

---

# CIVIL RIGHTS

## THE CONSERVATIVE CASE AGAINST THE FEDERAL MARRIAGE AMENDMENT

By ANNTIM J. VULCHEV AND JOHN YOO\*

---

### Introduction

Can you blame conservatives for proposing the Federal Marriage Amendment (FMA)<sup>1</sup>? Having been deprived of their voice on social issues by the Supreme Court on several occasions, conservatives now fear that continued judicial activism will soon also foreclose democratic decision making on marriage policy. No one should be surprised that opponents of same-sex marriage have taken a big step toward ensuring that laws about marriage are made in legislatures and not in courtrooms. However, the same principles that reject the judicial imposition of uniform social policies should also lead to a rejection of the FMA. By nationalizing marriage policy, the FMA undermines the benefits of federalism, such as decisionmaking by local governments closer to the people and competition among jurisdictions offering a diversity of policies.

This essay focuses on the right of states to withhold recognition of out-of-state same-sex marriages, and whether the FMA is necessary to achieve that end. Part I of this article describes current constitutional doctrine regarding the interstate recognition of same-sex marriages. Part II lays out the conservative case against the FMA, based on such antecedents as Prohibition and the nationalization of abortion policy. Part III proposes a better approach. If an amendment is necessary, its purpose should be to restore the *status quo ante* that existed before judges upended the social order in Massachusetts.<sup>2</sup> An amendment in keeping with our federal system would be one that preserved the definition of marriage to each state to decide for itself, just as our constitutional system permitted for the first two centuries of its existence.

### Part I Current Law and the Definition of Marriage

The possibility that one state's recognition of same-sex marriages can redefine the definition of marriage for other states depends on how courts would answer several questions. Specifically, would the Privileges and Immunities Clause of Article IV<sup>3</sup> or the Privileges or Immunities Clause of the Fourteenth Amendment<sup>4</sup> force states to recognize out-of-state same-sex marriages? Would the Full Faith and Credit Clause<sup>5</sup> require the same result? Lastly, what effect, if any, would the federal Defense of Marriage Act (DoMA)<sup>6</sup> have?

The answers to these questions will also inevitably be shaped by the U.S. Supreme Court's decision in *Lawrence v. Texas*.<sup>7</sup> An in depth analysis of *Lawrence* and the preceding case, *Romer v. Evans*,<sup>8</sup> is outside the scope of this paper. Nonetheless, it seems clear from these decisions that the Court is likely to consider laws that regulate homosexuality as the product of "animus"<sup>9</sup> that further "no legitimate state interest."<sup>10</sup> In neither *Lawrence* nor *Romer* did the Court accept the state's reasons as sufficient to overcome even rational basis review. It is also unclear from the decisions what legitimate state interest would justify the differential regulation of homosexuals, and what type of record the state would need to assemble to show that its interest is not the mere product of animus.

A state can obviously permit same-sex marriage through its own mechanisms of government, as happened in Massachusetts. However, this does not rise to the level of a national question. The people of Massachusetts through their legislature have the opportunity to overrule their high court and amend their constitution, and the more important concern is not whether same-sex marriages are performed anywhere, but whether they can be forced upon unwilling states from without.

Returning to the question of the interstate effects of one state's recognition of same-sex marriage, it is clear that the Privileges and Immunities Clauses of the Constitution would not require interstate recognition of same-sex marriages. Yet, the opposite argument has been made,<sup>11</sup> and so for that reason the Clauses should be examined briefly.

First, Article IV's Privileges and Immunities Clause is not implicated when a state that prohibits same-sex marriages within its own borders also refuses to recognize the validity of an out-of-state same-sex marriage. The out-of-state visitors are not denied anything that in-state residents already enjoy. According to Professor Tribe, there has "been little debate,"<sup>12</sup> about the approach exemplified by the Supreme Court's pronouncement in *Toomer v. Witsell*<sup>13</sup> that the Privileges and Immunities Clause "was designed to insure [sic] to a citizen of State A who ventures into State B the same privileges which the citizens of State

B enjoy.”<sup>14</sup> Art. IV, § 2 protects the rights of out-of-state visitors, but only if those rights are “fundamental”<sup>15</sup> and already enjoyed by citizens of the state.

Similarly, the Fourteenth Amendment’s Privileges or Immunities Clause,<sup>16</sup> embraced by the Supreme Court after 130 years of neglect,<sup>17</sup> also does not provide a basis for requiring interstate recognition of same-sex marriages. In *Saenz v. Roe*,<sup>18</sup> the Court held that because the right to travel is fundamental, the Privileges or Immunities Clause also guaranteed that a state’s new residents will be treated the same as more established residents.<sup>19</sup> The *Saenz* Court was not concerned merely with a deterrence to travel, but rather “a citizen’s right to be treated equally in her new State of residence.”<sup>20</sup> But the equality in question was in regards to benefits that existed entirely within a state’s borders. If the Privileges or Immunities Clause requires a state that does not allow same-sex marriages to recognize the same-sex marriage of transplants from, say, Massachusetts, it would mean that the Clause has created a certain minimum floor of rights in the family law area. But the Clause has not yet been read to do that. It protects the rights of citizens *qua* national citizens, and so far that has not been read to extend to family law issues.

An analysis of the Full Faith and Credit Clause *vis-à-vis* interstate recognition of same-sex marriages is more complicated. The Supreme Court has held that the Clause “does not require a State to apply another State’s law in violation of its own legitimate public policy.”<sup>21</sup> In the context of marriage, Professor Lea Brilmayer has argued that the Clause has never “been read to require one state to recognize another state’s marriages,”<sup>22</sup> and further, that the Clause and its attending judicial interpretation adequately safeguard a state’s liberty to not recognize same-sex marriages.<sup>23</sup> Notwithstanding Professor Brilmayer’s argument, a state court has relied on the Full Faith and Credit Clause to recognize certain marital rights for a same-sex couple in New York based on their Vermont civil union.<sup>24</sup>

Professor Brilmayer’s analysis, however, also does not adequately deal with *Lawrence* and *Romer*. States generally recognize marriages granted in other states, subject to a few narrow exceptions. Suppose a state continues to recognize out-of-state marriages, *except for* those between members of the same sex. This would trigger review under *Romer* and *Lawrence* to determine whether the state prohibition is anything more than the product of animus. The “public policy exemption,” after all, is not absolute,<sup>25</sup> and must sur-

vive the requirements of other parts of the Constitution. If, for example, a state recognized all out-of-state marriages except for those between members of different races, there seems to be little doubt that such a law would undergo – and fail – strict scrutiny under the Equal Protection Clause.

After *Romer* and *Lawrence*, it is likely that states may be forced to accept the legality of out-of-state same-sex marriages due to the Full Faith and Credit Clause. States could not take advantage of the public policy exemption to the Clause because a law discriminating against out-of-state same-sex marriages would not survive rational basis review as applied in the two decisions. It is difficult to see how a Court interested in being consistent could find that Texas’ criminal prohibition of sodomy did not further a legitimate state interest, but that a bar on out-of-state gay marriage did. Nor is it clear whether states could satisfy any minimal standard of evidence to show that such a prohibition was *not* the product of animus.

Anticipating the possibility that Full Faith and Credit would require interstate recognition of same-sex marriages, Congress passed DoMA. The first part of the act limits federal benefits of marriage to opposite sex couples.<sup>26</sup> More importantly, the second part, pursuant to Congress’s powers under Art. IV, § 1 to enact laws regarding “the manner in which [the] acts, records and proceedings [of other states] shall be proved and the effect thereof,”<sup>27</sup> confirms state power to refuse recognition of out-of-state same-sex marriages.<sup>28</sup> The law has been criticized as an inappropriate use of the Full Faith and Credit Clause,<sup>29</sup> but there is no obvious reason to believe it would be struck down on these grounds.

DoMA’s viability, however, is entirely dependent on how, once again, the reasoning of *Romer* and *Lawrence* is applied. Congress has used its power to regulate the recognition of out-of-state acts, records and proceedings to select one type of state action – the granting of marriages to same-sex couples – for prohibition. It seems this would be subject to *Romer* and *Lawrence* type scrutiny, assuming that the Court reads the Due Process Clause of the Fifth Amendment as it has read the Fourteenth Amendment’s Due Process Clause.<sup>30</sup> To use the race example again, imagine if Congress had passed a law allowing states to refuse to recognize interracial marriages. It seems clear that such a law would be subject to equal protection-style analysis under the Fifth Amendment, and that it would fail constitutional scrutiny. To be sure, *Lawrence* and *Romer* call for a lower level of scrutiny

– rational basis review – than the strict scrutiny applied in racial discrimination cases. Nonetheless, it is again difficult to see the justification that Congress could provide for DoMA that would surpass that provided by Texas in *Lawrence*. It is probable that DoMA would be struck down as a violation of the Fifth Amendment Due Process Clause.

## Part II The Conservative Case against the FMA.

While this article is about the wisdom of the FMA and not about the wisdom of same-sex marriage, each inquiry informs the other. More specifically: a) the starting observation that the nation’s significant opposition to same-sex marriage rights<sup>31</sup> is a manifestation of what is best termed “philosophical conservatism,” leads to b) the conclusion that the very principles which animate opposition to same-sex marriage should also lead to strong doubts about the FMA.<sup>32</sup> Describing the tradition of Edmund Burke, the influential historian J.G.A. Pocock identified “philosophical conservatism” as “the claim that human beings acting in politics always start from within a historically determined context, and that it is morally as well as practically important to remember that they are not absolutely free to wipe away this context and reconstruct human society as they wish.”<sup>33</sup> This is the essence of principled disapproval of the rush towards same-sex marriage, and it is this historical sensibility that should give marriage traditionalists pause in their current attempts to amend the Constitution.

Consider the history of constitutional amendments in general. The Framers designed the founding document to be difficult to amend, likely to be done only in response to strict necessity. Article V requires that two-thirds of the House and Senate propose the text, which must then receive the approval of three-quarters of the state legislatures. (Another process, never used, allows for two-thirds of the state legislatures to call a constitutional convention). As James Madison explained in the *Federalist No. 43*, this process allows for the correction of errors in the Constitution without allowing it to become as flexible as an ordinary piece of legislation. “It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”<sup>34</sup> In addition, wrote Madison, the amendment process worked a valuable role in maintaining the balance of powers between the federal and state governments. It “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.”<sup>35</sup>

It should not be surprising that this hurdle has led to relatively few amendments. Since 1791, when the Bill of Rights added the first 10 amendments to the Constitution, the nation has approved only 17 more over the course of the following 213 years. Many of these changes have focused on modernizing the workings of our democracy, such as expanding the electorate to include African-Americans, women and 18-year-olds, providing for the direct election of senators, limiting presidents to two terms, and specifying the order of presidential selection and succession. Almost all of the amendments have the purpose of either organizing or limiting the powers of the federal or state governments, such as the Equal Protection and Due Process Clauses requirement of equal and fair treatment by the government. The most notable effort to regulate purely private conduct—the 18th Amendment’s establishment of Prohibition—failed miserably and led to the rise of organized crime.

Our Republic is a consequence of the Founders pursuit of liberty. According to Tocqueville, the distinguishing characteristics of the original republic were “decentralized order” (federalism) and “mediating institutions,”<sup>36</sup> and the latter were reinforced by the former.<sup>37</sup> Thus, in turn, federalism was the great guarantor of liberty.<sup>38</sup> The hard choice that opponents of same sex marriage have to face is that “federalism’s survival... may depend on the willingness of citizens to defend the autonomy of their states even when confronted by national policies that would otherwise be attractive.”<sup>39</sup>

Here the analogy with Prohibition is instructive. Much like the current movement behind the FMA, in large part a response to decades of imposition by federal judges on a multitude of social issues, the “drys” behind Prohibition were in significant measure motivated to pursue their goals nationally after the Supreme Court on occasion stymied their ability to regulate alcohol at the state level.<sup>40</sup> Liquor merchants defeated state regulations by relying upon the Commerce Clause.<sup>41</sup> Prohibitionists eventually prevailed in 1913 with the passage of the Webb-Kenyon Act,<sup>42</sup> which prohibited the importation of liquor into any state with laws against its use. In 1917, the Supreme Court upheld the act in *Clark Distilling Co. v. Western Maryland Railway*.<sup>43</sup> But not satisfied by their victory with the Webb-Kenyon Act, prohibitionists succeeded with their demand that social policy be woven into the Constitution itself.

The irony was that a movement shaped by frustration with nationally imposed limits on state policy ended up greatly enhancing the power of the federal government. In addition to burgeoning federal agencies, the Supreme Court, for example, upheld broad powers for Congress under the Eighteenth Amendment's enabling clause, a consequence that would outlive Prohibition by influencing future constitutional litigation.<sup>44</sup> Enforcement of Prohibition was uneven and brutal,<sup>45</sup> but also ineffectual.<sup>46</sup>

A blanket prohibition on same sex marriages would similarly lead to a multitude of unforeseen circumstances. Many Americans passionately believe in gay marriage, and their numbers over the long run might increase. One salient question is: what will be the outlet of those citizens' passion on the subject? How will the nation cope with inevitable civil disobedience? Surely we shouldn't lightly approve of the violation of the Constitution. But then, it is worth asking whether a constitutional ban on gay marriage will promote the goals its advocates seek, rather than producing disregard for the law.

The example of *Roe v. Wade*<sup>47</sup> also sheds light on the harms of nationalization. There is a vast difference in legitimacy between a binding decision on a contentious social issue by a handful of justices, and a majoritarian preference sealed by a two-thirds majority in both chambers of Congress and approved by the legislatures of three-fourths of the states. However, many of the effects of the FMA would be the same as those begotten by *Roe*. Justice Scalia's dissent in *Planned Parenthood v. Casey* could be read as an eloquent warning about the dangers of injuring federalism by nationalizing any social policy:

Not only did *Roe* not ...*resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue — as it does over other issues, such as the death penalty — but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only

that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible.<sup>48</sup>

The mere effort to nationalize marriage could produce the same long-term negative effects, in which candidates of both parties must make pledges on gay marriage and the issue dominates our appointments to the federal courts. Allowing gay marriage to be decided state-by-state could avoid the political divisiveness produced by *Roe v. Wade* and, in fact, lead to a more enduring settlement of the issue.

### **Part III An Amendment that Protects a Democratic Consensus on Marriage and Preserves Federalism**

If courts applied the reasoning of *Lawrence* and *Romer* to strike down DoMA and state DoMAs, the solution would be a constitutional amendment that would merely restore power to the states. Such an amendment might be similar to the second part of DoMA,<sup>49</sup> its purpose being to ensure each state's right to not recognize out-of-state same-sex marriages. It would thus preserve the benefits of federalism by allowing states to compete for residents and businesses by offering different mixes of economic and social policies. As in a market, citizens can satisfy their preferences by deciding to live in states that provide the tax, education, welfare or family policies with which they agree. Some states, such as Massachusetts, might choose to permit gay marriage, while others such as California might choose to define marriage as between a man and woman, and Americans could choose to live in either state depending on what policy they support.

A pro-federalism amendment also makes sense as a matter of public policy. Advocates on both sides of this emotional debate are floating a variety of arguments about the effects of gay marriage. Supporters claim that it leads to the stability of relationships and extends the positive benefits of marriage to homosexual couples. Opponents argue that it undermines the institution of marriage and could lead to higher divorce and lower marriage rates.

All sides should admit that the sample size for making these judgments is far too small—there simply are not enough jurisdictions that have permitted gay marriage. Allowing each of the fifty states to choose a different policy on gay marriage would provide that diversity of experience that would allow us

to see whether gay marriage indeed causes negative effects on society or the opposite.

This would truly take advantage of Justice Brandeis' famous description of the states as "laboratories of democracy."<sup>50</sup> As he observed, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>51</sup>

### Conclusion

The Federal Marriage Amendment in the 108<sup>th</sup> Congress is dead,<sup>52</sup> and some of its supporters couldn't be happier.<sup>53</sup> In politics, tactical defeats are the constituency-motivating precursors of strategic victories, and traditionalists who oppose gay marriage may in fact be heading toward a future victory with the FMA (or at least collateral victories).<sup>54</sup> But neither the fight nor the prize is worth it. A better approach should seek to enhance federalism. Conservatives who have criticized the Supreme Court's nationalization of abortion in *Roe v. Wade* should support a more modest amendment that would prevent one state, such as Massachusetts, from deciding the policy on same-sex marriage for all other states.

\*Anntim J. Vulchev is a graduate of the University of California at Berkeley School of Law (Boalt Hall). John Yoo is a Professor of Law, University of California at Berkeley School of Law (Boalt Hall), and a visiting scholar at the American Enterprise Institute.

### Footnotes

<sup>1</sup> S.J. Res. 30, 108<sup>th</sup> Cong. (2004): "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."

<sup>2</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003).

<sup>3</sup> U. S. CONST. art. IV, § 2.

<sup>4</sup> U. S. CONST. amend. XIV, § 1.

<sup>5</sup> U. S. CONST. art. IV, § 1.

<sup>6</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. 7 (2000) and 28 USCS § 1738C (2000)).

<sup>7</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>8</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>9</sup> *Id.* at 632.

<sup>10</sup> *Lawrence*, 539 U.S. at 578.

<sup>11</sup> *See, e.g.*, Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 *RUTGERS L. REV.* 553 (2000) (arguing that the privileges and/or immunities clauses force states to recognize out-of-state same-sex marriages as an inherent part of the right to travel).

<sup>12</sup> Laurence H. Tribe, *American Constitutional Law* 6-36, at 1250 (3d ed. 2000). In the early case of *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (no. 3230), Justice Bushrod Washington attempted to "import the natural rights doctrine into the Constitution by way of the Privileges and Immunities Clause of Article IV." (Tribe 6-36 at 1252). The rights protected were "fundamental; which belong, of right, to the citizens of all free government." 6 Fed. Cas. at 552. However, the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), firmly circumscribed the Privileges and Immunities Clause. The Clause was held not to be a source of rights, and *Corfield* was read as further limiting the Clause, so in effect states could discriminate between residents and non-residents if the rights in question were not sufficiently important.

<sup>13</sup> *Toomer v. Witsell*, 334 U.S. 385 (1948).

<sup>14</sup> *Id.* at 395.

<sup>15</sup> *Corfield*, 6 F. Cas. at 552. A more recent interpretation of the privileges and immunities protected by Art. IV is found in *Baldwin v. Montana Fish and Game Comm'n.*, 436 U.S. 371, 383 (1978) ("Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."):

<sup>16</sup> U. S. CONST., amend XIV, § 1.

<sup>17</sup> Prior to 1999, the Clause was used by the Supreme Court only once previously to invalidate a state law, *Colgate v. Harvey*, 296 U.S. 404 (1935), and that case was overruled shortly thereafter. *Madden v. Kentucky*, 309 U.S. 83 (1940).

<sup>18</sup> 526 U.S. 489 (1999).

<sup>19</sup> *Id.* at 502-505.

<sup>20</sup> *Id.* at 505.

<sup>21</sup> *Nevada v. Hall*, 440 U.S. 410, 422 (1980). *See also* *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003), quoting *Sun Oil v. Wortman*, 486 U.S. 717 (1988) ("...the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate'."):

<sup>22</sup> Lea Brilmayer, *Full Faith and Credit*, *WALL ST. J.*, March 9, 2004 at A16.

<sup>23</sup> "Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?" *Full Faith and Credit, Family Law, and the Constitutional Amendment Process: Testimony of Professor Lea Brilmayer*. March 3, 2004 (developing the argument that states have had, and will continue to have, latitude to reject marriages from sister states).

<sup>24</sup> *In Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440 (N.Y. Misc.,

2003), a New York court ruled that a decedent's partner, because of the couple's Vermont-sanctioned civil union, could maintain a survivorship action against a hospital, where, under New York law, he normally would not be able to do so. The court noted, however, that it could reach its holding in large part because New York has no public policy on same-sex marriage or DoMA that would contravene the judgment.

<sup>25</sup> See, e.g., *Hyatt* 538 U.S. at 499 (the exemption was applied where the Court did not face a situation "in which a State has exhibited a policy of hostility to the public Acts' of a sister State.")

<sup>26</sup> 1 USCS § 7.

<sup>27</sup> U. S. CONST. ART. IV, § 1.

<sup>28</sup> "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." 28 USCS § 1738C.

<sup>29</sup> *Tribe*, *supra* note 10, 6-35 at 1247 n. 49 ("...[B]ut this statement cannot plausibly be construed to empower Congress to prescribe that states may choose to give *no effect at all* to an entire category of official state Acts.").

<sup>30</sup> See, e.g., *Bolling v. Sharpe* 347 U.S. 497 (1954).

<sup>31</sup> The current national majority that at this point opposes same-sex marriage transcends political parties and draws significant support from Democrats, moderates, and African-Americans. See *Democrats Seen More Open to Gay Marriage*, ASSOCIATED PRESS, July 21, 2004 available at [http://abcnews.go.com/wire/Politics/ap20040721\\_1629.html](http://abcnews.go.com/wire/Politics/ap20040721_1629.html) (citing Pew Research Center polls).

<sup>32</sup> The philosophical consistency of disapproving both of same-sex marriage and the FMA is also mirrored by the nation's simultaneous opposition to same-sex marriage and its hesitancy to embrace the FMA. See Alan Cooperman, *Christian Groups Say They Won't Give Up*, WASHINGTON POST, July 15, 2003, A04 ("The polls tell us that most people oppose gay marriage," said Pew pollster Andrew Kohut. "They also tell us that the public is pretty conservative when it comes to fiddling with the old Constitution.").

<sup>33</sup> J.G.A. Pocock, *Introduction to Edmund Burke, Reflections on the Revolution in France* vii. (J.G.A. Pocock, ed., Hackett Publishing Co., 1987) (1789-1799).

<sup>34</sup> *Federalist No. 43* at 278 (Clinton Rossiter ed., 1961).

<sup>35</sup> *Id.* at 278-9.

<sup>36</sup> See John McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 491 (2002).

<sup>37</sup> See *id.* 507-511.

<sup>38</sup> See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1357-1404 (1997).

<sup>39</sup> McGinnis, *supra* note 35, at 495.

<sup>40</sup> See Sidney J. Spaeth, Note, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 171-173 (1991) (Giving an overview of state regulation and corresponding Supreme Court decisions).

<sup>41</sup> *Id.*

<sup>42</sup> *Webb-Kenyon Act*, ch. 90, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (1982)).

<sup>43</sup> 242 U.S. 311 (1914).

<sup>44</sup> See David Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65, 118, ("Most significant for future constitutional litigation, however, were three decisions of the Taft period giving a broad construction to Congress's authority under section 2 of the [Eighteenth Amendment] 'to enforce this article by appropriate legislation'.")

<sup>45</sup> See Spaeth, *supra* note 39, at 161-162, N. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* 165 (1976).

<sup>46</sup> See MABEL WALKER WILLEBRANDT, *THE INSIDE OF PROHIBITION* (1929). Willebrandt, a former U.S. Deputy Attorney General in charge of Prohibition enforcement, labeled Prohibition a failure, primarily because of the obstructionism of unwilling officials. She also condemned the heavy-handed approach of officials who sought to compensate for local laxity with increasing numbers of federal agents. *Id.* at 177-179.

<sup>47</sup> 410 U.S. 113 (1973).

<sup>48</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 995 (1992).

<sup>49</sup> 28 USCS § 1738C.

<sup>50</sup> The reference is to *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>51</sup> *Id.*

<sup>52</sup> The Amendment was decisively defeated in the Senate, and while the House could still pick it up during the 108<sup>th</sup> Congress, the amendment would still need to pass through the Senate to advance out of Congress.

<sup>53</sup> See, e.g., Alan Cooperman, *Gay Marriage As The "New Abortion"*, WASHINGTON POST, July 26, 2004, A03. ("Until the Senate vote, evangelical leaders were bemoaning their supporters' passivity over the Massachusetts court decision. But several said they believed the vote energized grass-roots conservatives. 'We lost the vote, but I'm ecstatic,' [Southern Baptist Convention official, Rev. Richard Land] said.").

<sup>54</sup> See also Alan Cooperman, *Christian Groups Say They Won't Give Up*, WASHINGTON POST, July 15, 2003, A04, ("[Prison Fellowship Ministries head Charles Colson] and other evangelical leaders said the Senate vote achieved several objectives, including energizing grass-roots conservatives, forcing senators to take a stand and forging bonds between the Republican Party and socially conservative black churchgoers who have traditionally been steadfast Democrats.").