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THE PECULIAR FEDERAL MARRIAGE AMENDMENT

Scott Dodson†

I. INTRODUCTION

On July 14, 2004, on the Senate floor, the full Senate narrowly voted to reject cloture, 50-48, with two abstentions, on Senate Resolution 40, a proposed constitutional amendment to define marriage and its legal incidents in the United States.1 This Federal Marriage Amendment, or FMA, states:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.2

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1. See Vote on the Motion to Invoke Cloture on the Motion to Proceed to Consider S.J. Res. 40, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=2&vote=00155 (last visited Nov. 1, 2004) [hereinafter Cloture Vote]. The two abstentions were White House hopefuls John Kerry and John Edwards. Id.

The FMA's definition of marriage as between one man and one woman prevents states or the national government from extending the definition of marriage to include same-sex couples. It also prohibits states or the national government from constraining officials intent on denying same-sex couples the legal benefits of marriage. The FMA takes this power away from the states in derogation of individual liberty and equality. As a constitutional matter, that power shift is quite peculiar. Indeed, there is nothing like it in the Constitution.

Our Constitution is thematic. One theme is a commitment to state power and local democracy—what some term "federalism." In general, the national government has limited, specifically enumerated powers focusing on national issues, while all other powers are reserved to the people or the states. Unless the national government enacts positive, constitutional laws to the contrary, the people of the several states generally can use their state democratic processes to legislate their local affairs, such as the definition of marriage in their communities, and their state constitutional processes to establish the standards of their choice. This default constitutional balance of power in favor of the states assures the states plenary power over their local affairs and officials, except where superseded by positive federal law.

Where the Constitution alters this balance by limiting state power, it usually does so only in furtherance of other recognizable themes. The themes of individual liberty and equality, for example, often trump state power. Under the Bill of Rights, as applied to the states through the Due Process Clause of the Fourteenth Amendment, the states may not infringe freedom of speech, freedom of religion, and a host of protections for the criminally accused. The Equal Protection Clause of the Fourteenth Amendment removes from the states much power to discriminate among citizens based on special classifications. The Voting Amendments prohibit states from discriminating among various classes in the fundamental right to

3. Robert Bork's claim that the FMA merely guards against the prospect that the judiciary will legalize same-sex marriage without the express consent of the legislatures, see Robert H. Bork, Stop Courts from Imposing Gay Marriage, WALL ST. J., Aug. 7, 2001, at A14, is untenable. The FMA would equally prohibit same-sex "marriages" made law by legislative or state constitutional processes. Also, although the FMA would not by its terms prohibit the people of a state from requiring that marital benefits be conferred upon same-sex couples by state constitutional amendment, it would prevent the courts from interpreting the amendment to have its intended effect.

4. See infra Part III.


6. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").
vote. These provisions, and others, remove from the states some of their power to regulate, but they do so in furtherance of the themes of individual liberty and equality.

The FMA is antithetical to each of these three themes. It is antithetical to federalism and state power because it removes from the states some of their power over marriage, a matter traditionally regulated by the states. It is antithetical to individual liberty because it abridges the fundamental right of consenting adults to marry whom they choose. And the FMA is antithetical to equality because it denies to a specified group the benefits and privileges of another group. No other provision in the Constitution is so contrary to the pervading themes of state power, liberty, and equality.

In this essay, I discuss the Constitution's commitment to the three themes I have articulated—state power, individual liberty, and equality—and then demonstrate how the FMA is uniquely contrary to all three. I do not intend to go so far as to suggest that the FMA would be an "unconstitutional amendment," if such things are possible, nor do I mean to suggest that same-sex marriage is or should be affirmatively protected by the Constitution. I mean only to suggest that proposed amendments altering the Constitution's commitment to the theme of state power, especially in an area of traditional state regulation, should be scrutinized warily for thematic coherence with other strong constitutional values of liberty and equality. Because the FMA restricts state power over a subject traditionally reserved to state governance, and is inconsistent with other pervading themes of liberty or equality, the FMA would be a decidedly peculiar appendage to our modern Constitution.

II. THEMES OF STATE POWER, LIBERTY, AND EQUALITY

The Constitution is a thematic document. It exhibits a default commitment to state power in a traditional effort to leave matters of local

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7. See id. amends. XV, XIX, XXIV, XXVI.
8. See, e.g., Everett V. Abbot, Inalienable Rights and the Eighteenth Amendment, 20 COLUM. L. REV. 183, 185–87 (1920) (suggesting that the Eighteenth Amendment might violate an inalienable natural right to pursue happiness through alcohol); William L. Marbury, The Nineteenth Amendment and After, 7 VA. L. REV. 1, 2–3, 28–29 (1920) (arguing that the Nineteenth Amendment is unconstitutional because it deprives nonratifying states of their sovereign power to regulate elections); George D. Skinner, Intrinsic Limitations on the Power of Constitutional Amendment, 18 MICH. L. REV. 213, 218–23 (1920) (arguing that states cannot ratify amendments ceding power reserved to them by the Ninth and Tenth Amendments); Jeff Rosen, Note, Was the Flag Burning Amendment Unconstitutional?, 100 YALE L.J. 1073, 1073 (1990) (arguing that the failed Flag Burning Amendment would have been an unconstitutional infringement on natural rights).
concern and local governance to the states. Where the Constitution (or the Supreme Court’s interpretation of it) departs from that commitment to state power, it does so in furtherance of other recognizable themes, in particular, individual liberty and equality. The FMA, however, is antithetical to these themes; it takes power away from the states in a traditional area of state regulation and nationalizes a conception of marriage in contravention of both individual liberty and equality.

A. Commitment to State Power in a Federal System

The Constitution establishes a “dual sovereignty” by the states and federal government in which the states are sovereign participants in the vast governance of America. To enable meaningful state participation at the local level, the Constitution sets out the permissible national powers in a limited and enumerated fashion, generally restricting the scope of federal regulation to national, foreign, and interstate matters. Its very next section expressly carves out exceptions to these grants. Finally, the Constitution makes even federal laws permitted under the Constitution nevertheless quite difficult to enact. These provisions restrict national power in favor of a stronger commitment to plenary state power.

And these are just the limitations imposed by the original Constitution. A Bill of Rights, according to many founders, was unnecessary because the Constitution’s own limited and divided powers left those fundamental civil

9. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (“We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”).

10. See U.S. CONST. art. I, § 8. For a stark contrast between the limited nature of federal grants of power over state citizens and the plenary federal power over federal territories, compare id., with id. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

11. See THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the national government has three principal purposes: provide for the common defense, preserve domestic security, and maintain national and international commerce); id. at 156 (“The POWERS are not too extensive for the OBJECTS of federal administration, or, in other words, for the management of our NATIONAL INTERESTS; nor can any satisfactory argument be framed to show that they are chargeable with such an excess.”).


13. Enactment requires majority approval in both Houses. Id. § 7, cl. 2. After bicameral passage, a bill becomes law if the President also approves. Id. If the President does not, the bill becomes law only upon a two-thirds approval in each House. Id.
liberties untouched and reserved to the states or the people. But most states ratified with the insistence of a Bill of Rights to restrict national power even further. The limitations on the powers granted to the federal government imply that the states (and their citizenry) retain all other powers. The Tenth Amendment makes this implication explicit.

The states have more than mere "reserved" powers under the Constitution. The Constitution assumes the continued existence of the states as quasi-independent and autonomous political entities. It also grants the states a special agency in the mechanics of the national government by, for example, providing that the states prescribe the times, places, and manners of congressional elections, giving the states an important role in the Electoral College, and mandating—at least originally—that Senators be chosen by state legislatures. Finally, the Eleventh Amendment embodies a

14. See Gordon S. Wood, The Creation of the American Republic, 1776–87, at 536–42 (1969). Alexander Hamilton wrote a spirited argument against inclusion of a Bill of Rights in the Constitution on the grounds that the Constitution already included substantial limitations on governmental power in favor of individual liberties; that a Bill of Rights was only necessary to reserve power from the rulers, whereas the Constitution was a limited grant of power to them; and that the limited nature of the powers in the Constitution were themselves an implied Bill of Rights. See The Federalist No. 84, at § 10–20 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Wood, supra, at 539–43.

15. See Wood, supra note 14, at 542–43.

16. U.S. Const. art. I, § 8 (specifying the limited powers of the national government); id. § 9 (excluding from the national government certain powers).

17. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written."); The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961):

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . 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.

Id.

18. U.S. Const. amend. X ("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.").


20. U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

21. Id. art. II, § 1, cl. 2.

22. Id. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.").
commitment to state sovereignty by protecting states from suits brought by private individuals in federal court. Thus, the Constitution exhibits specific commitments to state power, autonomy, and efficacy.

The federalist balance of power between the state and national governments has a regular litany of normative benefits. Two are important here. First, autonomous and multiple local governments increase political diversity, which permits mobile citizens to choose a state which best suits their needs and permits states to experiment or borrow ideas from their sister states. Second, allocating national issues to the national government and local issues to the states helps ensure that the issues are addressed by the government most efficiently or expertly able to address them.

The Constitution says nothing about marriage. It implicitly leaves the power to define marriage to the residuum of state authority. It may be that Congress even lacks the power to define marriage for the states, at least under the Commerce Clause. The Court has suggested that this allocation

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

24. See Dodson, supra note 19, at 399–400.


27. See Friedman, supra note 25, at 397, 401–02; cf. United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (“If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.”); id. at 583 (Kennedy, J., concurring) (stating that a statute exceeding Congress’s commerce power “forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise”).

28. See United States v. Morrison, 529 U.S. 598, 615–16 (2000) (stating that upholding the law, which the Court refused to do, would have allowed Congress to regulate family law and other areas of traditional state regulation); Lopez, 514 U.S. at 564 (refusing to permit Congress
of power furthers normative benefits: the states are the better government to regulate family matters because of their traditional expertise with them and their close affiliation with local preferences.29

In 1996, responding to the recognition that state-sanctioned same-sex unions were on the rise, Congress passed the Defense of Marriage Act30 ("DOMA"), which defines marriage as between one man and one woman for federal law purposes and permits states to disregard other states’ recognition of same-sex partner benefits.31 DOMA preserves the ability of the states to define marriage for their own citizenry.32

As contemplated by the federalist structure, the states are perfectly capable of deciding for themselves what definitions of marriage will control in their states.33 Alaska constitutionally defined marriage as between one
man and one woman in 1999, and twenty-six states in 2004 introduced or are expected to introduce constitutional amendments that would prohibit same-sex marriage. The Hawaii Constitution permits, but does not require, the preclusion of same-sex marriage. More than 170 state and local governments extend health benefits to same-sex partners of public employees. Vermont’s Civil Union Act extends marriage benefits to "civil unions" between same-sex couples. California’s domestic partnership statute permits same-sex couples to register as domestic partners and confers some benefits, such as hospital visitation rights, on domestic partners. In February 2004, San Francisco city officials became the first government officials in the United States in almost thirty years to grant same-sex marriage licenses. And, famously, the Massachusetts Supreme Court held that the denial of a marriage license to same-sex couples violated the Massachusetts Constitution.

34. ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). For more on the Alaska amendment, see generally Kevin G. Clarkson et al., The Alaska Marriage Amendment: The People’s Choice on the Last Frontier, 16 ALASKA L. REV. 213 (1999).

35. Joe Crea, State Lawmakers Embrace Anti-Gay Bills in ’04 Session, WASH. BLADE, July 9, 2004, at 17. Ten states (Georgia, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Oklahoma, Tennessee, Utah, and Wisconsin) passed constitutional amendments banning same-sex marriage in 2004 that now are subject to voter approval. The Louisiana, Oklahoma, Georgia, Utah, and Kentucky amendments would constitutionally ban civil union and domestic partnership rights to same-sex couples. Eleven states (Alabama, Arizona, Kansas, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, and Washington) considered, but failed to pass, constitutional amendments banning same-sex marriage. Another five states (Arkansas, Michigan, Montana, North Dakota, and Oregon) are likely to put constitutional amendments on the voter ballot in 2004. Id.


41. Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). That court subsequently reiterated that civil unions were insufficient—the state constitution demanded
This motley of experimentation and local governance is precisely the result that the Constitution's commitment to state power is designed to encourage. Different citizenries clearly want marriage defined or regulated in different ways. Accordingly, our federalist, multi-sovereign government normally ensures that the different state citizenries govern themselves, as they have shown themselves capable of doing.

The FMA would disrupt this system. It nationalizes the definition of marriage and removes from the states (and their citizens) the power to define marriage for themselves. Under the FMA, states could not legislatively or constitutionally extend the definition of marriage to same-sex couples. States could not experiment with constitutionally requiring that the benefits of marriage be extended to same-sex couples. Instead, marriage would be uniformly defined by the national government, and the legislatures and people of the several states powerless to alter that nationalized meaning. The FMA would alter the Constitution's commitment to state power by abridging state power over the local concern of marriage.

Constitutional provisions and amendments withdrawing power from the states are, of course, neither necessarily unwise nor unprecedented. Even a cursory reading of the Constitution evinces more than a few incursions on state power. However, as I explain, most of these withdrawals do so in furtherance of some other recognizable constitutional theme, such as liberty or equality. It is to these two particular themes that I turn next.

B. Commitment to Liberty and Equality

The themes of individual liberty and equality flow through the Constitution and its founding history. Fundamental rights and liberties, for the British, were creatures of law and inherently protected by Parliament.42 American Whigs, however, holding a deep mistrust of government and fear of tyranny,43 rejected the theory that rights were created by Parliament alone because they saw Parliament as an uncontrollable tyrant, creating and destroying fundamental rights at whim.44 They also despised the nepotism nothing short of full marriage and marital benefits to same-sex couples. Opinions of the Justices to the Senate, 802 N.E.2d 565, 567-72 (Mass. 2004). Massachusetts officials began issuing state-sanctioned same-sex marriage licenses on May 17, 2004. Yvonne Abraham & Rick Klein, Free to Marry: Historic Date Arrives for Same-Sex Couples in Massachusetts, BOSTON GLOBE, May 17, 2004, at A1.

42. WOOD, supra note 14, at 262–65.
43. Id. at 19–25.
44. Id. at 265–66.
and governmental favor in British rule, instead supporting equality—or at least a measure of equality of opportunity sufficient to permit merit-based advancement. These were the rallying cries of the Revolution: “We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness.”

The Constitution resulting from these ideals, though leaving to the states the vast residuum of power, explicitly restricts state power in favor of individual liberties and equality. It prevents states from passing bills of attainder, passing ex post facto laws, or impairing contracts; it assures trial by jury in state criminal trials; and it prohibits one state from discriminating against citizens of another state. (In a similar expression of individual rights vis-à-vis the national government, the Constitution also protects those accused of a federal crime by requiring a trial by jury, mandating strict proof of treason, and giving the President a broad pardoning power.) To embody Americans’ dislike of social favoritism,

45. Id. at 78-80.
46. Id. at 70-72, 78.
47. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
48. Some debated whether state power was constrained by unmentioned natural rights principles. Compare, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-88 (1798) (Chase, J.):
I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without [control] . . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.

with id. at 399 (Iredell, J., concurring) (“If. . . the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.”).
49. U.S. CONST. art. I, § 10 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .”). James Madison asserted these to be “contrary to the first principles of the social compact, and to every principle of sound legislation. . . . Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights.” THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).
50. U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”).
51. Id. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).
52. Id. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”).
53. Id. art. III, § 3 (limiting the definition of treason and requiring either a confession in open court of the testimony of two witnesses for a conviction).
54. Id. art. II, § 2, cl. 1 (“[H]e shall have Power to grant Reprieves and Pardons for Offenses against the United States . . . .”). Alexander Hamilton called the pardoning power a
Article I, section 10 prohibits the states from granting any "Title of Nobility." A

In at least one respect, of course—slavery—the pre-Civil War Constitution was fundamentally anti-egalitarian. But this countervailing doctrine could not be peaceably maintained, and the resulting clash of the themes of equality, individual liberties, and state power led to the Civil War, which resolved the thematic clash against state power and in favor of individual rights and equality. After the Civil War, Congress passed and the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments, which, for the first time since ratification of the original Constitution, took responsibility for protecting fundamental individual liberties and ensuring basic equality away from the states.

"benign prerogative" that "should be as little as possible fettered or embarrassed." THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).


56. See id. art. I, § 2, cl. 3 (counting slaves as three-fifths of a person); id. art. I, § 9, cl. 1 (prohibiting Congress from banning the importation of slaves until 1808); id. art. IV, § 2, cl. 3 (providing that escaped slaves must be returned to their owners).

57. Many have argued that Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 403–09 (1856), which held that slaves were not citizens and Congress could not constitutionally free them, ushered in the Civil War. See J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 HARV. L. REV. 963, 976 (1998) (citing Dred Scott as the case that precipitated the Civil War); Greg Sergienko, Social Contract Neutrality and the Religion Clauses of the Federal Constitution, 57 OHIO ST. L.J. 1263, 1277 n.67 (1996) (suggesting that Dred Scott precipitated the Civil War); Sol Wachtler, Judicial Lawmaking, 65 N.Y.U. L. REV. 1, 8 (1990) (noting that Dred Scott is considered by many to be the precipitator of the Civil War).

58. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

59. Id. amend. XIV, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

60. Id. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

61. This great shift in state power came into full effect very slowly. The Supreme Court began to parse the boundaries between individual liberty, equality, and state power and, in infamous cases such as Plessy v. Ferguson, 163 U.S. 537 (1896), the Civil Rights Cases, 109 U.S. 3 (1883), and the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), construed that boundary in favor of state power. Even as late as 1927, Justice Holmes derided the Equal
The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment have provided some of the most celebrated cases before the Supreme Court. The Due Process Clause protects from state intrusion the vast majority of the individual liberties found in the Bill of Rights. Under the Equal Protection Clause, the Supreme Court desegregated state schools and helped usher in the revolutionary civil rights movement. The theme of equality extends to voting rights, redistricting cases, and interstate travel. The Clause also began to merge with the theme of liberty, especially in cases concerning voting rights and intimate relationships, to turn the Due Process Clause into a bulwark for individual liberty.

The Due Process Clause codifies a right to be left alone, a protection of individual liberty itself. In the name of due process, the Court has struck

Protection Clause as the "last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927). In the industrial age following Reconstruction, the Court experimented with protecting economic liberty as a constitutional right under the Due Process Clause. See Lochner v. New York, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment . . . . The right to purchase or to sell labor is part of the liberty protected by this amendment . . . . "). However, it was not until the heyday of the Warren Court, in the 1950s and 1960s, that constitutional equality and individual liberty took the forefront. See discussion infra pp. 795-96 and accompanying notes.

65. See Baker v. Carr, 369 U.S. 186, 237 (1962); see also Gray v. Sanders, 372 U.S. 368, 381 (1963) (coining the phrase "one person, one vote").
68. This right had its underpinnings before the Warren Court. See, e.g., Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."); Meyer v. Nebraska,
down laws infringing an adult’s right to watch obscene movies,\(^{69}\) laws infringing a prisoner’s right to notice and a hearing before being committed to solitary confinement,\(^{70}\) and laws infringing the right to interstate travel.\(^{71}\)

In the name of liberty, the Court has struck down state laws outlawing the distribution of contraceptives,\(^{72}\) miscegenation,\(^{73}\) abortion,\(^{74}\) and sodomy.\(^{75}\)

In these cases, although acknowledging that “marriage is a social relation subject to the State’s police power,”\(^{76}\) in the name of liberty and equality, the Court invalidated state laws imposing too great a burden on the freedom of consenting adults to make their own choices in their intimate relationships.\(^{77}\)

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262 U.S. 390, 399 (1923) (asserting that liberty includes “the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . ., and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”). It was the Warren Court, however, which gave the right its life.

76. Loving, 388 U.S. at 7.
77. Lawrence, 539 U.S. at 562 (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); id. at 572 (“[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”); Casey, 505 U.S. at 849 (“[T]he Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood.”); id. at 851 (stating that personal decisions relating to marriage, “are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State”); Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting) (arguing that the Court ignores the fundamental interest persons have in determining “the nature of their intimate associations with others”); Eisenstadt, 405 U.S. at 453 (asserting that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup” and that, as a result, “the right to privacy means . . . the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”); Loving, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”); id. (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under
These cases vindicating individual liberty and equality are the roots of our modern conception of the Constitution. The Constitution is not simply a document favoring state power with limited exceptions for individual rights and equality. It is a strong defender of civil rights. No longer is the Equal Protection Clause the last resort of constitutional challenges. It has spearheaded an era of unprecedented tolerance for minorities, women, and many other classes. No longer are the states free to establish a state religion or beat confessions out of criminal suspects. The individual liberties protected by the Bill of Rights apply (in most part) to the states. The fundamental right to vote has been extended to eliminate discrimination on the basis of gender, adult age, and income. In this modern era, we firmly believe that the Constitution should and does protect us from unjustified governmental intrusion and discrimination.

Our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."; Griswold, 381 U.S. at 485 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

78. Perhaps Justice Brennan put the value of that tolerance best: "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies." Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

79. See supra notes 63-66 and accompanying text.

80. In Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872), the Court upheld an Illinois statute prohibiting women from practicing law. Justice Bradley wrote: "The paramount duty and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Id. at 141 (Bradley, J., concurring). It was not until 1971 that the first gender classification was struck down. Reed v. Reed, 404 U.S. 71, 76-77 (1971). The Court gradually eroded gender stereotypes by, for example, striking down a Utah law which required that parents support female children until age eighteen but males until age twenty-one. See Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (stating that the law was based on "old notions" of a woman's role in society).


82. U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

83. Id. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

84. Id. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other [federal] election . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").
Thus, where the Constitution (or at least the Court's interpretation of it) invalidates state laws, it normally does so in favor of civil rights. States may provide more individual protection from state power than the federal Constitution does, but the Constitution invalidates state laws providing less individual protection than the federal constitutional floor. The Constitution does not, however, make a regular point of invalidating state laws that provide more individual protection than that federal floor. The Constitution protects liberty and equality; it does not disparage them. That Congress or the states may deny or disparage many rights unprotected by the Constitution is unquestionable; but it would be an upending change for the Constitution to force them to do so.

That is precisely what the FMA would do. The FMA would add to the Constitution a provision which restricts the ability of the states to protect the fundamental right of marriage and discriminates against a class of persons with respect to that right. It would force Congress and the states to treat same-sex couples differently than opposite-sex couples in historically the most fundamental and intimate of ways—the association of marriage. It would enshrine, in stark fashion, tyranny and intolerance in a document otherwise understood to protect just the opposite.

The FMA is similar to Colorado's infamous Amendment 2, struck down in 1996 by the Supreme Court's decision in Romer v. Evans. Amendment 2 prohibited any Colorado state action designed specifically to protect homosexuals. The Amendment had "the peculiar property of imposing a broad and undifferentiated disability on a single named group" by permanently withdrawing from homosexuals, but no others, the ability to

85. See The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) (discussing the protections of the federalist system).
86. Arizona v. Evans, 514 U.S. 1, 8 (1995); Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards"); William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 495 (1977).
89. Colo. Const. art. II, § 30b:
[No Colorado state entity] shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id.
90. Romer, 517 U.S. at 632.
seek legal protection from discrimination by statute. The Court could ascribe no motivation for Amendment 2 besides animus towards homosexuals. According to the Court, such a law was "unprecedented in our jurisprudence."

Like Amendment 2, the FMA would single out a specific group of people for the purpose of denying them fundamental rights afforded others. The FMA would deny them the right to marry whom they choose. It would treat same-sex couples as "different" in the eyes of the state. And it would eliminate the ability of same-sex couples to petition their own state government to protect their rights. If the Constitution invalidates Amendment 2 as inconsistent with its themes and tradition, then the FMA would create an unprecedented tension between itself and the rest of the document. Because it advances antithetical notions of liberty and equality, all at the expense of state power, the FMA would be a truly peculiar amendment to the Constitution.

III. THE UNIQUENESS OF THE FMA

That the FMA would be a peculiar amendment does not mean that it would also be a unique one. In the FMA's case, however, it is unique when compared to the existing constitutional amendments.

I mentioned above that the Constitution's commitment to state power is not inviolate. Indeed, a few provisions of the original Constitution remove power from the states just as the FMA would. Many that I have listed do so in furtherance of individual liberty or equality. The others do so in

91. Id. at 627, 631.
92. Id. at 632.
93. Id. at 633.
94. See supra text accompanying notes 50–57. Others remove power from the states for the purpose of effectuating their power in state-state relationships. For example, the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); protects the efficacy of one state's laws in other states without facially disparaging liberty or equality. So does the Privileges and Immunities Clause, id. § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); which also furthers the themes of individual liberty and equality. See Doe v. Bolton, 410 U.S. 179, 200 (1973) (discussing the Privileges and Immunities Clause); Hague v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939) (same); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180–81 (1868) (same); Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230) (same). The Extradition Clause, U.S. Const. art. IV, § 2, cl. 2, which requires states to extradite persons accused of a crime by another state, is somewhat contrary to individual liberty, but not particularly contrary to equality. These provisions exist principally to maintain amiable state-state relationships, not to remove power from the states to the detriment of civil rights.
95. See supra Part II.
furtherance of another important and recognizable constitutional theme: ensuring the efficacy or uniformity of national power. 96 The Supremacy Clause 97 and the exclusions in Article I, Section 10, 98 for example, remove power from the states merely to strike the proper balance of power between federal and state legislation. They are not particularly contrary to individual liberty or equality. The so-called Dormant Commerce Clause, which prevents states from unduly burdening interstate commerce, 99 does likewise, although the Dormant Commerce Clause actually furthers equality in practice because it is likely to invalidate a state law which discriminates against out-of-staters and unlikely to invalidate a state law which does not discriminate. 100 Although these provisions do take power away from the states, none does so in the antiliberty and anti-equality way that the FMA does.

As I have mentioned, most of the amendments constrain governmental power in favor of individual liberty or equality. However, many other amendments in the Constitution further neither liberty nor equality. Several are housekeeping or structural amendments, such as the establishment of procedures for presidential succession, 101 which promote workable government. These are readily distinguishable from the decidedly policy-slanted FMA. The three remaining amendments, however—the Eleventh, 102 Sixteenth, 103 and Eighteenth 104—cannot be dismissed so readily, because each shares something in common with the FMA. Each abridges a specific individual liberty. To that extent, they, like the FMA, are also somewhat

97. U.S. Const. art. VI, § 1, cl. 2 (decreed that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").
98. Id. art. I, § 10.
101. U.S. Const. amend. XXV.
102. Id. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
103. Id. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").
104. Id. amend. XVIII, § 1 ("After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.").
odd amendments. However, unlike the FMA, not one of them abridges all three themes I have articulated above—liberty, equality, and state power—and the one which abridges two of the three was promptly repealed by another amendment. Accordingly, the FMA, should it be ratified, would stand as the one constitutional provision to reduce state power to the detriment of individual liberty and equality.

The Eleventh Amendment, which restrains the judicial power of the United States in certain cases involving suits by private individuals against states, is similar to the FMA because it limits certain individuals’ ability to sue a state and it facially discriminates between in-state and out-of-state plaintiffs. However, unlike the FMA, the Eleventh Amendment restores power to the states, rather than stripping the states of power, because, under the Eleventh Amendment, a state can choose to subject itself to suit if it wishes. In addition, the Supreme Court has applied the Eleventh Amendment indiscriminately to both in-state and out-of-state plaintiffs. Accordingly, although on its face the Eleventh Amendment has some similarities to the FMA, it really only shares the FMA’s antagonism towards individual liberty.

The Sixteenth Amendment, which grants the federal government the power to impose an income tax, shares the same analogy. It in no way limits the power of the states to assess and collect income taxes. Nor does it discriminate against a class of citizens. The Sixteenth Amendment is essentially neutral on state power and neutral on equality. It does, of course, infringe upon individual rights to liberty and property. However, it does not share the other anticonstitutional slants that the FMA furthers.

Perhaps the closest analogue to the FMA is the Eighteenth Amendment, which ushered in Prohibition. The Eighteenth Amendment stripped the states of their traditional power to regulate alcoholic beverages and elevated Prohibition to constitutional stature, beyond the reach of government, much as the FMA purports to do with marriage. Unlike the FMA, however, the Eighteenth Amendment does not have much to do with equality, and, in any case, the Eighteenth Amendment was a social disaster.

105. Id. amend. XXI (repealing the Eighteenth Amendment).
106. Id. amend. XI.
108. E.g., Hans v. Louisiana, 134 U.S. 1, 18–21 (1890) (recognizing that the Eleventh Amendment extends to out-of-state plaintiff suits and extending immunity to in-state plaintiff suits as well).
110. U.S. CONST. amend. XVIII, § 1.
quickly repealed by the Twenty-First Amendment, which restored the federalist structure. So perhaps I was wrong to say that the FMA is like nothing in the Constitution—it shares the dubious distinction of having its closest analogue be the only amendment ever repealed.

IV. THE IMPORTANCE OF CONSTITUTIONALISM

If it is sobering that the FMA purports to strip away state choice, individual liberty, and equality, all at the same time, it is particularly disturbing that it does so by federal constitutional amendment.

There is a fundamental difference between legislation enacted by the government and constitutional provisions adopted by the people. The Framers, concerned with Parliament’s control over individual rights, adopted a natural rights view, rather than a positivist one. They believed that natural rights held by the people should be impervious to legislative encroachment. Constitutionalism provided an answer by lodging the protection of certain fundamental rights and liberties with the people themselves and placing them beyond the reach of the government.

Because constitutional provisions are unalterable by the government, nonprocedural amendments should be reserved for those “great and extraordinary occasions” for which the people need to rein in their government to prevent it from trampling on their rights. Accordingly, the Framers intentionally made the Constitution difficult to amend, requiring the support of two-thirds of each House of Congress, plus ratification by three-fourths of the states.

111. Id. amend. XXI.
114. See WOOD, supra note 14, at 266, 275–76.
116. As Justice Blackmun has stated: “While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election.” Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring & dissenting); accord Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (“It is precisely because the issue raised by this case touches [upon] the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.”).
117. U.S. CONST. art. V.
ratification. Over 11,000 amendments have been proposed, yet only thirty-three have passed Congress, and only twenty-seven have been ratified into law by the states. One reason for the intentional difficulty of amendment is to prevent shortsighted amendments from undermining or conflicting with fundamental values and undercurrents existing in the rest of the Constitution. As I have argued, the FMA contravenes this latter norm by competing against the themes of state power, liberty, and equality otherwise enshrined in the Constitution.

Federal constitutional amendments are also intentionally difficult to prevent the tyranny of prior generations. Recent polls indicate that a slight majority of Americans supports a constitutional ban on same-sex marriages. Why then, some may ask in the name of democracy, should the will of the people not be constitutionalized? Although the FMA may be supported now, its support correlates with age groups—older respondents are more likely to support the FMA than younger respondents. Indeed, a majority of those aged eighteen to twenty-nine actually opposes the FMA. If the FMA were adopted today, in twenty years the FMA could exist even though a majority of Americans opposed it. The urgency with which proponents push the FMA suggests that they fear their time is dwindling, that younger generations may soon control the majoritarian sentiment. If so, this urgency "reflects a deeply anti-democratic impulse, a fundamental

118. Sullivan, supra note 2, at 692.
120. Some of the most notorious failed bids include amendments to address gender discrimination, require a balanced budget, limit congressional terms, prohibit flag burning (twice), allow a presidential line-item veto, abolish the electoral college, outlaw abortion, prohibit remedial school busing, grant the District of Columbia statehood, and authorize school prayer. See RICHARD B. BERSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 142-43 (1993) (discussing the Equal Rights Amendment); Sullivan, supra note 2, at 691–94 (surveying proposed constitutional amendments).
121. Sullivan, supra note 2, at 697 (discussing the "dangers that tinkering with the parts poses to the coherence of the whole"); id. at 700 ("But it is clear that amendments can cause tension with the original document, and may exert a gravitational force extending beyond their specific subject matter. This is at least an additional argument for keeping amendments to an essential minimum."). The difficulty of amendment also promotes stability and preserves the rule of law by distinguishing constitutional values from mere legislation. Id. at 695–96; see also THE FEDERALIST No. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961) (cautioning "against that extreme facility, which would render the Constitution too mutable").
122. Seelye & Elder, supra note 2, at 1 (reporting that 55% favor and 40% oppose an amendment).
123. Id. (reporting that that age cohort opposes an amendment, 52% to 44%).
distrust of normal political processes. One should not "believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs."

Even if, as some assert, it is the state courts, rather than the people or the legislatures, which are defining marriage, the federalist system is designed to replace unpopular state court decisions through the state—not the federal—democratic process. If a state citizenry disagrees with its court's interpretation of its constitution, it can elect different judges or amend its own constitution to correct the court's interpretation. Resorting to the state constitutional process is precisely what Alaska, Hawaii, and other states have done. In this way, the citizenry of each state can

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126. Bork, supra note 3, at A14. Such sentiments are reminiscent of the reactions of many to the Supreme Court's desegregation cases. After Brown v. Board of Education, 347 U.S. 483 (1954), ninety-six southern congressmen issued the following denouncement:

We regard the decision of the Supreme Court in the school cases as clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the states and the people.

The original Constitution does not mention education. Neither does the Fourteenth Amendment nor any other amendment.

... Though there has been no constitutional amendment or act of Congress changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.

...

We decry the Supreme Court's encroachments on rights reserved to the states and to the people, contrary to established law and to the Constitution.

We commend the motives of those states which have declared the intention to resist forced integration by any lawful means.

Text of 96 Congressmen's Declaration on Integration, N.Y. TIMES, Mar. 12, 1956, at 19.

127. Most states are not shy about amending their constitutions. In contrast to the federal Constitution's twenty-seven amendments, Alabama's constitution has been amended over 700 times; California's over 500; and Texas's over 300. ALA. CONST. amendments I-DCCLXXXVI; Daniel Sneider, California Reformers Swipe at Beloved Ballot Initiatives, CHRISTIAN SCI. MONITOR, May 30, 1996, at 3 (reporting that "California's Constitution has been amended 492 times since it was enacted in 1879"); http://www.lrl.state.tx.us/legis/constAmends/lrlhome.cfm (updated Feb. 2004) ("[T]he Texas Constitution has been amended 432 times since its adoption in 1876.").

128. See supra notes 34–36 and accompanying text.
consider and select a definition of marriage most suited to its own sentiments. Federal amendment is a particularly crude way of correcting perceived judicial activism on the state level. 129 Should the FMA be ratified, those states in the supermajority could impose their definition of marriage on nonratifying states, even if the nonratifying states had codified a different definition of marriage through a nonjudicial process such as legislation or state constitutional amendment.

Federal constitutional amendments are not mere legislation. They are difficult because they are special. As a general rule, nonstructural amendments should be employed only to restrict government power, only to vindicate civil rights or notions of equality. The FMA does not fit that bill.

V. CONCLUSION

The FMA, despite its popular support, would turn the Constitution in a new direction, away from some of the most important themes it enshrines. There are dangers for appending such a peculiarity. Provisions embodying contrary themes cause internal tension and perhaps difficulty with interpretation. One of the beauties of the document is its relative coherence; the themes are recognizable and, for the most part, consistent. The FMA would bring a drastic change to these themes and may have consequences for their future interpretation that radiate far beyond the FMA’s intended effect. We should always be cautious before amending the Constitution. We should be especially cautious with the FMA.

129. Never have the American people used a federal constitutional amendment to reverse a state court’s interpretation of its own state’s constitution or laws. Lea Brilmayer, *Full Faith and Credit*, WALL ST. J., Mar. 9, 2004, at A16.