.'" RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 352-54 (1974).

52. DE SECONDAT, *supra* note 50, at 6.

53. *Id.* at 294.

54. Dailey, *supra* note 20, *passim.*

55. *Id.* at 1793.

56. *Id.* at 1825.

The fostering of civic virtue, believed by the Founders to be the critical pre-constitutional foundation for any "republican" (representative democratic) form of government, was believed to be beyond the ability and competence and safe control of the national government. Instead, local communities could more appropriately shape laws that would reflect the family (especially parenting) values of the *polis*.[57] Through federalist ideas in family law, the Founders expected to encourage local participation in the formulation of laws and government policies. Furthermore, "the civic virtue of situated autonomy"[58] required demanding the kinds of families that would inculcate the virtues of responsible citizenship, which could best be done in a "small republic" local setting.[59] Professor Dailey's "localism" theory emphasizes that "the communitarian nature of family law requires a level of political engagement and a sense of community identity that lie beyond the reach of national politics,"[60] that "state sovereignty over family law serves to diffuse governmental power over the formation of individual values and moral aspirations,"[61] and that residual national authority to protect individual rights "ensur[es] that states do not override fundamental liberal values."[62]

Other scholars of federalism and of family law agree with Dailey's general positions regarding the significance of state control of family law in the Founding Era (as well as in contemporary political theory).[63] Federalism was linked to virtue in the prevailing republican political theory at the time of the Founding. The Founders believed that citizens needed to be virtuous in order to sustain a republic, and that civic virtue was best cultivated and nurtured in local, rather than national, civic communities.[64]

Early Court decisions reflected this view of federalism and family law. For example, in *McCulloch v. Maryland*,[65] Chief Justice John Marshall explained that the design of the Constitution allocated distinct spheres of governmental authority to the states and to the national government, noting: "In America, the powers of sovereignty are divided between the government of the Union, and

57. *Id.* at 1826-35.
58. *Id.* at 1850.
59. *Id.*
60. *Id.* at 1871.
61. *Id.* at 1872.
62. *Id.*
63. *See* NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE 9-10 (2000) (describing Republican principles and the ideology of families); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999) (describing history of federalism in family law and federal court jurisdiction). *See also* Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175 (2000); David D. Meyer, *The Paradox of Family Privacy*, 53 VANDERBILT L. REV. 527 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).
64. Kala Ladenheim, *Federalism and the Courts, at http://www.cas.sc.edu/poli/courses/scgov/Federalism_and_the_Courts.htm* (last visited Apr. 19, 2005) *See also* Christopher M. Duncan, *Men Of A Different Faith: The Anti-Federalist Ideal In Early American Political Thought*, 26 POLITY 387 (1994).
65. 17 U.S. (4 Wheat.) 316 (1819).

those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."[66] The McCulloch Court further declared that it was the responsibility of the Supreme Court to contain the national power within constitutionally-defined bounds.[67] Likewise, in *Cohens v. Virginia*, the Court referred to the American states as "members of one great empire—for some purposes sovereign, for some purposes subordinate."[68] In *Gibbons v. Ogden*, the Court described the legislative power of the states as "a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government."[69]

C. *Nineteenth Century Developments and the Civil War Amendments*

In the early decades of the United States of America, some regulation of families occurred at three levels of government in America—local, state and national. But, as Professor Nancy Cott states: "The most diffuse, least recognized of the three was the national authority exerted over marriage. Lacking specific regulatory power, the federal government had few visible avenues along which to implement its fundamental commitment to monogamy. It had little bureaucracy and few powers directly touching the population."[70] By contrast, "[t]he state-level apparatus of formal control [of marriage] included the enforcement of laws by municipal and state officials and the decisions made in state courts . . . . *The federal principles of the United States allowed each state to make its own rules on marriage and divorce . . . .*"[71]

The Reconstruction Amendments modified the allocation of powers between the national government and the States.[72] All three of the amendments

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66. *Id.* at 410.

67. *Id.* at 423 ("[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the [national] government[,] it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.")

68. 19 U.S. (6 Wheat.) 264, 414 (1821).

69. 22 U.S. (9 Wheat.) 1, 203 (1824).

70. COTT, *supra* note 63, at 24.

71. *Id.* at 28. "Local control and flexibility" were the touchstones of marriage regulation in the United States during the eighteenth century. *Id.* at 40. Professor Cott hints that this may have been due largely to the weakness of the national government in the founding era, and the need to focus its attention and resources on such matters as national defense, foreign policy, and domestic economic policy. *Id.* at 24-40. She gives little attention to the political theory of federalism in the Founding Era. However, as Part II.B, *supra*, shows, the intellectual foundations of federalism in family law were firmly established in the American political identity of the era.

72. The overall intent and effect of the Fourteenth Amendment on the structure of federalism has been much debated, with little consensus other than that the Reconstruction Amendments were intended both to give the national government more power to protect individual rights and to preserve state sovereignty. *See generally* Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 68-69 (1987) (Civil War Amendments were "constitutionally revolutionary" and "held the potential of ending federalism and establishing a consolidated, unitary state" but "the framers eschewed this extreme institutional arrangement . . . .");

adopted immediately after the Civil War increased congressional authority by granting Congress the ability to enforce the provisions of the Thirteenth, Fourteenth and Fifteenth Amendments through legislative means. The amendments established, as a matter of constitutional (national) law, certain substantive policies. Nothing in the text of any of the Reconstruction Amendments mentions family law. However, in the nineteenth century slavery was considered a matter of "domestic relations,"[73] and slavery was abolished by the Thirteenth Amendment. In that respect, the Civil War amendments entirely removed one "domestic relation" from control of the states by abolishing entirely the domestic relationship, status and institution of slavery. That is not an insignificant modification of federalism in family law, but it is a very specific change. There is no other reference to any other aspect, element, or dimension of what today we would call "family law" in any of the Reconstruction Amendments. The focus on slavery only suggests that no general, immediate transfer of regulatory authority over domestic relations from the states to the national government was intended.

Of course, in the congressional and ratification debates, there was disagreement over the potential effect of family regulation on the Fourteenth Amendment. For example, attempts to link slavery to polygamy were common in the era, and while these concepts were intellectually embraced by some, they were deemed insufficient legal grounds by backers of congressional legislation to eradicate the practice of polygamy among the Mormons living in the federal territory of Utah. Instead, anti-polygamy activists relied on other constitutional grounds for passage of their anti-polygamy legislation.[74] Concern over the reach of the Fourteenth Amendment also erupted in debates over whether married women's property laws would be invalidated under the Fourteenth Amendment.[75] But consistently deference was given to state control over domestic relations.

WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 1-12 (1988) (noting that there are good historical arguments for both broad and narrow interpretations of the Fourteenth Amendment; best research shows dual intent to secure equality and individual rights and to preserve federalism).

73. BLACKSTONE, COMMENTARIES *422 (the three great relations in private domestic life are master and servant, husband and wife, and parent and child); COTT, *supra* note 63, at 62 (category of domestic relations included both husband-wife relations and master-servant relations, including slaves). *See generally* Sarah Barringer Gordon, Review of Chapel and State, *Laws Written in the 19th Century to Prevent Polygamy are Thwarting the Efforts of Today's Same-Sex Marriage Advocates,* LEGAL AFFAIRS, Jan./Feb. 2003, at 46, 47 ("Until the Civil War, proslavery Southerners blocked any attempt to legislate against polygamy. The legal category of domestic relations covered masters and servants as well as husbands and wives; both slavery and polygamy were relationships of private authority, Southerners argued, that should be shielded from state intrusion.").

74. *See generally* L. Rex Sears, *Punishing the Saints for Their "Peculiar Institution": Congress on the Constitutional Dilemmas,* 2001 UTAH L. REV. 581, 600-09.

75. *See generally* Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding,* 94 Nw. U. L. Rev. 1229, 1250-53 (2000) (describing disabilities and unequal civil rights of married women at the time of adoption of the Fourteenth Amendment); Kathleen M. Sullivan, *Constitutionalizing Women's Equality,* 90 CAL. L. REV. 735, 736 (2002) ("The Fourteenth Amendment added the provision that no state shall deprive any person of the 'equal protection of the laws,' or of the

Similar disputes existed over the impact of the Fourteenth Amendment on anti-miscegenation laws.[76] In *Loving*, the Supreme Court noted that there was credible historical evidence of Founders' opinions on both sides of the antimiscegenation issue and that the historical record was simply inconclusive on that point.[77] The Court reached its decision invalidating Virginia's anti-miscegenation laws by proceeding from and acting to effectuate a different, indisputable intent and purpose of the founders of the Fourteenth Amendment—to eliminate anti-Black racism and government policies of White Supremacy.[78]

As such, while there remain many unanswered questions about the scope and intent of the Fourteenth Amendment, it can be said with some confidence that intent to eliminate or reduce federalism in family law (apart from abolition of slavery) was not a purpose of any of the Civil War Amendments. After the adoption of the Reconstruction Amendments the doctrine of federalism in family law continued in full force. Even after the Civil War—when the divergent marriage practices of the South had been suppressed by military might, the trend toward nationalism was very strong, and "[e]lite organs such as *The Nation* and the *New York Times* even mentioned that federal control of marriage standards might be a good idea"[79]—the federalist principle of "State sovereignty over marriage" survived.[80] The "reframing of American political society" after the Civil War incorporated a preferred model for American marriage while "highlight[ing] the state's role" in marriage regulation.[81] The

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'privileges and immunities' of federal citizenship. Nothing in that provision, however, appeared at its ratification to contemplate equality for women. Indeed, Section 2 of the Fourtenth Amendment, to the horror of contemporary suffragists who had also fought for abolition, introduced the word "male" into the Constitution and linked it to the franchise . . . .").

76. *See* CONG. GLOBE, 39th cong., 1st Sess. 632-33 (1866) (Rep. Moulton, Illinois Republican, states: "I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman"); CHESTER JAMES ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT 60 (1981) ("Among the people who ratified the Fourteenth Amendment there appears some understanding that [it,] in its privileges and immunities clause, embraced the right of a person to marry whomsoever one pleased, regardless of race."); Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50 (1964) (at least 29 states maintained antimiscegenation laws after adoption of the Fourteenth Amendment; Whites were concerned about "polluting" the White race); Laurence C. Nolan, *The Meaning of* Loving: *Marriage, Due Process and Equal Protection (1967-1990)*, 41 HOW. L.J. 245 (1998) (reviewing history of miscegenation and of post-*Loving* equal right to marry cases).

77. 388 U.S. 1, 9-10 ("As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources 'cast some light' they are not sufficient to resolve the problem; '(a)t best, they are inconclusive . . . .'") (citing Brown v. Board of Education, 347 U.S. 483, 489 (1954) and Strauder v. West Virginia, 100 U.S. 303, 310 (1880)).

78. *Loving*, 388 U.S. at 9-10.

79. COTT, *supra* note 63, at 103.

80. *Id.* at 104.

81. *Id.* Professor Cott suggests strongly that a national consensus about marriage stood above state political control of marriage laws. It is clear that during this period there was a dominant national ideal of marriage, namely a Protestant-Victorian monogamous model. *See also* EVA RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 16-19 (1986). However, if Professor Cott's arguments are interpreted to suggest that as a matter of legal doctrine state regulation of family relations was

principle of separate-spheres-of-separate-sovereigns continued to apply to protect and preserve state sovereignty in the field of family regulation.[82] Indeed, a generation after the Reconstruction Amendments were adopted, federalism in family law was cited as one excuse to reject women's suffrage claims.[83]

D. Constitutional Amendment Proposals and the Nineteenth Amendment

Evidence of the survival and vitality of the principle of federalism in family law are the many constitutional amendment proposals that were introduced after the Civil War for the purpose of giving to the national government authority to regulate some aspect of family law. These proposals indicate that even after the Reconstruction Amendments were adopted, it was the common understanding that the national government still lacked authority to generally regulate family law. These amendment proposals were introduced to change that situation and give such power to the national government.

In the 215 years since the Constitution was ratified, more than 11,000 proposed amendments to the Constitution of the United States have been introduced in Congress.[84] Scores of those proposed amendments to the Constitution have dealt expressly with family law matters; including proposals to give Congress power to make uniform marriage and divorce laws (the theme of most of the proposals), to preserve state control over marriage and divorce, to abolish polygamy, prevent federal interference with domestic relations, and to regulate or protect miscegenation.[85] The most recent proposals to amend the

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subordinate to some national substantive standard, the evidence for that proposition is thin. For instance, the federal government was heavily involved in the regulation of Mormon polygamous activity and the suppression of the domestic institution of slavery.

82. *See* Collector v. Day, 78 U.S 113, 124 (1870) (noting that "[t]he general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.").

83. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 998-1000 (2002) (citing federalism claims in an 1882 Minority Report of the Senate Committee on Woman Suffrage, and in an 1884 House Judiciary Committee report).

84. Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 93 LAW LIBR. J. 303, 309 (2001). In the first 100 years, more than 1300 proposed amendments were introduced, of which only fifteen were ratified; and in the next forty years, another 1370 amendments were proposed, of which four were ratified. *Id.* at 307. As such, in the past three-quarters of a century, over 8,000 amendments have been introduced of which only eight have been ratified. *See also* Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for A "Republican Veto,"* 22 HASTINGS CONST. L.Q. 325 (1995); Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1996). The total of 11,000 is given in Kermit L. Hall, Book Review, 41 AM. J. LEGAL HIST. 487, 488 (1997), and Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996).

85. *See generally* 2 HERMAN V. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY, ANN. REP. OF THE AMER. HIST. ASS'N FOR THE YEAR 1896 (G.P.O. 1897); M.A. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION, H.R. DOC. NO. 551, 70th Cong., 2d Sess (G.P.O. 1929); PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, S. DOC. NO. 93, 69th Cong., 1st Sess. (1926); PROPOSED

Constitution introduced in Congress are the various versions of the Federal Marriage Amendment.[86] To date, none of these proposed amendments dealing directly with family law has been ratified. In fact, only one tangentially related proposal (the proposed Equal Rights Amendment in 1972) advanced in the amendment process to the point where it was actually proposed by Congress and sent to the States for possible (but ultimately unsuccessful) ratification. The others have not even been approved by Congress.

Clearly, the process of amending the Constitution is very difficult. First, getting the amendment proposed by two-thirds of the states or two-thirds of both houses of Congress is most difficult. Of more than 11,000 proposed amendments that have been introduced in Congress, only thirty-three have obtained the two-thirds approval in both houses of Congress or from two-thirds of the states necessary to send the proposed amendment to the states for ratification.[87] However, of the thirty-three amendments that Congress has proposed, twenty-six or twenty-seven (over 80%) have been ratified;[88] only six have failed to be ratified by the states.[89] None of the thirty-three amendments that have been proposed by Congress since 1790 has dealt specifically or explicitly with marriage or family law, and the Fourteenth Amendment is the only one that has had significant impact upon family law because the Court has used its due process and equal protection provisions to overturn state domestic relations laws.[90] Thus, the history of the proposal and ratification of

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AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INTRODUCED IN CONGRESS FROM DEC. 6, 1926 TO JAN. 3, 1941 (G.P.O. 1941); PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INTRODUCED IN CONGRESS FROM THE 69TH CONGRESS, 2D SESSION THROUGH THE 84TH CONGRESS, 2D SESSION, S. Doc. No. 65, 85th Cong., 1st Sess. (G.P.O. 1957). In his excellent paper presented at the Yale Law School symposium on *Breaking with Tradition*, Professor Edward Stein identified 138 amendments which have been proposed since 1870, 77 of which were jurisdictional and 55 of which dealt with polygamy. Edward Stein, Past and Present Proposed Amendments to the United States Constitution Regarding Marriage (2005) (unpublished handout distributed at Symposium) (on file with author).

86. *See supra* note 4 and accompanying text.

87. Hall, *supra* note 83, at 488; Sullivan, *supra* note 84, at 692.

88. No court has held that the twenty-seventh amendment has been validly ratified, but in 1992, the Archivist of the United States certified that over the prior 202 years, the requisite 38 states had ratified the amendment. Scholars are split as to whether the amendment is valid. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 539-42 (1992) (reviewing controversy among scholars and in Congress, but noting that Congress overwhelmingly recognized the amendment).

89. Troy G. Pieper, *Playing with Fire: The Proposed Flag Burning Amendment and the Perennial Attack on Freedom of Speech*, 11 ST. JOHN'S J. LEGAL COMMENT. 843, 847 n.16 (1996) ("The six are: a 1789 amendment that would have increased the size of the legislature with population growth; an 1810 amendment revoking citizenship of any person accepting a title of nobility from a foreign sovereign; an 1861 Amendment protecting slavery; a 1924 child labor amendment; the Equal Rights Amendment of 1972; and the District of Columbia Statehood Amendment of 1978.").

90. The Nineteenth Amendment guaranteeing women's suffrage directly dealt with the political aspect of gender roles, but not with family roles. The proposed Equal Rights Amendment could have impacted family law much like the Fourteenth amendment did, but the ERA failed ratification in no small part precisely because its opponents objected to its potential impact upon state laws regulating family relations.

Amendments to the Constitution underscores the validity and confirms the continued constitutional legitimacy of the principle of federalism in family law.

Professor Reva B. Siegel recently offered a creative argument that adoption of the Nineteenth Amendment, independently and in conjunction with the Fourteenth Amendment, altered the structure of federalism in family law.[91] She proposes "a synthetic reading of the Fourteenth and Nineteenth Amendments that would bring to the interpretation of the Equal Protection Clause a knowledge of the family-based status order through which women were disfranchised for most of this nation's history" and that would eliminate "historic forms of subordination [of women] in the family."[92] Professor Siegel demonstrates that some opponents of the Nineteenth Amendment "asserted that federalism principles precluded enfranchising women under the United States Constitution, contending that doing so would impermissibly interfere with local control of the franchise and the family."[93] One of the arguments used by opponents of extending a federal constitutional right to vote to women was that it violated the principle of federalism in family law.[94] She also reviews the federalist claims of anti-women's-suffrage activists, raised in *Leser v. Garnett*,[95] that the Nineteenth Amendment was itself unconstitutional, in part because "it invades a totally new sphere . . . a sphere essentially belonging to municipal law and therefore to the states."[96]

Professor Siegel produces substantial evidence that after the adoption of the Reconstruction Amendments, federalism in family law continued to be a strong and important doctrine recognized in Congress, the states, and throughout the country. She shows that desperate opponents of women's suffrage, recognizing the importance of the doctrine of federalism in family law, tried to portray the Nineteenth Amendment as a threat to that idea of federalism. Professor Siegel succeeds in showing that their argument about federalism was so tangential and insubstantial that when suggested in the Petitioner's brief in *Leser v. Garnett*, the Supreme Court did not even respond to it. Instead, the Supreme Court upheld ratification of the Nineteenth Amendment by rejecting the principal substantive claim that "so great an addition to the electorate, if made without the state's consent, destroys its autonomy as a political body."[97] The language of the Nineteenth Amendment deals specifically with the discrete matter of women's right to vote. It strains

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91. Siegel, *supra* note 83.
92. *Id* at 952.
93. *Id.* at 953.
94. *Id.* at 997-1002.
95. 258 U.S. 130 (1922).
96. Siegel, *supra* note 83, at 1006, citing Brief for Plaintiffs in Error at 75, Leser v. Garnett, 258 U.S. 130 (1922) (No. 553).
97. 258 U.S. at 136. While her article is well-researched and creative, it is curious that Siegel attempts to breathe new life into William Marbury's old unsuccessful argument that federalism in family law is undermined by the Nineteenth Amendment.

credulity to claim that the language, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex,"[98] was understood or intended by the persons who drafted, supported, and ratified the Nineteenth Amendment to mean that state regulation of domestic relations was to be limited or superceded by federal law.[99]

Moreover, the subsequent history of the unsuccessful attempt to adopt the proposed Equal Rights Amendment (ERA) in the 1970s and 1980s is strong evidence that federalism in family law survived the adoption of the Nineteenth Amendment. The ERA and the decade-plus effort to pass it would not have been necessary if Siegel's theory were correct. However, the proposed ERA fell short of ratification. Among the arguments asserted successfully by opponents of the ERA to block ratification were arguments about the potential impact of the ERA on family laws.[100] Underlying that argument are the twin contentions that (1) the regulation of family relations belongs to the states, and (2) adoption of the ERA would endanger the doctrine of federalism in family laws. The proposed Equal Rights Amendment shows that federalism in family law was alive and well long after the adoption of the Nineteenth Amendment, that there was substantial concern about the possibility of a negative impact of the ERA upon federalism in family law, and that such concern contributed to the failure of the attempt to ratify the ERA.

III. JUDICIAL RECOGNITION OF FEDERALISM IN FAMILY LAW

The doctrine of federalism in family law is long and deeply established in judicial precedents, including a long-line of decisions by the Supreme Court of the United States.[101] "Our Federalism" has been the subject of scores of Supreme Court opinions.[102]

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98. U.S. CONST. amend XIX, §1.

99. Siegel shows how, under twenty-first century feminist theories, a connection between women's suffrage and state regulation of family relations can be conceptualized, but she does not show (or even attempt to show) that the citizens who constituted the super-consensus of "We/She the People" who established the Nineteenth Amendment intended to reduce federalism in family law. While a feminist theoretical interpretation is possible, another interpretation involving a clear, categorical, legal distinction between voting rights and family relations is more plausible. *See Siegel, supra* note 84.

100. *See generally* Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy,* 34 RUTGERS L.J. 107 (2002) (citing arguments that the ERA would legalize same-sex marriage); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law,* 150 U. PA. L. REV. 419, 489 (2001) ("Opponents charged that the proposed ERA would federalize state law and would deprive women and children of protective legislation in the fields of employment and family law"); Lynn D. Wardle, *The Impact of the Proposed Equal Rights Amendment Upon Family Law,* 23 J. FAM. L. 477 (1984).

101. *See generally* Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison,* 25 OKLA. CITY U. L. REV. 843, 862 (2000) ("The Court has suggested that family law remains a preserve of state regulation.").

102. The term "our federalism" occurs in opinions in over 80 Supreme Court decisions based on a Westlaw search of the Supreme Court database conducted on April 19, 2005. *See e.g.,* Alden v. Maine, 527 U.S. 706, 748 (1999) ("Although the Constitution grants broad powers to Congress, our federalism

The Tenth Amendment's reservation of undelegated powers to the states or to the people, and the Eleventh Amendment's protection of state sovereign immunity have been primary vehicles for assertion of federalism. There is some evidence that the Guarantee Clause was originally understood to protect federalism by preventing federal usurpation of or interference with state governmental functions.[103] Cases interpreting the Tenth Amendment have often specifically singled out family law as a prime example of the type of regulation which is reserved to the states and beyond the regulatory authority of the national government. Beyond restraining congressional over-zealousness, the Tenth Amendment preserves a structural reservation of the authority to regulate domestic relations to the states, and that structural barrier sometimes has been cited by the Court in upholding state family laws and policies.[104]

For example, in *United States v. Morrison*,[105] the Supreme Court invalidated as unconstitutional part of the federal Violence Against Women Act (VAWA).[106] In a 5-4 vote, the Supreme Court affirmed the dismissal of a lawsuit seeking private damages under that section of VAWA by a woman who alleged that she had been raped by football players at Virginia Polytechnic Institute. The Court held that the creation of a federal cause of action act was unjustified by Congress's regulation of commerce and that the regulation of domestic relations is beyond the constitutional power of Congress. While numerous studies showed the detrimental effects of gender-related violence, the Court rejected social science data as justification for Congress to regulate conduct that is not otherwise within federal control, emphasizing that Congress's lack of authority to regulate family relations might be brushed aside if the broad "but for-effects" analysis of the plaintiff to justify VAWA were accepted. Thus, the Court invalidated the VAWA provision because it was concerned that if it upheld the statute, it would be difficult to not also uphold federal laws that directly regulate family relations.

The dissenters in *Morrison* noted that incidental congressional regulation of family relations is not impermissible if the statute is tied to interstate movement, arguing that the interstate travel aspects of violence against women were a legitimate focus of VAWA. The dissenters also suggested that the protection the majority gave was merely optical. "[I]n a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that

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requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.").

103. *See, e.g.*, William T. Mayton, *Direct Democracy, Federalism & the Guarantee Clause*, 2 GREEN BAG 269 (1999); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

104. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975) (upholding state durational residency requirement for divorce).

105. 529 U.S. 598 (2000).

106. 42 U.S.C. § 13981 (2000).

ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs."[107]

During the same term as *Morrison*, the Court also decided *Jones v. United States*. In *Jones*, the defendant "tossed a Molotov cocktail" into a home owned and occupied by his cousin.[108] He was convicted of violating a federal law that makes it a crime to damage or destroy "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[109] The district court and Seventh Circuit rejected Jones' argument that the federal law exceeded Congressional powers as applied to arson of a private residence. The Supreme Court unanimously reversed. Writing for the Court, Justice Ginsburg noted that "an owner-occupied residence not used for any commercial property" is beyond the regulatory reach of Congress. The home fire-bombed by the defendant "was a dwelling [used] for everyday family living."[110] While there were many interstate connections (the property was used to secure a mortgage from a lender in another state, to obtain a casualty insurance policy from another state, and to receive natural gas from other states) the unanimous Court's emphasis on the lack of Congressional power to regulate homes used as ordinary family residences supports the family federalism doctrine.[111]

Morrison and *Jones* reaffirmed the approach taken by the Court in 1995 in *United States v. Lopez*.[112] In *Lopez*, the Court (again by a 5-4 vote) struck down the Gun-Free School Zone Act of Congress as unjustified by the Commerce Clause and as infringing upon the reserved sovereignty of the states. The Court referred to the principle of family law federalism in dicta, noting that if the rationale for upholding the law was accepted,

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate. . . . This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.[113]

According to the majority, Justice Breyer's dissent in the case also suggested "that there might be some limitations on Congress' commerce

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107. 529 U.S. at 659 (Breyer, J., dissenting).
108. 529 U.S. 848, 851 (2000).
109. *Id.* at 850.
110. *Id.* at 859.
111. *See generally* Ronald D. Rotunda, *The New States' Rights, the New Federalism, the Commerce Clause, and the Proposed New Abdication*, 25 OKLA. CITY L. REV. 869, 921-23 (2000).
112. 514 U.S. 549 (1995).
113. *Id.* at 564-65.

power, such as family law . . . ."[114] Thus, "both the majority and the dissent in *Lopez* invoked family law as a paradigmatic example of state authority."[115] It is not insignificant that even the dissenters in *Morrison* and *Lopez* gave deference to the principle of federalism in family law, and suggested that only indirect congressional regulation of domestic relations was permissible and that it was or would be rare.

In *Elk Grove Unified School District v. Newdow*, decided in 2004, the Court invoked the principle of federalism in family law when it dismissed for lack of standing a non-custodial father's claim that a public school practice of having students recite the pledge of allegiance violated his parental right to control the religious upbringing of his daughter.[116] The Court noted that the child's mother had exclusive legal custody, and that under California family law that meant the non-custodial parent lacked standing to assert his parental rights claim. The majority emphasized:

> One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." So strong is our deference to state law in this area that we have recognized a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving "elements of the domestic relationship," even when divorce, alimony, or child custody is not strictly at issue. . . . Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.[117]

Not infrequently, an issue can be reasonably characterized as both a family law matter and a matter of national interest (such as commerce or individual rights). In such cases, the doctrine of federalism in family law

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114. *Id.* at 564.

115. Dailey, *supra* note 19, at 1816.

116. 542 U.S. 1, 124 S.Ct. 2301 (2004).

117. 542 U.S. at __, 124 S.Ct. 2301, 2309 (citations omitted). Three justices who concurred in the judgment argued that the domestic relations exception to diversity jurisdiction did not apply because the *Newdow* case arose under federal question jurisdiction, not diversity jurisdiction, doctrine, and that the Court should defer to the Ninth Circuit's interpretation of California law under which Newdow did have standing. 124 S. Ct. at 2313-14 (Rehnquist, C.J. concurring in the judgment) ("That conclusion does not follow from *Ankenbrandt's* discussion of the domestic relations exception and abstention; even if it did, it would not be applicable in this case because, on the merits, this case presents a substantial federal question that transcends the family law issue to a greater extent than *Palmore*. The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction . . . . This case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree.") (citations omitted).

requires deference to the state family law rule unless an overriding national interest is shown to justify displacing state law with federal law. For example, in *United States v. Yazell*,[118] the Court insisted that an anachronistic state law providing for the incapacity of married women to contract (which the state had repealed before the case made it to the Supreme Court) must be applied to prevent a federal agency to recover a loan it had made to a married woman. Mrs. Yazell had obtained a Small Business Administration loan while living in Texas. Since the state at that time followed the rule of the incapacity of married women, she raised this issue in defense when sued for payment of the debt. The Court upheld the application of the Texas marital rule because the federal government failed to show a sufficient national interest to justify "overriding a state law dealing with the intensely local interests of family property and the protection . . . of married women."[119]

The Court has frequently noted this rule even when concluding that the federal interests would be substantially damaged if state law were applied. Thus, in *Hisquierdo v. Hisquierdo*,[120] the Court reiterated the high-standard federal deference to state family law rule in holding that a federal Railroad Retirement Act rule specifically making railroad employee pensions the separate property of railroad employees preempted a state's general community property laws. The Court declared:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.[121]

In 1981 the Court held in *Ridgeway v. Ridgeway*[122] that federal law provisions giving servicemen free alienation of Servicemen's Group Life Insurance benefits preempted a state court divorce decree ordering the serviceman to keep his children as beneficiaries on his life insurance policy to secure payment of child support. The Court reiterated the "limited application of federal law in the field of domestic relations,"[123] but it noted that if necessary " to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights," even "a state divorce decree, like other law governing the economic

118. 382 U.S. 341 (1966).
119. *Id.* at 349.
120. 439 U.S. 572 (1979).
121. *Id.* at 581 (internal citations omitted).
122. 454 U.S. 46 (1981).
123. *Id.* at 54.

aspects of domestic relations, must give way to clearly conflicting federal enactments."[124]

The Court has declared that federal law governing servicemen's life insurance supercedes state community property law, for example, when "Congress has spoken with force and clarity" and application of state law would "frustrate[] the deliberate purpose of Congress."[125] Numerous other decisions apply this strong choice-of-law rule of deference to state domestic relations law. Justice Thurgood Marshall summarized the state of the law in 1987 as follows:

> We have consistently recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests."[126]

Virtually all of the cases in which the Court has concluded that federal law preempts state family laws have involved conflicts over property interests. Strong Commerce Clause interests of the federal government may be implicated in cases involving property exchange or transmission disputes and may explain the relatively lower deference to state law and greater willingness to find overriding federal interests. When domestic status itself (such as marriage, divorce, parenthood, paternity, custody, and visitation) or the relationship interests is the issue, the federal interests are less compelling and the interest in state regulation and definition is much more profound.

It should be exceedingly difficult to justify preempting state law defining and governing status and relational rights and interests. One of the few cases in which that has occurred is *Loving v. Virginia*.[127] Since the core purpose of the Fourteenth Amendment was to eliminate state racial discrimination, especially state policies that denied the equal worth and citizenship rights of black Americans, and since the core purpose of the Virginia anti-miscegenation law was to express White Supremacy in the fundamental social relation of society, the Court correctly perceived a direct and irreconcilable conflict between the two. The extreme and fundamental nature of the inescapable core conflict between state marriage law and a central constitutional command in *Loving*

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124. *Id.* at 55 (citations omitted).

125. Wissner v. Wissner, 338 U.S. 655, 658-59 (1950) (applying federal law concerning distribution of serviceman's life insurance proceeds instead of state community property law).

126. Rose v. Rose, 481 U.S. 619, 625 (1987) (holding that state statute pursuant to which the father was ordered to pay child support from his veterans' disability benefits was not preempted by federal law) (citations omitted).

127. 388 U.S. 1 (1967).

provides a clear illustration of the kind of extraordinary federal interests required and irrational countervailing state interests that would justify federal nondeference to state family law.

The reservation of state sovereignty was only to the extent that the powers were not extended to the national government. Thus, when proper federal laws conflict with state laws regulating family relations, a mechanical approach would suggest that if the federal law is within the scope of constitutional law-making authority of the national government, there is no state sovereign interest infringed. This has been the source of the boilerplate dicta that "the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'"[128]

Nonetheless, a necessary corollary to the Tenth Amendment is actual respect for the sovereignty of the states. That respect compels the federal courts to refrain when possible from heavy-handed overriding of important state interests and policies. While the language of the Supremacy Clause may in some cases justify a domineering application of preemption, the federal design and spirit of the Constitution compel a more moderate comity-based approach to resolving most federal-state conflicts of law.[129] That spirit of federalism and comity encourages (if not requires) the Court whenever possible to: (1) compare the nature of the state and federal interests in conflict in terms of constitutional significance, (2) assess the degree to which those interests would be thwarted or frustrated by the application of the competing rule, and, thus, (3) determine whether to override or preempt state law (or federal law) on the basis of whether substantial harm will be done to a significant federal or state interests. Under this analysis, state interests in family laws regulating relational status interests would rank very high in assessment of the nature of the state interest affected, while state regulation of property interests might be ranked somewhat lower in comparative scale, given the heavy national interest in commercial and economic matters.

Family law federalism has been a critical concept noted in many other federalism decisions of the Supreme Court involving jurisdictional issues.[130] In 1858, the Court declared in *Barber v. Barber*: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of

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128. New York v. United States, 505 U.S. 144, 156 (1992) ("As Justice Story put it, '[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.' 3 J. Story, Commentaries on the Constitution of the United States 752 (1833).")

129. *See* DANIEL J. ELEZAR, *Federalism and Pluralism in a Free Society, in* FEDERALISM AND THE WAY TO PEACE 17 (1994) ("In essence, a federal arrangement is one of partnership, established and regulated by covenant, whose internal relationships reflect the special kind of sharing which must prevail among the partners, namely, one that both recognizes the integrity of each partner and seeks to poster a special kind of unity among them.").

130. *See generally* Warren Kim Claussen, Subject Matter Jurisdiction Over Domestic Relations Controversies (1983) (unpublished manuscript, on file with author).

divorce . . . ."[131] The dissenting justice agreed fully with the principle but not with the application of it, arguing:

> It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household. . . . The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power [to regulate domestic relations] belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.[132]

In 1878, in *Pennoyer v. Neff*, Justice Field noted: "The State. . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."[133]

In 1890, in *Ex parte Burrus*,[134] a grandfather incarcerated for failing to obey a federal court order to turn over custody of his grandchild to the child's father entered upon the father's habeas corpus petition. The Supreme Court granted the grandfather's petition for writ of habeas corpus noting, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."[135] Thus, in at least three cases decided in the nineteenth century, both before and after the Civil War, the principle of federalism in family law was specifically articulated.

In 1930, the Supreme Court decided the first case to squarely hold, rather than opine in dicta, that federal courts lack jurisdiction over family law cases.[136] The wife of the Romanian vice-consul filed suit for divorce in federal court relying upon the grant in Article III of the Constitution of judicial power over "all Cases affecting Ambassadors, other public Ministers and Consuls." After the federal court dismissed the suit for lack of subject matter jurisdiction, the wife sued for divorce in Ohio state court. Her husband argued that the

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131. 62 U.S. (21 How.) 582, 584 (1858). *See generally* Adler, *supra* note 63, at 231-41 (reviewing domestic relations exception to federal court diversity jurisdiction); Dailey, *supra* note 20, at 1822-23 (reviewing *Barber*). The Court's dicta followed a suggestion that the federal courts had no jurisdiction over suits not historically recognized in law or equity made by Chief Justice Taney in a 1855 dissenting opinion in a suit to recover money from a decedent's widow to fulfill charitable bequests made in a will. *See* Fontain v. Ravenel 58 U.S. (17 How.) 369, 391-93 (1855) (Taney, J., dissenting).

132. 62 U.S. (21 How.) at 602 (Daniel, J., dissenting).

133. 95 U.S. 714, 734-35 (1877).

134. 136 U.S. 586 (1890).

135. *Id.* at 593-94.

136 Ohio ex rel. Popovki v. Alger, 280 U.S. 379 (1930).

federal court had exclusive jurisdiction over suits involving Consular officials, but the Ohio Supreme Court ruled that the federal court had no jurisdiction over divorce suits.[137] A unanimous Supreme Court of the United States affirmed in *Ohio ex rel. Popovici v. Alger*. Writing for the Court, Justice Holmes noted (citing *Barber* and *Burrus*) that it had been "unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce."[138] He declared, "If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument [Article III of the Constitution] accordingly."[139]

In 1975, in *Sosna v. Iowa*,[140] the Court upheld a one-year durational residence requirement for divorce against an individual rights (travel) constitutional challenge. In language oft-repeated since, Justice Rehnquist declared for the Court that: "[D]omestic relations . . . has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact."[141]

In 1992, in *Ankenbrandt v. Richards*,[142] the most recent major federal court domestic relations exception case, the Court affirmed the existence of a statutory, rather than constitutional, domestic relations exception to diversity jurisdiction. Finding a tort suit between ex-spouses for injuries to their children fell outside the domestic relations exception, the court reemphasized the limited scope and application of that jurisdictional doctrine.[143] However, the Court reaffirmed the "sound policy considerations" supporting the jurisdictional exception.[144] In numerous other cases, the Court has alluded to both jurisdictional limits and its own policies disfavoring review of state domestic relations laws.[145]

In several cases, the Court has distinguished the power of Congress to regulate domestic relations in the states from congressional power to regulate

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137. Ohio *ex rel.* Popovici v. Alger, 164 N.E. 524 (1928).

138. *Id.* at 383.

139. *Id.* at 383-84.

140. 419 U.S. 393 (1975).

141. *Id.* at 404. *See also* Sherrer v. Sherrer, 334 U.S. 343, 362 (1948) (Frankfurter J. dissenting) ("The Framers left [the] power over domestic relations in the several States, and every effort to withdraw it from the States within the past sixty years has failed.").

142. 504 U.S. 689 (1992).

143. *See* Adler, *supra* note 63, at 238.

144. 504 U.S. at 690.

145. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 431 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court."). *See generally* Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669 (1995) (suggesting that after *Ankenbrandt* the domestic relations exception applies only to "core" domestic relations issues); Anthony B. Ullman, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983) (suggesting that only divorce and child custody cases should be left out of federal courts).

domestic relations in the federal territories.[146] The Supreme Court has repeatedly acknowledged and developed the doctrine of federalism in family law in a variety of contexts dealing with a wide array of issues, for nearly 150 years, as a vital principle of constitutional, statutory and common law. These cases confirm the absence of federal authority to directly regulate family law in the states. Thus, "certain subjects are presumptively beyond Congress' power to regulate: non-economic regulation, especially if it concerns the family."[147]

Despite the long history of recognizing the doctrine of federalism in family law, in recent decades, federal courts have frequently asserted jurisdiction and rendered judgments to interfere with state regulation of family relations.[148] In many cases, the court decisions are highly political and very controversial. While some of the laws upheld by federal courts have been of dubious substantive merit (if not clearly foolish), the courts have seldom bothered to consider whether the doctrine of federalism in family law would apply to restrain the court from interfering with the state's regulation of its own domestic relations. The basis for many of these decisions has been quite tenuous as the judges have simply acted to bring the law into conformity with their own personal policy preferences. Not surprisingly, where there has been a judicial willfulness there has been a judicial waywardness.

IV. PRESERVATION OF THE INSTITUTION OF MARRIAGE IS A CRITICAL NONGOVERNMENTAL FACET OF FEDERALISM

The institution of marriage is an essential nongovernmental component of the federal system. It is a place where virtue is fostered, and virtue was essential to the preservation of the republican Constitution.

A. Marriage Inculcates and Fosters Civic Virtues Such As Resistance to Tyranny

The framers of the American Constitution believed that virtue was the indispensable quality upon which rested the superstructure of republican constitutional government and its complex arrangements designed to preserve liberty under law.[149] For example, Benjamin Franklin wrote that "only a

146. *See* Simms v. Simms, 175 U.S. 162, 167-68 (1899) (Arizona territory); De La Rama v. De La Rama, 201 U.S. 303 (1906) (Philippines).

147. Brian Bix, *Physician-Assisted Suicide and Federalism*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 53, 67 (2003).

148. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

149. As James Madison explained in Federalist No. 55, human beings have a dual nature (a capacity for good and a capacity for evil), and "republican government *presupposes the existence* of those qualities [virtues] in a higher degree than any other form." THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed. 1961) (emphasis added). For a fuller discussion of virtue as a

virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters."[150] John Adams acknowledged, "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[151] James Madison likewise declared that "[t]o suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."[152] Thus, virtue was the substructure upon which the superstructure of constitutional rights and government was built. If that foundation slipped, the government and the liberties it protects would not survive.

> The Founders understood the term *self-government* in a double sense: (1) governing oneself morally, controlling one's own tendency to indulge the selfish and violent passions unreasonably; and (2) governing oneself politically, through democratic institutions that provide a wide scope for self-governing private associations such as families, churches, private schools and businesses.[153]

The marital family was understood to be one of the indispensable cornerstones of the constitutional foundation and indispensable for the preservation of the new republic. Marriage created the marital family, and the marital family was the seedbed in which virtue was to be cultivated and nurtured.[154]

The Founders deliberately provided "legal supports for the family . . . [which were] important elements in the stability of marriage."[155] They did so because they 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 had created. Professor 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 . . . ."[156] In the

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prerequisite for republican self-government, see Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy,* 32 HOFSTRA L. REV. 349 (2003).

150. THE WRITINGS OF BENJAMIN FRANKLIN 569 (Albert H. Smyth ed., 1970).

151. J. HOWE, THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 165 (1966).

152. THE WRITINGS OF JAMES MADISON 223 (Gaillard Hunt ed., 1904). *See also* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 8 (1985) ("Studying the experiences of women in the Revolutionary era led historian Mary Beth Norton to conclude that the revolutionaries' one unassailable assumption was that the United States could survive only if its citizens displayed virtue in both public and private life.'").

153. WEST, *supra* note 39, at 160. *See also id.* at 85-108, 159, 176.

154. *See* COTT, *supra* note 63. *See also* Dailey, *supra* note 20, at 1871-72 (families were seen by Founders as the primary cultivators of civic virtue); Frohnen, *supra* note 40, at 941-42 (Founding generation believed that virtue would be cultivated in local communities and that "the main task of government was to foster and protect the multitude of associations in which proper character was formed.").

155. WEST, *supra* note 39, at 176.

156. COTT, *supra* note 63, at 9. "The republican theory of the United States . . . g[a]ve marriage a political reason for being. *Id.* at 10.

prevailing political theory of the founding era, the family was considered one of the essential pillars of republican virtue,[157] and it not only needed to be nurtured, but also protected from the tyranny of the government. For instance, Mary Lyndon Shanley writes that Montesquieu suggested "that marriage and the form of government were mirrors of each other. Accepting Montesquieu's perspective, American revolutionaries and their descendants understood marriage and the family to be schools of republican virtue."[158]

The writings of the Founders themselves confirmed this view of the role of family. For example, John Adams observed:

> 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 Infancy, they learn their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers?[159]

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. . . . Individuals learned virtue in their families, churches, and schools."[160] As 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 . . . 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.[161]

These common ideas about family "had a dramatic 'republicanizing' effect" in society in the Founding era.[162] One consequence was unprecedented equality and respect for the roles of women in American society. Historian Jan Lewis reports that "Revolutionary-era writers held up the loving partnership of

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157. Dailey, *supra* note 20, at 1796. *See generally* Gerald J. Russello, *Liberal Ends and Republican Means*, 28 SETON HALL L. REV. 740, 755-56 (1997) (noting that two pillars of republican virtue were religion and family).

158. Mary Lyndon Shanley, Review Essay, *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). *See also* COTT, *supra* note 63, at 10.

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

160. Frohnen, *supra* note 40, at 946-47 (quoting George Mason, *Opposition to a Unitary Executive* (June 4, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL DEBATES 47 (Ralph Ketcham ed., 1986)).

161. LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 229 (1980).

162. WEST, *supra* note 39, at 103.

man and wife in opposition to patriarchal dominion as the republican model for social and political relationships."[163] 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, according to historian Mary Beth Norton, "it even seemed as though republican theorists believed that the fate of the republic rested squarely, perhaps solely, on the shoulders of its womenfolk."[164]

Shortly after the founding of the American Republic, the perceptive French social commentator Alexis de Tocqueville, observed:

> There is certainly no country in the world where the tie of marriage is more respected than in America or where conjugal happiness is more highly or worthily appreciated. . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. There his pleasures are simple and natural, his joys are innocent and calm; and as he finds that an orderly life is the surest path to happiness, he accustoms himself easily to moderate his opinions as well as his tastes. . . . [T]he American derives from his own home that love of order which he afterwards carries with him into public affairs.[165]

He also remarked that "the feeling . . . [a citizen] entertains towards the State is analogous to that which unites him to his family . . . ."[166] "Tocqueville concluded that family stability produces social responsibility and order, whereas family instability fosters social misbehavior."[167] His contemporary, social commentator Francis Grund, emphasized the importance of the republican family for the preservation of the American constitutional system 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

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163. Jan Lewis, *The Republican Wife: Virtue and Seduction in the New Republic*, 44 WM & MARY Q. 689, 689 (1987), *quoted in* WEST, *supra* note 39, at 103. A generation later, de Tocqueville recognized equal partnership when, contrasting the roles of women in American and Europe, he observed: "The 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." WEST, *supra* note 39, at 103 (citing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 600-03 (George Lawrence, trans., J.P. Mayer, ed. 1988)).

164. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 7-8 (1985).

165. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 304 (Phillip Bradley ed., Alfred A. Knopf 1972) (1835).

166. *Id.* at 94.

167. Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23, 28 (2001). *See also* Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1563 (1998).

> 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 in the Constitution in order to vary the whole form of their government.[168]

Thus, the institution of marriage not only serves as a buffer against tyranny of feral youth and of alienated adults, but also against the tyranny of anarchy and of the collapse of the constitutional system.

B. *Marriage Is the Foundation of the Mediating Structure That Resists Tyranny*

Marriage and the marital family are recognized to be "mediating structures" that stand between the naked individual and the overwhelming, alienating power of the government. Mediating structures are "the value-generating and value-maintaining agencies in society."[169] "These mediating structures or 'communities' . . . mediate between the individual and the state or the market need nourishing . . . ."[170] The Founders understood that certain nongovernmental institutions were essential to foster the kind of citizenship necessary to support a democratic republic. Among these institutions were marriage and the marriage-based family. The Founders believed that religion and morality were sources of virtue, and that certain nongovernmental "institutions—family, school, churches, neighborhood, and other local institutions—were, in fact, the *primary feeders* and *stimulators* of the general civil religion."[171] The marital family was one of the critical institutions in which civic virtue would be generated and regenerated.

Early Americans believed that each of us must be taught virtue in our local communities. Because they understood the bases of virtue to be primarily moral rather than political, early Americans believed that the state should promote other institutions, especially the public worship and private instruction of religion, in which virtue would be directly inculcated. In addition to promoting religion, people generally believed the main task of government was to foster and protect the multitude of associations in which proper character

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168. FRANCIS J. GRUND, THE AMERICANS IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS 171 (1837).

169. PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 6 (1977). *See also* PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY (Michael Novak ed., 1996).

170. Spaht, *supra* note 167, at 1573 n.108. *See also* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 479 (1983) (mediating structures necessary to protect the individual from the alienating power of society). *See generally* SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995).

171. RICHARD VETTERLI & GARY BRYNER, IN SEARCH OF THE REPUBLIC 52 (rev. ed. 1996). *See also* LUTZ, *supra* note 7, at 83.

was formed .[172] The marital family was the most "local" of local communities, the ultimate "little platoon" (Edmund Burke's language), the first school of civic virtue.[173]

Rather than empowering the national government to directly control the generation of the public or civic virtue necessary to sustain a republican form of (self-) government, the founders applied their federalism principles and left that critical function to the states, and to nongovernmental institutions. The responsibility to nurture virtue, so essential to the preservation of the Constitution, was dispersed to the local states, and the nongovernmental institutions of the family, the churches, and the schools.[174] Consistent with federal principles, empowering the institutions of marriage and the marital family reduced the potential for tyranny by the national government. The Constitution ensured that "the development of virtue, to a great extent, had been removed from the political realm to these other institutions of society as a separation between society and government had evolved."[175]

Anthropologist Stanley Diamond has noted that "[w]e live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts."[176] He describes the "progressive reduction of society to a series of technical and legal signals, the consequent diminution of culture, i.e., of reciprocal, symbolic meanings."[177] Sociologist Jack Douglas agrees: "The bureaucracies may begin with fervent expressions of intentions to aid the family, but regardless of good intentions, they must wage war on the family in order to build their own power."[178]

Many of the mediating structures that used to constitute community and protect the individual have disappeared or atrophied. Today, those mediating institutions that have survived—including marriage, the marital family, and religious institutions—are much weaker and less able to give support. Protection for conjugal marriage is critical to preserve one of the crucial "mediating structures" in our constitutional system.[179]

Our democratic society can accommodate some "free riders" living in alternative, non-marital relationships. Some modest amount of deviation from

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172. Frohnen, *supra* note 40, at 941-42.

173. RAOUL BERGER, FEDERALISM: THE FOUNDERS DESIGN 55 n.37 (1987) (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 195 (Harvard Classics, 1909)).

174. Thus, the central government was not given authority to nurture virtue; in fact, a specific provision authorizing Congress to establish institutions of higher education was even stripped from the Constitution. *See generally* JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 477 (Aug. 18, 1787); *id.* at 639 (Sept. 14, 1787).

175. Vetterli & Bryner, *supra* note 171, at 52.

176. Stanley Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOC. RES. 42, 44 (1971).

177. *Id.*

178. Jack Douglas, *The Ultimate Costs of the Retreat from Marriage and Family Life*, *in* THE RETREAT FROM MARRIAGE 55, 57 (Bryce J. Christensen ed., 1990). *See also* Alexsandr I. Solzhenitsyn, A World Split Apart, Commencement Address delivered at Harvard University (June 8, 1978).

179. *See* Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L. J. 289, 343-44 (1998).

the norm of conjugal marriage is not threatening, and some breakdown of family integrity can be coped with, but when the quantity of those problems becomes significant, they burden and undermine society and its institutions. Society needs a critical mass of married two-heterosexual-parent families, both to raise their own children well and to serve as models for children growing up in alternative family structures. That is another reason why the legalization of same-sex marriage would endanger our constitutional system. Legalization would legitimate and normalize an alternative form of relationship that would subvert the effectiveness of and eventually possibly even overwhelm the institution of marriage. Thus, the marital family was understood by the Founders to be essential to protect liberty.[180]

V. THE JUDICIARY POSES A THREAT OF "TYRANNY" TO THE INSTITUTION OF MARRIAGE TODAY

A. Loving v. Virginia*: The Same-Sex Marriage Movement Is Not the First Political/Social Reconstruction Movement to Attempt to Achieve Its Objectives By "Capturing" Marriage and Redefining It*

Marriage is a powerful social institution. It shapes the parties who enter into that special relationship, its effects reach and influence their children, and its shape conveys powerful messages to society that create social expectations and influence social behavior.

It is no wonder, then, that various political movements seeking to reform society have sought throughout history to "capture" marriage by redefining its terms, conditions, and requirements to achieve fundamental social reconstruction. This is clearly at least one of the profound goals of the movement to legalize same-sex marriage:

> [I]n very large measure for the advocates of the radical redefinition of marriage, marriage is not an *end* but a *means*. Or, stated slightly differently, the institution of marriage is not really a destination but rather a powerful tool for the achievement of a broader cultural, social, and political agenda. And powerful that tool most certainly is. Once the law authoritatively changes the core meaning of marriage and thereby gives birth to the institution of genderless marriage out of the rubble of the historic institution of man/woman marriage (there cannot be *two* institutions of marriage, only *one*), the new institution will shape the children now and in each generation of children hereafter. The new meaning will be mandated in texts, in schools, and in many

180. WEST, *supra* note 40 at 85-108, 159. *See also* MCDONALD, *supra* note 14, at 72-74, 161.

> other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution. And history shows the extraordinary difficulty for those who, by private educational endeavor and similar sacrifice in families and other groups, try to establish a sort of linguistic enclave in the heart of a community that has no comprehension of what matters to them.[181]

However, the same-sex marriage movement is hardly the first to adopt this tactic.[182] During the past two or three centuries, two other powerful socio-political movements sought to "capture" marriage to further their ideological agendas. Both succeeded to some extent, and marriage law (and American society) was denigrated and harmed in each case.

The first was the movement to separate the races. Anti-miscegenation laws were enacted as early as 1691 in Virginia to preserve the notion of racial superiority, known as White Supremacy.[183] However, as Professor Jill Hasday has noted: "During Reconstruction, anti-miscegenation laws, which had assumed a relatively minor position in Southern slave codes, spread to a number of Southern states for the first time."[184] Before the Civil War, Alabama, Georgia, Mississippi, and South Carolina had no anti-miscegenation statutes, but during Reconstruction, each of these states prohibited interracial marriage.[185] Following the South's defeat in the Civil War, perhaps relating to profound insecurities generated by the war defeat, destruction, and post-war reconstruction, the assertion of racial superiority became a compelling socio-

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181. Letter from Monte Stewart, President of the Marriage Law Foundation, to Lynn Wardle (Feb. 24, 2005) (on file with author).

182. I am indebted to Monte Stewart, President of the Marriage Law Foundation, for suggesting this argument to me. He writes:

> [T]he advocates of genderless marriage are not the first to attempt to capture for essentially non-marriage purposes the powerful expressive and educative tool that the institution of marriage is. With the same accurate assessment of the institution as a vastly powerful means to achieve in society various non-marriage purposes, white supremacists and other racists used the law to change and high-light shared public meanings constituting the institution, all in an effort to implement their vision of the "good" society. From those efforts came the anti-miscegenation laws struck down as unconstitutional by the California Supreme Court in 1948 in *Perez* and by the United States Supreme Court in 1967 in *Loving*.

Id..

183. *See, e.g.*, Walter L. Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191-92 (1966) (while the first Virginia law forbidding interracial sexual relations was passed in 1630, the first law prohibiting interracial marriage was not enacted until more than six decades later, in 1691). *See also* CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS, SEX AND LOVE IN THE SEGREGATED SOUTH 1-21 (2003) (history of anti-miscegenation in the South from colonial settlement to the Civil War); ROBERT J. SICKELS, RACE MARRIAGE AND THE LAW 10-68 (1972) (reviewing racist ideology underlying the anti-miscegenation laws); Randall Kennedy, *Racial Passing*, 62 OHIO ST. L. J. 1145 (2001) (review of history of anti-miscegenation); Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421 (1988) (reviewing racial and eugenic policies embodied in anti-miscegenation laws).

184. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1345 (1998).

185. *Id.* at 1345 n.172.

political movement in the South. "In all, thirty-eight states and commonwealths banned interracial marriage during the nineteenth century. Anti-miscegenation laws were concentrated in the South and West, with the Northeast and Midwest relying on private prejudice to accomplish the same end."[186]

The eugenics movement, which originated in the late nineteenth century in England, purported to provide a "scientific" basis for racial and social hierarchy.[187] Eugenics influenced immigration law, sterilization law, and marriage law.[188] In fact, the Virginia anti-miscegination law that was invalidated in *Loving v. Virginia* was passed in 1924 as part of a comprehensive scheme of eugenic regulation that also included the involuntary sterilization law that was upheld in *Buck v. Bell* (with Justice Holmes' infamous dictum that "three generations of imbeciles is enough.").[189]

Both the racist White Supremacy movement and the eugenics movement attempted to capture marriage law in order to legitimate their ideologies. Both attempted to achieve social reconstruction by redefining marriage. In terms of the tactic of trying to redefine marriage in order to promote a socio-political movement, and the strategy of "capturing marriage" as a means of normalizing and legitimating a controversial philosophy, the same-sex marriage movement is following the same path taken most prominently in the nineteenth century by the White Supremacy movement, and in the early twentieth century by the eugenics movement.[190]

The logic of the Supreme Court decision in *Loving* should suggest the similarity (and the flaw) of the same-sex marriage political movement to redefine marriage to those earlier discredited social reconstruction movements that attempted to redefine and "capture" marriage to achieve their social policy objectives that are extraneous to marriage. Like White Supremacists and eugenicists, the proponents of same-sex marriage today may persuade some states for some period of time to redefine marriage in order to promote their ideology, but those successes should eventually be repudiated and come to the same end as the racist and eugenics redefinition of marriage met in *Loving*.

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186. *Id.*

187. To see a good visual example of eugenic ideology, see Edwin Blashfield's turn-of-the-century mural, *The Evolution of Civilization,* which decorates the rotunda of the Jefferson Reading Room of the Library of Congress.

188. *See* Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 843-59 (1986); Robert A. Destro, *Symposium: Law and the Politics of Marriage:* Loving v. Virginia *After 30 Years*, 47 CATH. U. L. REV. 1207, 1220 (1998).

189. Lombardo, *supra* note 183, at 423-24, 432-36.

190. Unlike advocates of same-sex marriage who frequently try to compare the substance of the position in defense of the institution of conjugal marriage to the substance of the position taken by the White Supremacists in *Loving*, this article does not compare the same-sex marriage ideology to the ideologies of racism or eugenics, but notes the similarity of the political strategy of seeking to capture marriage taken by all three movements.

Many advocates of same-sex marriage often assert that legal discrimination on the basis of homosexuality is essentially indistinguishable from legal discrimination in marriage on the basis of race or gender, and that it is as indefensible for government to prohibit homosexual couples to marry as it is to prohibit interracial couples to marry, raising the "*Loving*-analogy."[191] I, however, would like to suggest they have the analogy backwards. Their position in terms of attempting to redefine marriage to achieve goals external to marriage policy is comparable to that of the White Supremacy movement in promoting and defending the Racial Integrity Act of 1924 that was invalidated in *Loving*.

In *Loving,* the Supreme Court recognized that interracial marriages and same-race marriages are functionally equal. The classification scheme in the Virginia anti-miscegenation laws was wholly unrelated to the subject of regulation (marriage).[192] By comparison, regulation on the basis of sexual orientation or practice goes to the core of marriage (sexual regulation). The claim that same-sex relationships are equal to or fungible with conventional heterosexual marriage relationships is rhetoric without substance. In fact, *Loving* emphasized the *uniqueness* of conjugal marriage. The Court held that male-female marriage is a constitutionally singular, preferred, protected relationship. Indeed, the Court declared that conventional marriages are so unique, special, and important to the very nature and structure of our society that they are deemed "fundamental" under our Constitution. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[193] Such description could hardly be applied to same-sex marriage any more than it could be said of same-race unions. Moreover, even the segregationist nature of the restriction in *Loving* is distinguishable from laws permitting only integrationist heterosexual marriage. Virginia's anti-miscegenation law that the Court struck down prohibited cross-classification unions, while heterosexual-marriage laws require it. Heterosexual marriage laws compel a degree of cross-cultural integration because they mandate male-female unions, whereas anti-miscegenation laws mandated (and homosexual marriage would legitimate) segregationist associations. Asking the government to place its preferred public imprimatur of "marriage" upon same-sex relationships turns *Loving* on its head.

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191. *See, e.g.*, Danielle Kie Hart, *Same-Sex Marriage Revisted: Taking A Critical Look at* Baehr v. Lewin, 9 GEO. MASON U. CIV. RTS. L.J. 1, 63 (1998); Andrew Koppelman, *Why Discrimination Against Lesbians And Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Arthur S. Leonard, *Lesbian And Gay Families And The Law: A Progress Report*, 21 FORDHAM URB. L.J. 927 (1994); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 546-47 (1990); Marty K. Courson, Note, *Baehr v. Lewin: Hawaii Takes a Tentative Step To Legalize Same-Sex Marriage*, 24 GOLDEN GATE U. L. REV. 41 (1994).

192. "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." *Loving*, 388 U.S. 1, 11 (1967).

193. *Id.*, citing Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942).

B. *The Judiciary Has Been Usurping Power and Destroying the Right of the People to Define and Preserve the Institution of Marriage*

The trend of judicial decisions regarding the extension of marital status, rights, and benefits to same-sex unions poses a grave threat to the principle of federalism in family law. Since federal constitutional law is the "Supreme Law" of the land, applicable in all states and preempting all conflicting state policies, if the courts interpret federal constitutional doctrines as mandating legalization of same-sex unions or the extension of marital benefits, that would both "federalize" and "constitutionalize" the issue, and would effectively destroy the principle of federalism in family law. That is exactly what is happening at this time. Courts are invoking constitutional principles to force states to legalize same-sex unions and to extend marriage benefits to same-sex couples.

Federal and state courts have invoked, stretched, and extended at least six different constitutional doctrines to compel legalization of same-sex marriage, civil unions, domestic partnerships or to mandate the extension of the significant legal incidents of marriage to same-sex couples; and at least two other constitutional doctrines have been proposed to justify judicial legalization of same-sex marriage.[194] (1)Many courts have cited constitutional *equal protection* principles to compel legalization of same-sex unions;[195] (2) Many courts have cited constitutional principles of substantive *due process* (privacy, right to marry, right of association) to reach similar results;[196] (3) Some courts have even applied *due process standards of arbitrariness or irrationality* to reach the same conclusion;[197] (4) Several courts have invoked *privileges and immunities* doctrine to compel states to legalize same-sex unions or give them marital benefits;[198] (5) Other courts have cited *full faith and credit* doctrines to compel recognition of same-sex unions;[199] and (6) At least one federal court has invoked the *bill of attainder clause* to support a preliminary finding that a

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194. *See generally* Wardle, *supra* note †.

195. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 943, 959 (Mass. 2003); Baker v. State, 744 A.2d 864, 879, 882, 885 (Vt. 1999); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Langan v. St. Vincent's Hosp., 765 N.Y.S.2d 411, 453-54 (N.Y. Sup. 2003).

196. *See, e.g., Goodridge*, 798 N.E.2d at 959-61; Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 *3, *4, *11 (Wash. Ct. Super. 2004); Hernandez v. Robles, 2005 WL 363778 (N.Y. Sup., Feb. 4, 2005).

197. *See, e.g., Goodridge*, 798 N.E.2d at 960; *Andersen*, 2004 WL 1738447 at *3, *4, *11-*12.

198. *See, e.g., Baker*, 744 A.2d at 867; Castle v. State, No. 04-2-0614-4, 2004 WL 1985215 at *3, *4, *10-*13, *16 (Wash. Ct. Super. 2004);

199. *See generally Alons v. Iowa District Court for Woodbury County*, Lambda Legal, *at* http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=203 (last visited Mar. 19, 2005); *Iowa Supreme Court to Hear Oral Argument Friday in Lesbian Civil Union Dissolution Case*, Lambda Legal, *at* http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=203 (last visited Mar. 19, 2005); *DOMA State Grants Lesbians Divorce*, 365gay.com, *available at* http://www.365gay.com/newscontent/120703iowaDivorce.htm (last visited Mar. 19, 2005).

state Defense of Marriage Amendment is unconstitutional.[200] Additionally, (7) Litigants and advocates of same-sex marriage have long invoked the *free exercise of religion* to support their claims;[201] and similarly, (8) Many legal commentators have asserted that marriage laws that do not allow same-sex marriage to violate the *establishment of religion* clause.[202] Thus, it is too late to say that the issue whether same-sex unions should be legalized should be settled by some other means than constitutional law. The issue has already been constitutionalized by these court decisions under a variety of constitutional doctrines.

While many of the state courts have acted under the state constitutions, the state constitutional doctrines they have applied have close federal counterparts. The membrane separating the state and federal versions of the constitutional doctrine is thin and porous. Often federal constitutional cases are cited in support of their decisions under state constitutional law compelling states to adopt the judge's preferred policy in favor of legalizing same-sex unions or to extend marriage-equivalent status and benefits. Thus, judicial interpretation of state constitutional doctrines to mandate legalization of same-sex marriage or equivalent status and benefits is but the first step of a simple two-step process leading to the interpretation of comparable *federal* constitutional doctrines to mandate legalization of same-sex marriage or equivalent status or benefits.

Thus, it is now clear, I would argue, that the issue whether to legalize same-sex marriage or equivalent status and benefits is well on its way to being constitutionalized and federalized. The only questions are: (1) *who* will decide what the controlling constitutional rule will be—(a) the courts, acting through constitutional interpretation, or (b) the people, acting through constitutional amendments—and (2) *what* the controlling constitutional rule will be—(a)

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200. Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004, 1008-11 (D. Neb. 2003).

201. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. Ct. App. 1973) (rejecting the claim of same-sex marriage applicants who claimed marriage law violated their constitutional right of free exercise of religion); Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 598 (2002) (arguing that Free Exercise guarantees preclude the state from maintaining a same-sex marriage ban without a showing of probable harm and suggesting that the fact that some religions recognize same-sex marriage provides yet another ground upon which to establish that states cannot meet their burden in justifying same-sex marriage bans.).

Some courts in the U.S. and Canada have considered and rejected claims that religious ministers would have to perform same-sex marriages in violation of their religious beliefs. *See, e.g. In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004); EGALE Canada, Inc. v. Canada (Attorney General), 13 B.C.L.R. (4th) 1, para. 181 (2003). On the other hand, state employees such as mayors and judges and employees in marriage offices apparently may be compelled to perform same-sex marriages over their religious objections in places where it is legal.

202. *See generally* David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage As An Expressive Resource*, 74 S. CAL. L. REV. 925, 948 n.117 (2001) (noting that lawmakers citations of the Bible "are at least a highly problematic basis for law in the United States under the Establishment Clause."); James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 373 (1997) (arguing that DOMA is an establishment of religion because it is prompted by no secular purpose).

preservation of the historic and unique legal status, rights, and benefits of conjugal marriage, or (b) extension of all of the rights, status and benefits of marriage to same-sex (and possibly other alternative) relationships, or (c) extension of some (but not all) of the rights, status and benefits of marriage to same-sex (and possibly other alternative) relationships.[203] Since it is clear that the issue is going to be constitutionalized, advocates of federalism in family law must ask which method of deciding what the matter will be will best preserve and revitalize the principle of federalism in family law—(1)(a) if federal courts extend broad constitutional doctrines to mandate the legal creation of same-sex marriage, or (1)(b) if a narrow constitutional amendment addressing the specific issue of same-sex marriage is proposed, passed, and ratified.

The judicial extension of broad constitutional doctrines such as those noted above to mandate legalization of same-sex unions would open the door to judicial determination of many other, indeed virtually all, family law issues because the federal constitutional doctrines involved are broad. Those constitutional doctrines, expanded and extended to allow courts to reach and decide the same-sex union issue, would then be broad enough to easily empower courts to use federal constitutional principles to routinely decide issues of adoption, custody, visitation, grounds for divorce, alimony, property division, child support, parental control of education, parental and spousal medical-decision-making, marital property control, and a host of other family law issues.[204] By comparison, the adoption of a narrow constitutional amendment establishing a definition of marriage as the union of one man and one woman would have relatively minimal spillover effect on other family law issues. Thus, from the perspective of protecting federalism in family law, it is prudent to favor enactment of a federal marriage amendment.[205]

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203. These two questions are connected inasmuch as the "activist" judiciary leans toward the liberal positions of (2)(b) and the more radical (marriage-equivalent) forms of (2)(c), while the people tend to lean toward the conservative position of (2)(a) or some moderate (selected benefits only) form of 2(c).

204. Already, federal constitutional doctrines are invoked in such disputes, but when the constitutional doctrines are extended—as they are being extended by courts to compel legalization of same-sex unions—the reach of those doctrines would be even greater and the scope of family law beyond the reach of those expanded federal rules and courts would be virtually nil.

205. The analysis in this subsection does not address what the content of that federal marriage amendment would be, and, arguably, even pro-same-sex-marriage federalists would prefer a constitutional amendment legalizing same-sex marriage to judicial expansion of general constitutional doctrines. However, as noted earlier, preservation of conjugal marriage is most consistent with the principles underlying federalism.

C. *The Proposed Federal Marriage Amendment Remedies These Two Threats to Federalism in Family Law*

The two sentences of the proposed Federal Marriage Amendment respond to both of these threats to marriage. The first sentence protects the vital organs of the institution of marriage by defining "marriage" for all purposes in the United States as "only of the union of a man and a woman."[206] Clearly, same-sex unions may not be deemed "marriages," and presumably no other kind of relationship (e.g., polyamorous relationships) may be treated as "marriage" in American law.[207] The mediating institution of conjugal marriage, which the Founders considered so important to cultivate the virtues of republican citizenship and to disperse power to protect individuals and their basic rights, is clearly, simply, and constitutionally secured. The threat of the expansion of constitutional doctrines to undermine protection for conjugal marriage is eliminated, as the text of the constitutional amendment will supercede conflicting judicial interpretations of constitutional doctrines. The erosion of federalism in family law generally by judicial construction of other constitutional doctrines is tempered.

The second sentence is aimed squarely at excessive judicial "activism," for it explicitly bars judicial "construc[tion]" of any constitutional provision (state or federal) "to require that marriage or the legal incidents thereof be conferred upon any unions other than the union of a man and woman."[208] It leaves intact the power of courts to construe state and federal constitutions as permitting (but not as requiring) marital incidents to be conferred upon same-sex couples. It also leaves intact the power of the politically accountable branches of government by legislation or administrative rule-making to confer marital incidents upon same-sex unions. At the same time, the courts are excluded entirely from making that policy decision, cabining the threat of the growing concentration and abuse of power by the judiciary.

Thus, the proposed Federal Marriage Amendment both preserves a fundamental mediating institution and checks a growing potential tyranny. It protects the institution of conjugal marriage which has long been recognized to be essential for the perpetuation of our republican system of government, and it bars the abuse of judicial power by activist judges who have been imposing their policy preferences for same-sex marriage upon the states under the guise of construing the state and/or U.S. Constitution. By reestablishing limits on

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206. *See* S.J. Res. 40, *supra* note 4 and accompanying text.

207. Questions may arise about what defines marriage. For instance, if some persons propose to give all of the full legal status, rights and benefits of marriage to same-sex unions or polyamorous relationships and to call those unions by some other name, such as "civil unions" or "domestic partnerships," will giving the "substance" of marriage but not using the "label" of marriage violate the first sentence? The second sentence answers this in part by explicitly announcing judicial limits on constitutional activism.

208. *See* S.J. Res. 40, *supra* note 4 and accompanying text.

judicial construction in this area of family law, it revitalizes the principle of federalism in family law generally.

VI. CONCLUSION: IT'S STILL ABOUT TYRANNY

Proposals to legalize same-sex marriage would radically alter the domestic habits of Americans which inevitably would lead to a radical variation of our constitutional government. Judicial construction of constitutional doctrines so as to compel legalization of same-sex marriage poses a threat of tyranny of unelected Platonic guardians.

The explosion of judicial activism in which courts invoke constitutional doctrines to mandate legalization of same-sex unions or the extension of marital incidents and benefits to same-sex couples seriously threatens the integrity of the principle of federalism in family law. The same-sex marriage issue is going to be constitutionalized one way or the other. The best way to protect federalism in family law (and the institution of marriage, to boot) from this latest threat of tyranny is to pass a focused and specific amendment like the proposed Federal Marriage Amendment.

Significant developments in the past two decades (especially the revival of federalism during the Reagan administation, some significant Supreme Court decisions, and the emergence of federalism in the formation of the European Union) have inspired legal and political scholars to rediscover the principle of federalism. The reasons recognized by the Founders more than 200 years ago continue to have validity and to be strong justifications for the continued vitality of federalism today. Federalism now, as 200 years ago, is principally concerned with preventing the concentration and abuse of governmental authority. Federalism still consists of checks and balances to prevent the concentration of power.[209] American federalism is by nature "noncentral," not decentral (as decentralization presupposes some "central" authority to regulate and enforce the allocation of power).[210] Concerns about the threat of concentration of power are no less significant today than they were in 1789. "While the strength of our federalism may have declined in tandem with the danger of strife arising from internal differences, it is not at all clear that the need to guard against centralized encroachments on individual liberty has likewise decreased."[211]

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209. DANIEL J. ELEZAR, EXPLORING FEDERALISM 29 (1987) (federalism diffuses power to prevent tyranny without preventing government).

210. *See* DANIEL J. ELEZAR, *Cooperative Federalism in the United States*, *in* FEDERALISM AND THE WAY TO PEACE 133, 143-47 (1994); DANIEL J. ELEZAR, *The Role of Federalism in Political Integration*, *in* FEDERALISM AND POLITICAL INTEGRATION 13, 32-36 (1984).

211. *See* Ernest A. Young, *Protecting Member State Autonomy In the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1729 (2002).

Federalism is a powerful structural method of protecting individual liberty against political coercion.[212] Indeed, "[t]he central interest of true federalism in all its species is liberty."[213] Not only does federalism lessen the Jacobin threat to liberty, it fosters and increases liberty by allocating some areas of regulation to the local state government. "If the concern is for the protection and maintenance of individual sovereignty against the potential coercion that may be imposed by political or collective action, the size of the political unit, measured by the number of members, becomes a relevant variable . . . ."[214]

Preservation of the integrity of the states as sovereign governmental entities is a basic purpose of federalism.[215] It "has been the Court's consistent understanding [that]: 'The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"[216] There is a limited "reverse Supremacy" principle, that state regulations concerning family and related police powers concerns preempt conflicting federal rules, and are supreme in their jurisdictions when they conflict directly and significantly with federal law.[217] One purpose for preserving state sovereignty is to preserve state protection against potential abuse of power by the national government. Thus, the historic role of the states in setting policy and law governing family relations is part of the scheme of America's system of dual-sovereignty federalism designed to prevent and restrain tyranny.

However, the power structure of American political society has shifted significantly since federalism was created by the Constitution of 1787. Today the growing power of the judiciary to make (not just to apply or to interpret) and impose family policy upon states, including to compel states to legalize same-sex marriage or marriage-equivalent unions, poses the most significant threat to federalism in family law. It also threatens the basic power of the people to define and protect their must fundamental social institutions. Federalism must respond to those new challenges. Just as the Founders in 1787 adjusted existing concepts of sovereignty and federalism to meet new forms of tyranny and cope with new challenges, so also today federalism in family law can adjust to these new threats of "tyranny" to preserve state control over

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212. James M. Buchanan, *Federalism and Individual Sovereignty*, 15 CATO J. No. 2-3, (1996), *available at* http://www.cato.org/pubs/journal/cj15n2-3/cj15n2-3-8.pdf (last visited Mar. 25, 2005).

213. ELEZAR, *supra* note 210, at 91.

214 BUCHANAN, *supra* note 212, at 4.

215. ELEZAR, *supra* note 130, at 19-22.

216. New York v. United States, 505 U.S. 144, 156 (1992) (citing Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 549 (1985)).

217. The *Erie* doctrine line of cases recognizes a species of "reverse Supremacy" in choice of law in federal courts sitting in diversity jurisdiction. *See* Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 U. KAN. L. REV. 751, 752 (1998).

family relations in general while also preserving the critical "floor" of the institution of marriage as the union of a man and a woman.

The Supreme Court has acted before to protect a constitutional minimum of security for the institution of marriage. In *Loving v. Virginia*, the Court rejected anti-miscegenation laws enacted decades earlier by popular political movements because those laws violated the core principles of the Fourteenth Amendment. The proposed Federal Marriage Amendment will protect the institution of marriage the same way that the Supreme Court decision in *Loving v. Virginia* protected marriage. Both *Loving* and the proposed Amendment are concerned with protecting marriage from being captured by ideological movements (White Supremacy/Gay Rights). Likewise, the proposed Federal Marriage Amendment will have no more an intrusive or undermining effect upon federalism in family law that the *Loving* decision had. Rather, both draw federal constitutional boundary lines around the basic social/legal institution of marriage to protect it and leave in place the power of the states to regulate marriage and family relations subject to that protection. Just as the *Loving* decision to reject an extraneous definition of marriage intended to promote "white supremacy" did not undermine federalism in family law, so also adoption of the proposed Federal Marriage Amendment to reject an extraneous definition of marriage that promotes gay rights will not undermine federalism in family law. Thus, the proposed Federal Marriage Amendment is a prudent and necessary remedy to the dangers that threaten both the institution of conjugal marriage and the principle of federalism in family law.