


6-1-2005

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WRITING COMPETITION 2004-2005

CHRISTINA OKON

*Congress Moves to Suspend Judicial Review to Protect the Unconstitutional
Defense of Marriage Act*

CONGRESS MOVES TO SUSPEND FEDERAL JUDICIAL REVIEW TO PROTECT THE UNCONSTITUTIONAL DEFENSE OF MARRIAGE ACT

Striving to preserve the institution of marriage for heterosexual couples, Congress passed the Defense of Marriage Act (DOMA)¹ in 1996. DOMA was billed as promoting state autonomy by letting the states decide whether same-sex couples might legally wed, and whether or not to validate one another's decisions regarding same-sex marriage. Not convinced that the states could correctly decide so vital an issue, Congress launched the Federal Marriage Amendment² in May 2003, defining marriage as restricted to a legal union between one man and one woman across the nation. However, fearing the light of scrutiny by what they call the activist judiciary, Republicans introduced the Marriage Protection Act (hereafter MPA)³ on October 16, 2003, to prohibit any federal court from reviewing cases arising under DOMA. On July 22, 2004, the MPA passed the House by a substantial majority. At the end of 2004, the MPA remained lodged in the Senate Committee on Judiciary. On March 30, 2005, it was introduced to the House yet once more, signed by 59 additional co-sponsors, all but two of them Republican. This article argues that DOMA and the MPA are unauthorized exercises of Congressional power and that they strip a disfavored class of citizens of constitutionally protected rights. Part I of this article will review DOMA, while Part II considers and refutes Congressional arguments used in support of the MPA.

PART I – THE DEFENSE OF MARRIAGE ACT

DOMA, codified at 28 U.S.C. §1738C, provides that states need not accord one another full faith and credit with regard to same-sex marriage; thus, a same-sex couple that traveled to and married in a state that permits same-sex marriage cannot force its home state to recognize that marriage or any orders entered pursuant to the marriage. Additionally, DOMA federalizes the definition of marriage, restricting marriage nationwide to “a legal union between one man and one woman as husband and wife.”

A. A Look at Congress' Purported Reasons for Passing the DOMA

Congress listed four areas that DOMA was intended to serve: (1) to defend and nurture the institution of traditional, heterosexual marriage; (2) defend traditional notions of morality; (3) protect state sovereignty and democratic self-governance; and (4) to preserve scarce economic resources.⁴ A look at the proffered reasons shows them to be without substance.

(1) Defending and Nurturing Heterosexual Marriage.

Representative Lipinski asserted that “allowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation.”⁵ In response to statements like those of Lipinski, Jonah M. Crane noted

"[T]hose who fear that the institution will crumble fail to point to any concrete way in which the extension of this important social institution to same-sex couples will affect marriages between men and women. Will any husband love his wife less, or any wife her husband? Will they be less committed? Will they value their marriage vows less? These questions," says Crane, "must now be answered by gay marriage opponents and must be answered at once under both a spotlight and a magnifying glass."⁶

(2) Defending Traditional Notions of Morality.

Addressing the subject of morality as a reason for DOMA, a recent Harvard Law Review article noted "[S]uch a justification clearly cannot stand after Lawrence [v. Texas], which rejected moral disapproval of homosexuality as a legitimate government interest."⁷ A look at a few opinions voiced by individual Congresspersons reveals that the phrase "traditional notions of morality" is simply homophobic animosity dressed up in pleasanter words.

Former House Judiciary Committee Chairman Henry Hyde didn't mince words when he asserted that most people disapprove of homosexual conduct and that they express their disapproval of homosexual conduct through the law, as "it is the only way possible to express this disapprobation."⁸ Tennessee's Representative Duncan, quoting Senator Daniel Patrick Moynihan's opinion some years earlier, noted "we have been defining deviancy down, accepting as part of life what we once found repugnant."⁹

Representative Coburn opined "I come from a district in Oklahoma [where people have] very profound beliefs that homosexuality is wrong.... They believe homosexuality is immoral, that it is based on perversion; that it is based on lust."¹⁰ Representative Barr declared that "the flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit."¹¹ Barr also opined that same-sex marriage "is an issue that is being used by the homosexual extremists to divide America. It is part of a deliberate, coldly calculated power move to confront the basic social institutions on which our country ... was founded..."¹²

Representative Smith stated that "[O]ur law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based."¹³ Representative Dorman predicted that Congress would be discussing the legalization of pedophilia within 3 to 4 years as a result of current trends,¹⁴ while Representative Packard warned that "civilizations that have allowed the traditional bonds of family to be weakened ... have not survived."¹⁵

Senator Orin Hatch asserted that he didn't "know anything more important to morality," or to the "overall well-being of our citizens than the preservation of the traditional marriage definition that has been the rule for 5,000 – plus years in this world; that is, that marriage should be between a man and a woman."¹⁶ Senator Hatch claims he's not motivated by bias against homosexuals. Indeed, Senator Hatch proudly asserted that he led the fight in three AIDS bills as evidence of his lack of bias.¹⁷

(3) Protecting State Sovereignty and Democratic Self-governance.

The argument that DOMA protects state sovereignty dissolves by taking a simple hypothetical. Assume Donna and Sarah married in Massachusetts. Seven years later, they separate or divorce. Donna moves to Florida, leaving the parties' children with Sarah, the birth mother. The children visit Donna each vacation and holiday. Suppose that Donna has a court-ordered support obligation for the children and Sarah and that Florida has laws refusing to recognize same-sex marriages. Would Florida enforce a support order against Donna? Suppose also that the parties had an order dividing the community property but one of the parties fails to comply with the order. What recourse would the other party have? What if the children are involved in an accident while visiting Donna? Could Donna participate in medical care decisions or visit them in a hospital intensive care unit or would she be denied admission because she would not be considered their parent under Florida law? What rights and benefits would the children have under Florida inheritance laws should Donna die intestate? Obviously, far from protecting Massachusetts' sovereignty, since its acts and judgments regarding same-sex marriage don't need to be honored in other states, Massachusetts has just been devalued as a sovereign power because of the DOMA.

(4) Preserving Scarce Economic Resources.

Given the multitude of federal and state programs designed to benefit marital partners, it is true that giving same-sex couples equal rights and benefits will shift allocation of federal and state resources to a degree. However, even this rationale fails to pass muster. Don't lesbians and homosexuals pay property, gasoline and income taxes just as their heterosexual counterparts do? That being the case, why should same-sex couples be denied access to the benefits accorded to heterosexual couples?

The Supreme Court has repeatedly held disparate treatment of disfavored groups impermissible. For example, in *Cleburne v. Cleburne Living Center*¹⁸ the Court held that a community's fears of mentally retarded citizens was not a valid justification to apply zoning regulations in a discriminatory manner. Likewise, in *United States Department of Agriculture v. Moreno*¹⁹ the government was precluded from denying food stamp benefits based solely on the fact that the household receiving them was unconventional, having been labeled by the government as a hippie commune. Denying marital privileges to same-sex couples likewise clearly amounts to disparate treatment of a disfavored class.

While the above-stated reasons provide the official, and rather transparent, rationale for DOMA, its proponents also favor the following arguments.

B. Additional Congressional Arguments Raised in Support of DOMA

Additional arguments raised by DOMA's sponsors include: 1) the dictionary defines marriage as being between one man and one woman; 2) traditional marriage has been the rule for more than 5,000 years; 3) procreation is the primary reason for

marriage; and 4) homosexuality is unnatural. A look at these favorites reveals that like DOMA itself, they can't withstand the light of scrutiny.

(1) The dictionary defines marriage as a legal union between one man and one woman.

Alec Walen, Graduate Fellow in the Program in Ethics and Professions, Harvard University responded to some of the arguments raised in support of DOMA,²⁰ including this one. Walen noted that language changes, as do dictionary definitions.²¹ Aside from the changes seen in dictionary definitions, marriage itself has changed through the ages. Today's marital partners come into the union on a more equal footing. It should also go without saying that dictionary definitions should not be elevated to legal status.

(2) Traditional Marriage Has Been The Rule For 5,000 Plus Years.

Senators Thurmond, Gramm and Hatch favor this argument.²² In response, Walen noted that King Solomon had over 700 wives and that Jacob, the son of Isaac, married both Leah and Rachel, having children through them as well as with their handmaids.²³ While Congress would undoubtedly disfavor these domestic arrangements, there are no biblical accounts of Jehovah destroying King Solomon's 699 extras in a fit of moral righteousness. One might also wonder what particular "tradition" Congress had in mind since traditions have changed markedly even since Blackstone's definition offered 250 years ago when he declared "the very being or legal existence of the woman is suspended during marriage."²⁴

(3) The Primary Reason For Marriage Is Procreation.

Some of DOMA's proponents, including Senator Byrd, declare that giving life to children is the primary purpose for marriage.²⁵ The argument goes that since gays and lesbians presumptively can't have children, at least not without the aid of a third party such as a sperm or egg donor, there is no point to them marrying. This view debases marriage, while discounting other valid reasons people marry, including the desire for lifelong commitment, companionship, to pool resources, and to share mutual goals. As noted by the Supreme Court in *Turner v. Safley*,²⁶ even prisoners whose ability to procreate is a literal impossibility have a fundamental right to marry during their incarceration.

The Vermont Supreme court noted that furthering the link between procreation and child rearing was substantially underinclusive since many opposite-sex couples marry for reasons unrelated to procreation; some because they are unable to have children, others because they choose not to.²⁷ Additionally, this position disregards the fact that 34.3 percent of female and 22.3 percent of male same-sex families have children,²⁸ either through artificial insemination, adoption, or from prior marriages. As noted by Summer L. Nastich, "studies confirm that children raised by gay and lesbian individuals are just as healthy and happy as children raised by heterosexual individuals."²⁹

More important, however, the world is not suffering a dearth in the birth rate. With the world's population at a staggering 6.25 billion people, natural resources are rapidly vanishing, leading to disastrous living conditions globally.³⁰ If anything, world governments should be encouraging and rewarding restraints on procreation, rather than arguing about the best domestic setting for increasing our numbers.

(4) Homosexuality is Unnatural

Homosexuality has presumably existed since the dawn of time, and as any farmer can attest, same-sex animals often engage in sexual conduct with one another. Having always existed, it must perforce be part of nature, even while being numerically less prevalent than heterosexuality. Of interest in this regard were studies conducted by Harry and Margaret Harlow at the University of Wisconsin decades ago. The studies revealed that primates raised in isolation did not know what to do with their sexual urges when brought together with other members of their species. The monkeys possessed no innate knowledge that females should exclusively couple with males.³¹ Indeed, the Harlows noted the monkeys "exhibited almost every kind of behavior except one – heterosexual behavior, which was conspicuous by its absence."³² While primates and humans are not identical, it is rather evocative to consider that heterosexual behavior may be learned, rather than natural, behavior.

The argument that homosexuality is unnatural echoes earlier Congressional rhetoric espoused in thwarting interracial marriage for nearly a century. In 1863, Wisconsin Senator Doolittle declared "intermarriages between the races are forbidden as criminal. Why forbidden? Simply because natural instinct revolts at it as wrong."³³

History reveals that America went through a period of intense antagonism towards interracial marriages, with thirty-eight states enacting miscegenation statutes,³⁴ almost the same number of states that have passed mini-DOMAs. In upholding the miscegenation statute, the court in *Scott v. Georgia*³⁵ declared "amalgamation of the races...is...unnatural," and bound to lead to the creation of "generally sickly and effeminate offspring." James Trosino noted that during those decades "white supremacist ideology infected the national political process. Congressmen invoked "scientific" proof of Negro inferiority during debate over civil rights laws."³⁶

The furor against the mixing of the races went beyond interracial marriages. Following the Court's decision in *Brown v. Board of Education*,³⁷ striking down the "separate but equal" holding of *Plessy v. Ferguson*,³⁸ more than one hundred members of Congress from eleven states signed a tract declaring the decision "a clear abuse of judicial power" and commending the states to "resist enforced integration by any means."³⁹

In 1963, the Supreme Court declared miscegenation laws unconstitutional, holding in *Loving v. Virginia*⁴⁰ that the fundamental right to marry includes being able to decide whether or not to marry, as well as the choice of marital partner. While interracial marriages are by no means the norm today, interracial spouses need no longer fear the

legal reprisals of earlier years. It is also questionable whether the current level of acceptance of interracial marriage would have manifested without the Supreme Court decision in *Loving*. Thus it is all the more vital that federal jurisdiction be preserved to strike down unconstitutional laws such as DOMA and the MPA.

C. Changing Social Trends Support Same-Sex Marriage

At the time DOMA passed, no state had legalized same-sex marriage. However, Congress was spurred into action by *Baehr v. Lewin*,⁴¹ the first case to challenge the denial of a marriage license to same-sex couples. The *Baehr* court held the denial of the marriage permit to be an unconstitutional infringement of the couples' equal protection rights and ordered the permits to be issued, while also giving the legislature time to respond to the decision. To prevent same-sex marriage from becoming a reality, the Hawaiian legislature rapidly passed laws precluding same-sex partners from being able to marry. Alaska's legislature soon followed with a similar ballot to prevent the court's holding in *Brause v. Bureau of Vital Statistics*⁴² from making same-sex marriage a reality in Alaska.

1. Acceptance of same-sex marriage abroad

Congress was undoubtedly also aware of increasing acceptance of homosexuals and lesbians, both in the United States and abroad. Mark E. Wojcik's⁴³ review of same-sex marriage legislation in other countries noted that Sweden gave limited recognition to same-sex couples by 1987. Denmark debated the issue for twenty years, passing partnership legislation in 1989, while Norway followed with its own registered partner legislation in 1993. Hungary amended its Common Law Marriage Act in 1996 to extend coverage to same-sex couples. France enacted the Pacte Civil de Solidarit  in 1999. The act is more restrictive than registered partnership acts of other countries but more liberal than registered partnership laws in the United States. Wojcik notes that Germany enacted "The Law on Ending Discrimination Against Same-Sex Communities" in 2001, providing limited rights to same-sex partners.

Wojcik reported that the Netherlands became the first country to sanction same-sex marriage, giving full equivalent rights and benefits to same-sex spouses as those traditionally enjoyed by heterosexual couples. Belgium soon followed, although it did not accord gay and lesbian couples the right to adopt children. More recently, in *Halpern v. Canada*,⁴⁴ the Ontario Court of Appeals upheld the right of same-sex couples to marry. The Canadian government did not appeal the decision; instead, it enacted enabling legislation. The trend internationally clearly favors marital rights for same-sex couples.

2. Acceptance of same-sex marriage in America

Last fall, the Massachusetts Supreme Court handed down *Goodridge v. Dept. of Public Health*,⁴⁵ declaring that the statute that denied same-sex couples the right to get a marriage license was unconstitutional under the due process and equal protection clauses of the Massachusetts' Constitution. The court noted that the Constitution "affirms the

dignity and equality of all individuals...forbidding the creation of second-class citizens.” The Goodridge holding led to legalization of same-sex marriage within that state. Unlike Hawaii and Alaska, the Massachusetts’ legislature did not have time to enact a statute to nullify the court’s decision. Only time will tell whether it will opt to do so. In the interim, more than 3,000 same-sex couples have been married in Massachusetts.⁴⁶

As a result of the Vermont Supreme Court’s decision in *Baker v. State*,⁴⁷ holding the denial of benefits to same-sex couples unconstitutional, the state enacted a civil union statute,⁴⁸ essentially reaffirming the limitation of marriage to opposite-sex couples while granting all of the benefits of marriage to same-sex couples.

The prevailing current trend clearly favors marriage rights for same-sex couples. It is simply a matter of time until Congress becomes more enlightened. Hopefully, the United States Constitution will not have been completely dismantled by the short-sighted majority before that day arrives.

D. *Asserted Congressional Authority for Passing DOMA*

Congress contends that its authority for DOMA comes from Article IV, Section 1 of the Constitution.⁴⁹ This section provides “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.”

A plain meaning reading of this clause fails to reveal a grant of authority allowing Congress to urge the suspension of the full faith and credit clause among the states. Instead, Congress was accorded authority to “prescribe” specifics as to how one state might validate another’s acts, records and proceedings. Clearly, Congress subverted and exceeded the Constitution’s grant of authority when it transformed the phrase “prescribe the Manner in which such Acts, Records and Proceedings shall be proved” to include the diametrical opposite authority. As Congress would have us believe, Article IV, Section 1 actually provides “Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be approved or disapproved and the Effect thereof.”

The canons of statutory construction require that words within statutes be given their ordinary, common meaning, unless they are technical terms of art. Statutes should also be construed so as to avoid unconstitutional results.⁵⁰ In addition, various provisions of a statute should be construed so as to be consistent with each other so that no part is rendered superfluous.⁵¹ In other words, a statute should be read so as to avoid internal inconsistencies. Since the Constitution mandates Full Faith and Credit **shall be given**, any interpretation by Congress that converts the mandate to **may either be given or withheld**, acts to nullify a clause that was intended by the framers to unite the States. Congress has no authority to abrogate Constitutional mandates, absent an amendment. While it is true that Congress drafted and circulated its Federal Marriage Amendment, the Amendment was not ratified. That being the case, Congress should not be permitted to assign tortured meanings to ordinary words.

E. Criticism of DOMA

Scholars have been outspoken in their criticism of DOMA. Professor Laurence Tribe of Harvard Law School, in a letter submitted for the record in Senate proceedings on June 6, 1996, stated: "My conclusion is unequivocal. Congress possess no power under any provision of the Constitution to legislate as it does in DOMA any such categorical exemption from the Full Faith and Credit Clause of Article IV."⁵² The ACLU in a background briefing in February of 1996 said "DOMA is bad constitutional law; an unmistakable violation of the Constitution."⁵³

Professor Stanley E. Cox noted that "DOMA is unconstitutional, not primarily because it authorizes ignoring final judgments from solely interested states, although it is clearly suspect on these grounds. The statute is more fundamentally unconstitutional because it replaces state sovereign lawmaking power with congressional back door attempts to legislate substantive rules."⁵⁴

Another scholar noted that DOMA violates equal protection principles because it is motivated by animus towards homosexuals as a class and in that it makes same-sex couples ineligible for a wide variety of legal protections and governmental benefits available to opposite-sex couples without any rational basis for doing so.⁵⁵

Kevin J. Worthen, Professor of Law and Associate Dean, J. Reuben Clark Law School, Brigham Young University, stated that "a federal statute defining marriage as including or excluding same-sex couples for all purposes nationwide would clearly be at odds with the limited national legislative power feature of the federal component of "our" system of government and, for that reason, would likely be held unconstitutional."⁵⁶

Maggie Gallagher, President of the Institute for Marriage and Public Policy in Washington, D.C. noted that "the legal benefits flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the extreme logical disjunction between the classification and the stated purpose of the law – protecting children and 'furthering the link between procreation and child rearing' – the exclusion falls substantially short of this standard."⁵⁷

There are, of course, scholars supporting DOMA as well. Dwight G. Duncan, Associate Professor of constitutional law at Southern New England School of Law has been particularly vocal, having supplied *amicus* briefs in several of the leading cases that have addressed same-sex marriage this decade. Duncan warns that "recent developments in family law, both in the United States and abroad necessitate a national strategy to preserve marriage's central role in the creation and formation of our posterity."⁵⁸ The primary thrust of Duncan's argument is that "marriage still matters because children still matter," and that "common sense says that children are best raised by both a mother and a father." While relying on "common sense," Professor Duncan appears to be indifferent to or unaware of the studies like those of Perrin and Kulin,⁵⁹ which found no evidence

that the children of gay and lesbian parents experience any particular difficulties as a result of their parents' sexual orientation.

F. *Marriage as a Constitutional Right*

Notably, the proponents for and against DOMA can't agree on what marriage actually is: a constitutional right or a heterosexual institution. Many of those who can't understand what the fuss is about might agree with May West who was heard to quip, "Marriage is a great institution, but I'm not ready for an institution."⁶⁰

In *Loving v. Virginia*,⁶¹ the Supreme Court said "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." *Loving* upheld the right to marry, as well as the choice of marriage partner, as a vital right, holding that the Due Process Clause of the Fourteenth Amendment "requires that the freedom of choice to marry not be restricted by invidious racial discriminations." More recently, in *Lawrence v. Texas*,⁶² striking down a Texas law against sodomy, the Supreme Court noted that "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," and that "when sexuality finds over expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons to make this choice."

While *Lawrence* did not reach the decision that the government must give formal recognition to same-sex marriage, the opinion foreshadows approval, noting "[T]he *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁶³ Indeed, dissenting Justice Scalia, noting this foreshadowing, expressed his disapproval by stating "[T]oday's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."⁶⁴

Given the premise that the right to marry entails fundamental liberty interests protected by the Constitution, DOMA substantially destroys those rights for same-sex couples. As such, in addition to the fact that Congress was not authorized to sanction and encourage suspension of the Full Faith and Credit Clause, the DOMA should be struck down by the Supreme Court as violating important Constitutional rights.

It is, of course, precisely this fear, coupled with the belief that federal judges are out of touch with American values, which has prompted Congress to draft the Marriage Protection Act precluding federal judicial review. In his remarks on July 22, 2004, in support of the Marriage Protection Act, Congressman Pearce (R. New Mexico) stated "I rise to support this rule, because this debate must be removed from the courts who (sic) are filled with unelected, lifetime judges..." However, shielding the DOMA from judicial review through passage of the MPA, threatens the very structure of our system of

government since it negates the horizontal checks and balances so carefully wrought by the founders between the three branches of the federal government, as well as the vertical checks and balances between the federal and state governments. Additionally, such shielding impermissibly excludes a disfavored minority from the courthouse, thereby violating due process, and equal protection as well as the privileges and immunities clauses. A look at the Marriage Protection Act and a discussion of why it is unconstitutional follows.

PART II – THE MARRIAGE PROTECTION ACT

Launched in 2003, it was known as “The Marriage Protection Act of 2004” last year and is currently known as the “Marriage Protection Act of 2005,” (hereafter the MPA). The MPA is legislation that seeks to amend title 28, United States Code, to prohibit Federal court jurisdiction over questions under the DOMA. Without the right of judicial review, marriage, that bastion of heterosexual relationships, is expected to remain sacrosanct. Specifically, the MPA provides:

No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section.

Congress asserts that Article III of the Constitution provides a grant of authority⁶⁵ for passage of the MPA, and that the Federal Judiciary Act of 1789 provides ample precedent legitimizing the MPA.⁶⁶ While the Constitution gave Congress substantial discretion to fashion the federal judicial landscape, nowhere is Congress authorized to violate individual Constitutional rights as they have evolved since 1789. A brief review of the specific grants of Constitutional authority follows, together with examples of how Congress has previously applied its grant of authority to restrict judicial review.

A. The Constitutional Provisions Establishing The Federal Courts

Initially, it should be noted that the Constitution itself was rather vague with respect to the judicial branch of the federal government as can be seen in the brevity of Article III. While Article I of the Constitution, addressed to the creation and powers of Congress, contains ten sections, some of which have as many as eighteen subsections, Article III pertaining to the federal judiciary contains merely three sections, none containing more than three subsections. Thus, while the Constitution mandated the creation of one Supreme Court and such inferior courts as Congress may create from time to time, it was silent as to how many judges would sit on the Supreme Court, or how many inferior federal courts might be appropriate. The pertinent provisions of Article III follow.

Article III, Section 1 provides in part: “The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.”

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Article III, Section 1 provides in part: “The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.”

Article III, Section 2(1) provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."

Article III, Section 2(2) provides that some of the Supreme Court jurisdiction shall be original, while the balance is to be appellate. Thus "[I]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

With respect to the Supreme Court's jurisdiction over "all cases ... arising under this Constitution" and under "the Laws of the United States," since the Constitution made this jurisdiction appellate, it follows that unless Congress created inferior courts, the Constitutional claims would necessarily arise from state courts. Such inferior federal courts were in fact established by the Judiciary Act of 1789.

B. *The Judiciary Act of 1789*

Enacted by the new Congress as its first piece of business for the new Republic, the Judiciary Act of 1789, 1 Stat. 85, known officially as "An Act to Establish the Judicial Courts of the United States," (hereafter "the Act,") set up the initial parameters of the federal courts. Thus the Act set forth the number of Supreme Court justices, the number and location of inferior federal courts, and the pay of federal judges, among other matters. The Act also restricted appellate jurisdiction of Constitutional claims, providing at Section 25, that federal courts could only take cases by writ of review in which the state court's decision was adverse as to the validity of a federal statute or treaty. In addition, the Act attempted to alter the Supreme Court's jurisdiction from that set forth in the Constitution, giving the Supreme Court original jurisdiction in matters of mandamus. However, within a couple of years of the Act's passage, in *Marbury v. Madison*,⁶⁷ Justice Marshall declared Section 13 of the Act unconstitutional. *Marbury* has been cited since 1803 in support of the right of judicial review of legislative acts.

C. *Marbury v. Madison Supports Judicial Review of Legislative Acts*

By far one of the most famous cases in American jurisprudence, *Marbury v. Madison* involved the right of petitioner Marbury to his commission as justice of the peace. In the waning hours of his administration, Federalist President John Adams had

created numerous judicial positions, filling the posts with Federalists. Through the Circuit Court Act of 1801, Adams created sixteen federal circuit court judgeships, while the Organic Act of the District of Columbia created forty-two judgeships, including Marbury's Justice of the Peace position. Adams had implemented this court-packing plan to safeguard the new Republic from incoming Thomas Jefferson, and his anti-federalist cohorts.⁶⁸

Marbury's commission had been signed by President Adams and sealed by John Marshall on the last day of the Adams' administration, and shortly before Marshall's new position as Justice of the Supreme Court commenced.⁶⁹ However, due to the haste of the proceedings at the eleventh hour of the Adams' administration, Marbury failed to receive his commission before Jefferson took office. Marbury filed suit in the Supreme Court for issuance of a writ of mandamus, seeking to force the new Secretary of State, James Madison, to deliver the commission.

Incoming Republican President Thomas Jefferson, the founding father most opposed to a strong judiciary, had not looked with favor on John Adams' parting action, a fact of which new Justice Marshall was keenly aware. Indeed, President Jefferson and the incoming Republicans promptly caused the Circuit Court Act of 1801 to be repealed. This took place while Marbury's case was pending in the Supreme Court. In addition, the new administration caused the June and December terms of the Court to be abolished, an unmistakable and mounting sign of Republican hostility towards the Court.⁷⁰

In rendering his decision, Justice Marshall determined that Marbury had a right to the commission, and that he also had a remedy. But apparently the remedy chosen by Marbury, based on Section 13 of the Federal Judiciary Act of 1789, turned out to be incorrect. Justice Marshall determined that Section 13, purporting to bestow original jurisdiction in matters of writs of mandamus on the Supreme Court was unconstitutional. Since Congress had no authority to bestow original jurisdiction on the Supreme Court if it was not granted in the constitution. Since the case also hadn't arisen from a lower court, Justice Marshall found that the Supreme Court lacked subject matter jurisdiction. Justice Marshall noted "the constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."⁷¹ With respect to the Court's right to review legislative act, Justice Marshall also declared:

"[I]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operations of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the

legislature, the constitution, and not the ordinary act, must govern the case to which they both apply.”

Because *Marbury* declared an act of Congress unconstitutional, *Marbury* is most often cited in support of the Court’s right of judicial review of legislative acts. However, while Justice Marshall’s decision was ingenious, it was not actually original since it merely echoes the position voiced by Hamilton in one or more of the *Federalist Papers* that had been publicly circulated to garner approval for the proposed government.

D. The Intent of the Framers Supports Judicial Review

When considering the constitutionality of acts of Congress, it is customary to look to the intent of the framers with regards to the underlying conflict. The subject of the right and authority of the federal courts to review acts of Congress was addressed by Alexander Hamilton in the *Federalist No. 78*,⁷² reflecting the following observations:

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare acts of another void, must necessarily be superior to the one whose acts are declared [void].

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable difference between the two, that which has the superior obligation and validity ought of course to be preferred; in other words, the constitution

ought to be preferred to the statute, the intention of the people to the intention of their agents.

It is clear from the foregoing excerpt that Hamilton, speaking on behalf of many of his fellow framers, intended the judicial branch to exercise review over acts of Congress and to cause laws found to be repugnant to the constitution to be set aside. While Hamilton also recognized the involvement of the legislature, he at no time stated that the legislature could either completely destroy judicial review or suspend established constitutional rights. In Federalist No. 81, Hamilton stated:

To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction [that] shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

While this section of Federalist No. 81 appears to provide support for Congress' position that it has the authority vested in it to eliminate Supreme Court review of particular subjects, it flies in the face of Hamilton's clear explanation that laws that are made in contravention of the constitution cannot stand. It would have been unthinkable to the founders that Congress could, by use of Hamilton's suggestion in Federalist No. 81, enact unconstitutional laws and thereafter also shield such laws from judicial scrutiny.

At the time Hamilton published his views on the federal judiciary, it would have been scarcely conceivable to him and his fellow founders that the Supreme Court would have sitting justices who were female or African-American within less than two hundred years. Yet, because of the way the Republic was set up, allowing for flexibility and the growth of individual rights and liberties throughout the decades, the face of government has changed. The Judiciary Act that was passed in 1875 marked a crucial expansion of the Court's jurisdiction.

E. The Judiciary Act of 1875 Extended Full Judicial Power

President Adams' administration had attempted to expand the scope of judicial review, giving the Supreme Court the full jurisdiction accorded by the Constitution in passing the Judiciary Act of 1801. However, as noted above, Jefferson's administration swiftly caused the repeal of laws expanding the scope and size of the judiciary. It wasn't until passage of the Judiciary Act of 1875⁷³ that jurisdiction of the federal courts was fully extended to embrace "all rights arising under the Constitution." This act was seen as a "turning point in the history of the jurisdiction of the federal courts, for they became free to accept jurisdiction of any claim or any right arising under a federal statute to determine if they had jurisdiction."⁷⁴

However, based on the Article III provisions noted above, together with the control exercised by Congress through the Judiciary Act of 1789 for eighty-six years, Representative Hostettler (R. Ind.), author of the MPA, believes Congress can also

suspend judicial review of any case it pleases. “[S]o the United States Constitution is very clear,” Hostettler declared. “Congress has the authority to create the inferior Federal courts. Congress has the authority to make exceptions and regulations with regard to all of the appellate cases that come before the Supreme Court. Anyone that actually reads the Constitution and has a basic understanding of grammar and the English language in general can find that in fact the Constitution grants Congress authority.”⁷⁵

Representative Sensenbrenner asserted that “the most cursory review of American history shows that...the very first Judiciary Act of 1789 denied the Federal courts original jurisdiction and the Supreme Court appellate jurisdiction to review the constitutionality of literally thousands of Federal statutes under a jurisdictional regime that governed for roughly a century.”⁷⁶

Representatives Hostettler and Sensenbrenner and their cohorts clearly confuse Constitutional authority to establish inferior federal courts with authority to reverse or destroy more than two hundred years of hard-won progress to secure the blessings of life, liberty and the pursuit of happiness to all American citizens, not just the majority who happen to be in power at the moment. A review of prior occasions on which Congress has exercised its authority to restrict federal judicial review follows.

F. Historical Measures by Congress to Restrict Federal Judicial Review

In 1868, only three years following the end of the civil war, Congress acted to prevent the Supreme Court from deciding what was deemed an unpopular political case, *Ex parte McCordle*.⁷⁷ McCordle, a newspaper editor, was held in custody by military authority for trial due to publication of articles held to be incendiary. McCordle applied for writ of habeas corpus under the Act of Feb. 5, 1867, authorizing the grant of such writs. The petition was denied and McCordle was returned to prison. As allowed under the Act of 1867, he then appealed to the United States Supreme Court. After the Court had listened to oral arguments but before a decision had been rendered, Congress, over the President’s veto, passed the Act of March 27, 1868, 15 Stat. 44, repealing the right of appeal to the Supreme Court. In this manner, McCordle’s appeal became moot.⁷⁸ It is clear that this particular Congressional act was intended to affect a single litigant who was deemed to sow political dissention following the feverish days of the civil war and the social unrest created in its aftermath.

Another early instance of Congressional intervention, again responding to the national unrest shortly after civil war, was the Act of 1870, passed in response to the Supreme Court’s decisions in *U.S. v. Anderson*,⁷⁹ and *U.S. v. Padelford*,⁸⁰ pertaining to the seizure of property belonging to rebels of the Confederacy. The Act declared it to be government policy that individuals prove their loyalty irrespective of any executive proclamation, pardon or grant of amnesty in certain claims. The Supreme Court was directed on appeal to dismiss the cases for lack of jurisdiction in “all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claims on any other proof of loyalty than such as is above required or provided.”⁸¹ It is evident from these Congressional acts that the country experienced severely trying times

following the civil war and that the acts were intended to safeguard the very existence of the Republic.

In 1887, twelve years after expanding federal jurisdiction, Congress amended the Act of 1875 to stem the flow of suits being brought before the federal courts.⁸² The jurisdictional amount in diversity cases was increased from \$500 to \$2,000; suits could no longer be brought in districts where the defendant was found, but instead would be restricted to such district where the defendant resided; banks were now considered citizens of the state of incorporation rather than citizens of states in which they were doing business, thereby withdrawing jurisdiction based solely on a bank's location. Jacob Trieber notes "this piece of legislation was considered by many members of the bar as wise in contracting the jurisdiction of the national courts."⁸³

More recently, Congress acted to preserve federal reserves by passing the Portal to Portal Act of 1947,⁸⁴ removing federal court jurisdiction in any case arising under the part of the Fair Labor Standards Act of 1938 that required employers to compensate overtime retroactively. Federal courts had seen 1,913 new actions between July 1, 1946 and January 31, 1947, together claiming over Five Billion Dollars in overtime for work performed prior to the passage of Fair Labor Standards Act (hereafter "FLSA"). At the time the Act was passed, the potential liability of the federal government exceeded One and a-half Billion Dollars.⁸⁵ The Portal to Portal Act essentially exempted all overtime salaries that accrued prior to May 14, 1947 by taking away federal court jurisdiction of such claims. Specifically, the Portal-to-Portal Act provided:

No court of the United States, or any State, Territory, or possession of the United States, or the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards of 1938, as amended, under the Walsh-Healy Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to any activity which was not compensable under subsections a and b of the Section.

Professors Hart and Wechsler note "[I]t was claimed that the Act, in its retroactive operation, destroyed vested rights in violation of the Fifth Amendment. The contention was universally rejected on the merits."⁸⁶

Notwithstanding the Portal-to-Portal Act, the federal courts of appeals and most district courts treated cases under FLSA as open to decision, despite the jurisdictional provisions and the usual separability clause.⁸⁷ Thus the Second Circuit in *Battaglia v. General Motors Corporation*,⁸⁸ noted that "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."⁸⁹ It should also be noted that the Portal-to-Portal Act did not apply in any case where the parties had

specifically contracted for overtime pay. Therefore, the Act did not destroy reasonable expectations of the workers who had signed on when overtime pay was not the norm.

As late as 1950, diversity cases constituted one-third of the federal judicial case load, a fact that led Congress to try and repeal diversity jurisdiction, but without success. In 1958 Congress took additional steps to curb access to the federal courts by declaring that corporations were citizens of the state of incorporation as well as of the states in which they did business, thereby defeating diversity jurisdiction in numerous cases. At the same time, the right to remove worker's compensation cases to federal court was abolished.

G. The MPA Fails the Congruence, Proportionality and Rational Basis Tests

In assessing the validity of an act of Congress, courts consider whether the act is congruent and proportional to the problem allegedly sought to be remedied. Thus, in *City of Boerne v. Flores*,⁹⁰ the Court determined that the Religious Freedom Restoration Act of 1993 was an unauthorized enactment since religious freedom was not suffering such setbacks as to warrant passage of the Act. Although these tests are normally applied to enactments under Clause 5 of the 14th Amendment, it is appropriate to ask what evils Congress was seeking to remedy when it enacted DOMA in the first place. As the introductory paragraphs makes clear, Congress intended to prevent the perceived evil of homosexual and lesbian couples enjoying the varieties of domestic bliss, legal standing, and benefits that come with the social and personal commitment known as marriage. At the time of DOMA's enactment, there was no evidence that same-sex marriage is an evil that destroys the health and welfare of our Republic, or which requires the type of remedy sought to be imposed through the DOMA. The MPA is intended to keep DOMA in place and to prevent the light of judicial scrutiny from reaching it. Like DOMA itself, it was also enacted without evidence that heterosexual marriage is in need of such protection, although listening to the debates on the floor of the House, it appears that by permitting same-sex coupled to wed, heterosexual marriage is doomed.

Justice O'Connor, in her concurrence in *Lawrence v. Texas*,⁹¹ suggested using a heightened scrutiny standard of review, stating "...moral disapproval of this group [homosexuals]' like a bare desire to harm the group, is an interest that is insufficient to satisfy the rational basis review under the Equal Protection Clause. Indeed, we never held that a moral disapproval without any other state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."

While members of Congress did not discuss the rational basis or congruence and proportionality tests, as shown by excerpts of Congressional debate below, members of Congress were keenly aware of the provisions of Article III, as well as the holding in *Marbury v. Madison*. Yet, proponents of the MPA blithely disregard the numerous illegalities posed by DOMA and the MPA, and the fact that both serve to diminish the Constitution and to disrupt the balance of powers between the three branches.

H. *Excerpts of Congressional Debates Concerning the MPA*

Author of the MPA, Hostettler, during discussions in the House Committee on the Judiciary on July 14, 2004, defended DOMA by asserting that Congress had the right to pass DOMA “[S]imply because Article IV, Section 1, of the Constitution gives Congress explicit and exclusive authority to regulate full faith and credit relationships between the States. There is no need for the Federal courts to consider the question about Congress’ authority when Congress’ authority is so clearly expounded in the Constitution.”⁹² Hostettler repeated these words several times during the course of that discussion, as though sheer repetition of this fallacy would convince his listeners of the correctness of his position. But as noted above, unless tortured beyond recognition, the right to prescribe the manner in which full faith and credit shall be accorded between the states is not the right to dictate that full faith and credit may be entirely dispensed with.

When asked whether he had ever seen legislation that entirely precluded judicial review, Hostettler, who is on record as stating that *Marbury v. Madison* was wrongly decided with respect to judicial review,⁹³ responded that the state courts could decide matters of DOMA. This led, of course, to the next point; i.e., what happens when different states render different decisions on the constitutionality of DOMA. Without Supreme Court review of conflicting state decisions, there would be a patchwork quilt of decisions and no way to have those decisions unified. This prospect did not trouble Hostettler or his right-wing cohorts. Of course, Hostettler was the same member of Congress who on July 22, 2004, asserted “...the thing you need to understand about constitutional law is it has virtually nothing to do with the Constitution.”⁹⁴

Representative John Conyers, Jr., (D. Mich.), commenting on the MPA, observed that “[A]t first glance, its proponents seem to have forgotten that our laws need to be constitutional. We all know from the Constitution and *Marbury v. Madison* that it is the role of the federal courts and the Supreme Court to review federal law. Yet that is exactly what this bill prohibits, virtually asking to be overturned. In some ways, this bill should not be a surprise because Republicans always try to remove federal courts from the process when courts might issue rulings contrary to right-wing beliefs. They did not like the Ten Commandments or Pledge of Allegiance decisions, so they introduced numerous bills to prevent federal courts from hearing cases on those two declarations. They also severely limited the ability of federal courts to issue writs of habeas corpus for state convictions.”⁹⁵

Chairman of the House Judiciary Committee Sensenbrenner (R. Wis.) voiced his support for the MPA by declaring that “far from violating separation of powers, as some have alleged, legislation that leaves State courts with jurisdiction to decide certain classes of cases would be an exercise of one of the very checks and balances provided for in the Constitution. No branch of the Federal Government can be entrusted with absolute power and certainly not a handful of tenured Federal judges who are appointed for life. The Constitution allows an exercise of judicial power, but it does not grant the Federal courts unchecked power to define the limits of its own power. Integral to the American constitutional system is each branch of the Government’s responsibility to use its powers

to prevent overreaching by the other branches.”⁹⁶ According to Mr. Sensenbrenner, suspending federal judicial review assures preservation of the checks and balances of our system of government.

Representative Nadler (D. New York), arguing against the MPA, noted that “[T]he hysteria over the marriage question has brought us to the point of considering a bill that would strip the Federal courts of the jurisdiction to hear cases involving alleged violations of an individual’s rights protected under our Constitution. These proposals are neither good law nor good policy. Past attempts to restrict court jurisdiction have followed many civil rights discussions, including the reapportionment cases. No less a liberal icon than Barry Goldwater battled court-stripping bills on school prayer, busing and abortion, which were the big issues of those days. He warned his colleagues that, quite, the frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of the free society, close quote. It is still true today. I trust that decades from now these debates will find their way into the textbooks next to the segregationist backlash of the 1950’s, the court packing plan of the 1930’s and other attacks on our system of Government.”⁹⁷

Representative Scott, as did others, reminded the Committee of the Judiciary that distinguished legal scholars Gerhard and Martin Redish,⁹⁸ who had been called to provide their expert opinions as to the constitutionality of the MPA, had cautioned Congress against suspending judicial review. Professor Redish observed “[T]o be sure, several other guarantees contained in the constitution, due process, separation of powers and equal protection, impose limitations on the scope of Congressional power. The due process clause of the fifth amendment requires that a neutral independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake. The constitutional directive of equal protection that restricts Congressional power to employ its power to restrict jurisdiction in an unconstitutional discriminatory manner. And as the Supreme Court made clear in the Romer case, when the motivation for legislation is to deprive a specific class of people, in this case, gays and lesbians, of their access to the courts, it is a violation of the equal protection clause.”⁹⁹ However, having called upon these distinguished scholars, the faction pushing this agenda simply ignored the warning.

Representative Dennis Moore addressed the House on these points as well, stating on September 8, 2004, “[W]hile Congress has broad authority under Article III of our Constitution to regulate the jurisdiction, procedures and remedies available in state and federal courts to hear cases regarding particular, controversial areas of constitutional law, such as school busing, abortion, prayer in school, and recitation of the Pledge of Allegiance, Congress’ Article III authority is generally used to address broad issues of court efficiency and resource allocation, rather than to allocate judicial power in a way that affects or influences the result in cases containing specific constitutional issues. Limiting the jurisdiction of any court for any particular class of cases raises questions regarding both the separation of powers doctrine and the Equal Protection Clause of our Constitution.”¹⁰⁰

III. CONCLUSION

As evident, Congress acts with proper authority when it attempts to shield federal courts from being inundated with cases by changing jurisdictional amounts or aspects of citizenship of corporations. As some of the arguments voiced above confirm, in the not too distant past, Congress has attempted to strip the federal courts of jurisdiction when issues of national concern arise that Congress does not wish to subject to federal judicial scrutiny. These issues have included segregation, prayer in the schools, the pledge of allegiance, the Ten Commandments, and busing of students. However, despite repeated efforts by right-wing idealists like Hostettler and Sensenbrenner, Congress has not yet succeeded in enacting legislation attempting to shield its own unconstitutional acts from being reviewed by the federal judiciary. Since the courts are the last bastion of hope for the protection of minorities against mainstream fears and aspirations, allowing Congress to slam the courthouse door shut, would set back civil rights in this country for decades to come.

Congress has power to limit jurisdiction of federal courts pursuant to Article III, but has no inherent authority to abolish civil rights, to violate the Privileges and Immunities, Equal Protection or Due Process Clauses, or to pass legislation that is discriminatory on its face and motivated by moral disapproval of homosexuality.

The Marriage Protection Act has been called a “a mean-spirited, unconstitutional, dangerous distraction,” and a bill whose intent is “to close the door to the Federal courthouse for an entire group of American citizens simply because of their sexual orientation.”¹⁰¹ Other members of Congress have called it “an ill-conceived precedent that will deny the citizens of America judicial review, due process, and equal protection under the law.”¹⁰² Representative Inslee characterized the MPA as “a first step to tyranny.” Today the procedure is used to thwart lesbians and gays, Inslee noted. Tomorrow it may well be used against another minority.¹⁰³ Representative Frank of Massachusetts made the chilling observation that Congress never does anything just once. “When you have developed a particular procedure to use in defense of your views, that gets used again and again.”¹⁰⁴ Given these warnings, it is clear that the MPA should be soundly rejected, and the DOMA rescinded.

Today, thousands of cases attest to the strength of the Constitution and the wisdom of the founders in apportioning governmental powers between three coequal federal branches and between the state and federal governments. DOMA and the MPA strike at this balance of power, thereby undermining the very foundation of government as we have come to know it. Therefore, regardless of one’s personal views of same-sex marriage, or even about marriage in general, we should urge our elected officials in Washington, D.C., and closer to home, to uphold the United States Constitution. We must insist on maintaining the right of judicial review when Congress enacts laws that are repugnant to the Constitution; laws that seek to strip disfavored minorities of access to the federal courts. It is meaningless to fight for freedom abroad, when it is denied to us at home.

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- ¹ Defense of Marriage Act 3, 110 Stat. at 2419 (codified at 1 U.S.C. 7).
- ² House Bill 56, the Federal Marriage Amendment; Senate Bill 26
- ³ 150 Cong. Rec. H 6562 (July 22, 2004).
- ⁴ H.R. Rep. No. 104-644
- ⁵ *Id.* (statement of Rep. Lipinski).
- ⁶ Jonah M.A. Crane. *Recent Development: Legislative and Constitutional Responses to Goodridge v. Dept. of Health*, 7 N.Y.U.J.Legis. & Pub. Pol'y 465, 484 (2003/2004).
- ⁷ 117 Harv. L. Rev. 2684, 2690 (June, 2004).
- ⁸ 142 Cong. Rec. H7501 (daily ed. July 12, 1996)(Statement of Representative Henry Hyde).
- ⁹ 150 Cong. Rec. H 6562 (July 22, 2004).
- ¹⁰ 142 Cong. Rec. H 7443 (daily ed. July 12, 1996) (statement of Rep. Coburn)
- ¹¹ *Id.* (statement of Rep. Barr).
- ¹² 142 Cong. Rec. H7444-45 (daily ed. July 11, 1996)(statement of Rep. Barr).
- ¹³ 142 Cong. Rec. H 7487 at 7494 (daily ed. July 12, 1996) (statement of Rep. Smith).
- ¹⁴ *Id.* at 7489 (statement of Rep. Dornan).
- ¹⁵ 142 Cong. Rec. H7449 (daily ed. July 11, 1996) (statement of Rep. Packard).
- ¹⁶ 150 Cong. Rec. S 7876 (July 9, 2004).
- ¹⁷ *Id.*
- ¹⁸ *Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432 (1985).
- ¹⁹ 413 U.S. 528, 535-36 (1973).
- ²⁰ Alec Walen. *The "Defense of Marriage Act" and Authoritarian Morality*, 5 Wm. & Mary Bill of Rights J. 619
- ²¹ *Id.* at 625.
- ²² 142 Cong. Rec. S10,114 (daily ed. Sept. 10, 1996)(Statement of Sen. Thurmond); (Statement of Sen. Gramm at S10,105).
- ²³ *Id.*
- ²⁴ 1 William Blackstone, Commentaries 430.
- ²⁵ 142 Cong. Rec. S 10,109 (daily ed. Sept. 10, 1996) (Statement of Senator Byrd)
- ²⁶ 482 U.S. 78 at 95 (1987).
- ²⁷ *Baker v. State*, 744 A.2d 864 (Vt. 1999).
- ²⁸ Jay Weiser, *The Next – Normal Developments Since Marriage Rights for Same Sex Couples in New York*. 13 Columbia Journal of Gender & Law 48, citing Tavia Simmons & Martin O'Connell, Census 2000 Special Reports (2003).
- ²⁹ Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*. 21 Law and Ineq. J. 114 (Winter 2003)
- ³⁰ <http://www.census.gov>
- ³¹ Harry F. Harlow, "Sexual Behavior in the Rhesus Monkey," in *Sex and Behavior*, ed. Frank A. Beach (New York: Wiley, 1965).
- ³² *Id.*, at p. 185.
- ³³ Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224, at 1228.
- ³⁴ Robert J. Sickels, *Race, Marriage and the Law* 35 (1972).
- ³⁵ *Scott v. Georgia*, 39 Ga. 321 (1869).
- ³⁶ James Trosino. *American Wedding: + Same-Sex Marriage and the Miscegenation Analogy*, 73 Boston U. L. R. 93 (Jan. 1993).
- ³⁷ *Brown v. Board of Education*, 347 U.S. 483 (1955).
- ³⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).
- ³⁹ Thomas E. Baker, Jerre S. Williams, *Constitutional Analysis in a Nutshell*, 2d ed., p. 144 (2003).
- ⁴⁰ 388 U.S. 1 (1967)
- ⁴¹ *Baehr v. Lewin*, 852 P.2d 44 (Haw.1993).
- ⁴² Alaska Superior Court, Feb. 27, 1998.
- ⁴³ Mark E. Wojcik. *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?* 24 N. Ill. U. L. Rev. 589 (Summer, 2004).
- ⁴⁴ 172 O.A.C. 276 (2003).
- ⁴⁵ 798 N.E.2d 941 (Mass. 2003).

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- ⁴⁶ <http://www.keepmedia.com/pubs/USATODAY/2004/11/30/660771>
- ⁴⁷ *Baker v. State*, 744 A.2d 864 (Vt. 1999).
- ⁴⁸ VT. STAT. ANN. Title 15, §§ 1201-1212(1989 & Supp. 2001).
- ⁴⁹ U.S. Constitution, art. IV, 1.
- ⁵⁰ 2A D. Sands, *Statutes and Statutory Construction*, § 45.11 (4th ed. 1973).
- ⁵¹ *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 617 F.2d 485, 493 (7th Cir. 1980).
- ⁵² 150 Cong. Rec. S 7876, Friday, July 9, 2004.
- ⁵³ *Id.*
- ⁵⁴ Stanley E. Cox. 32 Creighton L. Rev. 1063. *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflict Law*
- ⁵⁵ 117 Harvard L. Rev. 2684 (June 2004). *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*.
- ⁵⁶ Kevin J. Worthen, Same-Sex Marriage Symposium Issue: *Who Decides and What Difference Does it Make?: Defining Marriage in "Our Democratic, Federal Republic."* 18 Brigham Young J. Pub. L. 273 (2004)
- ⁵⁷ Maggie Gallagher, Essay: *Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 Notre Dame Journal of Law, Ethics & Public Policy 225 (2004).
- ⁵⁸ Dwight G. Duncan. *The Federal Marriage Amendment and Rule by Judges*. 27 Harvard L.J. of Law and Public Policy 543.
- ⁵⁹ Ellen C. Perrin & Heidi Kulkin, *Pediatric Care for Children Whose Parents are Gay or Lesbian*, 96 Pediatrics 629 (1996).
- ⁶⁰ Dwight G. Duncan. *The Federal Marriage Amendment and Rule by Judges*. 27 Harvard J. of Law and Public Policy 543 (Citing May West).
- ⁶¹ *Loving v. Virginia*, 388 U.S. 1 (1967).
- ⁶² *Lawrence v. Texas*, 539 U.S. 558 (2003).
- ⁶³ *Id.* at 573-574.
- ⁶⁴ *Id.* at 604.
- ⁶⁵ 150 Cong. Rec. S7876 (daily ed. July 9, 2004)(Statement of N.M. Senator Pearce).
- ⁶⁶ 150 Cong.Rec. E 1604 (September 13, 2004).
- ⁶⁷ *Marbury v. Madison*, 1 Cranch 137 (1803).
- ⁶⁸ Kathleen Sullivan, Gerald Gunther. *Constitutional Law*, 15th ed. Foundation Press (2004), p. 11.
- ⁶⁹ *Id.* at p. 11.
- ⁷⁰ *Id.* at p. 12.
- ⁷¹ *Marbury v. Madison*, 1 Cranch 148 (1803)
- ⁷² Hamilton, *The Federalist No. 78*
- ⁷³ Judiciary Act of March 3, 1875, 18 Stat. 470.
- ⁷⁴ Henry M. Hart, Herbert Wechsler. *The Federal Courts and the Federal System*. pp. 262-263. Foundation Press (1953).
- ⁷⁵ 150 Cong. Rec. E 1604 (September 13, 2004).
- ⁷⁶ *Id.*
- ⁷⁷ *Ex parte McCordle*, 7 Wall. 506 (U.S. 1868).
- ⁷⁸ Henry M. Hart, Herbert Wechsler. *The Federal Courts and the Federal System*. pp 290-291. Foundation Press (1953).
- ⁷⁹ *U.S. v. Anderson*, 76 U.S. 56 (1869).
- ⁸⁰ *U.S. v. Padelford*, 76 U.S. 531 (1869).
- ⁸¹ Act of July 12, 1870, 16 Stat. 235.
- ⁸² Act of 1887
- ⁸³ Jacob Trieber, 46 Am. Law Review 702, 711 (1912).
- ⁸⁴ Portal-to-Portal Act of 1947 (U.S. Code, tit. 29).
- ⁸⁵ Hart & Wechsler, at 300.
- ⁸⁶ *Id.* at 301.
- ⁸⁷ *Id.* at 302.
- ⁸⁸ *Battaglia v. General Motors Corp.*, 169 F.2d 254, cert. Denied 335 U.S. 887 (1948).
- ⁸⁹ *Battaglia v. General Motors Corp.*, 169 F.2d 254, cert. Denied 335 U.S. 887 (1948)

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- ⁹⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997).
⁹¹ *Lawrence v. Texas*, 123 S.Ct. 2472 at 2486 (2003).
⁹² House Report 108-614, Committee on the Judiciary (July 14, 2004).
⁹³ House Committee on the Judiciary, July 14, 2004 (Rep. Hostettler, R. Ind.).
⁹⁴ 150 Cong. Rec. H 6562 (July 22, 2004)(Hostettler, R. Ind.).
⁹⁵ *Id.* (Rep. John Conyers, D. Mich.)
⁹⁶ *Id.* (Rep. Sensenbrenner, R. Wis.)
⁹⁷ *Id.* (Rep. Nadler, D. New York).
⁹⁸ Martin Redish, Professor of Law, Northwestern Law School.
⁹⁹ *Id.* (Rep. Nadler, D. New York, quoting Professor Redish).
¹⁰⁰ 150 Cong. Rec. E. 1521 (Sept. 8, 2004)(Rep. Dennis Moore, D. Kan.).
¹⁰¹ 150 Cong. Rec. H. 6562 (July 22, 2004)(Rep. McGovern).
¹⁰² *Id.* (Jackson-Lee, D. Tx.)
¹⁰³ *Id.* (Rep. Inslee)
¹⁰⁴ *Id.* (Rep. Frank).