

7-1-2003

Who Decides and What Difference Does It Make?: Defining Marriage in "Our Democratic, Federal Republic"

Kevin J. Worthen

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>



Part of the [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Kevin J. Worthen, ??? ?????? ??? ??? ???? ?????? ??? ? ???? ???? ???? ? "?? ??????, ????? ??", 18 BYU J. PUB. L. 273 (2003).

This Symposium Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Who Decides and What Difference Does It Make?: Defining Marriage in “Our Democratic, Federal Republic”

Kevin J. Worthen*

Few issues of public and legal policy have captured more attention or generated more passion in the past decade than the legality of same-sex marriage. Literally hundreds of law review articles have been written on the topic.¹ Judicial decisions seemingly indicating a favorable view toward same-sex marriage have prompted a firestorm of legislative and constitutional activity in several states,² and proponents and opponents

This paper was presented at “The Future of Marriage and Claims for Same-Sex Unions Symposium” on August 29, 2003 at the J. Reuben Clark Law School, on the campus of Brigham Young University. The article is part of this special symposium issue and the views expressed herein are those of the author and do not represent the views of the Journal of Public Law, the J. Reuben Clark Law School, or Brigham Young University.

* Professor of Law and Associate Dean, J. Reuben Clark Law School, Brigham Young University. I thank Lynn Wardle, Bill Duncan, John Fee, Jim Rasband, and Cliff Fleming, as well as other participants in the BYU law faculty work-in-progress session for helpful comments and insights, and Hutch Fale for valuable research assistance.

1. A search in the Westlaw database for the past ten years reveals over two-hundred articles whose titles contain the terms “same-sex marriage,” “civil union,” or “Defense of Marriage.” Three separate searches were performed, all limited to articles published after 1992. The first sought for articles whose titles included the term “same-sex marriage,” the second for articles whose titles included the term “civil union” but not the term “same-sex marriage,” and the third for articles whose titles included “DOMA” or “Defense of Marriage.” There were 169 entries in the first category, twenty-six in the second, and thirty-four in the third.

2. The Hawaii Supreme Court decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), holding that the state constitution’s equal protection clause required that a statute restricting marriage to heterosexual couples be subjected to strict scrutiny, ultimately led to a state constitutional amendment authorizing the legislature to “reserve marriage to opposite sex couples.” HAW. CONST. art. I, § 23. See David Orgon Coolidge, *The Hawai’i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000) (detailing reaction to *Baehr*, culminating in constitutional amendment). An Alaska Superior Court decision holding that the state must demonstrate a compelling interest in order to justify refusal to issue a marriage license to same-sex couples, *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998), prompted the passage of a state constitutional amendment providing that “a marriage may exist only between one man and one woman.” ALASKA CONST. I, § 25. The Vermont Supreme Court held that denying same-sex couples the same benefits which were granted opposite-sex couples violated the state constitution, but deferred to the state legislature as to the means for remedying the violation. *Baker v. State*, 744 A.2d 864 (Vt. 1999). In response, the Vermont legislature enacted a civil union statute “reaffirming the limitation of marriage to opposite-sex couples, but granting all of the benefits of marriage to same-sex couples.” VT. STAT. ANN. tit. 15, §§ 1201-1212 (1989 & Supp. 2001).

anxiously await the results of court rulings in others.³ Numerous other states have not waited for judicial decisions, choosing to adopt legislation or constitutional amendments to address aspects of the issue before a court acts.⁴ The debate has been waged at the federal level as well. Congress has enacted the Defense of Marriage Act,⁵ and the U.S. Supreme Court's recent ruling in *Lawrence v. Texas*⁶ has been viewed by proponents as a helpful building block in their efforts to legalize same-sex marriage,⁷ while at the same time prompting renewed efforts by opponents to adopt a federal constitutional amendment to thwart that effort.⁸

Thus far the debate has centered largely on the substantive merits of the issue. This article does not. Instead, it seeks to draw attention to the perhaps equally important—but often overlooked—issue of the proper form and forum for resolving the substantive issue. It asks the question, if we awoke tomorrow to the newspaper headline—"Legality of Same-Sex Marriage Decided"—what difference would it make if the succeeding story referred to 1) a federal statute, 2) a U. S. Supreme Court decision, 3) a federal constitutional amendment, 4) a state statute, 5) a state supreme court decision, or 6) a state constitutional amendment? The article attempts to answer that question in light of the structure of what I call "our democratic, federal, republican" form of government.

The article proceeds in three parts. Section one considers the nature of the decision a government makes when it defines marriage, examining the various governmental interests in defining marriage which have been identified by proponents and opponents of legalizing same-sex marriage.

3. See, e.g., MichaelAnn Knotts, *NJ Domestic Partner Act: Much Praise for the Law that Falls Short of Others*, 13 N.J. Law.: Wkly. Newspaper 337 (Feb. 23, 2004); Mary P. Gallagher et al., Charles Toutant, Henry Gottlieb and Michael Booth, *Never Enough*, 174 N.J.L.J. 1111 (Dec. 29, 2003) (discussing pending appeal from a New Jersey trial court's ruling that the state's refusal to issue marriage licenses to same-sex couples did not violate the state constitution); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J.Super.L. Nov 5, 2003).

4. See Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 305-07 (2001) (citing and analyzing state defense of marriage acts).

5. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738C; 1 U.S.C. § 7).

6. 123 S. Ct. 2472 (2003).

7. Joanna L. Grossman, *Does Lawrence v. Texas "Change Everything?"*, 10 THE GAY & LESBIAN REVIEW WORLDWIDE 4 (Sept. 1, 2003); Joseph N. Ducanto, *Supreme Court Shows Winds Shifting on Gay Marriage*, 26 CHI. LAW. 68 (Sept. 2003); Nancy Gibbs, *A Yea for Gays*, TIME, July 7, 2003, at 38. The view that *Lawrence* will hasten the day in which same-sex marriage is legalized is not limited to same-sex marriage proponents. See, e.g., *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting) ("This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court").

8. Carolyn Lochhead, *Foes of Gay Marriage Renew Push for a Ban*, SAN FRANCISCO CHRONICLE, August 13, 2003, at A1; Michael J. McManus, *Save Marriage in Court . . . or Constitution?*, THE WASHINGTON TIMES, Sept. 26, 2003, at A21.

Section two then describes the key components of “our democratic, federal republic,” highlighting both theoretical and practical reasons for the adoption of those components. Section three evaluates the relative merits of deciding the same-sex marriage issue in each of the six potential forms in terms of compatibility with the key components of “our” system of government, at the same time examining some practical effects of deciding the issue in some of the forms.

This analysis indicates that where and in what form the same-sex marriage debate is resolved has implications for both our current governmental system and the long-term viability of the solution, whatever it may be. It also indicates that the best hypothetical newspaper story would begin with the phrase, “The state constitution was amended today”

I. NATURE OF THE MARRIAGE DEFINITION DECISION

In order to determine how and by whom the issue of same-sex marriage should be resolved in our system of government, it is helpful as an initial matter to determine the nature of the decision being made. An insight into this matter comes from a consideration of the interests a government (as opposed to individual actors)⁹ has in deciding what kinds of relationships will constitute a legal marriage.¹⁰

Although courts and scholars have, over time, identified a large number of societal interests in having laws that distinguish and privilege “marriage” from other relationships, in a general sense those interests can be classified into four main categories:¹¹ 1) society’s interest in pro-

9. As others have noted, when determining the government’s role in defining and regulating marriage, it is important to differentiate individual motivations for entering into a “marriage” relationship from societal interests in favoring and regulating such relationships. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 243 (2001); Lynn Wardle, “*Multiply and Replenish*”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL’Y 771, 777-79 (2001).

10. That the government has any interest in defining marriage is an issue which some dispute. See Jacob Sundberg, *Nordic Laws*, in DAS ERBRECHT VON FAMILIEMANGEHÖRIGEN IN POSITIVRECHTLICHER UND RECHTSPOLITISCHER SICHT 40 (1971) (noting that a 1969 directive for reform of Swedish law specified that legislation should be drafted so as not to favor in any way the institution of marriage over other forms of cohabitation) cited in MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 15 (1989).

11. For some time after the creation of the United States, courts and others often articulated as a governmental interest in defining and regulating marriage the link between the proper form of marriage and the proper form of government. See, e.g., *Reynolds v. United States*, 98 U.S. 145 165-66 (1878) (“According as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent rests. Professor Lieber says, polygamy leads to the patriarchal principle . . . which . . . fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy”). See generally NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9-131 (2000) (describing link

moting procreation and responsible child rearing,¹² 2) society's interest in promoting a particular moral atmosphere,¹³ 3) society's interest in promoting the individual well-being of its members by facilitating the kinds of intimate relationships that provide individual fulfillment,¹⁴ and 4) society's interest in the equitable distribution of economic and other tangible benefits.¹⁵ The first set of interests focuses on the family as an organic unit and views marriage as a means of perpetuating society (both physically and culturally). The second set of interests focuses mainly on the sexual relationship itself and views marriage as a means of symbolically reinforcing community norms concerning such matters. The third set of interests focuses on the individual, rather than the resulting unit,¹⁶

between commitment to monogamous marriage and American political theory throughout the eighteenth and nineteenth centuries). However, as Professor Cott has indicated, the link between marriage and political theory and governance waned considerably beginning in the twentieth century, *id.* at 157-58, to the point that there has been an "evaporation of the political role of marriage as ballast for the form of governance." *Id.* at 213. Thus, this one-time well-established governmental interest in regulating marriage has largely been replaced in public discourse by the other interests.

12. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) ("The laws regarding marriage . . . provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up."); *Turney v. Avery*, 113 A. 710, 710 (N.J. Ch. 1902) ("Lord Penzance has observed that the procreation of children is one of the ends of marriage. I do not hesitate to say that it is the most important object of matrimony, for without it the human race itself would perish from the earth." (citations omitted)); COTT, *supra* note 11, at 5 ("No modern nation-state can ignore marriage forms, because of their direct impact on reproducing and composing the population."). See generally Wardle, *supra* note 9, at 785-87.

13. *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage . . . [has] more to do with the morals and civilization of a people than any other institution."); E.J. GRAFF, WHAT IS MARRIAGE FOR? THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION 53 (1999) ("Marriage has long been seen as what makes sex legitimate—literally making it legal, roping it off from all those other kinds of sex for which an appalled neighborhood might haul you in front of the local ecclesiastical or county court.").

14. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) ("[M]arriages . . . are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (noting that constitutional protection afforded intimate associations such as marriage "reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.").

15. See, e.g., *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)."); COTT, *supra* note 11, at 156-179 (describing ascendancy of government's interest in economic impact of marriage).

16. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."); see also, Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 840 n.10 (1985) (noting "shift that [has] taken place from seeing the family as an organic group to seeing it as a contract among individuals").

and views marriage as a means of promoting individual well-being and happiness. The fourth set of interests focuses on the benefits associated with the marriage status and views marriage as a means of facilitating the efficient and economic distribution of government or private benefits.

While these views of marriage are not necessarily mutually exclusive, one's views on the proper definition depends, to a considerable extent, on one's view as to which of these functions should be the primary function of marriage. Thus, opponents of same-sex marriage tend to emphasize the societal perpetuation function of marriage¹⁷—with its focus on responsible procreation—and on the sexual norm reinforcement function of marriage—with its focus on the proper form of sexual relations. Proponents of same-sex marriage tend to emphasize the individual fulfillment function of marriage—with its focus on individual benefits from long-term intimate relationships. Proponents of domestic partnership laws tend to emphasize the distributional function of marriage—with its focus on benefits.¹⁸

The important point is that one cannot resolve the issue of which of these functions to prefer, how much weight to give them, or even how essential marriage is to the realization of the goal underlying the interest on value-neutral grounds. For example, one cannot decide how essential marriage is to responsible child rearing unless one first determines what values “children need.”¹⁹ This in turn requires some consideration of what values society favors. Similarly, one cannot decide how well marriage reinforces proper sexual norms unless one first determines what sexual norms are proper, an extremely value-contingent decision. Nor can one decide how essential marriage is to individual well-being unless one first determines what constitutes individual well-being and fulfillment, a determination which requires a prior decision as to what values society favors. Finally, and most importantly, one cannot begin to balance the various factors without further making the value choice as to which of the competing values (to the extent they conflict) should be preferred.

In short, when government defines marriage it necessarily determines, or reflects, to a considerable extent, its moral vision of what is

17. Wardle, *supra* note 9, at 785 (“the history of marriage regulation itself could be viewed primarily as the history of the regulation of sex, procreation, and child rearing, for those concerns have long outweighed such modern (and postmodern) interests as romantic love, companionate equality, interspousal intimacy, and economic maximization as the core societal concerns regarding marriage”).

18. See, e.g., Nancy K. Kubasek, Kara Jennings, Shannon T. Browne, *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 L. & SEXUALITY 55 (1997).

19. Ann Dailey, *Federalism and Family Law*, 148 U. PA. L. REV. 1787, 1869 (1995).

good for society and individuals. As Professor Fineman put it, “our beliefs about marriage help to shape our understandings of other societal institutions”²⁰—or, one might add, vice-versa.

The marriage definition debate is, therefore, an extremely value-laden decision dependent on one’s moral vision of what values are most important. The key question for this article is how such decisions are best made in our system of government. That in turn requires an examination of what “our” system of government is, and on what values it is based.

II. “OUR FEDERAL, DEMOCRATIC REPUBLIC”

In order to understand the manner in which value choices are best made in “our” system of government, it is helpful to note that one of the primary purposes of that system—a purpose evident from both the structure of the system and the history of its framing—is to prevent tyranny,²¹ and that one form of tyranny that the system is designed to prevent is that which exists when a king or other government entity controls the creation and transmission of all value and moral judgments and imposes them on the governed.²² However, even though the framers of our system agreed on the need to eliminate this—and other forms—of tyranny, they were far from unanimous about how that could best be accomplished.

A major source of disagreement on this matter stemmed from a fundamental difference of opinion concerning basic political philosophy. On one side of the divide were those who believed in “classic liberalism”—a key postulate of which is that government should have little or no role in

20. Fineman, *supra* note 9, at 247. See also *Maynard v. Hill*, 125 U.S. 190, 205 ([M]arriage has “more to do with the morals and civilization of a people than any other institution.”); *Noel v. Ewing*, 9 Ind. 36, 48 (1857) ([M]arriage “is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern . . . It is a great public institution, giving character to our whole civil polity.”).

21. See, e.g., Terri Peretti, *A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence*, 64 OHIO ST. L.J. 349, 358 (2003) (“It is commonplace to observe that the framers, in designing the Constitution, were strongly motivated by a fear of tyranny, particularly a majority tyranny that would likely develop in a democratic system.”). Speaking of the framers, Marci Hamilton has observed: “There was broad consensus on the end to be avoided—tyranny from any social center of power. The Framers typically focused on the choice of the best means to avoid tyranny.” Marci A. Hamilton, *Power, the Establishment Clause and Vouchers*, 31 CONN. L. REV. 807, 811 (1999).

22. “Monolithic control of the value transmission system is ‘a hallmark of totalitarianism.’” Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 480 (1983) (quoting P. BERGER & R. NEUHAUS, *TO EMPOWER THE PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 44 (1977)). Speaking of the purpose of the Establishment Clause, which prevents governmental intermingling with religion, Michael McConnell noted a similar concern about this form of tyranny. “Churches, synagogues, and other religious organizations were (and to a great extent still are) the leading institutions for the formation and dissemination of values and opinions. That is too important a function to be subjected to centralized political control.” Michael McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 848 (1999).

determining what constitutes the good for individuals and society. Under this view, government should, to the extent possible, be “value-neutral;” its proper role is to provide a process by which individuals can determine for themselves, both individually and in concert with other private actors, what values and morals are best.²³ According to the tenets of classic liberalism, the best way to prevent the form of tyranny in which an outside government makes and imposes value choices on the governed is to limit the power of government to make such choices.

On the other side of the divide were those who adhered to the “classic republicanism” political philosophy, the key postulate of which is that the purpose of government is to bring individuals together to determine and implement shared moral principles.²⁴ Under this view, government is not to be value neutral; to the contrary, its central purpose is to ensure that proper values are constructed, shaped, and disseminated throughout society because, according to this philosophy, only a society with proper values can remain free from tyranny.²⁵ These two competing philoso-

23. As Richard Stewart explained, “Liberal theory affirms the equal right and opportunity of each individual to pursue her own conception of the good. Government aids this enterprise by securing individuals’ private and political liberties, underwriting private agreements and associations, and providing other nurturing social services (such as education) and other collective goods (such as healthy environments).” Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1539 (1983). Thus, under the classic liberal view, “government must strive to remain neutral among competing conceptions of the good, while simultaneously securing the capacity of individuals and associations to realize their chosen ends.” *Id.*

24. Daniel Elazar describes these two “contrasting conceptions of the political order” as one (liberalism) in which “the political order is conceived as a market place in which the primary public relationships are the product of bargaining among [private] individuals and groups,” and one (classic republicanism) in which “the political order is conceived to be a commonwealth—a state in which the whole people have an undivided interest—in which the citizens cooperate in an effort to create and maintain the best government in order to implement certain shared moral principles.” DANIEL J. ELAZAR, *THE AMERICAN CONSTITUTIONAL TRADITION* 172 (1988). *See also*, Suzanne Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551 (1986) (“Where liberalism finds the primary purpose of government to be promotion of the diverse goods of individual citizens, republicanism finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values”).

25. The concern of classic republicans was summed up by the views of one writer of the time who noted that when virtue declined, citizens would no longer vigilantly watch over their freedom and government would become tyrannical. “Thus, before a nation is completely deprived of freedom, she must be fitted for slavery by her vices.” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 52-53 (1969) (quoting William Tudor, *An Oration Delivered at Boston, March 5, 1779*, in *PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA* 57 (Hezekiah Niles ed., 1876)). As Gordon Wood explained it, the belief was that “[r]epublics died not from invasions from without but from decay from within.” *Id.* at 53.

phies were much in play at the time of the framing²⁶ and pointed toward two different solutions to the tyranny problem.²⁷

In a general sense, the classic liberal view—under which government’s role was not to determine what was good for individuals or society, but rather to facilitate the process by which private individuals and private groups determine those issues for themselves—prevailed in the federal constitution.²⁸ The focus of that document is on process, specifically on the structures and processes through which governmental decisions are made at a national level.²⁹ Thus, the federal constitution is, by and large,³⁰ devoid of any express³¹ value or moral judgments. Instead, it reflects the view expressed in a central provision of the Declaration of Independence that “governments are instituted among men,” not to determine for its citizens what constitutes happiness, but to “secure” their right to pursue that goal according to their own vision of it.³²

Recognizing that no government can exist or function without the creation and implementation of some values, however, the framers inserted several structural defenses into the national system which were designed to prevent the kind of tyranny that can result when some entity becomes the disproportionate source of value judgments and opinions.

26. Gordon Wood has asserted that the classic republicanism that fueled the revolution was eclipsed by classic liberalism when the U.S. constitution was adopted. *Id.* at 608-12.

27. In a general sense, the liberal solution was to keep government out of the value selection process, while the republican solution was to make sure that the people remained in control of the government, whose role was to make sure the right values were chosen.

28. As Daniel Elazar explained, “[w]here the federal constitution to stand alone, one could conclude that morality and government were entirely separated in the new American constitutional order.” ELAZAR, *supra* note 24, at 169. It is clear, however, that supporters of the federal constitution believed that the constitution reflected some of the of the fundamental principles of classic republicanism. See, e.g., THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961) (“Republican government presupposes the existence of [qualities of human nature reflecting virtue] in a higher degree than any other form”). Indeed, as Akhil Amar has pointed out, portions of the federal constitution, particularly the Bill of Rights, also arguably reflect civic republicanism norms. See Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). See also *infra* note 36.

29. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88-101 (1980).

30. There are, of course, some exceptions to this. See *id.* at 92-93. As Ely also noted, however, the two most notable exceptions in the subsequent amendments (the Thirteenth outlawing slavery and the Eighteenth adopting prohibition) are the exceptions that prove the rule. *Id.* at 99. The lessons to be learned from the prohibition “exception” are discussed below. See *infra* text accompanying notes 90-104. Insights from the slavery experience are discussed *infra* at note 110.

31. Of course, “[l]ike every legal and political theory, [the theory of liberalism] rests on potentially controversial value choices. Its premise is that the ultimate good for men and women is plural and can be realized only by voluntary efforts, both individual and concerted.” Stewart, *supra* note 23, at 1539.

32. ELY, *supra* note 29, at 89-90. As Ely explains, this and other “critical constitutional documents” consistently portray the theme that “justice and happiness are best assured not by trying to define them for all time, but rather by attending to the governmental processes by which their dimensions would be specified over time.” *Id.* at 89.

Four of these features are of particular relevance to an understanding of our system of government.

First, and preeminent in the minds of many at the time of the framing, is the democratic notion of popular sovereignty,³³ which put the people who were to be governed (instead of some outside force such as a king) as the ultimate source of whatever value judgments the national government would adopt. It was “the people”³⁴—not a king or the nation state—who ordained and established the constitution, one of the purposes of which was to “secure the Blessings of Liberty”—the polar opposite of tyranny—to themselves and to their posterity.³⁵ By eliminating the distinction between the sovereign and the governed, this “democratic” feature of our government diminished the chances that outside values and judgments would be imposed by the government.³⁶

Two other structural tyranny defenses compose what I call the federal component of our system. The first is the division of the people’s sovereign powers—initially between state and federal governments, and then among the three branches of government (at least at the national level). This dual division of delegated powers, Madison argued, provided a “double security” against the tendency toward all forms of tyranny that might occur if one entity controlled all governmental power.³⁷

33. See, e.g., David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713, 733 (2002) (“[T]he Framers of the Constitution incorporated a novel, critical feature to further protect liberty from governmental tyranny. They vested governmental authority in the people.”). For further authority, see *id.* at n.95.

34. As Madison put it in *The Federalist*, “the Constitution is to be founded on the assent and ratification of the people of America” who are “the supreme authority.” THE FEDERALIST NO. 39, at 243 (Clinton Rossiter ed., 1961).

35. U.S. CONST. pmbl.

36. This feature of the federal constitution is completely consistent with classic republicanism as well. As Thomas Paine, a chief proponent of classic republicanism, explained, “the word republic means the public good or the good of the whole in contradistinction to the despotic form which makes the good of the sovereign or of one man, the only object of the government.” WOOD, *supra* note 25, at 55-56. Thus, even under the classic republican view, keeping people involved and in control of the system is a key component of the battle against tyranny. Classic republicanism instructed that “any government which lacked ‘a proper representation of the people’ or was in any way even ‘independent of the people’ was liable to violate the common good and become tyrannical.” *Id.* at 56 (quoting Samuel West, *A Sermon Preached . . . May 29th, 1776, Being the Anniversary for the Election of the Honorable Council for the Colony*, in THE PULPIT OF THE AMERICAN REVOLUTION: OR, THE POLITICAL SERMONS OF THE PERIOD OF 1776-280-81 (John W. Thornton. ed., 1860).

37. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”).

Although we have come to think of only the first of these divisions as the “federal” component of our system—referring to the other as separation of powers—in this article, I use the term “federal” to refer to both vertical and horizontal separation of powers, as well as to the limited nature of national

A second structural “federalist” defense mechanism against tyranny was the decision to limit the kinds of issues the national government could address.³⁸ That government was to exercise authority “principally on external objects” such as “war, peace, negotiation, and foreign commerce.”³⁹ While value choices inevitably are involved in such matters—as they are on any other governmental decision⁴⁰—the federal government was not to have control over governmental decisions affecting the more personal value choices “which, in the ordinary course of affairs, concern the lives, liberties and properties of the people.”⁴¹ Thus, the limited nature of the national government is a prominent part of the federal component of “our” government system.

The final tyranny-combating component of the federal constitutional structure of “our” system of government is its republican nature. In the national system, the value-laden decisions that must be made are made, by and large, by elected representatives in Congress, rather than directly by the people. This feature, coupled with the bicameral nature of the legislature⁴² and the provision for executive veto,⁴³ provides an additional check on undue governmental control over values by providing filters through which the value choices must pass before they become law.⁴⁴

governmental powers, which is a part of the more traditional federal definition. This expanded definition of the term—though certainly awkward and potentially misleading—is not as contrived as might at first appear. A federal system is one in which the sovereignty is divided among more than one government. The division of power among the three branches is also a division of sovereignty. More importantly, the framers clearly viewed the two concepts as related, at least insofar as they worked in tandem to prevent tyrannical use of the sovereign power. *See id.* The framers noted that the same principle explained, in part, the decision to further divide sovereign power in the legislative branch through adoption of a bicameral system. *See THE FEDERALIST NO. 62*, at 378-379 (James Madison) (Clinton Rossiter ed., 1961) (“[A] senate, as a second branch of the legislative assembly distinct from and dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.”).

38. *See, e.g.*, *THE FEDERALIST NO. 45*, at 292 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined.”).

39. *Id.*

40. When, for example, Congress decides to provide tax benefits to married couples, it makes a value choice as to the desirability of that condition. Even more seemingly value-neutral choices, such as the decision to use an income tax, rather than some other form of taxation, or even the decision to use taxation—rather than government-owned enterprises—to generate revenue for the government, necessarily involve value choices.

41. *THE FEDERALIST NO. 45*, at 293 (James Madison) (Clinton Rossiter ed., 1961).

42. U.S. CONST. art. I, § 1.

43. U.S. CONST. art. I, § 7.

44. *See, e.g.*, *THE FEDERALIST NO. 10*, at 82 (James Madison) (Clinton Rossiter ed., 1961) (the principle of representation serves to “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”). *See generally* Glen Staszewski, *Rejecting the Myth of Popular Sov-*

Therefore, in a republic such as ours, the inflamed passion of the majority, which controversial value decisions often engender, is less likely to find its way into governmental policy.

Thus, consistent with the theory of classic liberalism which it largely reflects, the principal remedy for tyranny adopted at the national level is the structure of “our” government: a democratic (with the people as sovereign), federal (with the dual division of sovereignty and the limited nature of federal power) republic (with elected representatives acting in a bicameral legislature subject to executive veto power). That kind of structural remedy is largely consistent with the liberal view that governmental structure should focus on process rather than substantive results.

Yet there is one feature of the original federal constitution which indicates that the victory of classic liberalism over its republican competitor was not complete and that the way in which tyranny is to be combated in our system is more complex than at first appears. Had the framers adopted wholeheartedly the liberal view that government should, to the fullest extent possible, be wholly removed from all value judgments, one would have expected provisions in the constitution that would have prevented not only the federal, but also the state, governments from making such judgments. In the absence of an express direction to that effect, one would have at least expected that—given Madison’s view that tyranny was more likely to occur in small republics (like states)⁴⁵ and that the best remedy for this was to resolve controversial decisions at a national level⁴⁶—proponents of classic liberalism would have insisted that Congress, rather than the states, be given whatever governmental powers were appropriate to regulate morals. Yet, stating what was the inevitable consequence of the limited nature of federal powers, the Tenth Amendment made clear that the police power, with its accompanying authority to regulate morals, was left to the “states.”⁴⁷

ereignty and Applying an Agency Model to Direct Democracy, 56 VAND. L. REV. 395, 401-03 (2003).

45. See THE FEDERALIST NO. 10 (James Madison).

46. Madison believed that, at a national level, factions which sought to impose value judgments on others were more likely to cancel each other out and that the other legislative filters which existed at the national level would further limit the number of value-judgments which would make their way into law. *Id.*

47. U.S. CONST. amend. X. See, e.g., *United States v. Lopez*, 514 U.S. 549, 566-67 (1995) (finding that the Constitution withholds from Congress the “general police power of the sort retained by the States”); *United States v. E. C. Knight Co.*, 156 U.S. 1, 11 (1895) (“[T]he power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, ‘the power to govern men and things within the limits of its dominion,’ is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive.”); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 7-8 (1998).

This decision appears especially incongruous with the remainder of the classic liberal orientation of the federal constitution when one realizes that the state constitutions at the time reflected much more the classic republican view that government's role was not to remain neutral on moral issues, but instead to act at the direction of its citizens to determine and "implement shared moral principles."⁴⁸ For example, whereas the federal constitution mandated government neutrality on religious matters,⁴⁹ the contemporaneous Massachusetts provision unabashedly declared that "the happiness of a people . . . essentially depend[s] upon piety, religion and morality" and authorized the legislature to require local governments "to make suitable provision, at their own expense, for the institution of public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be voluntary."⁵⁰ Moreover, while the federal constitution made clear that Congress had only the powers delegated to it by the federal constitution, prevailing doctrine then and now posits that state legislatures have inherent authority to regulate any subject—including morals—not expressly placed off-limits by the state or federal constitutions.⁵¹

Thus, the kind of value-laden moral decisions that liberal political philosophy seemed to abhor and which the federal constitution seemed to avoid—and discourage—at the national level were expressly permitted, and even encouraged, at the state level. While carefully limiting opportunities for the national government to make moral judgments in order to prevent tyranny, the framers choose to, by and large, leave the states free from constraint. How can one explain this incongruity?

Undoubtedly, some of it may be explained by the political reality that the national constitution would not have been adopted if it were

48. ELAZAR, *supra* note 24, at 172. See e.g., N.H. CONST. pt. 1, art. VI (2003) (As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes . . . shall at all times have the right of electing their own teachers . . ."); VA. CONST. of 1776, Bill of Rights, § 15 ("no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue").

49. U.S. CONST. amend. I.

50. MASS. CONST. of 1780, art. III. See also VA. CONST. of 1776, art. I, §§ 5 & 16 (admonishing citizens to treat others with "Christian forbearance, love, and charity").

51. See, e.g., *In the Interest of B.D.*, 720 So.2d 476, 478-79 (Miss. 1998) ("In decisions too numerous to mention, it is firmly established that the legislature has the inherent authority as an incident to the police power of the state, subject to constitutional limitations, to prescribe laws and regulations for the purpose of safeguarding the health, safety and morals of the inhabitants of the state."). For this reason, while the federal constitution is generally viewed as a grant of authority to Congress, state constitutions are generally construed as limits on legislative authority, with the presumption that, unless so limited, state legislatures have plenary power. See *State ex rel. Schneider v. Kennedy*, 587 P.2d 844, 850 (Kan. 1978); TARR, *supra* note 47, at 7.

viewed as too disruptive of the prior status quo and prevailing philosophy, and at least some of the framers who believed strongly in the liberal political philosophy may have been willing to go along with less than a perfect solution in order to achieve one that was better than the existing state of things. However, at least some of the framers also understood that there were legitimate reasons why one might conclude that liberty would be better served by allowing states this leeway, even under a classic liberal view of government.

First, Madison's views notwithstanding,⁵² it is not entirely clear that giving the police powers to the national government would have made their exercise any less of a threat to liberty, even with all the extra procedural filters that the constitution provided for legislative decisions at the national level. Indeed, granting Congress the police powers may have made those powers more dangerous by separating the value-shaping power more from the people who were to control it under the notion of popular sovereignty.⁵³ For many, the concern that the government agents would themselves be unfaithful to their trust and impose their values on the governed was a real threat,⁵⁴ and one more likely to occur if the agents were not intimately connected with the governed as they were at a local level.⁵⁵

Second, even if, contrary to this view (and more consistent with Madison's belief), oppressive use of legislative power is more likely to occur at the state rather than the national level, the harmful effects of such "bad" decisions are in one sense less at the local level because, as Michael McConnell has pointed out, "[o]ppressive measures at the state level are easier to avoid."⁵⁶ By moving to a different state, one can avoid

52. See THE FEDERALIST NO. 10 (James Madison).

53. Contrary to the claim of their opponents, the largely classic republican anti-federalists did not lack trust in the people to govern themselves, they simply thought the actual decision-makers were too far removed from the people under the proposed federal constitution. See WOOD, *supra* note 25, at 520.

54. *Id.* at 559, 598, 608; see also THE FEDERALIST NO. 63 (James Madison).

55. WOOD, *supra* note 25, at 520-21 (noting that Antifederalists were not anti-democratic, but "'localists,' fearful of distant governmental, even representational, authority" who argued that liberty would be lost because power was placed "into the hands of a set of men who live one thousand miles from you") (quoting 2 THE LETTERS OF RICHARD HENRY LEE 451-52 (James C. Ballagh ed., 1911)). Early state legislatures had greatest power among state governmental officials (considerably more than they did at the federal level, especially in early constitutions, see G. Alan Tarr, *Between Authority and Liberty: State Constitution Making in Revolutionary America*, 28 RUTGERS L.J. 865, 869 (1997) (book review); Rogan Kersh et al., "More a Distinction of Words than Things": *The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 16-17 (1998)) precisely because they were more representative of the people. WOOD, *supra* note 25, at 163 ("[T]he real importance of the legislatures came from their being the constitutional repository of the democratic element of the society or, in other words, the people themselves").

56. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1503 (1987) (book review).

moral choices with which one does not agree without relinquishing all the benefits of national citizenship, a form of exit not possible if moral decisions are made at the national level.⁵⁷

Third, requiring that the moral decisions that government makes be made at the state rather than the national level provides individuals with a greater choice of moral atmospheres to which to attach themselves, thereby enhancing, in one sense, the liberty of all citizens of the nation to choose their own moral values.⁵⁸

Finally, and most importantly for purposes of this article, cognizant of the ideals of classic republicanism, at least some of the framers undoubtedly understood that there were some aspects of that philosophy that were helpful, perhaps essential, to the avoidance of tyranny in any system of democratic government, even one largely oriented to a classic liberal philosophy. They realized that tyranny in a democracy can arise from a number of causes,⁵⁹ including as a result of citizen alienation from government. When citizens are alienated from the government, tyranny can result in at least two ways, each of which is countered to some extent by the classic republican view that citizens ought to work together to create and implement a shared vision of the good.

57. Moreover, as Michael McConnell has noted, in some situations, allowing moral decisions to be made at the state level can decrease the number of people who will feel oppressed by the decisions that are made.

For example, assume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A. *Id.* at 1494.

58. As Michael McConnell has explained:

Under a regime of decentralized decision making, it is more, not less, likely that communities will adopt a radical, controversial form of social organization. Santa Monica, California, for example, can adopt a form of socialism that is unlikely to command majority support in any state or the nation at large. To some, Santa Monica will be a beacon of (a particular form of) liberty; to others, it is a petty tyranny. Indianapolis can (or could, if the courts would allow it) adopt anti-pornography legislation more stringent than national norms. To some (a curious alliance of feminists and social conservatives) this protects their freedom from a pornography-ridden society; to others, this is a violation of freedom of expression. The liberty that is protected by federalism is not the liberty of the apodictic solution, but the liberty that comes from diversity coupled with mobility.

Id. at 1503-04.

59. Madison, for example, believed that tyranny could result from either "the 'oppression of [the] rulers'" or "the 'injustice' of 'one part of the society against . . . the other part.'" McConnell, *supra* note 56, at 1504 (quoting THE FEDERALIST No. 51, at 323 (Clinton Rossiter ed., 1961)). See also Michael A. Scaperlanda, *In Defense of Representative Democracy*, 54 OKLA. L. REV. 38, 41-42 (2001) (noting framers' belief that factional tyranny "can arise from three sources in society: (1) by a minority of the populace; (2) through an abuse of power by those chosen to govern . . . ; or (3) by a majority of the populace").

The first form of tyranny potentially resulting from citizen alienation arises as a result of all governments' need to enforce their laws. Generally speaking, obedience to law can come from either fear of punishment or voluntary compliance.⁶⁰ If a government must rely primarily on the former, it may well evolve into a tyrannical police state, as it is forced to place law enforcement officers in every location of possible violation. Thus, as the anti-federalist Brutus explained, in a free (non-tyrannical) society "the government must rest for its support upon the confidence and respect which the people have for their government and laws,"⁶¹ and not on fear of punishment. This attitude of voluntary obedience requires some subordination of the individual will to the common good, one of the central values classic republicanism sought to instill in its citizens.⁶² Moreover, the confidence in government which contributed to such an attitude is facilitated by the more intimate acquaintance that exists between a citizen and her state or local representative than between her and her Senator.⁶³ Therefore, when moral decisions are made at a national level, there will likely be less voluntary compliance and, given government's inevitable desire to enforce its laws, a corresponding tendency for the government to rely on oppressive law enforcement efforts.⁶⁴

Second, precluding government from acting at a local level on issues of greatest concern to citizens could result in a diminishment of public or civic virtue, the kind of attitude which arguably allows any kind of free democratic system to operate.⁶⁵ Classic republicanism postulated that

60. McConnell, *supra* note 56, at 1508.

61. *Id.* (quoting 2 THE COMPLETE ANTI-FEDERALIST 2.9.18 (Herbert J. Storing ed., 1981)). See also WOOD, *supra* note 25, at 66 ("In a free government the laws, as the American clergy [in the late eighteenth century] never tired of repeating, had to be obeyed by the people for conscience's sake, not for wrath's.").

62. WOOD, *supra* note 25, at 53 ("The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism.").

63. As Brutus put it,

The different parts of so extensive a country could not possibly be made acquainted with the conduct of their representatives, nor be informed of the reasons upon which measures were founded. The consequence will be, they will have not confidence in their legislature, suspect them of ambitious views, be jealous of every measure they adopt, and will not support the laws they pass.

McConnell, *supra* note 56, at 1508 (quoting 2 THE COMPLETE ANTI-FEDERALIST 2.9.18 (Herbert J. Storing ed., 1981)). "The confidence which the people have in their rulers, in a free republic arises from their knowing them, from their being responsible to them for their conduct, and from the power they have of displacing them when they misbehave." *Id.*

64. See discussion concerning prohibition *infra* text accompanying notes 90-104.

65. As Gordon Wood explained, classic republicans believed that "[a]lthough a particular structural arrangement of the government in a republic might temper the necessity for public virtue, ultimately 'no model of government whatever can equal the importance of this principle [of public or civic virtue], nor afford proper safety and security without it.'" WOOD, *supra* note 25, at 68 (quoting Phillips Payson, *A Sermon Preached . . . at Boston, May 27, 1778, in THE PULPIT OF THE*

citizens could maintain their freedom in a democratic form of government only if they were willing to fully engage in the process and as a result, be more willing to subordinate their well-being to the common good.⁶⁶ This kind of attitude is much easier to cultivate at a local level, where participation is easier and the ties that make such sacrifices possible more likely exist.⁶⁷ More importantly, classic republicans believed, this attitude of public virtue could be cultivated only if proper private virtues were inculcated in the citizenry;⁶⁸ hence the need for governments, particularly more local ones, to have some say in the overall moral atmosphere of the community. In the absence of such public virtue—which could result from citizen alienation from the governmental system—the national democratic system would arguably eventually evolve into a tyrannical state because the ultimate sovereignty of the people would diminish through lack of interest and involvement in the system.⁶⁹

Classic republicanism thereby provided the antidote to the two forms of tyranny (that arising from lack of adequate voluntary obedience to law and that arising from lack of adequate public virtue in the citizenry) that could result from citizen alienation from the government. Thus, the viability of the liberal individualistic political philosophy reflected in the federal constitution was arguably dependent to a considerable extent on the preservation of some aspects of the civic republican philosophy re-

AMERICAN REVOLUTION: OR, THE POLITICAL SERMONS OF THE PERIOD OF 1776-37 (Thornton ed., 1860)).

66. See *supra* note 62.

67. As McConnell explains, “[a]n individual is most likely to sacrifice his private interest for the good of his family, and then for his neighbors and, by extension, his community. He is unlikely to place great weight upon the well-being of strangers hundreds of miles away.” McConnell, *supra* note 56, at 1510.

68. As Wood explains, “public virtue, the willingness of the people to surrender all, even their lives, for the good of the state, was primarily the consequence of men’s individual private virtues. . . . A man raked by the selfish passions of greed, envy, and hate” would not possess public virtue. WOOD, *supra* note 25, at 69.

69. Tocqueville described well the state of affairs that could result from such citizen alienation from government.

[T]he citizen is unconcerned as to the condition of his village, the police of his street, the repairs of the church or of the parsonage; for he looks upon all these things as unconnected with himself, and as the property of a powerful stranger whom he calls the Government. He has only a life-interest in these possessions, and he entertains no notions of ownership or of improvement. This want of interest in his own affairs goes so far that, if his own safety or that of his children is endangered, instead of trying to avert the peril, he will fold his arms, and wait till the nation comes to his assistance. This same individual, who has so completely sacrificed his own free will has no natural propensity to obedience; he cowers, it is true before the pettiest officer; but he braves the law with the spirit of a conquered foe as soon as its superior force is removed: his oscillations between servitude and license are perpetual. When a nation has arrived at this state it must either change its customs and its laws or perish; the source of public virtue is dry, and, though it may contain subjects, the race of citizens is extinct.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 94 (Henry Reeve trans., 1961).

flected in the state constitutions of the time,⁷⁰ and one can accurately describe our system of government as a democratic, federal republic only if one understands that the term “republic” connotes not only the notion that contested value judgments are to be made by elected representatives, but also that the system is imbued with the anti-alienation features of classic republicanism which the framers arguably viewed as essential to the existence of a non-tyrannical state.⁷¹

In sum, there are three essential components (two of which have sub-components) of “our” system of government: 1) it is democratic (the people are the sovereign), 2) it is federal (in that it both divides power vertically and horizontally and limits the subjects over which the national government has jurisdiction), and 3) it is republican (in both the sense that it is a representative, rather than a purely democratic, form of government and in the sense that it is imbued with the anti-alienation features of classical republicanism).⁷²

70. As Daniel Elazar put it: “It is not unfair to say that the federal constitution could emphasize individualism and the market place precisely because the founders could count upon the state constitutions to emphasize the community and commonwealth.” ELAZAR, *supra* note 24, at 169. While several scholars have concluded that early state constitutions differed fundamentally from their federal counterpart by adopting a more civic republicanism point of view, others have asserted that there was less distance between liberalism and civic republicanism at the time. See TARR, *supra* note 47, at 64 & nn.15 & 16 (citing sources).

71. It was in reference to the latter meaning of the term that Thomas Paine observed, “What is called a republic is not any particular form of government.” WOOD, *supra* note 25, at 47.

72. One might challenge this analysis as incomplete because it does not take into account the changes to “our system of government” brought about by the Civil War Amendments, and particularly the Fourteenth Amendment. There is no doubt that the Fourteenth Amendment changed the balance between state and federal power significantly—indeed, that was the entire point of the amendment. Furthermore, there is no doubt that once the amendment was ratified, states had less leeway to shape the moral vision of their political communities than they did before the amendment, as constitutional limits were placed on the use of the police power that did not exist before. The amendment as a whole, as Akhil Amar has said about the privileges and immunities clause, “indicates a subtle, but real shift of emphasis, reflecting a vision more liberal than republican, more individualistic than collectivist, more private than public.” Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1261 (1992).

While this shift in emphasis was real, it does not alter the basic nature of the system described above, in my view. The limitations placed on the states, while of real significance, did not signal, nor require complete abandonment of the classic republican philosophy—which still prevailed to some extent. The police powers were not divested from the states, and few (other than Justice Black) argue that all limitations imposed on the federal government, now apply to the states’ use of those powers. Indeed, scholars like Akhil Amar have shown that several provisions of the Bill of Rights were themselves designed in large part to protect state sovereignty (and not just individual rights) and that those provisions which had that effect should not be applied to the states (or at least not in the same manner as they are to the federal government). See, e.g., AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 215-283 (1998). Thus, while the amendment clearly indicates that there are certain “moral” visions a state cannot adopt, it does not indicate they are precluded from adopting any moral vision. There is, therefore, still ample leeway for state citizens to work in a republican way if they choose to do so, and—given the anti-alienation benefits of the republican philosophy—good reason for them to do so.

With an understanding of both the value-laden nature of the marriage definition decision and the key components of “our democratic, federal, republican” system of government, it is possible to consider the question raised at the outset: given the nature of the decision and “our” system of government, by whom, and in what form should the same-sex marriage issue be resolved?

III. DEFINING MARRIAGE IN “OUR DEMOCRATIC, FEDERAL REPUBLIC”

As noted above, there are six different forms in which the same-sex marriage issue could be resolved. An analysis of the objections that might be raised by a proponent of “our” system of government against a decision in each of these forms shows that the decision is best made via a “properly-adopted” state constitution and that resolution of the issue in other forms will, to varying degrees, undermine both the values underlying our system of government, as well as the long-term viability of the decision itself.

A. *Defining Marriage by Federal Statute*

A federal statute defining marriage as including or excluding same-sex couples for all purposes⁷³ 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.⁷⁴ As noted above, the framers declined to give Congress

73. Federal law already regulates and shapes the marriage relationship in a number of indirect ways. *See, e.g.*, 29 U.S.C. § 1055 (f) (2000) (marriage requirement for certain ERISA benefits); IRC § 6013 (2000) (altering federal income tax for married couples). *See also* MICHAEL J. GRAETZ, *THE U.S. INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE* 29-40 (1999) (describing how federal income tax laws encourage, or in many cases, discourage marriage). However, most of these statutes do not provide a primary definition of marriage, instead relying on state law definitions. While the Defense of Marriage Act, Pub. L. No. 104-199, § 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738C; 1 U.S.C. § 7), does define marriage for purposes of federal law, that is still different from a federal statute which would supplant a state-law definition, or limit the choices available to a state. The desirability and constitutionality of the portion of DOMA which defines marriage for federal law purposes is not within the scope of this article, which focuses on the proper forum for defining marriage in its most basic form. For discussion of the issues raised by that portion of DOMA, *see* Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the “Defense of Marriage” Act*, 16 QUINNIPIAC L. REV. 221 (1996) (arguing that Congress lacks the power to define marriage even for federal law purposes); Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States’ Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571 (1997) (same); Andrew Koppleman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 4-5 (1997) (concluding that “Congress obviously has the power to define the terms of the U.S. Code,” but that DOMA is unconstitutionally discriminatory).

74. *See, e.g.*, *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (“[T]here is no federal law of domestic relations, which is primarily a matter of state concern.”); *In re Burris*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states, and not to the laws of the United States”); *United Ass’n of Journeymen Local 198 AFL-*

authority to make the kind of substantive value judgments required to decide what kinds of relationships should qualify as a marriage. Moreover, as noted above, there are good policy reasons why such contested value judgments should not be made by Congress at a national level. The decision would be made by elected representatives who are further removed from their constituents—both geographically and numerically⁷⁵—than are state officials. Furthermore, definitively resolving the issue at the national level prevents the relatively easy exit that exists at the state level, and likely increases the number of persons who will feel alienated by the decision, potentially undermining the classic republican components of our system. Thus, a congressional statute definitively resolving the issue would be inconsistent with both the federal and republican features of “our” system of government.

B. U.S. Supreme Court Decision

In the absence of a new constitutional amendment, the consistency with “our” system of government of a U.S. Supreme Court decision resolving the same-sex marriage issue would vary dramatically depending on the basis for the decision. If the decision were based on the Equal Protection Clause, it would be much more consistent with “our” system of government than would an identical decision based on privacy or some other constitutional value judgment.

CIO Pension Plan v. Myers, 488 F. Supp. 704, 707 (M.D. La. 1980) (“[T]he delicate relationships of husband-wife . . . are traditionally matters of exclusive state concern. No provision of Article I of the Constitution confers power upon the Congress to legislate in these sensitive state fields. Any general federal law attempting to regulate such relationships would be constitutionally infirm.”). *But see* Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1747 (1991) (concluding that, in light of the number of federal laws which affect and indirectly define family life, “the idea that family law belongs to the states becomes problematic”). For a thoughtful argument that state control of family is an essential aspect of a liberal democratic order, see Dailey, *supra* note 19.

75. Currently, each member of the U.S. House of Representatives represents approximately 646,000 constituents (a figure derived by dividing the 2000 population of the U.S. (281,424,177, www.census.gov/population/cen2000/tab01.xls) by 435). U.S. Senators from the more populous states represent millions (in the case of California, 1 for every 16 million residents). By contrast, some state legislators represent a group less than 2% that size. Wyoming, for example, has a representative for every 8,255 residents (60 state representatives representing 495,304 residents www.census.gov/population/cen2000/tab01.xls). Legislators in other states represent larger groups, but those groups are still a small fraction of the size of the groups represented in the U.S. Congress. Utah, for example, has a representative for every 29,823 residents (75 representatives, population of 2,236,714 www.census.gov/population/cen2000/tab01.xls), and Hawaii has a representative for every 23,856 residents (51 representatives, population of 1,216,642 www.census.gov/population/cen2000/tab01.xls). Even the larger states have constituents groups that are considerably smaller than those at the national level. New York, for example, has a representative for every 126,670 residents (150 representatives, population of 19,004,973 www.census.gov/population/cen2000/tab01.xls). The chance that an elected representative will accurately and fully represent her constituents obviously declines as the number of constituents increases.

An equal protection decision would arguably be consistent with all the premises of “our” system of government. While such a decision would clearly be based on a substantive value—equality—that value finds express mention in a constitutional amendment ratified by a sufficient number of states to largely satisfy both the democratic and federal features of “our” system of government.⁷⁶ Moreover, equality is a value norm which arguably is an essential feature of both the relatively value-free classic liberalism philosophy⁷⁷ and the more value-shaping philosophy of classic republicanism.⁷⁸ The main objection to such a ruling would, therefore, be that it might not comport with the democratic component of “our” system because, while the people clearly inserted the general concept of equality into the constitution, in the absence of an amendment specifically addressing its application to same-sex marriage, it is less clear that they would want the equal protection clause applied in any particular manner on that issue.⁷⁹

On the other hand, a decision resolving the issue (likely in favor of same-sex marriage) on privacy grounds—which after *Lawrence v. Texas*,⁸⁰ seems like the most likely alternative candidate—would arguably violate the democratic principle of “our” system of government. Non-textual substantive value judgments made by governmental actors who are not elected representatives of the sovereign people run the risk of creating one kind of tyranny “our” system was designed to prevent—extraneous creation and imposition of values.

More importantly, a non-textual privacy based decision would potentially violate the classic republican feature of “our” system by alienating

76. Even if the decision were otherwise contestable, it would be less violative of the democratic norm if based on equal protection grounds rather than on privacy or some other liberty type basis. As Justice Jackson explained, if a court strikes down substantive legislation on substantive due process or liberty grounds, the effect is frequently to disable “all government—state, municipal and federal—from dealing with the conduct,” thus leaving “ungoverned and ungovernable conduct which many people find objectionable.” *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). On the other hand, “[i]nvocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.” *Id.* Thus, an equal protection ruling will often still leave room for legislative choice by the people’s elected representatives. Moreover, this “democratic gain” is often achieved without any corresponding increase in the risk of majority tyranny because “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.” *Id.*

77. See ELY, *supra* note 29, at 77-101.

78. See WOOD, *supra* note 25, at 70-75.

79. Some might also argue that such a decision would still run the risk of interfering with anti-alienation aspects of the classic republican features of “our” system of government. However, as noted below, see *infra* text at notes 81-82, that interference would likely be less than if the Court were to rule on other more clearly contested value judgment bases, such as privacy.

80. 123 S. Ct. 2472 (2003).

from that system those who oppose the decision. Such alienation can well lead to withdrawal from the political process, or worse, to efforts to resolve the issue outside that process, as demonstrated by a similar non-textual, value-based Supreme Court decision on the abortion issue.⁸¹ The impact on the classic republican features of our system could be especially harmful were the Court to base its decision on the assertion in *Lawrence* that a state cannot regulate a practice merely because “a governing majority in [the] State has traditionally viewed [it] as immoral,”⁸² a statement seemingly at odds with the central premise of civic republicanism that government has a role to play in shaping and implementing shared moral principles.

The alienation that could result from such a decision might adversely impact not only our system of government, but also the viability of the proposed resolution of the dispute itself. As the long-running post-*Roe v. Wade*⁸³ controversy concerning abortion indicates, judicial resolution of value disputes at a national level may cause an issue to be more, not less, contentious in the long run.⁸⁴

Thus, the adverse impact on both “our” system of government and on the durability of the solution itself would vary dramatically depending on the basis for the judicial ruling, something proponents of such a solution should take into account.

81. See, e.g., Ron Word, *Abortion Foe Executed for Slayings at Clinic*, SEATTLE TIMES, Sept. 4, 2003, at A5 (describing murders by abortion opponents and noting that one of them urged foes of abortion “to do what you have to do to stop it”).

82. *Lawrence*, 123 S. Ct. at 2483 (quoting Stevens dissent in *Bowers*).

83. 410 U.S. 113 (1973).

84. As Justice Scalia pointed out in *Planned Parenthood of Pennsylvania v. Casey*:

Not only did *Roe* not, as the Court suggests, 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. *Roe*’s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. (“If the Constitution *guarantees* abortion, how can it be bad?”—not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. . . . *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since.

505 U.S. 833, 995-96 (1992) (Scalia, J., dissenting).

C. Federal Constitutional Amendment

A federal constitutional amendment⁸⁵ either legalizing or (more likely at the present time) prohibiting⁸⁶ same-sex marriage would not as clearly undermine the structural principles of “our” system of government as would a federal statute or a U.S. Supreme Court decision based on privacy or some other substantive value judgment. For just as clearly as the people limited congressional authority to the subjects expressly mentioned in the Constitution, they also authorized amendments—even amendments containing value judgments (as the presence of the Thirteenth⁸⁷ and Eighteenth⁸⁸ amendments demonstrates). Moreover, such an amendment would not, as a policy matter, be as violative of either the federal or republican features as would a federal statute, given that a constitutional amendment requires the concurrence of three-quarters of the states, thereby ensuring more state participation and engendering less alienation of the citizenry.

Similarly, that same majoritarian ratification process would render a solution by federal constitutional amendment less violative of the democratic feature of “our” government than would a judicial decision. Thus, of the national solutions, a federal constitutional amendment appears to be the best,⁸⁹ at least when measured by the extent to which it complies

85. This section addresses federal constitutional amendments which would provide a nationwide constitutional definition of marriage. *See, e.g.*, SJ30, 108th Cong., 2d Sess. (introduced March 22, 2004) (proposal to add to the U.S. Constitution a provision stating, “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.”).

A federal constitutional amendment which, rather than establish a national definition of marriage, sets forth the form and forum in which the issue would be resolved, *see, e.g.*, *A Battle, Joined Marriage and the Constitution*, National Review, March 22, 2004 (discussing proposal by Senator Orrin Hatch to amend the constitution to provide that “Civil marriage shall be defined in each state by the legislature or the citizens thereof. Nothing in this Constitution shall be construed to require that marriage or its benefits be extended to any union other than that of a man and a woman”) would be much more compatible with the salient features of “our” system of government, especially if it promoted resolution of the issue by either a state statute or constitutional amendment, the two forms most compatible with the norms of “our” system. *See* note 133 *infra*.

86. *See, e.g.*, S.J. Res. 30, 108th Cong. (2004); H.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong., (2003).

87. U.S. CONST. amend. XIII (prohibiting slavery).

88. U.S. CONST. amend. XVIII (outlawing manufacture, sale, and transportation of intoxicating liquors for beverages).

89. As noted above, a U.S. Supreme Court decision based on the Equal Protection Clause might arguably comport with most of the essential features of our system as well as a federal constitutional amendment. *See supra* text accompanying notes 76-79. The difference is that the tension with the “democratic” feature of the system which a judicial decision based on the general notion of equality might engender would be alleviated if the decision were made by a constitutional amendment specifically addressing the issue.

with the key premises of “our democratic, federal, republican” system of government.

Still, resolving the issue by federal constitutional amendment would run counter to some of the classic republican features underlying that system in ways that could undermine both those norms, as well as the long-term viability of the attempted solution. Our nation’s experience with constitutionally-imposed prohibition demonstrates how this could occur.

The constitutional amendment outlawing alcoholic beverages throughout the country⁹⁰ was at base a value judgment driven in part by the belief that abstinence from alcohol was essential to the enjoyment of “life in the whole, the good, and the beautiful.”⁹¹ As evidenced by the passage of the amendment, there was at least superficial super-majoritarian support for this vision of the good life. Yet, there was not a sufficient level of support to induce the kind of voluntary observance of the law that is required in a free republic. As a result, federal enforcement efforts increased dramatically,⁹² further alienating many from the federal government.⁹³ And ultimately, without local community support in several areas,⁹⁴ the experiment failed, notwithstanding the apparent na-

90. U.S. CONST. amend. XVIII.

91. J. H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT 34 (1963) (quoting Charles F. Aked, *Man and His Neighbor*, APPLETON’S MAGAZINE, July 1908, at 12:9). While much of the support for the temperance movement came from religious entities, see ANDREW SINCLAIR, PROHIBITION: THE ERA OF EXCESS 63-81 (1962), businesses and labor organizations were also involved because of their belief that sobriety expanded productivity, TIMBERLAKE, *supra*, at 66-68, and worker well-being, *id.* at 83. During World War I, temperance was also linked to patriotism. See P. H. ODEGARD, PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE 71 (1928) (“Liquor is a menace to patriotism because it puts beer before country”) (quoting Wayne Wheeler, MILWAUKEE JOURNAL, Oct. 3, 1917).

92. A presidentially-appointed commission, chaired by former Attorney General George Wickersham, noted in 1931 that “[t]here has been more sustained pressure to enforce this law than on the whole has been true of any other federal statute” and that “[n]o other federal law has had such elaborate state and federal enforcing machinery put behind it.” WICKERSHAM COMM’N, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. Doc. No. 71-722 (1931) [hereinafter “WICKERSHAM COMM’N”]. Yet, that same commission concluded that “increased personnel and equipment are needed if enforcement agencies are to cope.” *Id.* at 37.

93. The Wickersham Commission observed that overzealous attempts to enforce prohibition backfired in many locations. “High-handed methods, shootings, and killings, even where justified, alienated thoughtful citizens, believers in law and order.” WICKERSHAM COMM’N, *supra* note 92, at 46. See also, *id.* at 54 (“Many who are normally law-abiding are led to an attitude hostile to the statute by a feeling that repression and interference with private conduct are carried too far.”).

94. The Wickersham Commission noted that the root cause of the lack of enforcement was “the attitude of at least a very large number of respectable citizens in most of our large cities and in several states.” WICKERSHAM COMM’N, *supra* note 92, at 79. Elaborating, the Commission explained: “[A]dverse public opinion in some states and lukewarm public opinion with strong hostile elements in other states are obstinate facts which can not be coerced by any measure of enforcement tolerable under our polity.” *Id.* at 49.

tionwide support for the proposition.⁹⁵ As one scholar concluded, one lesson from the experience is that liquor control cannot succeed without approval of the local communities.⁹⁶ It appears to be the kind of moral decision⁹⁷ that is best solved at a state or local level. By 1933, the vast majority of Americans apparently agreed with this conclusion, for the twenty-first amendment not only repealed the eighteenth, it also expressly (though awkwardly)⁹⁸ made clear that states have more control over the issue than they previously had,⁹⁹ seemingly sending a discouraging message to any who might wish to revive the national experiment through normal legislative means.

95. "At the time of the adoption of the Eighteenth Amendment, thirty-three states had adopted prohibition by law or constitution; after the Eighteenth Amendment, twelve other states enacted prohibition." WICKERSHAM COMM'N, *supra* note 92, at 39. Thus, citizens of forty-five of the forty eight states had adopted a state policy consistent with the national norm that proved to be a failure.

96. Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 165 (1991) ("If any lesson can be learned from Prohibition, it is that liquor . . . cannot be subject to central planning. No system of liquor control has succeeded without the approval of the community.").

97. The contested issue of whether morals is involved often only exacerbates the problem. As the Wickersham Commission observed about prohibition, "[a] considerable part of the public were irritated at a constitutional 'don't' in a matter where they saw no moral question." WICKERSHAM COMM'N, *supra* note 92, at 54.

98. The operative language provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As Professor Tribe has pointed out, while the provision was designed to authorize states to regulate private conduct with respect to liquor, the text seems to directly prohibit that conduct itself, rather than to authorize states to do so. Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 (1995).

99. The exact extent to which the Twenty-first Amendment shields state liquor policy from federal control is far from clear, *see, e.g.*, *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (noting that prior decisions "demonstrate that there is no bright line between federal and state powers over liquor" and that "competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case'") (quoting *Hostetter v. Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)), but the Supreme Court has made clear that, at minimum, it gives states greater leeway to regulate than they had before the amendment, *see, e.g.*, *North Dakota v. United States*, 495 U.S. 423, 433 (1990) ("Given the special protection afforded to state liquor policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly."); *California Retail*, 445 U.S. at 110 ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system"). *See* John Foust, Note, *State Power to Regulate Alcohol Under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 680-88 (2000) (describing current Twenty-first Amendment jurisprudence and concluding that state law would be immune from Commerce Clause scrutiny only if it is "designed to promote temperance and [is] realistically designed to achieve that goal"); Matthew J. Patterson, Note, *A Brewing Debate: Alcohol, Direct Shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761 (reviewing the history of the Twenty-first Amendment and subsequent case law and arguing for a broader view of state powers).

This less-than-successful experience with placing a value judgment in the federal constitution ought to give some pause to those who view this as the optimum method to resolve the same-sex marriage issue, particularly because it was a failure that could have been forecast by those who understood the classic republican insight that in a free society, laws—especially those regulating lifestyle—must enjoy sufficient support to induce widespread voluntary compliance and that such support is much more likely to exist when the decision is made at a more local level.

Some may object to the prohibition analogy as inapt because enforcement of a ban on same-sex marriage (which can be effectuated through the simple expedient of refusing to grant the marriage license) will be much easier than was the ban on alcohol (which required affirmative intrusion into residences and other private places). While enforcement would undoubtedly be easier if same-sex marriage were the forbidden activity,¹⁰⁰ unenforceability was a symptom and product of the core problem with prohibition—alienation from government—not the core problem itself. Thus, the Wickersham Commission concluded that enforcement was a problem not because of the private nature of the conduct, but because of lack of support. It noted that drug laws were largely enforceable even though they were enforced through largely the same measures as were the prohibition laws.¹⁰¹ The core problem was that people in many areas did not support the rule¹⁰²—and lack of support was not just a cause of the enforceability problem, but also a problem in and of itself.¹⁰³ Moreover (and more relevant to the current discussion),

100. Enforcement of a nationwide ban on same sex marriages may not be as simple as at first appears, particularly if there are state or local governmental officials who feel strongly enough about the issue to issue licenses in apparent violation of law. See, e.g., *SF City Hall is Marriage Central*, S.F. CHRON., Feb. 16, 2004, at B3 (reporting that mayor issued licences to same-sex couple despite state statute defining marriage as between a man and a woman); Toby Smith, *Gay Wedding Bliss, Blues*, ALBUQUERQUE J., Feb. 21, 2004, at A1 (reporting that marriage licenses were issued to same-sex couples by Sandoval County in New Mexico until intervention by state attorney general).

101. WICKERSHAM COMM'N, *supra* note 92, at 79-80. The Commission noted that "[t]he means of detecting transportation [of drugs] are more easily evaded than in the case of liquor. Yet there are no difficulties in the case of narcotics beyond those involved in the nature of the traffic because the laws against them are supported everywhere by a general and determined public sentiment." *Id.* at 80.

102. The Wickersham Commission observed, "that under any system of reasonably free government a law will be observed and may be enforced only where and to the extent that it reflects or is an expression of the general opinion of the normally law-abiding elements of the community. To the extent that this is the case, the law will be observed by the great body of the people and may reasonably be enforced as to the remainder." *Id.* at 49. Thus, it was not the private nature of the conduct, but "[t]he state of public opinion, certainly in many important portions of the country," which "present[ed] a serious obstacle to the observance and enforcement of the national prohibition laws." *Id.*

103. "It is . . . a serious impairment of the legal order to have a national law upon the books theoretically governing the whole land and announcing a policy for the whole land which public

the core problem was exacerbated by the fact that the decision was made at a national level.¹⁰⁴

Finally, experience more directly relevant to the same sex marriage debate further indicates that even when enforcement of value judgments made by the more remote federal government can eventually be secured with enough effort, it may produce considerable (and perhaps unacceptable) feelings of government alienation on the part of those who disagree with the vision of the good life set forth in that judgment. In the mid to late nineteenth century, the federal government—with widespread popular support outside the affected area—defined marriage to outlaw the religious-based practice of polygamy among the members of the Church of Jesus Christ of Latter-day Saints in federal territories¹⁰⁵ (including the Utah territory where most members of the LDS Church resided). While the law was eventually enforced with enough success that the Church changed its position,¹⁰⁶ the resulting resentment toward the federal government among LDS members at the time was far from insignificant.¹⁰⁷ One gets the sense from some statements and attitudes of citizens of the Utah Territory at the time that there was little of the kind of civic or public virtue toward the federal government which the framers thought essential to a healthy democratic republic.¹⁰⁸ Indeed, many of them chose

opinion in many important centers will not enforce and in many others will not suffer to be enforced effectively. The injury to our legal and political institutions from such a situation must be weighed against the gains achieved.” *Id.*

104. *Id.* at 54 (noting that hostile attitude toward prohibition was “aggravated in many of the larger cities by a feeling that other parts of the land are seeking to impose ideas of conduct upon them”).

105. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

106. In 1890, the President of the LDS Church, Wilford Woodruff, issued a manifesto noting that “[i]nasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws and . . . publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land.” Official Declaration—1, THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 291-92. President Woodruff indicated that the decision was the result of divine revelation, rather than mere acquiescence. *Id.* at 292 (“I want to say this: I should have let all the temples go out of our hands; I should have gone to prison myself, and let every other man go there, had not the God of heaven commanded me to do what I did do: and when the hour came that I was commanded to do that; it was all clear to me. I went before the Lord, and I wrote what the Lord told me to write.”).

107. There was also some resentment by some non-LDS outside observers who questioned the cost (both in dollars and time and effort) of enforcing the ban on polygamy. One California newspaper at the time noted that “[t]he Government has enough fighting now on its hands and there is no necessity of increasing it.” 2 ORSON F. WHITNEY, HISTORY OF UTAH 99 (1893) (quoting DAILY ALTA CALIFORNIA, Mar. 11, 1863). Another opined that while “[t]he Mormons should, of course, submit to the laws . . . laws ought not be forced upon them which are repugnant to a very large majority of that singular people. . . . The pretty-much let-alone policy is the one which should be adopted.” *Id.* (quoting SACRAMENTO DAILY UNION, Mar. 12, 1863).

108. Evoking an attitude completely at odds with the kind of public virtue that engenders voluntary compliance with the law, one Latter-day Saint woman of the time proclaimed: “If the rulers

to leave the country and forfeit many of the benefits of citizenship.¹⁰⁹ Again, those advocating a federal constitutional solution to the same-sex marriage controversy should, at a minimum, consider the possibility that there will be similar costs to the structure from such an effort.¹¹⁰

Thus, while having a lesser impact on our system of government than the other two potential forms of resolving the issue on a national level, a federal constitutional solution would still not appear to be the optimum solution; at a minimum, it would impose real costs which should be considered before such a step is taken.

D. State Supreme Court Decision

As with a U.S. Supreme Court decision, the compatibility of a state supreme court decision resolving the same-sex marriage issue with “our” system of government depends in part on the grounds on which the decision rests. An equality-based ruling is likely to be less disruptive to the democratic feature of “our” system than a substantive value-based deci-

of our nation will so far depart from the spirit and letter of our glorious Constitution as to deprive our prophets, apostles, and elders of citizenship, and imprison them for obeying this law, let them grant us this last request, to make their prisons large enough to hold their wives for where they go we will go also.” DESERET NEWS, Jan. 15, 1870 at 2 (quoting Phoebe Woodruff), *quoted in* GUSTIVE O. LARSON, THE “AMERICANIZATION” OF UTAH FOR STATEHOOD 67-68 (1971). As one scholar has observed, by the time Utah became a state “the Mormons had come to resent and distrust the [federal territorial] government, which had generally tolerated and sometimes aided and fostered the violent depredations committed against them.” L. Rex Sears, *Punishing the Saints for Their “Peculiar Institution”*: Congress on the Constitutional Dilemmas, 2001 UTAH L. REV. 581, 585 (2001).

109. See RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 125-26 (2d ed. 1989) (describing movement of hundreds of LDS church members from the Utah territory into Mexico and Canada).

110. Experience with the one other clear value judgment in the constitution—the prohibition against slavery—also indicates that such judgments come at a high cost (in this case, the cost of a civil war). This is not to question the wisdom of the Thirteenth Amendment. Whatever the cost, it was a necessary and worthwhile national solution. Advocates of a national constitutional solution to the same-sex marriage issue should, however, consider whether the issue rises to the same level of importance as slavery and whether the costs—even though likely less than that of a civil war—are sufficiently offset by the benefits.

The decision to enshrine the anti-slavery value judgment in the largely value-neutral federal constitution might also be explained on other grounds that distinguish it from a federal constitutional amendment prohibiting same-sex marriage. Abraham Lincoln, for one, viewed slavery as inconsistent with the principle of self-government that underlies our entire system of government. See 2 COLLECTED WORKS OF ABRAHAM LINCOLN 247-83 (Roy P. Basler ed., 1953) (“When the white man governs himself that is self-government; but when he governs himself, and also governs another man . . . that is despotism. . . . [W]e began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for some men to enslave others is a ‘sacred right of self-government.’ These principles cannot stand together. . . . Let us re-adopt the Declaration of Independence, and with it, the practices, and policy which harmonize it.”). Thus, the Thirteenth Amendment can be viewed as a “structural” reinforcing provision of the constitution. Given the current nature of the same-sex marriage debate, a provision prohibiting same-sex marriage seems less obviously so. *But see supra* note 11.

sion.¹¹¹ However, differences in the nature of both the constitutions they definitively interpret and the structure in which they operate distinguish state supreme courts from their federal counterparts in ways that make a state supreme court ruling on the issue easier to square with the fundamental components of “our” system of government.

That definitive resolution by a state supreme court would involve interpretation of a state, rather than the federal,¹¹² constitution is significant in terms of its compatibility with both the democratic and the classic republican features of “our” system of government. Such a decision would be more “democratic” than one by the U.S. Supreme Court because citizens have a more direct impact on the content of state constitutions¹¹³ than they do on the content of the national constitution. This enhanced democratic control is heightened even further in many states by differences in the way justices are selected and retained at the state level.¹¹⁴ In many states, justices face periodic retention elections,¹¹⁵ and in some direct elections determine the membership of the court.¹¹⁶ While this does not automatically render the justices representatives of the people in the same sense that legislators are,¹¹⁷ it makes decisions by such courts more consistent with democratic values underlying our system of government.

111. See *supra* note 76.

112. While it is possible that a state supreme court could resolve the definitional dispute on federal constitutional grounds, such a ruling would be subject to review by the U.S. Supreme Court. Thus, this article does not address the consequences of a state supreme court ruling on federal grounds.

113. As Alan Tarr has explained, “Whereas the federal amendment process provides no mechanism for direct popular participation, the states have structured the process of constitutional change to maximize such participation.” TARR, *supra* note 47, at 25. Not only do some states permit constitutional amendments to be initiated by the people, some allow the people to call constitutional conventions, and all but one require that any amendment be ratified by the people. *Id.* at 25-26. Increased citizen control also stems from the smaller population base by which the decision is made (thereby increasing the relative influence of any one citizen).

114. According to one recent survey, there are only eleven states in which judges are “never subjected to election at any time in their judicial careers.” Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776 (1995).

115. In thirteen states, judges face periodic retention elections which are uncontested. Bright & Keenan, *supra* note 114, at 778. See, e.g., CAL. CONST. art. 6, § 16; FLA. CONST. art. 5, § 10; MD. CONST. art. IV, § 5A; UTAH CONST. art. VIII, §§ 8-9.

116. Judges in twenty-nine states face contested elections at some time in their careers. Bright & Keenan, *supra* note 114, at 777. In many, initial selection and retention is determined by contested elections. See, e.g., ALA. CONST. amend. 328, § 6.13; LA. CONST. art. 5, § 22; NEV. CONST. art. 6, §§ 3, 5; TENN. CONST. art. VI, § 3-4; TEX. CONST. art. V, §§ 2, 4, 6, 7.

117. See *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff’d*, 409 U.S. 1095 (1973) (holding that election of state supreme court justices in Louisiana are not subject to the one-vote, one-person requirement of the Fourteenth Amendment because “[j]udges do not represent people, they serve people”) (quoting *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio 1966)). *But see Chishom v. Roemer*, 501 U.S. 380 (1991) (holding those same justices were “representatives” for purposes of section 2 of the Voting Rights Act).

Differences between the federal and state constitutions also make it less likely that a state supreme court decision resolving the same-sex marriage dispute would undermine the classic republican norms of our system than would a U.S. Supreme Court decision. As noted above,¹¹⁸ “our” system contemplates that decisions at the state level may be, indeed perhaps must be, more value-laden than those at the national level, and that assumption is borne out in the language of many state constitutions.¹¹⁹ Because those constitutions can be more value-laden than their federal counterpart under our system of government—and because citizens of a state have much more input in determining the content of those constitutions¹²⁰—the sense of alienation from the system by those who oppose the decision is likely to be much less if the decision is based on state rather than the federal constitution.

That opponents of the decision would be less alienated from the system if the decision were made by a state supreme court, rather than the U.S. Supreme Court is made even more likely by the different geographic reach of decisions by the two courts. Since the state court decision’s impact would, as an initial matter,¹²¹ be limited to one state, those who disagreed with the decision to such an extent that they could no longer be fully responsible participants in the state system could exit that part without severing their links to the overall national system.

118. See *supra* text accompanying notes 47-51.

119. See, e.g., IDAHO CONST. art. III., § 20 (setting forth state position on gambling); DEL. CONST. art. 2, § 17 (same); KAN. CONST. art. 15, § 10 (setting forth state policy on sale of liquor); ALA. CONST. amend. 688 (prohibiting prostitution in certain parts of the state).

120. See *supra* note 113.

121. If a state supreme court decision had nationwide impact—through application of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, or some other choice of law doctrine—the alienation of the decision’s opponents would increase dramatically and alter the relative position of a state supreme court and a U.S. Supreme Court decision in that respect. A citizen is much more likely to feel alienated from government in ways that undermine the critical civic republican features of our system if the decision she opposes comes from a (state) court over which she has no control interpreting a value-laden (state constitutional) document on whose content she has no input than if it came from a (U.S.) court over which she has some—though indirect—control, interpreting a document that is generally speaking more value-neutral, see *supra* text at notes 28-32, and whose content she has more influence over. Thus, while this article does not address the widely-debated issue of whether one state should, or must, recognize marriages performed in other states, see, e.g., Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191 (1996); Michael J. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83 (1998); Andrew Koppleman, *Same-Sex Marriage, Choice of Law and Public Policy*, 76 TEX. L. REV. 921 (1998); Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799 (1999); Larry Kramer, *Same-Sex Marriage, Conflicts of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Andrew Koppleman, *supra* note 73; Timothy Joseph Keefer, Note, *DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-And-Credit Clause*, 53 WASH. & LEE L. REV. 1635 (1997), analysis of that issue in light of the components of “our democratic, federal, republican” system suggests that the answer to that question should be negative.

Thus, a state supreme court decision resolving the same-sex marriage issue for a particular state would have markedly less adverse impact on the key components of our governmental system than would a corresponding decision of nationwide impact by the U.S. Supreme Court. Still, there would be some tension between such a decision and the democratic components of that system (especially in the majority of states where judges are not elected directly), tensions that would be lessened if the decision were made by state constitutional amendment or state legislation.

E. State Statute

Resolution of the same-sex marriage debate by state statute¹²² is, in terms of compatibility with the key features of “our democratic, federal republican” system, preferable to each of the other four forms discussed thus far because a state statutory resolution of the issue does not suffer any of the potential defects that render the others somewhat suspect. Unlike a federal statute, which runs afoul of the limited powers feature of the federal component of our system, a state statute would not be beyond the jurisdictional authority of the enacting body since state legislatures have plenary authority.¹²³ Unlike a state or federal supreme court decision, such a statute could not be criticized as anti-democratic because it would be enacted by the duly elected representatives of the people. Finally, since it is enacted at a level at which participation and influence are relatively greater and exit is relatively easier, a state statutory resolution of the issue does not carry with it the same alienation potential which a federal constitutional amendment or U.S. Supreme Court decision might create. State statutory resolution of the issue, therefore, emerges as one of the prime contenders for the best form for resolving the same-sex marriage issue. The only question is whether it is preferable to a state constitutional amendment.

F. State Constitutional Amendment

Like a state statutory resolution, a state constitutional amendment directly addressing the same-sex marriage issue appears to be preferable to the first four forms addressed in this article. Such a state constitutional

122. In many states, including some where state constitutional amendments cannot be generated through the initiative process, state legislation can be enacted through that process. *See, e.g.*, UTAH CONST. art. VI, § 1; UTAH CODE ANN. §§ 20A-7-201 to 20A-7-213. Such legislative resolution of the issues presents the same problems posed by constitutional amendments adopted through that same means. *See infra* text at notes 127-30. The analysis in the text addresses only legislation adopted by the state legislature.

123. *See supra* note 51.

amendment would clearly be more compatible with all the components of our system of government than would a similar federal constitutional amendment (the federal form that is most compatible with “our” system of government). The increased input into the decision that citizens have at the state level,¹²⁴ coupled with their increased opportunity for exit,¹²⁵ considerably lessen the adverse impact on the anti-alienation aspects of the classic republican features of our system, the one aspect of a federal constitutional amendment that is most in tension with “our” form of government.

Such a resolution would also appear to be better than a state supreme court decision resolving the issue through the application of a provision less directly addressing the issue. A state constitutional amendment would not only be more democratic than a judicial decision, but the increased citizen input involved in the amendment process would also diminish the adverse impact on the anti-alienation features of classic republicanism, even for those who oppose the ultimate decision.

Resolution of the issue through state constitutional amendment is, therefore, like state statutory resolution, a prime candidate for the best form of resolution in our democratic, federal republic (at least in terms of its consistency with the fundamental norms of that system). However, whether it is arguably the best, or arguably one of the worst, depends on the exact method by which the constitutional amendment occurs.

In some states, constitutional amendments can occur through the initiative process whereby citizens place before the voters an amendment which has been drafted completely outside the legislative process.¹²⁶ An amendment which bypasses the elected representatives in the lawmaking process potentially violates the first republican component of “our” system, which favors representative, rather than purely democratic, resolution of policy decisions.¹²⁷ Indeed, the reasons given by the framers for favoring such representative form of government—including its tendency to prevent the tyranny of the majority feared by many of the framers—apply with particular force to state constitutional amendments adopted through the initiative process, as several scholars have demonstrated.¹²⁸ As these scholars have shown, use of the initiative process to

124. See *supra* note 113.

125. See *supra* text accompanying notes 56-57.

126. Eighteen states permit constitutional amendments to be initiated by the people. TARR, *supra* note 47, at 25. See, e.g., CAL. CONST. art. II, § 8(a); COLO. CONST. art. 5, § 1(1); MO. CONST. art. III, § 50; NEB. CONST. art. III, § 1; NEV. CONST. art. IXX, § 2(1); OK. CONST. art. 24, § 3.

127. See *supra* text accompanying notes 42-44.

128. See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1513-48 (1990); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401-05 (2003).

by-pass state legislatures could lead to one of the very forms of tyranny that our democratic, federal republican system is designed to prevent.¹²⁹ The potential extent of the undermining is such that a credible argument can be made that amending the state constitution through the initiative process violates the clause of the constitution guaranteeing to the states a “republican” form of government.¹³⁰ Thus, resolving the same-sex marriage issue through the initiative form of state constitutional amendment may arguably be as inimical to our system of government as any other form, joining federal legislation as the only form to which serious constitutional arguments could be raised.

On the other hand, constitutional amendments which originate in the state legislature, especially those which require the assent of a supermajority of each house of the legislature,¹³¹ not only avoid the “anti-republican” vices of initiative-generated constitutional amendments, they are arguably the form of resolution most compatible with all the features of “our democratic, federal republican” form of government. By passing the decision through the representative filtering process, such an amendment clearly comports with the representative republican principle. By requiring subsequent approval of a majority of voters, who are then free to exit the system if they oppose the decision strongly enough, it also complies with the classic republican features of “our” system. Majority approval by ballot also comports with the democratic feature of the system, by ensuring that no value is inserted into law without consent of the governed. Finally, because it is made at the state level, where value-laden decisions are more permissible, it comports fully with the two more traditional features¹³² of the federal component of our system.

Thus, the only remaining issue is whether a non-initiative generated state constitutional amendment is preferable to a state statutory solu-

129. Staszewski, *supra* note 128, at 401-03; Eule, *supra* note 128, at 1525.

130. U.S. CONST. art. IV, § 4. See Hans J. Linde, *When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993). As Justice Linde observed, the U.S. Supreme Court has indicated that disputes under the Guarantee Clause are not justiciable, at least in federal courts. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). However, that Court has not ruled on whether the state courts can enforce the provision, and some state courts have found such claims justiciable. See, e.g., *In re Interrogatories*, 536 P.2d 308 (Colo. 1975); *VanSickle v. Shanahan*, 511 P.2d 223 (Kan. 1973). But see *State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997) (holding Guaranty Clause claims non-justiciable in state courts); Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 59-67 (1998) (concluding that the justiciability of the Guarantee Clause in state courts is an open question, with good arguments available on both sides of the issue).

131. See, e.g., UTAH CONST. art. XXIII.

132. See *supra* note 37 (defining “federal” component of our system as including horizontal separation of powers).

tion.¹³³ That is a close question that could go either way. On one hand, a state constitutional amendment of the proper type does more to enhance both the democratic and civic republican features of “our” system of government than does a state statute because the people are more directly involved in the process, and it would provide these benefits without interfering in any way with the representative-based feature of republicanism.

On the other hand, a state constitutional amendment is somewhat less compatible than a state statute with the “horizontal” separation of powers feature of the federal component of “our” system because it would be subject to less judicial scrutiny than would a comparable state statute. While the federal judiciary would be available to ensure that the resulting decision did not violate federal constitutional norms if the decision were made by either a state statute or a state constitutional provision, there would be no meaningful role for the state judiciary to play if a state constitutional amendment definitively resolved the issue in a specific way.¹³⁴ If the same-sex marriage issue were resolved by a state statute, state courts would be permitted to determine whether the statute complied with other provisions of the state constitution, and this would provide a “double judicial security” of its own to ensure that the decision accurately represented the full vision of the good life which the state constitution embodies and not just the temporary inflamed passion of the majority.

Thus, whether a state statute or a state constitutional amendment is the best form of resolution is itself dependent on a value choice: which tyranny-combating feature of our system is more important—the horizontal feature of the federal component (which favors the state statute), or the democratic and classic republican components (which favors the state constitutional amendment)? Recognizing that the matter could go either way, I prefer the latter in this case for both practical and theoretical reasons.

133. A federal constitutional amendment which required that marriage be defined by state legislatures or the people of the state, *see supra* text accompanying note 85, might arguably be the best option since it would require that one of these two most preferable methods be used, without specifying which one.

134. Obviously, state courts would have jurisdiction to review the federal constitutionality of the state constitutional amendment, but ultimate judicial review authority would be exercised by the U.S. Supreme Court. *See supra* note 112. Moreover, while the state courts would be involved in the interpretive process with a state constitutional amendment, if the amendment were drafted in a careful way, that role would be nearly meaningless with respect to resolution of the core issue—whether same-sex relationships should be legally recognized as marriages. More importantly, the court would play that same role (broad or narrow though it may be) if the decision were made by state statute. What would be missing in the case of a state constitutional amendment is review for compliance with other provisions of the state constitution.

As a practical matter, recent experience has demonstrated that state court judicial review of state statutes can too easily lead to judicial resolution of the issue contrary to the will of the people and the legislature.¹³⁵ At least some state court judges appear to be too eager to resolve the issue for themselves, without a careful consideration of their proper role in the system. The risk of tyranny of the judiciary is therefore somewhat high on such an impassioned issue. This, in turn, lessens the net benefit of a “double” judicial security.

More importantly, as a theoretical matter, in our system, the ultimate sovereign who must remain responsible for whatever acts the government takes is the people.¹³⁶ While there are filters through which the people’s judgment must pass before it is properly implemented in our system, in the long run, it is their judgment, not that of the judiciary, which should control. If a state constitutional amendment were adopted through the non-initiative process, the people’s judgment would have passed through the requisite filters, and federal judicial review would be available to further ensure that other more process-oriented norms were not violated. Thus, while a proponent of “our democratic, federal, republican” form of government might be persuaded either way on the matter, this particular proponent concludes that the optimum form of resolution of the same-sex marriage issue is to specifically address the issue through a non-initiative generated state constitutional amendment.¹³⁷

135. See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) and *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), and constitutional amendments made in response, HAW. CONST. art. I, § 23; ALASKA CONST. art. I, § 25, and *supra* note 2. See also, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (prompting efforts to amend the state constitution); Yvonne Abraham, *Gay-Marriage Foes Aim for Double Ban on ‘08 Ballot*, BOSTON GLOBE, Mar. 20, 2004, at B1.

136. See THE FEDERALIST No. 31 (Alexander Hamilton).

137. An alternative optimum solution might be a “properly” adopted state constitutional amendment similar to that adopted by initiative in Hawaii, see HAW. CONST. art. I, § 23, which vests exclusive state power over the definition of marriage in the state legislature. Such a solution would have all the advantages of a “properly” initiated state constitution without enshrining the definition of marriage into the state constitution, thereby leaving the matter open for easier democratic change in the future. While some might prefer such a solution on the grounds that “attempts to freeze substantive values do not belong in the constitution,” ELY, *supra* note 29, at 99, that argument has more validity for the relatively value-neutral federal constitution (which is the document to which Ely’s comments were directed), than the more value-laden state constitutions. Thus, the preferability *vel non* of such an amendment over a state constitutional amendment which directly defined marriage might depend largely on one’s views on the “correctness” of the constitutional definition. If one agreed with the definition, one might likely prefer to have it enshrined in the constitution, where it would be more difficult to change. One who disagreed with the definition would likely prefer a more easily modifiable definition.

IV. CONCLUSION

The passion demonstrated by both sides of the same-sex marriage debate is unlikely to dissipate as the definitive decisions are made. Unfortunately, that passion may cause those involved to lose sight of other equally important issues, such as the impact the decision may have on our system of government. Reminding ourselves of the fundamental principles on which that system is constructed does not necessarily shed light on the proper outcome of the debate. It does, however, underscore that more is at stake in the debate than just the future definition of marriage, as important as that may be. In the long run, how and where such a decision is made may be just as important to our future society as what that exact decision is. Focusing on the proper form and forum issue may also serve to make the resulting decision both more sustainable and more tolerable for those who disagree with it. One may hope that those involved in the substantive debate will as carefully consider these matters as they do the merits of the contested issue as the debate continues.