OUR UNWRITTEN CONSTITUTION AND PROPOSALS FOR A SAME-SEX MARRIAGE AMENDMENT

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I. INTRODUCTION

Last year's judicial opinions in *Lawrence v. Texas*¹ and *Goodridge v. Department of Public Health*² have sparked interest in amending the United States Constitution to address the issue of same-sex marriages. Whether a constitutional amendment is necessary is unclear. In fact, many see the interest in amendments as part of election-year politics.³ Some argue that an amendment is premature until the Supreme Court of the United States has spoken.⁴ Nevertheless, joint resolutions of amendment have been introduced in Congress, and hearings have been held.⁵ This essay considers those amendments. In differing degrees, the proposals run counter to a strong congressional tradition that for over two centuries has entrusted the states with primary responsibility for defining and regulating family relationships. This tradition, which in effect is an unwritten principle of constitutional law, should not be set aside lightly.

The idea of a constitutional amendment to correct a judicial construction of the Constitution is not new. In the earliest days of our Republic, the Eleventh Amendment was promulgated and adopted to correct the Supreme Court's decision in *Chisholm v. Georgia*.⁶ Since that time, five more amendments have been added to the Constitution to overturn or correct specific decisions by the United States Supreme Court.⁷

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¹ 539 U.S. 558 (2003).
⁵ See infra notes 8-12 & 44 and accompanying text.
This essay addresses three specific proposals. The first in time is an amendment, commonly referred to as Musgrave I, sponsored by Representative Marilyn Musgrave in the House and Senator Wayne Allard in the Senate. Musgrave I would forbid states to provide same-sex marriages or even civil unions with domestic benefits for their own citizens. Although the President enthusiastically endorsed this severe intrusion into state sovereignty, the proposal's sponsors decided that it was too extreme. They have replaced it with a second proposal, Musgrave II, which leaves the states with some legislative authority to provide for civil unions between same-sex couples. A third proposal has been suggested by Senator Orin Hatch. Senator Hatch's basic idea is to assure that the issue of same-sex marriages and civil unions is left to the states free from federal interference. His proposal is commonly called the Federalism Amendment.

The current proposed constitutional amendments are motivated by a negative attitude toward same-sex marriage and address three issues of constitutional law. First, there is a concern that in the wake of the Goodridge case, when Massachusetts sanctions same-sex marriage, the Constitution's Full Faith and Credit Clause might require other states to recognize the validity of the new Massachusetts marriages. Second, there is a concern that the Lawrence case has put the nation on a slippery slope that eventually will constitutionally compel all states to make same-sex marriages available to their residents. All three proposed constitutional amendments would explicitly protect state sovereignty from these possible constitutional interpretations. Finally, there is some interest in providing a constitutional rule forbidding states to make same-sex marriages available to their own citizens. In particular, Musgrave I explicitly overrides state sovereignty in respect of same-sex marriages. Musgrave II and the Federalism Amendment also intrude upon state sovereignty but to a lesser degree.

II. THE FULL FAITH AND CREDIT CLAUSE

Does the Full Faith and Credit Clause require states to recognize a same-sex marriage that is valid under another state's law? This
question is not new. The same issue arose about ten years ago when the Hawaiian Supreme Court held that Hawaii's restriction of marriage to heterosexual couples violated the state's constitution.¹⁴ In that context, Dean Patrick Borchers wrote a lucid, thoughtful, and admirably balanced answer to the question.¹⁵ Since that time Professor Ralph Whitten has ably supplemented and updated Dean Borchers' analysis.¹⁶ The short answer surely is "no," as long as a state considers another state's marriage laws to be contrary to public policy.

Many Supreme Court decisions have recognized that the Constitution does not significantly restrain a state from refusing to give effect to another state's laws. For example, in a series of cases the Court has allowed forum state courts to ignore other states' workers' compensation statutes if the other state's compensation regime is "obnoxious" to forum state policy.¹⁷ Although the word "obnoxious" suggests a rigorous standard, the Court has deferred to the states when it comes to weighing and balancing state policies.

In Allstate Insurance Co. v. Hague,¹⁸ the Court addressed the issue whether Minnesota could ignore Wisconsin law on stacking an insurance company's liability for uninsured motorists. Assuming minimum contacts with Minnesota, all the justices agreed that Minnesota was free to prefer its own law over the other state's law. More recently in Sun Oil Co. v. Wortman,¹⁹ the Court held that choice-of-law rules that were well established when the Constitution was adopted are a priori constitutional. The Sun Oil Court warned that "long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional."²⁰ In effect, the Full Faith and Credit Clause allows individual states to prefer their own laws over the laws of another state.

The argument could be made that minor differences between workers' compensation schemes or the availability of stacking in insurance policies do not have nearly the social significance as the right

to marry and form a legal family. If so, one state perhaps should be constitutionally disabled from ignoring another state’s laws on this fundamental issue. Perhaps, but in a society committed to a market system for the allocation of goods and services, legal rights regarding the employment relationship and contractual rights cannot be dismissed as trivial. Moreover, if same-sex marriage does involve more significant policy interests than the workers’ compensation cases or the insurance stacking case, the second state’s interest in denying recognition is similarly more significant.\textsuperscript{21} The Supreme Court’s cases on this issue recognize that full faith and credit inevitably involves weighing and balancing policies, and the Court has held that the recognizing state should do the weighing and balancing.\textsuperscript{22}

In any event, the Supreme Court is not the only actor in this constitutional drama. The Constitution specifically empowers Congress to enact rules prescribing the extent to which a forum state is required to give effect to another states’ laws.\textsuperscript{23} Using this grant of authority, Congress enacted the Defense of Marriage Act ("DOMA"), which provides:

\begin{quote}
No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.
\end{quote}

In other words, DOMA restates and bolsters the traditional understanding of the Full Faith and Credit Clause.

Given DOMA and the traditional understanding of the Full Faith and Credit Clause, one wonders what purpose a Constitutional amendment would serve insofar as Full Faith and Credit is concerned. Perhaps some are worried that the Supreme Court might overturn the existing understanding and create a new constitutional order significantly restricting the state’s discretion in matters of choice-of-law. As a practical matter, however, a decision to construe the Full Faith and Credit Clause to require a forum state to recognize the validity of a Massachusetts marriage could not be restricted to the narrow issue of

\begin{itemize}
\item \textsuperscript{21} Cf. Williams v. North Carolina, 317 U.S. 287, 302-04 (1942) (indicating that states may ignore other states’ divorce law).
\item \textsuperscript{22} For a recent example of this analysis, see Franchise Tax Board of California v. Hyatt, 538 U.S. 488 (2003) (discussed in Whitten, \textit{supra} note 16 at 474.)
\item \textsuperscript{23} The Full Faith and Credit Clause is immediately succeeded by this grant of legislative authority: “And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. Const. art. IV \textsection 1, cl. 2.
\item \textsuperscript{24} 428 U.S.C. \textsection 1637C (2000).
\end{itemize}
marriages. The Court's decision would have to extend generally to all types of legal issues and would in effect constitutionalize much of choice-of-law doctrine. In other words the Court—without the assistance of the lower federal courts—would have to work out and enforce a substantial body of federal choice-of-law doctrine. Such a scenario is mathematically possible but wildly improbable.

Some may not be interested in preserving state sovereignty. Instead, some may seek to abrogate state sovereignty. Under this latter view, proposed amendments might be intended to forbid a state to recognize the validity of a Massachusetts marriage. For example, suppose a same-sex couple who have lived all their lives in a New England state were to be validly married under the laws of their state and subsequently were to retire. If they moved to a state with a sunnier clime as many retired couples are wont to do, their new domiciliary state might very well as a matter of its choice of law principles decide that the validity of the marriage should be determined by the laws of the couple's original domicile. Surely there is no legitimate reason for the Federal Constitution to forbid states from recognizing an otherwise valid marriage under these circumstances. A federal constitutional rule that allows states to sanctify same-sex marriages for their own citizens but forbids states to recognize same-sex marriages on the basis of choice of law principles would be a preposterous intrusion upon state autonomy.

The current proposed amendments that are intended to restrict state sovereignty are aimed primarily at individual states' power to authorize their own citizens to form a same-sex marriage. Nevertheless, the Amendments could be read as restricting a state's authority to recognize the validity of a marriage from another state. For example, Musgrave I forbids states to confer by state constitution or state law "marital status or the legal incidents thereof" upon same-sex

25. The only comparable experiment in recent years is the constitutional revolution in criminal procedure in the 1950s and 60s, which was enforced and fully elaborated primarily by the lower federal courts in habeas corpus cases. Of course the lower federal courts have no comparable authority over the outcome of state civil litigation.

26. See Whitten, supra note 16 at 473.


29. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (2) (1969), which provides that the second state should recognize the marriage. This general approach, however, is based in part on an assumption that differences among the marriage laws of various states usually involve only minor matters of debatable policy rather than fundamentals." Id., cmt. h. The issue of same-sex marriage can hardly be classified as a "minor matter" that is not fundamental.
Because choice of law principles are state laws, Musgrave I would also forbid a state from invoking its choice of law principles to recognize a same-sex marriage sanctified in another state. At first glance the impact of Musgrave I upon choice of law seems superfluous because the proposed amendment bars all the other states from providing for same-sex marriages. Therefore, the problem of recognizing a same-sex marriage from another state should never arise. The pure choice of law issue could, however, arise in the case of visitors from another country who have entered into a same-sex marriage under the laws of another country. The plain meaning of the Musgrave I would bar states from recognizing the legitimacy of the foreign visitors' marriage.

The other proposed amendments do not have a significant impact upon the pure choice of law issue. Musgrave II forbids the states from using state constitutions to recognize same-sex marriages. States are, however, free to provide for or recognize same-sex marriages by legislation or common law. Because choice of law principles are almost never found in state constitutions, Musgrave II appears to leave the recognition of marriages contracted outside a particular state to the noncontracting state's discretion. Although the Federalism Amendment appears to leave the issue of marriage entirely to the individual states, it arguably forbids state judges from using judicially created choice of law rules to recognize marriages lawfully formed in another state.

III. BEYOND FULL FAITH AND CREDIT

The three proposed amendments have implications for the Full Faith and Credit Clause, but their primary purpose is to address issues related to individual states' power to allow same-sex marriage for their own citizens. Musgrave I forbids states to provide same-sex marriages for their domiciliaries. Musgrave II forbids states to use their constitutions as a vehicle for providing same-sex marriages for their domiciliaries. Finally, the Federalism Amendment seems to be designed to assure that Federal law will not be used to require the states to provide same-sex marriages.

30. Musgrave I, infra, Appx. A.
31. This assumes that the first sentence of Musgrave II does not create an independent constitutional rule of decision. See infra notes 34-38 and accompanying text.
32. See infra notes 43-44 and accompanying text.
33. For a survey of state law on this issue, see Robin C. Miller, Annotation, Marriage Between Persons of Same Sex, 81 A.L.R. 5th 1 (2000).
A. AMBIGUITIES IN THE AMENDMENTS

Each of the proposals has a number of ambiguities, some significant, some not so significant. The problem of ambiguity is inherent in any attempt to frame general rules for the resolution of anticipated and unanticipated future cases. Neither a contract, an administrative regulation, a statute, a treaty, nor a Constitution can be drafted without ambiguities. We try to minimize the number of significant ambiguities in a written rule, but we cannot eliminate them.

Under our system of government, the inevitable presence of ambiguities in written laws in effect confers lawmaking powers on the judiciary. When ambiguities present themselves in future cases, the judiciary is empowered to proclaim the law's meaning by judicial decision. Generally this form of judicial lawmaking is subject to correction by legislative action, but constitutional lawmaking by the judiciary is different. When a court misconstrues an ambiguous provision in a constitution, a legislature cannot correct the mistake. A judicial construction of a constitution may only be changed through a constitutional amendment or a subsequent judicial decision. In effect this pragmatic fact of political life means that ambiguities in the proposed amendments will confer virtually unreviewable constitutional lawmaking powers on the federal judiciary.

1. Musgrave I & II

Musgrave I and II consist of two sentences: an ostensibly precatory clause and a second clause providing a constitutional rule of decision. Both proposals begin with the same sentence: "Marriage in the United States shall consist only of the union of a man and a woman." What is the purpose of this sentence? Is it merely precatory or is it also an independent constitutional rule of decision? If it is a rule of decision, it may create a constitutional mandate that supplements the amendment's second sentence. Under our political tradition, the meaning and effect of the first sentence is entrusted to the Supreme Court. Perhaps the Court would decide that the sentence is merely precatory. But perhaps the Court would not.

If the Amendments' first sentence provides a rule of decision, it is fraught with ambiguity. Some of the ambiguities amount to little more than law professors' or grammarians' parlor tricks. For example a union among three people could be classified as "the union of a man and a woman" as long as there was a minimal diversity of sexes.34

After all, the sentence relates to the union of a man and a woman, not a union between a man and a woman. Under this minimal diversity interpretation, the right to form a polygamous union would be constitutionalized. Or to continue with the fun and games, what about the union between a single parent and the parent's child? Of course these suggestions are preposterous. Presumably only those with a professed penchant for literalism might be persuaded.

There are, however, more significant ambiguities that go well beyond parlor tricks. A significant new moral or ethical dilemma that will arise in the next fifty years involves cloning and DNA experimentation. Are the offspring of cloning or DNA experimentation human beings with the rights of human beings? Is a scientifically created clone or genetically altered mutant a human being with the right to marry another human being? The first sentence of the proposed amendment could grant the Supreme Court virtually unreviewable legislative authority over this question. Perhaps this is a good idea. Perhaps this crucial question should not be entrusted to legislative majorities.

There are additional problems. Most of Western Europe recognizes some form of same-sex civil union, and in Portugal, homosexual couples apparently have the same rights as heterosexuals in common-law marriages. Suppose a visitor from a foreign country—perhaps with diplomatic immunity, perhaps without—brings a same-sex spouse or a polygamous spouse to the United States. What are the spouses' rights between or among themselves and with respect to others in the United States? Would the amendment override the rights of foreign diplomats under international law? Suppose that under German law a German inherits his or her same-sex partner's property in the United States. Would the amendment override the existing treaty between the United States and Germany that guarantees the right of German citizens to inherit property in the United States? These questions are quite nuanced, and the answers surely should not be worked out as a matter of constitutional law.

Similarly, the amendments provide no guidance for defining the terms man and woman. In most cases the meaning of these terms will be obvious, but thousands of our transgendered citizens cannot be neatly classified as either man or woman. How would the Amend-

35. One court has already held that Wolverine of the X-Men is not a human being. Toy Biz, Inc. v. United States, 248 F. Supp. 2d 1234 (Ct. Int'l Trade 2003).
36. Gay Germans Settling into Civil Unions, DALLAS MORNING NEWS, May 9, 2004, at 18A.
oment treat a person who is physically one gender but psychologically another? How would the Amendment treat a person whose sexuality is physically ambiguous? How would the Amendment treat a person whose sex has been adjusted by surgery? These are difficult questions that surely should not be constitutionalized and consequently committed to the Supreme Court's unreviewable legislative discretion.

Musgrave I and II's second sentences clearly establish constitutional rules of decision. Musgrave I, after defining marriage as "the union of a man and a woman," provides, "[n]either this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Under this proposal states' clearly held public policy preferences would be overridden by a national policy condemning same-sex marriages. Because Musgrave I was such an extreme invasion of state sovereignty on an essentially local matter, Musgrave II has been proposed: "[n]either 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." The purpose of the change is to "make it perfectly clear" that state legislatures are free to authorize civil unions and provide domestic benefits for same-sex couples. As with all drafting endeavors, Musgrave II carries its own ambiguities.

Musgrave II's second clause has some bemusing quirks. Although the clause ostensibly recognizes state sovereignty over the issue of marriage, it forbids the people of a state from guaranteeing the right of same-sex marriage to themselves through constitutional amendment. Presumably the amendment's drafters are worried that state courts like the Massachusetts Supreme Court might interpret a state constitution as guaranteeing the right to a same-sex marriage. The effect, however, is to bar the people, themselves, from amending their own constitutions. Surely a rule regulating the process of state constitutional lawmaking should originate from the people of the state rather than from the federal government.

Another of Musgrave II's perplexing puzzles involves the constitutions of Puerto Rico and United States territories like the Marshall Islands and American Samoa. Apparently courts are authorized to construe these constitutions to require same-sex marriages. This distinction between state and territorial constitutions probably is an

40. *PUERTO RICO CONST., MARSH. IS. CONST., AM. SAMOA CONST. See also MARIANA IS. CONST., MICR. CONST., PALAU CONST.*
oversight. Perhaps the issue of territorial constitutions is covered by Musgrave II's first sentence, but if so, the first sentence becomes a rule of decision with all the consequent problems.\footnote{See supra notes 34-38 and accompanying text.}

2. The Federalism Amendment

At first glance the Federalism Amendment seems the least intrusive upon state sovereignty of the three amendments, but the first sentence of the Federalism Amendment also presents difficulties. Senator Hatch's first sentence reads, "[c]ivil marriage should be defined in each state by the legislature or the citizens thereof." Because the amendment merely allocates legislative authority, it is not as problematic as Musgrave I & II. Nevertheless, the sentence is clearly designed to allocate legislative authority within a state and therefore cannot be dismissed as precatory. Presumably it is intended to exclude courts—like the Massachusetts Supreme Court in Goodridge—from participating in the legislative process. Senator Hatch has stated that this is the purpose: "I think it would also be prudent if we look at approaches which keep the courts from forcing its definition of marriage on states, and instead let the legislatures and the citizens decide for themselves what is best for them."\footnote{Gay Marriages Proliferate, WASH. POST, Mar. 4, 2004 (quoting Sen. Hatch). See also Edwin Meese, A Shotgun Amendment, WALL ST. J., Mar. 10, 2004 (asserting an amendment will protect the nation from state judges like those in Massachusetts).} Thus the first sentence would allow a state legislature but not a state court to define civil marriage any way it wished.\footnote{While the sentence is intended to allow a state legislature to ban same-sex "civil marriages" notwithstanding equal protection arguments to the contrary, surely the sentence is not intended to override other disparate classifications based upon race or religion. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967). The second sentence of the Hatch Amendment is not subject to this construction.} In addition the Federalism Amendment allows "the [state's] citizens" to define a "civil marriage." This provision apparently would permit states to define civil marriage by state-wide referendum like in California or by constitutional amendment approved by a plebiscite. Presumably this reference to "the people" is intended to exclude state courts—like the Massachusetts Supreme Court—from defining civil marriage through judicial interpretation. Senator Hatch's distrust of state and federal judges cannot be dismissed as a sport. Most proponents of a same-sex amendment have a like-minded distrust.\footnote{See, e.g., Statement of Katherine Spaht before the Senate Judiciary Committee, Mar. 23, 2004; Statement of Senator John Corwyn, 150 Cong. Rec. S1506 (Feb. 24, 2004); Edwin Meese, A Shotgun Amendment, WALL ST. J., Mar. 10, 2004; Sponsors Reward Marriage Amendment Proposal, L. A. TIMES, Mar. 23, 2004; A Battle Joined, NAT'l REVIEW, Mar. 22, 2004; Statement of Teresa Collet before the Senate Judiciary Commit-
less of how the legislature or the people may define civil marriage, the resulting rule will have ambiguities. A fair reading of the Federalism proposal would bar a court from construing ambiguous provisions of state law defining civil marriage. The words are consistent with this reading and with the announced purpose to exclude courts from construing state law.

If the Federalism Amendment were to become law, what should a court do when confronted by an ambiguity in a state statute or Constitution related to the definition of marriage? A fair reading of the amendment would require the state court to abstain from deciding the question in any way until the ambiguity is resolved by clarifying legislation or constitutional amendment. Moreover, because the allocation language in the Federalism Amendment is not confined to same-sex marriages, the abstention issue would also arise in the context of statutory ambiguities affecting traditional marriages.

B. Concluding Thoughts

Should the Constitution be amended? This is perhaps the ultimate political question. There are many arguments pro and con whose weight can only be judged by the body politic. Are same-sex unions contrary to God's command and therefore to be forbidden? Are they immoral without regard to particular religious beliefs? Should society outlaw or discourage relationships that cause no harm to others? Do these unions in some way destabilize heterosexual unions? The answers to these questions are fairly obvious to most of us. The problem is that we do not all see the same obvious answers.

In addition to these more or less substantive considerations regarding the desirability of a same-sex amendment, there are a number of more procedural considerations. With the exception of the disastrous XVIII Amendment on prohibition, which was quickly repealed, the Constitution has never had a provision that intrudes so directly into private relationships. Of course society routinely tells private individuals how they may or may not relate to each other, but rules regulating private relationships are always subconstitutional rather than constitutional. In other words, rules that positively restrict private relationships are always left to the democratic process. Perhaps the need to impede sin and immorality is too important to be left to the democratic process. That is a political question.

Another consideration relates to the principle of federalism, which is deeply imbedded in the Constitution. Federalism has always
been a central tenet, even the central tenet of our Constitution. The plan of the Constitution is to divide sovereignty between the national government and the individual states. Over two hundred years of political and constitutional history supports and confirms the Founders' judgment that some matters are best left to local resolution and others require a national solution. The trick—and it is not a parlor trick—is to determine which matters should be considered local and which should be considered national. Long ago an English historian pronounced that the United States Constitution is "all sail and no anchor," and the issue of allocating power between the state and national government is a prime example. The Constitution provides a constitutional rule of decision for allocating some matters to the states or to federal government. For example, states are preempted from acting in respect of many matters related to foreign affairs. Similarly, the Constitution by negative inference reserves most matters related to intrastate commerce to the states. As a practical matter, however, beginning with John Marshall's Chief Justiceship there has been a tendency to construe the Constitution's grants of Federal power expansively. Since the middle of the last century, expansive interpretations of the Interstate Commerce Clause have vested immense legislative authority in the Congress. When the Congress exercises this authority, state authority is automatically overridden or ousted. The result is that most allocation decisions have become political questions left to the Congress.

To say that in most cases Congress has the final decision on allocating power between the state and federal governments is not to say that Congress has unbridled discretion. The Constitution provides some guidance. In addition, the structure of the Constitution significantly limits Congressional discretion. The states are represented in Congress. From the beginning we have always understood that Representatives and Senators look after their respective states' interests. State representation was the motivating assumption undergirding the Grand Compromise at the Philadelphia Convention.

To classify issues as political questions left to Congress's legislative discretion is not to abandon principle. In addition to the Constitution's substantive and structural constraints, Congress is constrained by longstanding unwritten traditions or principles. These principles are powerful and well understood. Although they are not enshrined in the Constitution's words, they have a status not unlike the British

Our unwritten constitution. The British have an unwritten Constitution with Parliament as its ultimate expositor. Parliament, however, does not have unbridled discretion. Parliament is bound by unwritten constitutional principles. Similarly, on its face the United States Constitution seems to vest Congress with virtually unreviewable authority over the allocation of powers between state and federal governments. Nevertheless, in exercising its power of allocation, Congress is constrained by unwritten principles developed over the course of two centuries. One such rule is that by and large matters of commercial law, tort law, and property law are left to the states. Congress does not enact laws in these areas unless a significant federal interest requires that the states' traditional authority be ousted. Similarly, another of our ancient unwritten principles of Federalism allocates family law matters to the respective states' control.

I do not mean to say that these unwritten principles allocating certain fields of human activity primarily to state regulation are bright line rules. They are not. Rather they take the familiar form of a general rule that may be varied where reasonable. Courts frequently operate under such principles. For example a well known statute vests the federal courts with supplemental jurisdiction but gives the courts discretion to decline to exercise this power when appropriate.\(^4\)\(^8\) In exercising their discretion, federal judges are guided by their understanding of and feel for the proper allocation of judicial power between state and federal courts. Similarly, Congress is guided by its understanding of and feel for the proper allocation of legislative power between state and federal governments.

Our tradition of leaving matters related to the family to state law is especially strong. Unless there is some powerful reason to supplement or to override state control over family matters, the Federal government almost never intrudes in this arena. Perhaps the best known example of a federal intrusion into family law matters is \textit{Loving v. Virginia}, in which federal law significantly restricted state sovereignty over the definition of marriage.\(^4\)\(^9\) \textit{Loving}, however, is clearly \textit{sui generis} and arose from a bloody Civil War and a series of Constitutional Amendments designed to abrogate state sovereignty in respect of newly created citizens. \textit{Loving} is the exception that makes the rule.

Musgrave I flagrantly violates the strong unwritten tradition that entrusts family matters to state rather than national control. The


\(^{49}\) 388 U.S. 1 (1967).
proposal's sponsors recognized this problem when they replaced it with Musgrave II.\footnote{See supra notes 9-10 and accompanying text.} Nevertheless, serious problems remain.

Does the first sentence of Musgrave II create a substantive constitutional rule of decision? If so, the proposal is doubly problematic. It transfers lawmaking authority from the states to the national government and as a practical matter vests the Supreme Court rather than Congress with a virtually unreviewable discretion to flesh out the barebones of the proposed constitutional rule. This allocation of legislative jurisdiction over family law makes no sense.

The second sentence of Musgrave II is more bemusing than problematic. Why dictate to individual states what they may and may not say about marriages in their constitutions? The apparent and only plausible explanation for this bemusing quirk is an intense distrust of state judges. Musgrave II is intended to bar state supreme courts from construing their state constitutions to require same-sex marriages. Rather than dictate to individual states what they may or may not provide in their constitutions, why not leave the issue to the individual states? If a particular state supreme court errs in construing its constitution, the state may correct the error through a constitutional amendment. This dynamic process of constitutional lawmaking has already occurred in Hawaii and Alaska and is occurring at present in Massachusetts. Then there is the disparate treatment of state and territorial judges. Surely the absence of any reference to territorial constitutions is a mere drafting oversight.

The distrust of state judges is also evident in the Federalism Proposal. The Proposal's ostensible purpose is simply to restate the existing state of affairs that leaves family matters to state regulation, but the proposal also seems to bar state judges from construing state laws that define marriage. Moreover, the quixotic notion of barring judges from construing laws is the professed purpose of the proposal's drafter. If this naive notion is taken seriously, mischievous and even bizarre results will ensue.

The current proposals to amend the Constitution are fundamentally flawed by the proponents' palpable mistrust of state institutions. Their proposals in varying degrees would override local lawmakers by imposing a uniform federal rule. There can be no general constitutional objection to imposing a national solution to specific problems that confront the nation. The original Constitution entrusted the federal government with power to override local interests in respect of a number of topics. Similarly, the post-Civil War amendments to the Constitution limited state sovereignty by imposing general federal re-
quirements of due process and equal protection upon state actors. But why rush to judgment? In the past virtually all constitutional amendments since the Bill of Rights have been directed at very real national problems— not mere possibilities that probably will never come to pass.

Ultimately I agree with my friend Scott Gerber: "[d]on't abuse a rare process." We should wait until the Supreme Court of the United States—not state supreme courts—rules that same-sex marriages are required by the Fourteenth Amendment. Then a constitutional amendment will be ripe for consideration. This is precisely the approach that Hawaii, Alaska, and now Massachusetts have pursued.

51. The only exception is U.S. Const. amend. XXVII, which was originally proposed in the 1790s and finally ratified in 1992.
APPENDIX A: MUSGRAVE I

House Joint Resolution 56

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

APPENDIX B: MUSGRAVE II

Senate Joint Resolution 30

"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."

APPENDIX C: FEDERALISM AMENDMENT

Senator Hatch's Amendment55

"Civil marriage shall be defined in each state by the legislature or the citizens thereof. Nothing in this Constitution shall be construed to require that marriage or its benefits be extended to any union other than that of a man and a woman."

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