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ARTICLES

THE FEDERAL MARRIAGE AMENDMENT AND THE FALSE PROMISE OF ORIGINALISM

Thomas B. Colby*

This Article approaches the originalism debate from a new angle—through the lens of the recently defeated Federal Marriage Amendment. There was profound and very public disagreement about the meaning of the FMA—in particular about the effect that it would have had on civil unions. The inescapable conclusion is that there was no original public meaning of the FMA with respect to the civil unions question. This suggests that often the problem with originalism is not just that the original public meaning of centuries-old provisions of the Constitution is hard to find (especially by judges untrained in history). The problem is frequently much more fundamental, and much more fatal; it is that there was no original public meaning to begin with. It is a natural consequence of the constitution-making process that a constitutional provision addressing a deeply controversial subject can only be enacted when it is drafted with highly ambiguous language so that, rather than possessing a single original meaning, it appeals to disparate factions with divergent understandings of its terms. As such, the central premise of originalism—that, in Justice Scalia’s words, the Constitution was enacted with “a fixed meaning ascertainable through the usual devices familiar to those learned in the law”—is often inaccurate. And for that reason, the central promise of originalism—that, by relying on an objective, discoverable, fixed constitutional meaning, originalism can prevent judges from subverting democracy and the rule of law by reading their personal values into the Constitution—is a false one.

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INTRODUCTION

The originalist school of constitutional interpretation blossomed in the 1980s in response to the perceived judicial activism of the Warren and Burger Courts.¹ In asserting the existence of an objective, discoverable, fixed constitutional meaning capable of directing judicial decision-making in a value-neutral manner, originalism made an enticing promise—a way to ensure that judges do not subvert democracy and the rule of law by reading their personal values into the Constitution.²

This was an enticing promise, to be sure, but it was one that originalism initially could not keep. As first conceived, originalism was a jurisprudence of original intent. It sought to interpret the Constitution according to the subjective intentions of those who framed it: The Constitution means what the Framers intended it to mean.³ That theory was sharply criticized on a number of fronts, most convincingly for two seemingly insurmountable flaws. First, it is a fool's errand to attempt to ascertain the collective intent of a large group of individuals, each of whom may well have been motivated by differing desires.⁴ Second, much of the historical evidence indicates that the Framers themselves manifestly did not intend for the Constitution to be interpreted according to their subjective intentions.⁵ Thus, a jurisprudence of original intent is both impossible (there was no single original intent of the diverse Framers) and self-defeating (in order to faithfully follow the original intent of the Framers, one must not follow the original intent of the Framers). As such, it obviously could not follow through on its promise to deliver us from judicial activism.

These withering critiques were successful in defeating the theory of original intent, but not in putting an end to the originalist movement. Far from it, in fact. Originalism has transformed itself to deflect these criticisms, and in so doing, it has reemerged much stronger. As Justice Scalia—originalism's leading champion—has explained, today's originalists seek “the original meaning of the text, not what the original drafts-

1. See Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol'y* 599, 599–603 (2004) [hereinafter Whittington, *New Originalism*].

2. See, e.g., Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 *Ind. L.J.* 619, 647 (1996); Barry Friedman, *The Turn to History*, 72 *N.Y.U. L. Rev.* 928, 943 (1997) (noting this promise).

3. See, e.g., Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 *Harv. J.L. & Pub. Pol'y* 5, 10–11 (1988) [hereinafter Meese, *Original Intent*].

4. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. Rev.* 204, 209–17 (1980).

5. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 903–13 (1985).

men intended.”⁶ Rather than looking to uncover the subjective intentions of the Framers, the focus of the modern originalist inquiry is on the original, objective public meaning of the text. “All that counts,” explains Judge Robert Bork, “is how the words used in the Constitution would have been understood at the time.”⁷

This redirected focus on original meaning, rather than original intent, ostensibly avoids both the problem of determining the collective intent of the numerous Framers (the Framers may have had many reasons for enacting it, but the text nonetheless had only one meaning⁸) and the problem of self-defeat (much of the historical evidence that was mustered to undermine the reliance on original intent actually supports the reliance on original meaning by suggesting that the Framers believed that the original meaning of the text, rather than the original intent of the drafters, would control future constitutional interpretation⁹). Originalists thus believe that the new, “original meaning originalism” overcomes the most prominent objections to the old, “original intent originalism,” while at the same time fulfilling the central promise of the originalist enterprise: the ability to provide a neutral, objective method of constitutional decisionmaking.

Indeed, the new originalism, almost every bit as much as its failed forerunner, stakes its claim on its ability to overcome “the main danger in judicial interpretation of the Constitution[:] . . . that the judges will mistake their own predilections for the law.”¹⁰ Originalists cast their theory as a “safeguard against political judging” and a “vindication of democracy

6. Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation* 3, 38 (Amy Gutmann ed., 1997) [hereinafter, *Scalia, Common-Law Courts*]. For discussion of the evolution of originalist thought from original intent to original meaning, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611, 620–29 (1999) [hereinafter *Barnett, An Originalism*]; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1134–48 (2003); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 *Okla. L. Rev.* 1, 3–11 (2007); Whittington, *New Originalism*, *supra* note 1, at 603–07.

7. Robert H. Bork, *The Tempting of America* 144 (1990) [hereinafter *Bork, Tempting*].

8. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *Const. Comment.* 257, 258 (2005) [hereinafter *Barnett, Trumping Precedent*] (“That there is a unique original public meaning is a far more plausible claim than that one can discern a unique original intention from the potentially conflicting intentions of various framers.”).

9. See Barnett, *An Originalism*, *supra* note 6, at 621, 627–28.

10. Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849, 863 (1989) [hereinafter *Scalia, Lesser Evil*]. As one prominent originalist has written, “the arguments on behalf of originalism . . . are preoccupied utterly with the examination of judicial power’s legitimacy.” Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 *Harv. J.L. & Pub. Pol’y* 283, 284 (1996).

against unprincipled judicial activism.”¹¹ Enforcing the original meaning of the text ensures that the judge will give force to the will of the people—either the current majority that enacted the law under review, or the supermajority that assented to the Constitution.¹² Any other form of constitutional interpretation, originalists assert, “must end in constitutional nihilism and the imposition of the judge’s merely personal values on the rest of us.”¹³

The primary attraction of originalism thus lies in its promise to rescue democracy from judicial subjectivity. As one scholar recently put it, “originalism is said to tame the monster of judicial activism by teaching that a conscientious inquiry into historical sources will yield the original meaning of constitutional text and thereby provide a reliable and objective basis for constitutional adjudication.”¹⁴

The new originalism, reconstructed in terms of original public meaning, is a theory on the rise. So powerful is its lure—so tempting is its promise—that it has seduced at least two, and perhaps four, Justices of the Supreme Court.¹⁵ And it has become so successful in the academy that one prominent constitutional scholar has concluded that it “is now the prevailing approach to constitutional interpretation.”¹⁶

But can the new originalism really do what the old originalism could not? Can it, in fact, keep its promise of enabling judges to reach objective answers to constitutional questions without reference to their own predilections? In other words—leaving aside the prodigious debate about the theoretical desirability and normative “correctness” of originalism—is it even possible to implement originalism at all? Can a judge who is convinced that originalism makes sense in theory actually apply it successfully in practice?

Many critics of originalism believe not. Their argument typically comes in a soft version—originalism is possible, but it cannot be done by

11. Bork, *Tempting*, supra note 7, at 146, 164; see also *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (“Strict adherence to this [originalist] approach is essential if we are to . . . [avoid] infusing the constitutional fabric with our own political views.”); BeVier, supra note 10, at 287–88 (“A further virtue of originalism is the impersonality of its decisionmaking criteria.”).

12. See William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 *Minn. L. Rev.* 1021, 1043 (2004) (noting this originalist belief).

13. Robert H. Bork, *Styles in Constitutional Theory*, 26 *S. Tex. L.J.* 383, 387 (1985). To be sure, some modern academic originalists do not ground their support for originalism on its promise to curb judicial discretion. Still, their originalism necessarily remains premised on the underlying assumption about the existence of an original meaning that this Article seeks to question. See *infra* note 385.

14. Rosenthal, supra note 6, at 1.

15. See *id.* at 3 & nn.5–6 (discussing avowed originalism of Justices Scalia and Thomas and noting that, in their confirmation hearings, Chief Justice Roberts and Justice Alito also expressed sympathy with originalism).

16. Barnett, *An Originalism*, supra note 6, at 613.

untrained lawyers and judges¹⁷—and a hard version—originalism is not possible at all because the original meaning of most constitutional provisions has been lost in the intervening centuries and cannot be rediscovered today by examination of the incomplete and often untrustworthy historical record.¹⁸

Originalists recognize these difficulties. Justice Scalia, for instance, admits that, because “it is often exceedingly difficult to plumb the original understanding of an ancient text,” this is “a task sometimes better suited to the historian than the lawyer.”¹⁹ But originalists remain confident that judges, with the help of historians, can overcome these obstacles. The historical record is, originalists believe, on the whole complete and reliable enough to illuminate the original meaning of the constitutional text in the vast majority of cases.²⁰

Both this defense of originalism and the criticism to which it is responding are based on an underlying assumption that there *was* an original meaning of the Constitution. The dispute is over whether or not judges can accurately discover it.²¹ This Article questions that assumption by approaching the originalism debate from a new angle—through the lens of the recently defeated amendment to the Federal Constitution that would have banned same-sex marriage: the Federal Marriage Amendment (FMA).²² Although the FMA gained majority support in both Houses of Congress, and would very likely have been ratified had it been sent to the states, it failed to receive the required two-thirds congressional vote. This Article asks what would have happened if it had passed.

17. See, e.g., Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L.J. 1085, 1089 (1989) (arguing that complexity of historical record “do[es] not mean that historical investigation is hopeless” because “[h]istorians learn to make sophisticated credibility judgments” about records, “[b]ut judges may be ill-prepared to make such judgments”).

18. See, e.g., Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 Marq. L. Rev. 475, 477 (2006) (collecting sources arguing “that the historical record is too incomplete or inconclusive for modern-day readers to pinpoint the Framers’ original meaning”).

19. Scalia, *Lesser Evil*, *supra* note 10, at 856–57.

20. See, e.g., Bork, *Tempting*, *supra* note 7, at 165 (arguing that, while “some meanings will be doubtful or even lost, . . . much that is certain or probable remains”); Barnett, *An Originalism*, *supra* note 6, at 649–50 (“Compelling analyses of the original meaning of even the most controversial provisions of the Constitution have been developed . . . [T]he past fifteen years has yielded a boon tide of originalist scholarship that has established the original meanings of several clauses . . . previously . . . shrouded in mystery primarily for want of serious inquiry.” (footnotes omitted)).

21. See, e.g., Bork, *Tempting*, *supra* note 7, at 165 (admitting that on “rare occasions” a judge may not be able to determine original meaning, but that is because “the original understanding really is lost,” not because it never existed); Barnett, *An Originalism*, *supra* note 6, at 649 (“[T]hat which exists is possible to exist.”).

22. The proposed amendment was initially dubbed the Federal Marriage Amendment and was later renamed the Marriage Protection Amendment. See *infra* Part I. Throughout this Article, I will generally use the original title, often abbreviated as the “FMA,” or simply the “Amendment.”

In particular, it asks how an originalist judge would have gone about ascertaining its original public meaning and applying that meaning to resolve what would certainly have become the central interpretive question posed by the FMA: the constitutionality of civil unions of the type authorized in Vermont and a number of other states.

In Part I, I set out in considerable detail the history of the drafting and consideration of the FMA, explaining the extent to which there was profound and very public disagreement about the meaning of the Amendment—in particular about the effect that it would have had on civil unions. The Amendment was highly ambiguous on this issue, and that ambiguity was essential to its hopes of accumulating the broad-based support needed for passage. The Amendment came close to succeeding only because both those who *supported* civil unions (but not gay marriage) and those who *opposed* civil unions (along with gay marriage) understood it to reflect their views.

Part II explains that, in light of this history, the inescapable conclusion is that there was no original public meaning of the Federal Marriage Amendment with respect to civil unions. It was facially ambiguous and meant very different things to different people; no one could possibly have known whether it did or did not permit civil unions. As such, had it been ratified, a judge committed to the originalist enterprise in interpreting it would have been at a loss. To resolve the civil unions question, she would have been forced to look elsewhere—to some form of nonoriginalist constitutional interpretation.

Part III steps back from the FMA to make a broader point about the viability of originalism in general. The example of the FMA provides compelling evidence that often the problem with originalism is not just that the original public meaning of centuries-old provisions of the Constitution is hard to find (especially by judges untrained in history). The problem is frequently much more fundamental, and much more fatal: There *was no original public meaning to begin with*. And because it is of course not possible to find and apply that which has never existed, in many instances originalism, as a viable form of constitutional interpretation, is a nonstarter. In other words, the central *premise* of originalism—that the Constitution “has a fixed meaning ascertainable through the usual devices familiar to those learned in the law”²³—is often inaccurate. And thus, the central *promise* of originalism—that it can effectively eliminate judicial subjectivity—is a false one. However desirable originalism may appear in theory, it is quite often simply not possible in practice.

This Article is not grounded in a deconstructionist argument that language inherently has no objective meaning, such that all written instruments are inevitably ambiguous. Nor does it suggest that the

23. Scalia, *Lesser Evil*, *supra* note 10, at 854; see also Bork, *Tempting*, *supra* note 7, at 2 (noting that originalism is premised on notion that constitutional principles “are known and constrain judges”).

Constitution in all particulars lacks an original public meaning. It argues instead that it is wrong to assume—as originalism generally does—that the fact that a constitutional provision was enacted necessarily means that there was supermajority support for (or at least willingness to go along with) a particular political or legal principle objectively reflected in its text. That assumption surely holds true for some constitutional provisions, and the original meaning of those provisions may well be ascertainable through historical inquiry. But political realities dictate that constitutional provisions of a certain type, of which the FMA is a striking example, tend not to have a single, original public meaning. It would certainly have been possible, as a *textual* matter, to draft the FMA unambiguously to allow, or preclude, civil unions. But had the FMA been so drafted, it would have been impossible, as a *political* matter, to enact it. The FMA serves as a uniquely compelling illustration of the proposition that, as a natural consequence of the constitution-making process, a constitutional provision addressing a deeply controversial subject can only hope to be enacted when it is drafted with highly ambiguous language so that, rather than possessing a single original meaning, it appeals to disparate factions with divergent understandings of its terms.

Yet it is precisely that category of constitutional provisions—those involving the then- (as now-) controversial subjects of equality, fundamental rights, and expansive federal power—that engender the greatest fear of judicial overreaching. As such, originalism will usually fail to live up to its promise in the very cases to which that promise is most acutely directed. Whether they like it or not, judges are forced to look beyond the (non-existent) original meaning in order to answer the constitutional questions that pose the greatest risk of “judicial activism.” The promise of originalism is thus a false one.

I. CIVIL UNIONS AND THE FEDERAL MARRIAGE AMENDMENT

A. *The Original Federal Marriage Amendment*

In a landmark 1999 opinion, the Vermont Supreme Court interpreted the Vermont State Constitution to require the State “to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”²⁴ Although same-sex couples must have the same right to enter into legally significant partnerships as opposite-sex couples, the court held, the legislature need not include their unions within the institution of “marriage.” The decision whether to situate gay unions “within the marriage laws themselves or a parallel ‘domestic partnership’ system or some equivalent statutory alternative, rests with the Legislature.”²⁵

24. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

25. *Id.*

The following year, the Vermont legislature responded by enacting legislation²⁶ that permits persons of the same sex to enter into “civil unions”—a term defined in the statute to “mean[] that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.”²⁷ The statute explicitly mandates that “[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”²⁸ Thus, “[p]arties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons,” and “[t]he law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.”²⁹

Yet for all of that, the statute also purports to make clear that a civil union is not a marriage. The legislative findings accompanying the Civil Unions Bill begin with an emphatic declaration that “[c]ivil marriage under Vermont’s marriage statutes consists of a union between a man and a woman,” and thus the “system of civil unions does not bestow the status of civil marriage.”³⁰ Accordingly, in Vermont, “marriage” remains an institution available only to opposite-sex couples, but each and every one of the legal rights associated with marriage is now equally available to same-sex couples.

The Vermont Supreme Court’s decision raised fears among social conservatives around the country that other courts would soon follow suit and find a state or federal constitutional right to same-sex marriage or civil unions. The only sure-fire way to avoid that result, those conservatives felt, was to amend the Federal Constitution.³¹ Hence, the birth of the Federal Marriage Amendment.

In the spring and summer of 2001, a small group of legal scholars hammered out the text of the Federal Marriage Amendment through a

26. Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 72 (codified at Vt. Stat. Ann. tit. 15, §§ 1201–07 (2002)).

27. Vt. Stat. Ann. tit. 15, § 1201(2). To be eligible for a civil union, applicants must “[b]e of the same sex and therefore excluded from the marriage laws of this state.” Id. § 1202(2).

28. Id. § 1204(a).

29. Id. § 1204(c), (d).

30. 2000 Vt. Acts & Resolves 72.

31. See, e.g., Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 *Regent U. L. Rev.* 21, 29–30 (2004) [hereinafter George, *Judicial Usurpation*]; Robert Bork, *Op-Ed.*, *Stop Courts from Imposing Gay Marriage*, *Wall St. J.*, Aug. 7, 2001, at A14 [hereinafter Bork, *Stop Courts*].

series of email and telephone conversations.³² The Amendment was principally authored by three prominent academics: Professor Robert George of Princeton University, Professor Gerard Bradley of Notre Dame Law School, and Judge Robert Bork, formerly of Yale Law School.³³ Those three scholars settled on the following language, which was formally announced in July 2001 by the Alliance for Marriage, an organization of conservative religious leaders created for the purpose of endorsing the Amendment:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.³⁴

What do those words mean? What would this proposed amendment have accomplished if it had become part of our Constitution? Surely, it would have prohibited state or federal courts from announcing a constitutional right to same-sex “marriage” denominated as such. And surely it would have prohibited Congress and the state legislatures from extending the statutory right to “marriage” to same-sex couples. But what about civil unions? Would it have permitted state governments to establish them, or would it instead have rendered any such state laws unconstitutional?

That question could not possibly have been unanticipated by the Amendment’s authors. After all, the Amendment was drafted on the immediate heels of the Vermont Supreme Court’s decision and the Vermont legislature’s statutory creation of civil unions in response. When the FMA was being drafted, civil unions were front and center of the gay marriage debate.

Nor would this have been an inconsequential, academic question. Opinion polls have generally concluded that, although most Americans do not support extending marriage to gay and lesbian couples, there is solid majority support for affording same-sex couples at least the right to enter into civil unions.³⁵ Indeed, a number of states have already followed Vermont’s lead and enacted their own civil union bills affording gay couples all of the rights of marriage, save only the label, and other states have enacted “domestic partnership” laws extending *virtually* all of the rights of marriage to same-sex couples.³⁶ Momentum for civil unions

32. See Alan Cooperman, Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text, Wash. Post, Feb. 14, 2004, at A1 [hereinafter Cooperman, Little Consensus].

33. See *id.*

34. *Id.*

35. Many of these polls are collected at Law and Civil Rights, PollingReport.com, at <http://pollingreport.com/civil.htm> (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*).

36. See New Hampshire Law Makes Same-Sex Civil Unions Legal, Boston Globe, June 1, 2007, available at http://www.boston.com/news/local/articles/2007/06/01/new_

is growing, and advocates on both sides of the issue recognize that even more states are likely to follow suit in the near future.³⁷ As such, if the FMA had become a part of our Constitution, the constitutionality of civil union laws would have been litigated immediately, and civil unions would instantly have become the central focus of the struggle to define the scope of the new constitutional mandate.

So what is the correct answer? Does the Amendment allow the states to establish civil unions, or not? The question is straightforward and obvious. The answer is anything but.

The Amendment's first sentence—"Marriage in the United States shall consist only of the union of a man and a woman"—might seem at first blush to have nothing to say about civil unions. By its plain terms, it applies only to marriage. And as the Vermont legislature took pains to tell us, the "system of civil unions does not bestow the status of civil marriage."³⁸ But two of the three principal authors of the proposed Amendment disagree. Professors George and Bradley contend that, properly interpreted, this first sentence would do more than just prohibit states from bestowing the *title* of "marriage" upon same-sex unions. It would also prohibit the states from bestowing upon gay and lesbian couples the *essential qualities* of marriage, regardless of what label the state chooses to affix upon the same-sex union, "in the same way that, if the Constitution forbade states from creating 'navies,' they clearly could not establish 'flotillas' or 'armadas,' either."³⁹ In other words, the Constitution protects (and prohibits) substance, not labels. Just as the government cannot get around the Constitution's general prohibition on warrantless searches by authorizing the police to conduct "explorations" of a suspect's home without a warrant, Professors George and Bradley contend that the government would not be able to get around the Constitution's would-be prohibition on same-sex marriage by authorizing same-sex couples to enter into "civil unions" that are identical to marriages in all but name.

Professor George has clarified that, since marriage is inherently a sexual union, under the FMA, "states may not create 'faux marriages' by predicating rights, benefits, privileges, and immunities on the existence, recognition, or presumption of sexual conduct or relationships between unmarried persons."⁴⁰ Thus, says George, a state may enact a domestic partnership or civil union law providing benefits to unmarried couples only if that law applies broadly to any unmarried adults living together,

hampshire_law_makes_same_sex_civil_unions_legal/ (on file with the *Columbia Law Review*).

37. See Anthony Faiola, N.H. Is Set to Approve Same-Sex Civil Unions, *Wash. Post*, Apr. 26, 2007, at A1.

38. 2000 Vt. Acts & Resolves 72, § 1(10).

39. Cooperman, *Little Consensus*, *supra* note 32; see also Ramesh Ponnuru, *Marriage Amendment Jitters*, *Nat'l Rev.*, Nov. 24, 2003, at 31, 32 [hereinafter Ponnuru, *Jitters*].

40. George, *Judicial Usurpation*, *supra* note 31, at 30.

with no expectation of a sexual relationship between them.⁴¹ A civil union that narrowly targets only same-sex romantic couples is a marriage by another name, and is therefore prohibited by the FMA.

Professor George believes this mandate to be “implicit in the terms of the FMA.”⁴² If he is correct, then the Amendment would preclude a civil union law like Vermont’s.⁴³ A Vermont-style civil union is no less premised on the existence of a sexual relationship than is a marriage. The Vermont legislature’s factfindings make clear that the purpose of the institution of the civil union is to allow romantically committed same-sex couples to enter into permanent relationships on the very same terms, and with the very same benefits, as those available to opposite-sex couples who choose to enter into marriage.⁴⁴ Neither civil union laws nor marriage laws make the existence of a sexual relationship an explicit requirement (or even a necessary one, as impotent or celibate couples are free to enter into marriages and civil unions), but both institutions are implicitly premised to precisely the same extent on the understanding that there will generally be a romantic, sexual relationship between the participants.⁴⁵

But is Professors George and Bradley’s reading of their Amendment the correct one? The Amendment’s third principal author, Judge Bork, has reached the polar opposite conclusion. According to Bork, this “first sentence means [only] that no legislature may confer *the name of marriage* on same-sex unions.” The first sentence does *not*, says Bork, prohibit states like Vermont from “enact[ing] a civil-unions law, marriage in all but name.” Rather, “[s]o far as legislatures are concerned, the primary

41. See *id.*; Cooperman, Little Consensus, *supra* note 32 (explaining Professor George’s view of civil unions under FMA).

42. George, Judicial Usurpation, *supra* note 31, at 30.

43. See Gerard V. Bradley, Same-Sex Marriage: Our Final Answer?, 14 Notre Dame J.L. Ethics & Pub. Pol’y 729, 729 (2000) (“Vermont recently became the first American jurisdiction to legally recognize same-sex ‘marriages,’ calling them (chiefly for political reasons) ‘civil unions.’”).

44. See 2000 Vt. Acts & Resolves 72–73. Thus, a person may not enter into a civil union in Vermont with a relative. Vt. Stat. Ann. tit. 15, § 1203 (2002).

45. As Professors George and Bradley have observed, the law of marriage does, to a limited degree, recognize the essential role of sexual intercourse in the marital union by establishing impotence as a legitimate ground for annulment. See Robert P. George & Gerard V. Bradley, Marriage and the Liberal Imagination, 84 Geo. L.J. 301, 308 (1995). But so too does the law of civil unions. Vermont law provides that the “law of domestic relations, including annulment . . . shall apply to parties to a civil union.” Vt. Stat. Ann. tit. 15, § 1204(d). Thus, Professor George appears to be mistaken (or perhaps disingenuous) when he declares, in the very same paragraph in which he announces his understanding that the FMA would foreclose legal recognition of gay unions premised, like marriage, on the existence of a sexual relationship, that the FMA “preserves the principle of democratic self-government on the issue of civil unions” and “fail[s] to ban civil unions.” George, Judicial Usurpation, *supra* note 31, at 30; see also Robert George, The 28th Amendment, Nat’l Rev., July 23, 2001, at 32, 34 (arguing that FMA would not ban civil unions).

thrust of the sentence's prohibition is symbolic, reserving the name of marriage to its traditional meaning."⁴⁶

Remarkably, even the Amendment's authors could not agree on the most fundamental, basic question about the meaning of its opening sentence.

And that's the clear sentence. The proposed Amendment's second sentence—"Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups"—is even more ambiguous. Judge Bork insists that this second sentence precludes *courts* from mandating civil unions (as the Vermont Supreme Court had done), but leaves *legislatures* free to enact them of their own accord. To Bork, the second sentence "recognizes that liberal activist courts are the real problem," and thus leaves "the question of arrangements less than marriage . . . to the determination of the people through the democratic process." Indeed, Bork has explicitly declared, "To try to prevent legislatures from enacting permission for civil unions by constitutional amendment would be to reach too far."⁴⁷ But the actual language of the second sentence seems hard to square with Judge Bork's interpretation. What is a legislatively enacted civil unions law if not a "state . . . law" that "require[s] that . . . the legal incidents" of "marital status" "be conferred upon unmarried couples"?

Initially, Judge Bork's interpretation of both sentences—that they collectively reserve the word "marriage" for opposite-sex unions alone, but they allow legislatures (but not courts) to create civil unions or otherwise to bestow marital rights under another name upon same-sex couples—predominated in the public understanding of the fledgling FMA. Less than a month after the proposed Amendment was announced, the conservative Family Research Council had already denounced it for allowing states to create civil unions.⁴⁸ Other conservatives concurred in this interpretation of the Amendment's limited scope, but grudgingly accepted it anyway. The *National Review's* Stanley Kurtz, for instance, explained that "[w]orries that liberal states may offer homosexual couples civil unions equivalent to marriage in all but name are justified. But out of respect to our federal system, the backers of the Federal Marriage Amendment understand that such battles will have to be fought democratically, on a state-by-state basis."⁴⁹ That was indeed the

46. Bork, *Stop Courts*, *supra* note 31.

47. *Id.*

48. See Stanley Kurtz, *The Right Balance*, *Nat'l Rev. Online*, Aug. 1, 2001, at <http://www.nationalreview.com/contributors/kurtz080101.shtml> (on file with the *Columbia Law Review*).

49. *Id.*

expressed view of the Alliance for Marriage—the organization that had been created to promote the Amendment.⁵⁰

When the Federal Marriage Amendment was originally introduced in the House of Representatives in May of 2002,⁵¹ it went nowhere. The following March, however, the Massachusetts Supreme Judicial Court heard oral argument in *Goodridge v. Department of Public Health*,⁵² the case that ultimately established a state constitutional right to same-sex marriage in Massachusetts. The *Goodridge* litigation, and the media frenzy that it occasioned, reignited the fires of the movement to amend the Federal Constitution, and the FMA was reintroduced in May 2003 by Representative Marilyn Musgrave.⁵³ A month later, those fires erupted into a blaze when the Supreme Court of the United States issued its decision in *Lawrence v. Texas*⁵⁴ invalidating state criminal prohibitions on homosexual sex with reasoning that, according to Justice Scalia's alarmist dissent, "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."⁵⁵ *Lawrence* and *Goodridge* added an element of urgency to the perceived need to use the constitutional amendment process to preempt a judicial declaration of a constitutional right to gay unions. In the first month after the *Lawrence* decision, the FMA gained fifty new cosponsors, tripling its prior support and propelling it to the forefront of the congressional agenda.⁵⁶ The gay marriage debate in Congress had begun.

Throughout that debate, the FMA's sponsors stood by Judge Bork's and the Alliance for Marriage's interpretation of the Amendment's meaning with regard to civil unions. Representative Musgrave, the Amendment's principal sponsor in the House, declared: "The intent from Day One has been respectful of state legislatures. . . . I don't support civil unions, but I'm ready to have those battles state by state."⁵⁷ Echoing Judge Bork's views, the sponsors sold the Amendment as aimed only at curtailing "judicial activism."⁵⁸ To that end, they insisted that their Amendment would preclude the courts from "discovering" a state or federal constitutional right to gay marriage or civil unions, but it would not preclude the state legislatures from democratically creating a right to civil

50. See Alan Cooperman, *Opponents of Gay Marriage Divided: At Issue Is Scope of an Amendment*, Wash. Post, Nov. 29, 2003, at A1 [hereinafter Cooperman, *Opponents*].

51. See H.R.J. Res. 93, 107th Cong. (2002).

52. 798 N.E.2d 941 (Mass. 2003).

53. See H.R.J. Res. 56, 108th Cong. (2003).

54. 539 U.S. 558 (2003).

55. *Id.* at 604 (Scalia, J., dissenting).

56. See Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 *BYU J. Pub. L.* 569, 573 (2004).

57. Cooperman, *Little Consensus*, *supra* note 32.

58. See Melissa A. Glidden, *Recent Development, Federal Marriage Amendment*, 41 *Harv. J. on Legis.* 483, 494–95 (2004); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 *Mich. L. Rev.* 431, 475–77 (2005).

unions (though it would preclude them from creating a right to gay marriage). As the Senate Republican Party Committee explained it, “the amendment is designed to preserve the ability of state legislatures to allocate civil benefits within each State. [Only] [s]tate courts . . . would not be able to create this new right.”⁵⁹

The press initially accepted and repeated this understanding. The *Baptist Press*, for instance, published an article in July 2003 confidently declaring that, “[w]hile the amendment would preclude judges from forcing ‘civil unions’ and same-sex, marriage-like benefits upon states, it would not prevent state legislatures from continuing to make such decisions.”⁶⁰

But not everyone was convinced. Initially, it was the Amendment’s second sentence that raised concerns. In May 2003, the ACLU issued and posted on the internet a letter to the Senate Judiciary Committee insisting that, contrary to the promises of the Amendment’s sponsors, the Amendment might well have the effect of voiding legislatively enacted domestic partnership and civil union laws.⁶¹ Two months later, Andrew Sullivan, a prominent internet columnist, blogger, and well-known conservative advocate for gay rights, reached the same conclusion. Sullivan charged that the second sentence would bar the states from enacting or continuing to enforce not only gay marriage laws, but also “all domestic partnership laws, any state-provided benefits, or any support for same-sex couples anywhere anyhow.”⁶²

Law professor Eugene Volokh, another prominent blogger, agreed that the language of the FMA was best read to bar civil unions. Noting that the second sentence of the Amendment provides that “state . . . law . . . shall [not] be construed to require that . . . the legal incidents [of marriage] be conferred upon unmarried couples,” Volokh explained that that is exactly what civil union laws try to do: confer upon certain unmarried couples all of the rights and benefits—the “legal incidents”—of marriage.⁶³ As such, the FMA would preclude the courts from “construing” a state civil union law to do what it purports to do. Thus, if the legislature

59. U.S. Senate Republican Policy Comm., *The Threat to Marriage from the Courts 11* (July 29, 2003), available at <http://rpc.senate.gov/releases/2003/jd072903.pdf> (on file with the *Columbia Law Review*).

60. Tom Strode, *Marriage Protection Amendment Gets Push After Court Ruling*, *Baptist Press*, July 1, 2003, at <http://www.bpnews.net/bpnews.asp?id=16215> (on file with the *Columbia Law Review*).

61. Letter from ACLU to Members of the Senate Judiciary Committee Urging Opposition to H.J. Res. 56, the Marriage Constitutional Amendment (May 23, 2003), at <http://www.aclu.org/lgbt/relationships/12063leg20030523.html> (on file with the *Columbia Law Review*).

62. Posting of Andrew Sullivan to andrewsullivan.com, http://time-blog.com/daily_dish/index.php?dish_inc=archives/2003_07_01_dish_archive.html (July 10, 2003, 14:56 EST) (on file with the *Columbia Law Review*).

63. See Posting of Eugene Volokh to *The Volokh Conspiracy*, http://volokh.com/2003_07_06_volokh_archive.html#105786956006497748 (July 10, 2003, 13:39 EST) (on file with the *Columbia Law Review*).

of a state were to enact a civil union law—requiring state and local officials to treat such unions as tantamount to marriages—state judges and officials would be precluded by the FMA from giving it effect.⁶⁴

Ramesh Ponnuru, a writer for the *National Review*, immediately disagreed with Sullivan and Volokh and insisted that the FMA's second sentence would *not* prohibit state legislative attempts to extend marital rights to same-sex couples. According to Ponnuru, that sentence is better read to apply only to judicial attempts to declare that a law facially granting benefits only to opposite-sex married couples should somehow be “construed” to extend those benefits to committed same-sex couples; it would not apply to a law explicitly granting benefits to same-sex couples.⁶⁵ As Ponnuru later argued, a benefit should be treated as an “incident of marriage” within the meaning of the second sentence only if the legislature has chosen to make it available only to married couples. Once a legislature chooses to make it generally available to unmarried couples through civil unions, it is no longer an incident of marriage, and the Amendment will no longer preclude the courts and other government officials from affording it to couples in civil unions.⁶⁶

Volokh was unconvinced. He explained that “legal incidents of marriage” is an inherently ambiguous phrase. It could be interpreted as Ponnuru suggested, to refer to “those things that state law provides only to married couples”; but it could also be interpreted to refer to “those things that law has traditionally provided only to married couples.”⁶⁷ Indeed, Volokh cited a number of judicial decisions that have used the phrase “incidents of marriage” to refer to benefits that are traditionally afforded to married couples but can also be bestowed upon unmarried couples. “In all these cases,” explained Volokh, “the courts were treating

64. See *id.*; Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/2004_02_08_volokh_archive.html#107636855674742165 (Feb. 9, 2004, 15:15 EST) (on file with the *Columbia Law Review*) [hereinafter February Volokh Posting]; Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/2003_07_06_volokh_archive.html (July 10, 2003, 17:50 EST) (on file with the *Columbia Law Review*).

65. See Posting of Ramesh Ponnuru to The Corner, <http://corner.nationalreview.com/post/?q=MzBlMWMwOTg4M2RhNWU0YjhjZThkZDk1NmVjMzQ4NjY=> (July 12, 2003, 11:04 EST) (on file with the *Columbia Law Review*). Representative Musgrave later echoed that, in light of the words “construed to require” that follow it, the “phrase ‘state or federal law’ means statutory and common laws of general applicability not otherwise having to do with conferring the legal incidents of marriage on unmarried persons.” Memorandum from Office of U.S. Representative Marylyn Musgrave, Memorandum Regarding the Meaning of the Musgrave Federal Marriage Amendment 3 (May 13, 2004) [hereinafter Musgrave Memorandum], reprinted in Federal Marriage Amendment (The Musgrave Amendment): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 108th Cong. 12 (2004) [hereinafter May 13, 2004 Hearing]; see also May 13, 2004 Hearing, *supra*, at 18 (statement of Judge Robert H. Bork).

66. See Ramesh Ponnuru, *Times vs. Sullivan*, Nat'l Rev. Online, Feb. 9, 2004, at <http://www.nationalreview.com/ponnuru/ponnuru200402091407.asp> (on file with the *Columbia Law Review*).

67. February Volokh Posting, *supra* note 64.

'incidents of marriage' as something that even unmarried couples may possess—and when that happens, the right or behavior does *not* 'cease[] to be an incident of marriage'; it remains an incident of marriage, though one that unmarried couples possess together with married ones."⁶⁸

Thus, by the time the Senate Judiciary Committee's Subcommittee on the Constitution held the first of many congressional hearings on the FMA on September 4, 2003,⁶⁹ there was considerable public disagreement among legal commentators as to what, exactly, the FMA would accomplish. At that first congressional hearing, law professor Dale Carpenter made the committee aware of the concern that, when it is read in the very reasonable manner suggested by Professor Volokh, the second sentence of the FMA "might even prevent State courts from enforcing domestic partnerships or civil unions."⁷⁰

That very same day, another law professor, Charles Rice, a proponent of amending the Constitution to ban both gay marriage and civil unions, published an op-ed arguing that the FMA was unacceptably vague and needed to be rewritten. Rice explained that, "[s]ome of its principal backers, including . . . Bork . . . apparently think the FMA would allow a legislature to approve Vermont-style, same-sex 'civil unions' Other proponents of FMA believe it would forbid a legislature to approve such 'civil unions.' The FMA, unfortunately, is so unclear that either position is fairly arguable."⁷¹

Professor Rice made a compelling argument for more clarity, but what he apparently did not take into account was that this ambiguity may well have been intentional. When Judge Bork and Professors George and Bradley were drafting the Amendment, they were hoping to satisfy a number of different constituencies within the broad conservative tent.⁷² There may have been widespread agreement among conservatives that there was a need for an anti-gay-marriage amendment, but there was profound disagreement on its proper scope and reach. According to Professor George: "some people wanted to ban all civil unions"; "some people wanted a pure federalism amendment," leaving the issue of civil unions to the states, and guaranteeing that no state would be forced to recognize civil unions entered into in other states; and "some wanted a pure judicial restraint amendment," precluding state and federal *judges*

68. *Id.*

69. See What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 108th Cong. 1 (2003).

70. *Id.* at 21 (statement of Dale Carpenter, Associate Professor of Law, University of Minnesota Law School); see also *id.* at 34.

71. Charles E. Rice, Reformulate the Federal Marriage Amendment, HumanEvents.com, Sept. 4, 2003, at <http://www.humanevents.com/article.php?id=1724> (on file with the *Columbia Law Review*).

72. See Cooperman, Little Consensus, *supra* note 32.

from mandating civil unions, but not tying the hands of legislators.⁷³ Those goals were, of course, mutually exclusive; to appease those who wanted to ban civil unions would be to defy those who wanted to preserve legislative flexibility, and vice versa. The only way to satisfy all of those constituencies simultaneously was to pen an amendment that was ambiguous enough that it could plausibly be read to support each position.

And that is just what the drafters did. The FMA's vague language allowed it to be all things to everyone, such that the disparate factions could unite around its indeterminate text. The "social conservatives could not," the *National Review* reported, "agree on what the language meant."⁷⁴ And that is precisely why they were able to coalesce around it. It was simultaneously acceptable to Judge Bork, who favored leaving the question of civil unions to the state legislatures, and to Professors George and Bradley, who did not. It was being promoted to a moderate public by the Alliance for Marriage as leaving the civil unions issue to the states, while at the same time, Professor George was privately reassuring leaders of the social conservative movement that it would do just the opposite.⁷⁵

If the drafters did intend to avoid conflict by phrasing the Amendment in this way, their plan was at least partially unsuccessful. Initially, the Amendment did not prove to be all things to absolutely everyone in the conservative movement. A small number of social conservative groups that favored banning all gay unions, not just gay marriages, interpreted the FMA to go against their wishes by allowing legislatively created civil unions, and publicly opposed it for that reason.⁷⁶ As Michael Farris, chairman of the Home School Legal Defense Association, put it: "I don't care if you call it civil unions. I don't care if you call it domestic partnership, I don't care if you call it cantaloupe soup, if you are legally spouses at the end of the day, I am not willing to do that."⁷⁷ These groups insisted on changing the language of the Amendment to make crystal clear that it would prohibit civil unions. At the same time, other conservatives (including the White House and Senator Hatch) who favored leaving the civil unions question to the state legislatures, took the opposite approach. They too were unhappy with the ambiguous text and they privately urged the Amendment's sponsors to change the language to make the opposite crystal clear: that the Amendment would not prohibit civil unions.⁷⁸ In the words of one observer, "[c]onservative activists were pulling the

73. *Id.*

74. Ponnuru, Jitters, *supra* note 39, at 32.

75. See Interview by Editors of Human Events with Sandy Rios, President, Concerned Women of America (Jan. 14, 2004), in *Sandy Rios: Banning Gay Marriage Tops CWA Agenda*, Human Events, Jan. 26, 2004, at 24.

76. See Cooperman, Little Consensus, *supra* note 32; Ponnuru, Jitters, *supra* note 39, at 32.

77. David D. Kirkpatrick, Conservatives Using Issue of Gay Unions as a Rallying Tool, *N.Y. Times*, Feb. 8, 2004, at A1 [hereinafter Kirkpatrick, Rallying Tool].

78. See Ponnuru, Jitters, *supra* note 39, at 32.

amendment right while the Republican establishment was pulling it left. It looked as though the amendment would fall apart.”⁷⁹

On November 18, 2003, the Massachusetts Supreme Judicial Court issued its decision in the *Goodridge* case, mandating full marriage rights for gays and lesbians.⁸⁰ That decision spurred the Congress into action. Something needed to be done to get over the impasse among conservatives. Republican congressional leaders met the very next day to discuss the language of the FMA in anticipation of formally introducing it in the Senate.⁸¹ They were undoubtedly aware at that meeting of the profound ambiguity in the language of the Amendment. That ambiguity had already been pointed out to them at a hearing, and it had been the focus of a spirited debate among conservatives. And yet, just days later, the FMA was introduced in the Senate by Senator Wayne Allard with language identical to the House bill.⁸² The impasse had been overcome in the only manner that it could have been: by embracing, rather than eliminating, the ambiguity.

The decision to stick with the Alliance for Marriage’s text was a deliberate one, made after a heated meeting between congressional leaders and the Arlington Group,⁸³ an association of the nation’s most influential social conservative organizations that had proposed revisions to the FMA designed to make clear it would ban Vermont-style civil unions.⁸⁴ As Glenn Stanton of Focus on the Family explained, the issue at the meeting was “‘purity versus pragmatism Do we go for everything that we want, or take the best we think we can get?’”⁸⁵ A few social conservative groups came down on the side of purity, insisting “that it would be pointless to fight for an amendment that allowed gay marriage in all but name. The amendment had to ‘protect an institution, not a word.’”⁸⁶ But after the congressional leaders made a compelling case that the votes would never be there for the Arlington Group’s rephrased amendment, the Reverend Donald Wildmon, the founder of the American Family Association and the man who had originally convened the Arlington Group, explained that “‘reality set in’” among those attending the meeting, and a reluctant near-consensus emerged in favor of pragmatism over principles.⁸⁷

Yet the allegedly pragmatic FMA did not clearly permit civil unions; the textual ambiguity that had led a number of legal experts to conclude that the Amendment would actually *preclude* civil unions remained. On November 29, 2003, Matt Daniels, the president of the Alliance for

79. *Id.*

80. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968–69 (Mass. 2003).

81. See Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. Times, Nov. 20, 2003, at A29.

82. See S.J. Res. 26, 108th Cong. (2003).

83. See Seelye, *supra* note 81.

84. See Kirkpatrick, *Rallying Tool*, *supra* note 77.

85. Cooperman, *Opponents*, *supra* note 50.

86. Ponnuru, *Jitters*, *supra* note 39, at 32.

87. Kirkpatrick, *Rallying Tool*, *supra* note 77.

Marriage (the group that had initially proposed and remained the leading proponent of the Amendment) publicly admitted the existence of the ambiguity, and explained that his group was working on “minor changes in the text to make it explicit and undeniably clear that we are not seeking to invalidate legislatively created civil unions.”⁸⁸ Over the next several months, however, as the Amendment continued to gather supporters and continued to make its way through the legislative process, those changes did not come.

In the meantime, the public debate among columnists and internet bloggers about the probable effect of the FMA on the institution of the civil union continued.⁸⁹ Although many of the Amendment’s advocates repeated the claim that it would leave the issue of civil unions to the state legislatures,⁹⁰ the ACLU and other groups continued to insist that the Amendment would have dire consequences for civil unions.⁹¹ Op-eds were written questioning the FMA’s sponsors’ reading of the text.⁹² Major news outlets, including the *New York Times*,⁹³ the *Washington Post*,⁹⁴ the

88. Cooperman, Opponents, *supra* note 50.

89. Some authors joined Professor Volokh and Andrew Sullivan in questioning the promises of the Amendment’s sponsors. See, e.g., Posting of Jacob Levy to The Volokh Conspiracy, http://volokh.com/2004_02_15_volokh_archive.html (Feb. 19, 2004, 8:06 EST) (on file with the *Columbia Law Review*); Posting of Walter Olson to Overlawyered, <http://www.overlawyered.com/archives/000834.html> (Feb. 20, 2004, 12:05 EST) (on file with the *Columbia Law Review*). Others joined Ramesh Ponnuru in defending the interpretation insisted upon by the Amendment’s sponsors. See, e.g., Posting of Justin Katz to Dust in the Light, http://dustinthelight.timshelarts.com/lint/2004_02.html (Feb. 18, 2004, 15:35 EST) (on file with the *Columbia Law Review*); Posting of Anthony Rickey to Three Years of Hell, <http://www.threeyearsofhell.com/archive/000480.php> (Feb. 11, 2004, 3:05 EST) (on file with the *Columbia Law Review*).

90. See, e.g., David Limbaugh, Time for a Federal Marriage Amendment, Newsmax.com, Jan. 16, 2004, at <http://archive.newsmax.com/archives/articles/2004/1/16/02331.shtml> (on file with the *Columbia Law Review*).

91. See, e.g., ACLU, Frequently Asked Questions About the Federal Marriage Amendment and Gay Marriage, Feb. 25, 2004, at <http://www.aclu.org/lgbt/gen/11931res20040225.html> (on file with the *Columbia Law Review*); Pride at Work, Federal Marriage Amendment Q & A, at <http://www.prideatwork.org/page.php?id=258> (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*).

92. See, e.g., E. Thomas McClanahan, Op-Ed., States Not Judges, Should Decide the Fate of Marriage, Milwaukee J. Sentinel, Feb. 26, 2004, at 19A (noting that FMA’s text is “thoroughly muddled on the subject of civil unions,” to point of being “linguistic goo,” and arguing that, while “[s]ome supporters say the amendment would permit civil unions . . . I don’t see it in the words”); Eric Shumsky, Op-Ed., The Amendment Speaks for Itself, Wash. Post, Feb. 29, 2004, at B5 (finding that contrary to proponents’ interpretation, “the language in the Musgrave amendment would render civil unions . . . meaningless”).

93. See Editorial, Putting Bias in the Constitution, N.Y. Times, Feb. 25, 2004, at A22 (arguing that language of Amendment could “be used to deny gay couples even economic benefits”).

94. See Cooperman, Little Consensus, *supra* note 32 (reporting “no consensus—even among its authors—about what the text means”).

Economist,⁹⁵ and the *National Review*⁹⁶—among many others—reported on the textual ambiguity and the widespread disagreement regarding the effect of the Amendment on civil unions.⁹⁷

The Senate Judiciary Committee held another subcommittee hearing on the topic, at which several Senators explained that, on their reading of the text, the Amendment would preclude state legislatures from enacting enforceable civil union laws.⁹⁸ Senator Kennedy, in particular, spoke forcefully: “Advocates of the amendment claim that it addresses only gay marriage and will not prevent States from granting the legal benefits of marriage to same-sex couples through civil laws. But that is not what the text of the amendment says.”⁹⁹ Rather, because it “forbids same-sex couples from receiving the legal incidents of marriage,” it “would prohibit State courts from enforcing . . . laws that deal with civil unions.”¹⁰⁰ Several witnesses and advocacy groups expressed their agreement with that reading at the hearing,¹⁰¹ and even one of the leading public advocates of amending the Constitution, Maggie Gallagher, acknowledged the possibility that the wording of the proposed Amendment might not be consistent with the expressed intentions of its sponsors.¹⁰² And yet, the Alliance for Marriage and the Amendment’s congressional sponsors continued to push the ambiguous text.

Many opponents of the FMA were inclined to ascribe nefarious purposes to the failure to clear up the potentially misleading text. As the *Washington Post* reported, “[g]ay rights groups contend that the phrase

95. See New Fuel for the Culture Wars, *Economist*, Feb. 28, 2004, at 29, 29–30 (noting argument of FMA supporters that it “would stop only marriage among homosexuals, not civil unions” and argument of FMA opponents that “proponents of a constitutional ban are just plain wrong—or lying—when they say their amendment would permit civil unions”).

96. See Ponnuru, *Jitters*, supra note 39, at 33 (describing controversy about meaning of Amendment).

97. The media had previously been inclined to accept uncritically the FMA’s sponsors’ characterization of its effects on civil unions. But complaints from watchdog organizations like Fairness and Accuracy in Reporting led most media outlets to begin, in February 2004, to acknowledge the uncertain scope of the Amendment. See Peter Hart, *Activism Shifts Coverage of Proposed Gay-Marriage Amendment*, *Extra!*, Mar./Apr. 2004, available at <http://www.fair.org/index.php?page=1171> (on file with the *Columbia Law Review*).

98. See, e.g., *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?*, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 108th Cong. 168 (2004) [hereinafter March 3, 2004 Hearing] (statement of Sen. Patrick J. Leahy, Ranking Member, S. Comm. on the Judiciary) (“Such language would almost certainly take away the rights of States to create domestic partnerships or civil unions.”).

99. *Id.* at 43 (statement of Sen. Edward M. Kennedy, Member, Subcomm. on the Constitution, Civil Rights and Property Rights).

100. *Id.* at 43 (statement of Sen. Kennedy).

101. See, e.g., *id.* at 62 (press release of ACLU); *id.* at 162–63 (letter from Leadership Conference on Civil Rights); *id.* at 222–24 (statement of NAACP).

102. See *id.* at 35–36 (statement of Maggie Gallagher, President, Institute for Marriage and Public Policy).

about ‘legal incidents’ of marriage would bar civil unions, and that evangelical Christian organizations are trying to sell the amendment to the public as more moderate than it is.”¹⁰³ On his blog, law professor Jack Balkin suggested that the text was a game of “bait and switch,” “cleverly and confusingly written” to make Vermont-style civil union laws unenforceable, while appearing at first glance to leave the matter of civil unions to the states.¹⁰⁴ That charge was repeated by numerous others, including Senator Kennedy, who accused the FMA’s supporters of attempting to “confuse and deceive the American people about . . . what their proposed amendment will do,”¹⁰⁵ and gay rights advocate Evan Wolfson, who accused the Amendment’s supporters of “being deliberately deceptive,” and insisted that, notwithstanding the moderate-sounding promises of the Amendment’s backers, its “vague and sweeping language” was “intended to deny any . . . measure of protection, including civil unions.”¹⁰⁶ Similarly, Andrew Sullivan asserted that the Amendment’s backers were deliberately “lying about their amendment”¹⁰⁷ and had planted the second sentence as a “stealth bomb” to surreptitiously eliminate civil unions.¹⁰⁸

The critics may have been right that the FMA’s sponsors and proponents were intentionally deceiving the American people. But one need not ascribe fraudulent motives in order to explain their failure to clear up the ambiguity in their text. The sponsors may indeed have believed that their Amendment allowed the states to create civil unions, and they may, personally, have been perfectly willing to amend the text in order to make that proposition more clear. But their hands were likely tied by

103. Cooperman, Little Consensus, *supra* note 32.

104. Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2003/11/is-federal-marriage-amendment-bait-and.html> (Nov. 21, 2003, 14:34 EST) (on file with the *Columbia Law Review*) [hereinafter Balkin, Balkinization].

105. March 3, 2004 Hearing, *supra* note 98, at 42 (statement of Sen. Kennedy).

106. Mike Allen & Alan Cooperman, Bush Plans to Back Marriage Amendment, *Wash. Post*, Feb. 11, 2004, at A1.

107. Posting of Andrew Sullivan to andrewsullivan.com, http://time-blog.com/daily_dish/index.php?dish_inc=archives/2004_02_01_dish_archive.html&PHPSESSID=6295a59f99f10f156f495c772e646208 (Feb. 8, 2004, 23:06 EST) (on file with the *Columbia Law Review*).

108. Posting of Andrew Sullivan to andrewsullivan.com, http://time-blog.com/daily_dish/index.php?dish_inc=archives/2004_02_01_dish_archive.html&PHPSESSID=6295a59f99f10f156f495c772e646208 (Feb. 11, 2004, 12:31 EST) (on file with the *Columbia Law Review*). This view was endorsed by a great many other internet posters and commenters. See, e.g., Comment of Joe D. to Three Years of Hell, <http://www.threeyearsofhell.com/archive/000480.php> (Feb. 11, 2004, 9:56 EST) (on file with the *Columbia Law Review*) (arguing that only possible explanation for sponsors’ failure to change text of Amendment was that they were attempting to preserve support of those who wanted to ban civil unions and believed that current wording would accomplish that task); Comment of Toluca Jim/Visible Hand to Three Years of Hell, <http://www.threeyearsofhell.com/archive/000480.php> (Feb. 11, 2004 12:16 EST) (on file with the *Columbia Law Review*) (suggesting that ambiguous text was intentionally drafted to appear to be compromise, while in fact having extreme effect).

their need to hold together their tenuous coalition. Making clear that the Amendment *bars* the states from adopting civil unions would have alienated moderates and made it politically impossible for the President and many in Congress to support it; it would have been dead on arrival. But at the same time, making clear that the Amendment *allows* the states to adopt civil unions would have made it extremely hard to drum up grassroots support among the social conservative movement; it would have caused a massive exodus of support from the religious right.¹⁰⁹ With the ambiguity remaining in place, social conservative groups like the Family Research Council (which had publicly refused to compromise on the civil unions issue and had adamantly resisted the Alliance For Marriage's suggestions to liberalize the language to make clear that it allowed civil unions) were able to aggressively back the Amendment, sending out blanket email messages to build support.¹¹⁰

At the very least, the ambiguity made it easier for these groups to avoid mention of civil unions in their advocacy, thus averting confrontation with their more purist, less pragmatic members.¹¹¹

The Traditional Values Coalition's Andrea Lafferty—a staunch opponent of civil unions—lamented this fact:

[T]hey neglected to inform our own people that this amendment ducks on civil unions This has caused a “fog of war” to descend on this debate with few of the rank-and-file grass-roots activists across America understanding that this marriage amendment . . . symbolically reasserts the traditional definition of marriage but substantially leaves it open to distortion by civil union[s]¹¹²

Indeed, if the allegations of one ideologically pure religious conservative website are to be believed, the ambiguity was consciously exploited by the social conservative advocacy groups to actively mislead their members into supporting a compromise amendment that the faithful would otherwise not have accepted: “Instead of warning their members that this wording actually allowed gay civil unions, these organizations boldly lied, stating that this amendment was needed in order to

109. Indeed, many conservative groups feared that the failure to make the opposite change—to amend the text to explicitly ban civil unions—would on its own make it difficult to drum up grass roots evangelical support. See Cooperman, *Opponents*, supra note 50.

110. See Keith Perine & Jennifer A. Dlouhy, *Parties Wary of Political Risk in Stands on Gay Marriage*, 62 *Cong. Q. Wkly.* 84, 91 (2004).

111. See Louis P. Sheldon, *TVC Opposed to Marriage Protection Amendment*, Traditional Values Coalition, June 1, 2006, at <http://traditionalvalues.org/modules.php?sid=2742> (on file with the *Columbia Law Review*) (noting that Amendment's supporters have “artfully avoided” any discussion of civil unions).

112. Andrea Lafferty, *Should Congress Ban Gay Marriages and Civil Unions? YES*, OregonLive.com, July 13, 2004, at http://www.oregonlive.com/special/gaymarriage/index.ssf?/special/oregonian/gaymarriage/040713_yes.html (on file with the *Columbia Law Review*).

prevent gay civil unions! No one from Focus On The Family ever told their members the truth!”¹¹³

In other words, the ambiguity at the very least made it possible for those conservative groups that were willing to compromise to drum up support among their less-compromise-inclined membership without having to answer for their impurity.¹¹⁴ But of course, the ambiguity also had the potential to do more than that. It may also have given these groups hope that they could yet prevail on the civil unions issue in the courts, notwithstanding the unhelpful rhetoric from the Amendment’s sponsors. Publicly airing those thoughts was impossible, as it would have alienated the moderates and destroyed the coalition. But privately, those groups had every reason to remain optimistic that, at the end of the day, the “compromise” would end up being no compromise at all.

It was on February 24, 2004, in the midst of this public confusion (and perhaps deception), that President Bush announced his support for the FMA.¹¹⁵ For months, Bush had resisted aggressive courting from the FMA’s backers, in part because he feared being labeled as intolerant or bigoted.¹¹⁶ The FMA had put Bush in a political bind at the outset of his reelection campaign. Pollsters and strategists warned the President that publicly supporting a constitutional amendment banning gay marriage would make him appear intolerant, which could cost him much-needed support among swing voters, “soccer moms” and other moderate Republicans, and the approximately one million gay Republican voters who had supported him in the 2000 election¹¹⁷ (when he had declared that gay marriage was an issue for the states to resolve¹¹⁸). But at the same time, Karl Rove, Bush’s most trusted political advisor, warned him that the failure of millions of evangelical voters to turn out at the ballot box had nearly cost him the election in 2000, and impressed upon him the need to please his conservative Christian base in order to win reelec-

113. National Disaster!! Congress Changes Language of Federal Marriage Amendment to Allow Gay “Civil Unions”!, *The Cutting Edge*, at <http://www.cuttingedge.org/NEWS/n1905.cfm> (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*) [hereinafter *National Disaster*]. These remarks, and those of Andrea Lafferty, quoted above, were actually made after the language of the FMA was revised. See *infra* Part I.B.

114. Louis Sheldon of the Traditional Values Coalition later lamented, “If there was a ‘truth in labeling’ requirement for political groups, AFM would be forced to change its name to Alliance for Marriage and Civil Unions.” Traditional Values Coalition, *Alliance for Marriage Also Supports Homosexual Civil Unions*, Mar. 6, 2007, at <http://www.traditionalvalues.org/print.php?sid=3025> (on file with the *Columbia Law Review*).

115. See Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage: President Says States Could Rule on Civil Unions*, *Wash. Post*, Feb. 25, 2004, at A1 [hereinafter *Allen & Cooperman, Bush Backs Amendment*].

116. See Kirkpatrick, *Rallying Tool*, *supra* note 77.

117. See David D. Kirkpatrick, *Bush’s Push for Marriage Falls Short for Conservatives*, *N.Y. Times*, Jan. 15, 2004, at A18 [hereinafter *Kirkpatrick, Bush’s Push*].

118. See *Marriage Amendment: Will It Help or Hurt Bush?*, *CNN.com*, Feb. 26, 2004, at <http://www.cnn.com/2004/ALLPOLITICS/02/25/elec04.prez.bush.marriage/> (on file with the *Columbia Law Review*).

tion.¹¹⁹ Christian conservative leaders insisted that the President support the FMA. Gary Bauer of American Values warned, “If the White House puts this on the back burner or doesn’t put political capital into it, that would deeply demoralize a large block of voters that they are expecting to turn out in November.”¹²⁰

The President thus found himself in something of a catch-22. To win reelection, he needed the support of both social conservatives and Republican moderates. And yet, on this fundamental issue, those two groups were far apart. The conservatives were demanding his support for banning not only gay marriage, but also civil unions.¹²¹ Many moderates, on the other hand, were somewhat put off by the idea of *amending the Constitution* to ban gay marriage, and they perceived a ban on civil unions as downright discriminatory and mean-spirited.¹²²

In the end, the President was saved by the FMA’s unclear wording. The textual ambiguity allowed him to appear moderate by publicly supporting the right of states to create civil unions (the compromise position endorsed by the political center), while not alienating his socially conservative base, at least some of whom may have been satisfied by behind-the-scenes assurances that the Amendment would in fact end up banning all civil unions, despite the contrary rhetoric from its sponsors.¹²³

To be sure, some social conservatives were not satisfied. Concerned Women for America, for instance, issued a statement shortly after President Bush’s announcement saying that it “cannot support the defective remedy he has chosen” because it could allow the states to create civil unions.¹²⁴ But most of the President’s social conservative base was willing to go along. The *Baptist Press* reported that, “[f]or the most part, pro-

119. See Kirkpatrick, *Bush’s Push*, *supra* note 117.

120. *Id.*

121. See, e.g., Franklin Foer, *Marriage Counselor*, *Atlantic Monthly*, Mar. 1, 2004, at 39, 40 (noting anger among social conservative leaders over Alliance for Marriage’s support for amendment that would ostensibly allow states to create civil unions).

122. See Kirkpatrick, *Bush’s Push*, *supra* note 117.

123. Thus, for instance, Louis Sheldon of the Traditional Values Coalition observed that, given the political sensitivity of the issue, he did not mind that President Bush, when endorsing the Amendment, also indicated support for allowing state legislatures to create civil unions (though Sheldon himself would settle for nothing less than an amendment banning all civil unions). “The whole point here is to be generic on the issue [in public comments] but specific in the wording” of the Amendment, said Sheldon. Seelye, *supra* note 81. Sheldon publicly supported the original version of the FMA and pledged to rally his organization’s members in its support. See Michael Foust, *Top Leaders Thank Bush for Marriage Amendment Stance*, *Baptist Press*, Feb. 25, 2004, at <http://www.bpnews.net/bpnews.asp?id=17721> (on file with the *Columbia Law Review*); People for the American Way, *National Coalition Promotes Federal Heterosexual Marriage Amendment*, at <http://www.pfaw.org/pfaw/general/default.aspx?oid=4156> (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*) (noting that Sheldon declared that “TVC will do whatever it can to help the Alliance for Marriage secure passage of The Federal Marriage Amendment”). Yet he adamantly opposed amending the Constitution in a way that would permit civil unions. See Sheldon, *supra* note 111.

124. Allen & Cooperman, *Bush Backs Amendment*, *supra* note 115.

family organizations seem unified”; indeed, seventy leaders of major social conservative organizations “issued a statement, praising Bush . . . and pledging their support.”¹²⁵

B. *The Revised Federal Marriage Amendment*

Unfortunately for the FMA’s sponsors, as much as they might have liked to leave the ambiguous wording of the second sentence unaltered, that option ultimately proved unacceptable to the moderates in their coalition. The fact that the second sentence was naturally read to preclude state legislatures from creating civil unions as an alternative to gay marriage apparently made it impossible for the Amendment to garner enough votes in the Senate.¹²⁶ Thus, literally on the eve of a March 23, 2004, hearing on the Amendment in the Senate Judiciary Committee, Senator Allard was forced to introduce a revised version providing:

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.¹²⁷

The first sentence remained unchanged between the two drafts of the Amendment, but the words “nor state or federal law” had been excised from the second sentence.

Senator Allard explained his reasons for the change: “[A]fter hearing . . . comments from my colleagues and working with constitutional scholars, the decision was made that we would change the words so that it met the goals which I publicly talked about,” namely, that it would allow state legislatures to create civil unions.¹²⁸ Senator Allard described his revisions as “technical in nature” and designed simply “to clarify and remove any ambiguity.”¹²⁹ “Numerous critics have propounded the false notion that we have far greater restrictions in mind, and it is my hope that our technical changes will serve to clear the air of this charge.”¹³⁰

125. Michael Foust, *Should a Marriage Amendment Also Ban Civil Unions?*, Baptist Press, Dec. 5, 2003, at <http://www.baptistpress.com/bpnews.asp?id=17217> (on file with the *Columbia Law Review*). The Amendment’s liberal opponents were not placated by President Bush’s assurances about civil unions, and some of them promptly added the President to their list of persons who were intentionally lying about the Amendment’s effects. See, e.g., *Marriage Equality*, at <http://www.wall-eye.com/marriageequality.html> (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*) (“The President knows that civil unions are not allowed in the language of the [FMA]. . . . The American people are deliberately being misled.” (emphasis omitted)).

126. See Carl Hulse, *Backers Revise Amendment on Marriage*, N.Y. Times, Mar. 23, 2004, at A21.

127. S.J. Res. 30, 108th Cong. (2004).

128. A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 9 (2004) [hereinafter *March 23, 2004 Hearing*] (statement of Sen. Wayne Allard).

129. *Id.* at 9.

130. *Id.* at 11.

On the basis of their quick, initial read, many of the blindsided Democratic Senators and committee witnesses seemed to agree that the revised language had cleared up the primary ambiguity in the earlier draft—that it was now clear that the Amendment would allow state legislatures to create civil unions.¹³¹ By removing the words “nor state or federal law,” the revision seemed to eliminate the concern that the Amendment would preclude a court from construing a state law to allow civil unions, even if that was the clear mandate of the legislation. On his blog, Professor Volokh—who had been one of the first critics to raise that concern—immediately agreed, declaring that the revised Amendment “clearly lets state voters and legislatures enact civil unions by statute.”¹³² The Bush Administration also quickly endorsed that reading.¹³³

But others were unsure that the ambiguity had been successfully excised. Appearing on behalf of the American Bar Association, Phyllis Bossin testified more cautiously that, due to the removal of the words “nor state or federal law,” it “would appear that a state legislature could pass a law permitting civil unions However, the drafting is silent on this question and leaves open the possibility that a state would be prohibited from passing such a law.”¹³⁴ Thus, said Bossin, even with the change, “the amendment is so ambiguously worded that it is not at all clear whether it would prohibit statutory civil unions.”¹³⁵

Over the next several months, however, a general consensus began to emerge that the revised second sentence would not forbid state legisla-

131. See, e.g., *id.* at 8 (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary); *id.* at 26 (statement of Sen. Russell D. Feingold, Member, S. Comm. on the Judiciary); *id.* at 45, 65 (statement of Professor Teresa Collett, Professor, St. Thomas School of Law); *id.* at 45, 73 (statement of Professor Katherine Shaw Spaht, Jules F. and Frances L. Landry Professor of Law, Louisiana State University).

132. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2004_03_21-2004_03_27.shtml (Mar. 22, 2004, 10:31 EST) (on file with the *Columbia Law Review*).

133. See Federal Marriage Amendment Proponents Offer Compromise, Fox News, Mar. 22, 2004, at <http://www.foxnews.com/story/0,2933,114898,00.html> (on file with the *Columbia Law Review*).

134. March 23, 2004 Hearing, *supra* note 128, at 58–59 (statement of Phyllis G. Bossin, Chair, Section on Family Law, American Bar Association).

135. *Id.* at 59. In addition, there was a great deal of confusion at the hearing about whether the revised text would allow a state to create civil unions by constitutional amendment, rather than by ordinary statute. After all, the revision may have removed the ban on construing state “law” to require that the benefits of marriage be extended to gays and lesbians, but in its revised form the Amendment still declared that “the constitution of any State” shall not “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.” Some Senators and witnesses at the hearing insisted that states would be allowed to enact such constitutional amendments, see, e.g., *id.* at 22 (statement of Sen. Allard), while others found the text ambiguous on this point, see, e.g., *id.* at 46 (statement of Cass R. Sunstein, Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago), and still others insisted that the states would not be able to do so, see, e.g., *id.* at 28–29 (statement of Sen. Richard J. Durbin, Member, S. Comm. on the Judiciary). This uncertainty persisted throughout the entire life of the FMA.

tures from creating civil unions by statute.¹³⁶ For the few social conservative groups that had already opposed the FMA for not going far enough to prevent civil unions, the textual clarification only served to illuminate the need to reject the Amendment. Concerned Women for America, for instance, issued a press statement declaring: “At least this clarifies whether the amendment is worded specifically to allow state legislatures to create counterfeit ‘marriage.’”¹³⁷ But the vast majority of social conservative groups maintained their support, even those groups like the Family Research Council that had been vehemently adverse to compromise and had aggressively insisted from the very beginning on an amendment that would bar civil unions.

Why would a social conservative organization that refuses to compromise and insists on an amendment that bars both gay marriage and civil unions be willing to go along with a revision to the second sentence that makes clear that that sentence does not prohibit legislatively created civil unions? The answer may lie in the fact that Senator Allard and the Alliance for Marriage had done nothing to change the Amendment’s first sentence. Recall that two of the three authors of the FMA understood the first sentence to prohibit legislatively created civil unions, even without the aid of the second sentence.¹³⁸ The fact that the *second* sentence is best read *not to preclude* state legislatures from passing civil union laws is irrelevant if the *first* sentence is best read *to affirmatively prohibit* state legislatures from doing so. The year-long, high-profile debate over the disputed meaning of the second sentence, culminating in the decision to alter its text and the subsequent debate over the meaning of the revised text, had served to distract attention from the unsettled meaning of the first sentence. Yet that uncertainty persisted, even if it had, to this point, largely avoided public scrutiny.

As gay rights advocates began to focus on the meaning of the first sentence, they became disillusioned with what they saw. David Remes, an attorney with the Washington, D.C., law firm of Covington & Burling,

136. Thus, for example, law review articles published during this period reported that any previous ambiguity on the question of legislatively created civil unions had been eliminated. See, e.g., Glidden, *supra* note 58, at 484–85.

137. Press Release, Concerned Women for Am., CWA Calls for Real Protection of Marriage (Mar. 22, 2004), at <http://www.cwfa.org/articledisplay.asp?id=5396&department=MEDIA&categoryid=family> (on file with the *Columbia Law Review*). There were reports that the leaders of those few conservative groups that did speak out against the amended FMA were forced out of office by James Dobson of Focus on the Family, an extremely powerful figure in the social conservative movement. See J. Edward Pawlick, Sandy Rios of CWA Removed by James Dobson, *Mass. News*, Mar. 17, 2004, at http://www.massnews.com/2004_editions/03_march/031704_dobson_replaces_rios.htm (on file with the *Columbia Law Review*). While some social conservatives saw these allegations as evidence that Dobson is actually less conservative and righteous than he claims to be, see National Disaster, *supra* note 113, it is of course possible that Dobson was fighting hard to silence opposition to the FMA from the right because he believed that the FMA would have a more draconian impact in practice than its supporters were able to publicly admit.

138. See *supra* note 39 and accompanying text.

prepared and circulated on behalf of “a broad coalition of civil rights, religious, legal, and professional organizations” a memorandum analyzing the meaning of the revised FMA. In that memorandum—often referred to in the public debate as the “Covington Memorandum”—Remes opined that “[l]egislation extending to same-sex couples the ‘legal incidents’ of marriage under the second sentence of the FMA would inevitably be attacked as an end-run around the prohibition of same-sex marriage in the first sentence of the FMA.”¹³⁹ As Remes explained, the “argument would be that if the first sentence of the FMA is to have any real meaning, it cannot be read simply to bar the use of ‘marriage’ as a label but must be read to bar same-sex unions that are ‘marriages’ in substance.”¹⁴⁰

At a House Judiciary Committee hearing on May 13, 2004, Representative Musgrave introduced a memorandum on the meaning of the FMA prepared by her office. In that memorandum, Musgrave offered a conclusory rejection of the conclusions of the Covington Memorandum: “[T]he FMA is not intended to prevent the legislatures of the various states from enacting . . . a law similar to the Vermont civil union law that is intended to give partners in a relationship all of the benefits of marriage save the single exception of calling their relationship a ‘marriage.’”¹⁴¹ Rather, “[t]he sponsor intends that the first sentence of the FMA should apply exclusively to legally-recognized relationships that are called ‘marriage’ under the law of a state.”¹⁴² Musgrave insisted that her Amendment sought only to protect the important symbolism of the word “marriage,”¹⁴³ a claim echoed at the hearing by Judge Bork.¹⁴⁴

The conservative group Liberty Counsel also published a long memorandum purporting to respond to the Covington Memorandum. That memorandum insisted that “the FMA does not prohibit the legislature from extending legal protection or benefits to same-sex couples,”¹⁴⁵ but it conspicuously did not explicitly opine on whether the first sentence would preclude a Vermont-style civil union, and it did not attempt to rebut the main thrust of the Covington Memorandum’s argument that the

139. Memorandum from David H. Remes, Partner, Covington & Burling, *The Proposed Federal Marriage Amendment Repudiates Fundamental Constitutional Principles and Would Embroil Federal and State Courts in Endless Litigation 2* (May 12, 2004), available at www.pfaw.org/pfaw/dfiles/file_342.pdf (on file with the *Columbia Law Review*).

140. *Id.*

141. Musgrave Memorandum, *supra* note 65, at 10–11.

142. *Id.* at 11.

143. May 13, 2004 Hearing, *supra* note 65, at 105 (statement of Rep. Marilyn Musgrave).

144. See *id.* at 109 (statement of Judge Bork).

145. Memorandum from Mathew D. Staver et al., Liberty Counsel, *The Federal Marriage Amendment Preserves Marriage as the Union of One Man and One Woman and Is Consistent with Constitutional Jurisprudence and Federalism 7* (July 10, 2004), available at http://www.lc.org/marriage/fma_memo_senate_071004.pdf (on file with the *Columbia Law Review*).

first sentence would likely be read to protect more than just a label.¹⁴⁶ Indeed, Liberty Counsel was at the same time arguing to the California courts that a constitutional amendment banning gay marriage forecloses the legislature from enacting domestic partnership laws.¹⁴⁷

Despite the profound ambiguity that remained in the first sentence and that had now come to public light, Senate leaders worked to schedule a floor vote on the FMA prior to the 2004 elections, so as to force Democrats, particularly Senators Kerry and Edwards, the Democratic Party's presidential ticket, to go on record on this divisive issue.¹⁴⁸ Senate Democrats were furious that the Amendment was being rushed to the floor without first receiving a vote in the Judiciary Committee, and without the benefit of a committee report explaining the meaning of the proposed text. Senator Leahy lamented that an unfortunate byproduct of the strategic decision to bypass committee consideration for political gain was that the full Senate was being forced to consider an unacceptably ambiguous amendment. Noting that "[c]ommittee consideration can also ensure that we agree on what an amendment does, even if we disagree on whether what it does is desirable," Senator Leahy introduced into the congressional record a newspaper article from the *Washington Post* explaining how even the Amendment's own authors could not agree about what it means.¹⁴⁹ All of the Democrats on the Senate Judiciary Committee wrote a joint letter to Chairman Hatch urging him to delay the debate and vote on the ground that, "while the language of the FMA has recently been modified, there is still significant doubt as to its intent and effect."¹⁵⁰

Nonetheless, Republican leaders brought the FMA to the Senate floor, where it was debated by the full Senate from July 9 to July 14, 2004. Throughout that debate, the Amendment's supporters repeatedly and confidently insisted that it would not interfere with the ability of the state legislatures to create civil unions by statute. Typical of these statements was the decree by Senator Allard, the Amendment's principal sponsor, that "the amendment does not seek to prohibit in any way the lawful, democratic creation of civil unions."¹⁵¹ But in the same breath, Senator Allard characterized the creation of civil unions in Vermont as "the first

146. See also, e.g., William C. Duncan, Survey of Interstate Recognition of Quasi-Marital Statutes, 3 Ave Maria L. Rev. 617, 634 (2005) (declaring that it "is not a plausible reading" of second sentence that it would bar legislatively created civil unions, but ignoring possibility that first sentence might do so).

147. See *Knigh v. Superior Court*, 26 Cal. Rptr. 3d 687 (Ct. App. 2005).

148. See Klarman, *supra* note 58, at 465.

149. 150 Cong. Rec. S8000 (daily ed. July 13, 2004) (statement of Sen. Leahy).

150. *Id.* at S7964 (reproducing letter of June 25, 2004).

151. 150 Cong. Rec. S7873 (daily ed. July 9, 2004) (statement of Sen. Allard); see also 150 Cong. Rec. S8069 (daily ed. July 14, 2004) (letter from Professor Teresa S. Collett) (arguing that all "fair-minded" FMA opponents had to admit that, as currently worded, Amendment allowed legislatures to create civil unions); 150 Cong. Rec. S7916 (daily ed. July 13, 2004) (statement of Sen. Kyl); *id.* at S7913 (statement of Sen. Hatch).

success” in “the effort to destroy traditional marriage.”¹⁵² And he introduced into the record a magazine article arguing that the experience with state-sponsored same-sex unions in Scandinavia shows that *all* legally recognized gay unions are destroying marriage: “Scandinavian registered partnerships are Vermont-style civil unions. They are not called marriage, yet resemble marriage in almost every other respect. . . . The lesson of the Scandinavian experience is that even de facto same-sex marriage undermines marriage.”¹⁵³

Not surprisingly, then, opponents of the FMA remained unconvinced by claims that its likely effects were clear. Senator Feingold argued that “[t]here is significant doubt about how this amendment will be interpreted and what effect it will have on a whole variety of state and local ordinances.”¹⁵⁴ In particular, the FMA’s opponents expressed fear that the “proposed amendment could be construed to challenge already existing civil union . . . laws or to bar future attempts to enact such laws.”¹⁵⁵ Senator Durbin, for example, noted that while the language may, at first blush, “seem [] straightforward enough,” in fact “it is uncertain whether arrangements such as civil unions . . . could exist at all under this first sentence of the Federal Marriage Amendment.”¹⁵⁶

Other opponents of the FMA went even further, opining not that the Amendment was ambiguous, but rather that it quite clearly would *not* allow the states to create civil unions, and that the Amendment’s supporters were being dishonest in saying otherwise. Senator Corzine, for instance, decried, “It is unfortunate that a misinformation campaign about the consequences of this amendment has been waged upon the American public by organizations that want to play politics at the expense of gay and lesbian Americans.”¹⁵⁷ And Senator Boxer blasted: “Don’t let anyone tell you: I am for this amendment . . . but I support civil unions [O]nce this is enshrined in the Constitution, the States will not be able to confer equal benefits on civil unions”¹⁵⁸

152. 150 Cong. Rec. S7872 (daily ed. July 9, 2004) (statement of Sen. Allard).

153. 150 Cong. Rec. S8006–07 (daily ed. July 13, 2004) (reprint of Stanley Kurtz, The End of Marriage in Scandinavia: The “Conservative Case” for Same-Sex Marriage Collapses, *Wkly. Standard*, Feb. 2, 2004, at 26).

154. *Id.* at S7964 (statement of Sen. Feingold).

155. *Id.* at S7965.

156. *Id.* at S7973 (statement of Sen. Durbin).

157. 150 Cong. Rec. S8079 (daily ed. July 14, 2004) (statement of Sen. Corzine).

158. 150 Cong. Rec. S7956–57 (daily ed. July 13, 2004) (statement of Sen. Boxer). A number of Democratic Senators also insisted that, even as amended, the FMA’s *second* sentence would preclude legislatively created civil unions. See, e.g., 150 Cong. Rec. S8083 (daily ed. July 14, 2004) (statement of Sen. Levin). Moderate Republican Senators apparently expressed the same concerns behind the scenes. See Helen Dewar & Alan Cooperman, GOP May Revise Marriage Amendment, *Wash. Post*, July 13, 2004, at A2 (reporting that some Republicans believed Amendment “could be interpreted as either sanctioning or banning such [civil] unions”); Carolyn Lochhead, GOP Senators in Disarray over Gay Marriage, *S.F. Chron.*, July 13, 2004, at A1 (noting Republican concern that FMA wording might ban civil unions). Some gay rights activists also echoed these concerns.

In response, Senator Allard expressed frustration that the Amendment's opponents were resorting to "misrepresentation about what this amendment is all about and what it does."¹⁵⁹ He explained that he had "spent considerable time consulting with legal scholars, constitutional scholars, consulting with my colleagues, and working with staff in the Judiciary Committee" and had satisfied himself that the allegations about civil unions were simply "ridiculous charges."¹⁶⁰ He noted that the Judiciary Committee had held many hearings on the Amendment, and that the language of the first sentence was "very straightforward" and "carefully thought out."¹⁶¹ To wit, Senator Allard introduced into the record a memorandum prepared by eight law professors concluding that the argument that the FMA would ban civil unions is "based in hypothetical speculation, rather than serious constitutional analysis" and that, in fact, the FMA is a "simple" amendment "carefully" drafted to ensure "that questions of marriage-like benefits for unmarried couples are reserved to legislative processes."¹⁶² Senator Cornyn, another FMA supporter, similarly declared that arguments that the Amendment:

prevents States from enacting civil unions if they should wish to do so through their elected representatives . . . do not hold water. But they do not have to work for our opponents on this issue to say them because that is not the point. The point is, if you cannot convince them, confuse them. Their aim is to distract the American people¹⁶³

If that was indeed the opponents' aim, then they succeeded in confusing even many Senate Republicans. The *Washington Post* reported that, behind closed doors, "[s]ome Republicans argued that proposed

See, e.g., 150 Cong. Rec. S8085 (daily ed. July 14, 2004) (letter from Gay, Lesbian and Bisexual Local Officials Board of Directors) (stating that second sentence of amendment could "preempt[] state and local laws" that confer benefits on gay couples); Andrew Sullivan, Bush on Gay Marriage: Uncivil, *New Republic*, July 13, 2004, available at <http://www.cbsnews.com/stories/2004/07/13/opinion/main629390.shtml> (on file with the *Columbia Law Review*) (arguing that second sentence of Amendment would make civil unions and domestic partnerships unenforceable). Their reasoning, however, was muddled. Though they may not have clearly expressed their thoughts, or even understood the issue in this light, it makes sense to view their objections to the second sentence (to the extent that they were not simply disingenuous) as reflecting a concern that that sentence does not clearly and affirmatively empower state legislatures to create civil unions or otherwise to bestow the incidents of marriage upon gay couples. The most that can be said of the confusing second sentence is that, as revised, it no longer precludes state legislatures from doing so; it takes no position on legislatively created civil unions. As such, it does not override the first sentence, if that sentence is read to prohibit the state legislatures from creating civil unions.

159. 150 Cong. Rec. S8016 (daily ed. July 13, 2004) (statement of Sen. Allard).

160. *Id.*

161. 150 Cong. Rec. S7905–06 (daily ed. July 12, 2004) (statement of Sen. Allard).

162. 150 Cong. Rec. S8017 (daily ed. July 13, 2004) (letter from George W. Dent, Schott-van den Eynden Professor of Law, Case Western Reserve University School of Law, et al., *The Meaning of the Proposed Federal Marriage Amendment* (July 12, 2004)).

163. 150 Cong. Rec. S8063 (daily ed. July 14, 2004) (statement of Sen. Cornyn).

language on other legal arrangements, such as civil unions, was confusing and could be interpreted as either sanctioning or banning such unions.”¹⁶⁴ Thus, despite a massive grassroots effort by the Family Research Council and Focus on the Family to lobby potentially undecided Senators by telephone, and despite two appeals by President Bush, it became clear that there were not enough votes to send the Amendment to the states for ratification.¹⁶⁵ Scrambling Republican leaders thus sought to engineer a vote on an alternative version of the Amendment that would consist of only the first sentence, leaving out the much-maligned second sentence.¹⁶⁶ (Apparently, the Republicans who supported abandoning the second sentence believed that doing so would somehow remove—or at least deflect public attention from—the confusion about civil unions, notwithstanding the fact that, in reality, it was the first sentence that threatened legislatively created civil unions, not the (revised) second one. Indeed, some conservative groups, like the Traditional Values Coalition and Concerned Women for America, supported abandoning the second sentence because they believed that, standing alone, the first sentence would clearly *preclude* civil unions.¹⁶⁷) But Democrats used procedural maneuvers to prevent the Republicans from rewriting the text on the fly at the eleventh hour,¹⁶⁸ and the FMA’s opponents ultimately succeeded in killing the Amendment by prevailing on a procedural vote by a count of fifty to forty-eight.¹⁶⁹

C. *The Marriage Protection Amendment*

Even before the final vote, however, the Senate Majority Leader vowed that the upcoming defeat would not be the end of the FMA.¹⁷⁰ The day after the Senate vote, leaders of the Arlington Group dubbed the defeat in the Senate only a minor setback and promised to continue the battle.¹⁷¹ Prison Fellowship’s Chuck Colson declared, “I look at this as a 10-year fight. This is Day One.”¹⁷²

Day Two, as it turned out, was not far off. Just two months after the Senate vote, Representative Musgrave formally introduced the revised

164. Dewar & Cooperman, *supra* note 158.

165. See *id.*; Lochhead, *supra* note 158.

166. See 150 Cong. Rec. S7930 (daily ed. July 12, 2004) (statement of Sen. Frist).

167. See Robert Knight, *Why a Federal Marriage Amendment Is Needed*, June 8, 2006, at <http://www.cwfa.org/articles/10822/CWA/family/index.htm> (on file with the *Columbia Law Review*); Sheldon, *supra* note 111.

168. See Lochhead, *supra* note 158.

169. See 150 Cong. Rec. S8090 (daily ed. July 14, 2004).

170. See Ed Henry & Craig Broffman, *Marriage Amendment Expected to Die in the Senate*, CNN.com, July 14, 2004, at <http://edition.cnn.com/2004/ALLPOLITICS/07/13/same.sex.marriage/> (on file with the *Columbia Law Review*).

171. See Alan Cooperman, *Christian Groups Say They Won’t Give Up*, Wash. Post, July 15, 2004, at A4.

172. *Id.*

version of the FMA in the House of Representatives.¹⁷³ Although the amendment that she proposed was essentially word-for-word identical to the revised version of the FMA that had just failed in the Senate,¹⁷⁴ Representative Musgrave chose to rechristen her resolution the “Marriage Protection Amendment.”¹⁷⁵ In another attempt to place incumbents on record on this divisive issue in the weeks leading up to the 2004 election, the Republican leadership in the House of Representatives engineered a floor vote on the Amendment just seven days after it was introduced, despite the fact that it had received neither a vote nor a mark-up in the House Judiciary Committee.¹⁷⁶

As the House vote approached, the Amendment’s opponents drafted letters to Congress repeatedly calling attention to the potentially broad scope of the first sentence. The ACLU, for instance, urged the Representatives to “consider the full consequences of the amendment,” especially “the ‘sleeper sentence.’”¹⁷⁷ Although most of the public discussion had focused on the second sentence, the ACLU explained that:

the harmful impact of the first sentence is much broader. . . . What the supporters of the amendment have never told Congress is that many of their anti-gay organizations have used similar state definitions of marriage to challenge a wide range of protections provided by state and local governments to same-sex couples and their families.¹⁷⁸

Similarly, the American Bar Association reiterated its concern that “the proposed amendment is far too vague to ascertain its full meaning with certainty,” and in particular that, “despite the claims of the resolution’s authors, it is unclear whether a state would be prohibited from passing laws permitting civil unions.”¹⁷⁹

173. See H.R.J. Res. 106, 108th Cong. (2004).

174. The only difference was that, in the first sentence, the House bill used the word “solely” whereas the Senate bill used the word “only.” Compare *id.*, with S.J. Res. 30, 108th Cong. (2004).

175. The previous title, “Federal Marriage Amendment,” had called attention to the Amendment’s Achilles heel among conservatives: the apparent inconsistency between nationalizing marriage law—an area traditionally within the heart of state sovereignty—and a commitment to federalism. The new title, “Marriage Protection Amendment,” played to the Amendment’s primary appeal to conservatives—its purported protection of the traditional institution of marriage from liberal judicial activism.

176. See 150 Cong. Rec. H7928 (daily ed. Sept. 30, 2004) (statement of Rep. Dingell) (“There have been no Committee hearings, no time to look at different amendment proposals, and no opportunity to have the important deliberations that should take place when amending the Constitution.”).

177. Letter from Laura W. Murphy & Christopher E. Anders, Dir. & Legislative Counsel, ACLU, to U.S. Senate (July 9, 2004), at <http://www.aclu.org/lgbt/relationships/12377leg20040709.html> (on file with the *Columbia Law Review*).

178. *Id.*

179. Letter from Robert J. Grey, Jr., President, Am. Bar Ass’n, to Members of Congress (Sept. 20, 2004), reprinted in 150 Cong. Rec. H7459 (daily ed. Sept. 23, 2004); see also Letter from Leadership Conference on Civil Rights to U.S. House of Representatives (Sept. 28, 2004), at <http://www.civilrights.org/library/advocacy-letters/>

Ignoring these concerns, the House Republican Study Committee's *Legislative Bulletin* insisted that the FMA would leave the decision whether to allow civil unions up to the legislatures of the individual states.¹⁸⁰ Republican supporters of the Amendment repeated that claim on the House floor during the debate.¹⁸¹

As their Senate counterparts had done, House Democrats accused the Amendment's supporters of willfully misrepresenting the effects that it would have on civil unions. Representative Pelosi, for instance, declared that "proponents have disingenuously claimed that this amendment would not preclude civil unions or domestic partnerships," even though "organizations supporting this amendment are now using similarly worded State laws to challenge recognition of domestic partnerships in several States. And we know these organizations, which the Republican leadership is beholden to, will not stop there."¹⁸² Representative Nadler similarly charged that "[t]his amendment does more than it purports to do. . . . [D]o not tell me this is only about marriage. I do not believe it."¹⁸³ Throughout the debate, a parade of opponents of the FMA repeated over and over again in no uncertain terms that the Amendment would have the effect of banning civil unions.¹⁸⁴ Even some moderate Republicans opposed the Amendment for this reason.¹⁸⁵

8220marriage-protection-amendment-h-j-res-106.html (on file with the *Columbia Law Review*).

180. See Republican Study Comm., *Legislative Bulletin* 1 (Sept. 30, 2004), available at <http://www.house.gov/hensarling/rsc/doc/LB%2009-30-04.pdf> (on file with the *Columbia Law Review*).

181. See, e.g., 150 Cong. Rec. H7921 (daily ed. Sept. 30, 2004) (statement of Rep. Kingston) (asserting that "the Marriage Protection Amendment would not prevent any State from enacting civil union laws").

182. *Id.* at H7923 (statement of Rep. Pelosi).

183. *Id.* at H7900 (statement of Rep. Nadler); see also *id.* at H7890–91 (statement of Rep. Frank).

184. See, e.g., *id.* at H7924 (statement of Rep. Wexler) ("[T]his amendment would not only ban same-sex marriages but also civil unions . . ."); *id.* at H7891 (statement of Rep. Moran) ("[T]his amendment would usurp the will of the people in States that have used their traditional States rights authority to define civil marriage and civil union laws."); *id.* at H7889 (statement of Rep. McGovern) ("[I]f this amendment becomes the law of the land, civil union and domestic partnership laws all across the country will be thrown out the window.");

185. See *id.* at H7909 (statement of Rep. Kolbe) (arguing that FMA "would prohibit" state legislatures from "enact[ing] provisions for civil unions between two people of the same sex"); Press Release, Log Cabin Republicans, Log Cabin Republicans Vote to Withhold Endorsement from President Bush (Sept. 8, 2004), reprinted in 150 Cong. Rec. H7893–94 (daily ed. Sept. 30, 2004). Once again, some of the opposition to the Amendment (from both Democrats and moderate Republicans) appears to have been based on an interpretation of the second sentence, rather than the first one, as somehow banning civil unions of its own accord, even after the textual revision. See, e.g., 150 Cong. Rec. H7929 (daily ed. Sept. 30, 2004) (statement of Rep. Cardin) ("These [government-conferred benefits of civil unions] . . . could be called into question by this Federal constitutional amendment if they are considered 'legal incidents' of marriage."); *id.* at

At the opposite extreme, at least one conservative Republican, Representative Hostettler, voted against the Amendment because he believed that it *did* allow the states to create civil unions: “[The] civil union law in Vermont [is] unaffected. . . . This Amendment may actually, by restricting the courts’ ability to grant the incidents of marriage but remaining silent as to the legislatures, provide a constitutional basis for civil unions. I cannot support this result.”¹⁸⁶

Ultimately, the Amendment fell short of the necessary two-thirds vote, accumulating 227 yeas to 186 nays.¹⁸⁷ But even before the final vote was taken, the Majority Whip promised that the fight to amend the Constitution had only just begun: “[W]e will be back. We will never give up. We will protect marriage in this country.”¹⁸⁸

D. *The Marriage Protection Amendment Redux*

The rushed votes in Congress apparently had their intended effect of helping Republican incumbents and challengers in the 2004 election.¹⁸⁹ But the Amendment’s backers were not satisfied with only a political victory. The day after the election, Focus on the Family’s James Dobson renewed his call for a federal constitutional amendment,¹⁹⁰ and a few days later, Karl Rove responded by promising that the President would renew his push for the FMA.¹⁹¹ It was no longer good enough to win by losing. The Republican Party’s social conservative base felt responsible for the results of the election, and in return for their loyalty, they wanted to see their top priority—the Federal Marriage Amendment—enacted, not just voted on. As Mathew Staver, the president of Liberty Counsel, put it, “[Y]ou’ll see an accelerated effort to move forward with a federal constitutional amendment because of the marriage and morality mandate the president received in the election.”¹⁹²

H7925 (statement of Rep. Bono) (“[The Amendment] precludes States from granting marital status or the ‘legal incidents thereof’ to unmarried couples.”).

186. 150 Cong. Rec. H7926 (daily ed. Sept. 30, 2004) (statement of Rep. Hostettler).

187. See *id.* at H7933–34.

188. *Id.* at H7924 (statement of Rep. DeLay).

189. See Klarman, *supra* note 58, at 465–71 (noting that vulnerable Democrats, like Senate Minority Leader Tom Daschle, who were forced to go on record against FMA were “almost certainly harmed” in election, and observing that “opposition to same-sex marriage mobilized conservative Christians to turn out at the polls in 2004 in unprecedented numbers,” and “also acted as a ‘wedge’ to dislodge traditionally Democratic constituencies such as African Americans, the elderly, and working-class Catholics,” and thus “may well have determined the outcome of the presidential election” and “clearly provided the margin of victory for Republican senators in closely fought contests”).

190. See *id.* at 471–72.

191. See Gay Marriage, Online NewsHour, Nov. 8, 2004, at http://www.pbs.org/newshour/bb/law/july-dec04/gaymarriage_11-08.html (on file with the *Columbia Law Review*) [hereinafter NewsHour Debate].

192. Adam Liptak, Caution in Court for Gay Rights Groups, *N.Y. Times*, Nov. 12, 2004, at A16.

Now that the President and congressional leaders felt greater pressure to actually pass the Amendment, rather than simply hold a vote on it, one might have expected them to clear up the ambiguities that had emerged during the prior debates. But on January 24, 2005, Senator Allard reintroduced the Amendment—again under the title “Marriage Protection Amendment”—in the Senate without changing a word.¹⁹³ In doing so, Senator Allard reiterated his mantra that under the Amendment the states “would still be free to determine for themselves civil union, benefit, and partnership definitions.”¹⁹⁴

Some of the Amendment’s liberal opponents apparently believed that claim.¹⁹⁵ Most, however, did not. Immediately, civil rights groups reiterated their disagreement with Senator Allard’s reading of his Amendment. The Human Rights Campaign issued a statement claiming that civil unions would be “endangered” should the Amendment pass,¹⁹⁶ and the ACLU issued a press release declaring that the Amendment would deny states the right to create civil unions.¹⁹⁷

Obviously, the confusion had in no way subsided since the last time that the Amendment had been proposed in Congress. To take just one example of the lingering public confusion in the period between the 2004 election and the reintroduction of the Amendment at the start of the following congressional term, PBS hosted a debate on its *NewsHour* program between Shannon Royce, Executive Director of the Marriage Amendment Project, and Matt Foreman, Executive Director of the National Gay and Lesbian Task Force.¹⁹⁸ During that debate, Royce declared that the “amendment as it’s currently drafted . . . leaves the civil union/domestic partnership benefits questions . . . to the state legislatures,” whereas Foreman countered that “[The Amendment] precludes more than just marriage. It precludes civil unions. These people will stop at nothing to try to deprive gay people of their rights.”¹⁹⁹

In April 2005, the Senate Judiciary Committee’s Subcommittee on the Constitution held a hearing on the newly reintroduced FMA. At that hearing, Democratic Senators reminded the Republicans of the fact that,

193. See 151 Cong. Rec. S365–66 (daily ed. Jan. 24, 2005).

194. *Id.* at S365 (statement of Sen. Allard).

195. See, e.g., Joan Shaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 *Am. U. L. Rev.* 1487, 1517 n.178 (2005) (asserting that, as originally drafted, FMA would have banned civil unions, but as revised, it would allow state legislatures to create them).

196. Letter from Winnie Stachelberg, Political Dir., Human Rights Campaign, to U.S. Senators (Jan. 24, 2005), available at <http://nmmstream.net/hrc/downloads/lobbyday/HRCMPA109thCongress.pdf> (on file with the *Columbia Law Review*).

197. See Press Release, ACLU, *ACLU Criticizes Reintroduction of Federal Marriage Amendment; Says Measure Has Different Name, Same Discriminatory Goals* (Jan. 24, 2005), available at <http://www.aclu.org/lgbt/relationships/12431prs20050124.html> (on file with the *Columbia Law Review*).

198. See *NewsHour Debate*, *supra* note 191.

199. *Id.*

the last time the Senate considered the Amendment, Senators “had a hard time agreeing on exactly what it would do,” and they explained that “[a]mbiguity still remains as to whether the language of the amendment would permit States to offer . . . civil unions to same-sex couples.”²⁰⁰

The hearing served only to amplify the ambiguity. When the Republicans called as a witness Professor Gerard Bradley—one of the original authors of the Amendment—he reiterated his belief that, contrary to what Senator Allard had been saying, the FMA would invalidate Vermont’s civil union law because that law “is marriage in all but name,” and thus “is ruled out by the definition of marriage in the first sentence.”²⁰¹

Six months later, the Subcommittee on the Constitution held another hearing on the FMA, at which Senator Feingold again expressed concern that “we still don’t really know . . . whether the language of the amendment would permit States to offer . . . the option of civil unions.”²⁰² This time, Senator Brownback, the Republican Chairman of the Subcommittee, apparently agreed: “I hope today we can get from the witnesses some thoughts on the specific language, because we have held a number of hearings on a constitutional amendment and we really need to get down to the wording of this in discussion as we move that on forward.”²⁰³

But the hearing did nothing other than further intensify the confusion. To illustrate his point that “the amendment reflects remarkably poor lawyering,” Professor Louis Seidman, the Democrats’ legal expert, explained that a civil union could be viewed as a “marriage,” in which case “[i]t is unconstitutional under the first sentence of the amendment,” or it could be treated as granting only the legal incidents of marriage, in which case “it might well be constitutionally permissible under the second sentence.”²⁰⁴ Professor Seidman explained that “even the drafters of the amendment are apparently unsure about its effect on these statutes,” and he queried how a judge could “possibly determine whether or not a

200. *Less Faith in Judicial Credit: Are Federal and State Defense of Marriage Initiatives Vulnerable to Judicial Activism?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 3–4 (2005)* (statement of Sen. Feingold, Member, S. Comm. on the Constitution, Civil Rights and Property Rights).

201. *Id.* at 25 (statement of Professor Gerard V. Bradley, Professor, University of Notre Dame Law School).

202. *An Examination of the Constitutional Amendment on Marriage: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 3 (2005)* (statement of Sen. Feingold).

203. *Id.* at 4 (statement of Sen. Brownback, Chairman, Subcomm. on the Constitution, Civil Rights and Property Rights).

204. *Id.* at 69–70 (statement of Louis Michael Seidman, John Carroll Research Professor of Law, Georgetown University Law Center).

civil union . . . is a ‘marriage in all but name’ when even drafters of [the] amendment are uncertain as to its meaning.”²⁰⁵

The Republicans called two legal experts to illuminate the issue, but remarkably, those two experts gave somewhat conflicting answers, *both of which were squarely inconsistent with the preferred interpretation of the Amendment’s congressional sponsors*. The first witness, Professor Richard Wilkins, insisted that the Amendment reflects “very careful thinking, careful lawyering, and careful wording.”²⁰⁶ Echoing the views of Professor Robert George—one of the Amendment’s principal drafters—Professor Wilkins’s testimony appeared to indicate that a civil union law would be unconstitutional under the FMA, but only if it purported to give the rights and benefits of marriage to a nonmarital union premised on the existence of a sexual relationship.²⁰⁷ The other witness, Professor Christopher Wolfe, testified that *any* civil union law that granted all of the benefits of marriage save only the title “marriage” to two unmarried persons—whether it was premised on a sexual relationship or not—would be unconstitutional.²⁰⁸

At the close of the hearing, Senator Brownback expressed hope that the profound and deepening uncertainty could be eliminated by a committee markup.²⁰⁹ But just three weeks later, when the Subcommittee on the Constitution held such a markup, Senator Brownback’s hopes were dashed. Senator Feingold, the only Senator to make a public statement at the markup, noted that one “question that is important to many Senators, and to many Americans, as they consider this constitutional amendment is how it will apply to laws passed by state or local governments granting same sex couples the right to enter into civil unions.”²¹⁰ He explained in great detail how the testimony at the hearings made clear that even the “supporters and drafters of this amendment can’t agree on how it would affect civil union laws,” and he lamented that

205. *Id.*

206. *Id.* at 18 (statement of Richard G. Wilkins, Professor of Law and Managing Dir., The World Family Policy Center, Brigham Young University).

207. See *id.* at 11, 19–20, 22. In subsequent written responses to questions, Professor Wilkins appeared to contradict his oral testimony when he concluded instead that the FMA would allow a state legislature to create civil unions conferring all of the benefits of marriage, save only the word itself, upon a same-sex sexual union. See *id.* at 33–35.

208. *Id.* at 42 (statement of Christopher Wolfe, Professor of Political Science, Marquette University); see also *id.* at 23, 25–26.

209. See *id.* at 30 (statement of Sen. Brownback). “A markup is a meeting of the committee to debate and consider amendments to a measure under consideration. The markup determines whether the measure pending before a committee will be recommended to the full Senate, and whether it should be amended in any substantive way.” U.S. Senate, Senate Legislative Process, available at http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*).

210. Statement of U.S. Senator Russ Feingold at the Senate Judiciary Constitution Subcommittee Markup, Nov. 9, 2005, available at http://judiciary.senate.gov/member_statement.cfm?id=1676&wit_id=85 (on file with the *Columbia Law Review*).

“[t]his amendment has been around for nearly two years and we still don’t have” an “unambiguous statement of [its] meaning.”²¹¹ He concluded, “So I would hope . . . that every Senator who is planning to vote Yes on this amendment today will tell us before we conclude this meeting what he thinks the amendment means.”²¹²

Those hopes were dashed as well. The Subcommittee voted 5-4, along party lines, to forward the Amendment to the full Judiciary Committee without making any changes, without issuing a report, and without offering any clarification of the Amendment’s meaning.²¹³

When the full Judiciary Committee undertook its own markup of the Amendment the following spring, it did so behind closed doors, away from the public and the press, and it left no record of its proceedings.²¹⁴ In a public statement, Senator Leahy dubbed the Amendment “exceedingly confusing” and noted that it remains unclear “whether the proposed Amendment would make the Vermont [civil unions] law unconstitutional.”²¹⁵ But nothing was done at the markup to clear up the confusion. According to Senator Feingold, who stormed out of the meeting in disgust, “[d]ebate and discussion were minimal.”²¹⁶ At the close of the markup, the Committee voted 10-8—again along party lines—to send the measure to the full Senate, again without amendment, and again without a written report clarifying the Amendment’s meaning.²¹⁷

The following month, as the midterm congressional elections neared, the full Senate once again debated and voted on the FMA. And once again, the public discourse leading up to the Senate vote revealed considerable confusion about what effect the Amendment would have on civil unions.

The Amendment’s supporters repeated their assurances regarding the narrow reach of their handiwork. The Senate Republican Policy

211. *Id.*

212. *Id.*

213. See Human Rights Campaign, *Cynical Politics Behind Subcommittee Passage of Discriminatory Marriage Amendment*, Nov. 9, 2005, at <http://www.hrc.org/issues/marriage/1872.htm> (on file with the *Columbia Law Review*); see also Bill Summary of S.J. Res. 1, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SJ00001:@@L&summ2=m&> (May 18, 2006) (on file with the *Columbia Law Review*) (noting that language was never amended and showing no reports were issued).

214. See Executive Business Meeting: Markup of S.J. Res. 1 Before the S. Comm. on the Judiciary, May 18, 2006 (statement of Sen. Feingold, Member, S. Comm. on the Judiciary) [hereinafter Feingold Statement].

215. *Id.* (statement of Sen. Leahy, Ranking Member, S. Comm. on the Judiciary). Senators Leahy and Feingold were the only committee members to make public statements at the markup.

216. Feingold Statement, *supra* note 214.

217. See Tom Strode, *Committee Sends Marriage Amendment to Full Senate*, Baptist Press, May 18, 2006, at <http://www.bpnews.net/bpnews.asp?id=23272> (on file with the *Columbia Law Review*); see also 152 Cong. Rec. S5455 (daily ed. June 6, 2006) (statement of Sen. Feingold) (noting continuing absence of any “unambiguous statement” of meaning of Amendment).

Committee declared that “this constitutional amendment does not bar ‘civil union’ . . . arrangements . . . as long as those laws are enacted through the legislative process.”²¹⁸ At a press conference urging Congress to pass the Amendment, President Bush repeated that claim.²¹⁹ Senator Allard even went so far as to pen an op-ed in *USA Today* promising that his Amendment would “leav[e] to state legislatures the freedom to address the question of civil unions.”²²⁰

But at the same time, many opponents of the Amendment continued to insist publicly that the sponsors were simply wrong (and intentionally so) about its effect on civil unions. Senator Allard’s op-ed was met with a letter to the editor in *USA Today* proclaiming: “As a gay conservative who will be directly affected by this legislation, I am outraged that Sen. Allard is misleading the American people. . . . [I]t’s likely that the amendment, if passed, would be used to justify the invalidation of civil unions”²²¹ A number of advocacy groups similarly declared that “the amendment’s broad language would attack . . . civil unions.”²²²

In addition, a broad range of individuals and organizations from across the political spectrum declared that the FMA was ambiguous on this issue and could be read either to preclude or to permit legislatively created civil unions.²²³ The *New York Times* editorialized against the

218. U.S. Senate Republican Policy Comm., *Why a Marriage Amendment Is Necessary* 15 (Mar. 28, 2006), available at http://rpc.senate.gov/_files/Mar2806MarriageAmendSD.pdf (on file with the *Columbia Law Review*).

219. See Press Release, Office of the Press Sec’y, President Discusses Marriage Protection Amendment (June 5, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060605-2.html> (on file with the *Columbia Law Review*).

220. Wayne Allard, Op-Ed., *Protect Traditional Marriage*, *USA Today*, June 1, 2006, at 10A.

221. Patrick M. Killen, Letter to the Editor, *Marriage Bill Seeks to Strip Freedoms*, *USA Today*, June 7, 2006, at 10A; see also, e.g., Bruce Fein, Op-Ed., *Marriage Amendment Miscue*, *Wash. Times*, May 23, 2006, at A19 (arguing from conservative perspective for pure federalism amendment leaving matter to states, rather than FMA, which “precludes legislative bodies from recognizing same-sex unions irrespective of majority sentiments”).

222. Press Release, ACLU, Senate Judiciary Committee Approves Discriminatory Constitutional Amendment, ACLU Denounces Amending the Constitution Behind Closed Doors (May 18, 2006), available at <http://www.aclu.org/lgbt/marriage/25602prs20060518.html> (on file with the *Columbia Law Review*); see also Press Release, Billy DeFrank LGBT Cmty. Ctr., *Federal Marriage Amendment Re-Introduced in the United States Senate* (June 5, 2006), at http://www.defrank.org/news/2006_0605_fma.html (on file with the *Columbia Law Review*) (“The amendment would also prevent legislative or judicial extension of marriage-like rights to same-sex couples or other unmarried persons in the United States.”).

223. Among those noting the ambiguity was Law Professor Nate Oman, see Posting of Nate Oman to Times and Seasons, <http://www.timesandseasons.org/?p=3192> (June 4, 2006) (on file with the *Columbia Law Review*), and the Center for American Progress, see Mark Agrast et al., *Fact-Checking the President’s Statement on the Marriage Amendment* (June 6, 2006), available at <http://www.americanprogress.org/issues/2006/06/b1736995.html> (on file with the *Columbia Law Review*). The ambiguity was observed by liberals who opposed the Amendment in part because of the possibility that it could preclude legislatively created civil unions, see, e.g., Equal Rights Washington, *Ask Your Elected*

Amendment in part on this ground.²²⁴

Against this backdrop, the Senate debated the Amendment over the course of three days. The debate was a virtual carbon copy of the one that had occurred two years earlier. Senator Allard forcefully repeated his position on the Amendment's limited effect on civil unions: "Just as important as what it does do, is what it does not do. I have said it time and time again and I say here again today for the record—the amendment does not seek to prohibit, in any way, the lawful, democratic creation of civil unions . . ." ²²⁵ Other cosponsors of the Amendment echoed that interpretation.²²⁶ Indeed, one cosponsor—Senator Brownback, who had chaired the Constitution Subcommittee hearings on the FMA—was somehow willing to assert that the Amendment would allow state legislatures to authorize not only civil unions, but also gay marriage:

This is a very simple amendment. It is hard for me to understand why anybody would oppose it when 45 of 50 States have defined marriage as the union of a man and a woman, and this simply says that if States want to define it differently, they have to go through the legislative process and not the courts, so that the Court can't force it. It must be done by a legislative body. And if some States decide to do that, then that is provided for in this amendment.²²⁷

Clearly, there remained substantial confusion (or dishonesty) even among the Amendment's principal backers.

On the other side of the aisle, a number of Democratic opponents of the Amendment again declared in equally confident terms that the

Leaders to Keep Discrimination out of the US Constitution, May 31, 2006, available at http://eqfed.org/erw/alert-description.tcl?alert_id=3748021 (on file with the *Columbia Law Review*) ("[The Amendment] might also ban other forms of partnership recognition, such as civil unions."); Human Rights Campaign, Vote No on the Federal Marriage Amendment, at <http://www.hrc.org/voteno/background.htm> (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*) ("[T]he amendment could forever invalidate civil unions."), by conservatives who opposed it in part because of the ambiguity, see, e.g., Knight, *supra* note 167 (noting that Concerned Women for America did not support Amendment as worded because it "is open to differing interpretations, and its drafters acknowledged that it was specifically worded so state legislators could create civil unions"), and by conservatives who supported it despite its failure to clearly ban civil unions, see, e.g., Posting of Cory Burnell to Christian Exodus Blog, <http://www.christianexodus.org/blog/2006/06/follow-up-on-federal-marriage.html> (June 5, 2006, 22:15 EST) (on file with the *Columbia Law Review*) (concluding that Amendment "may allow civil unions," but arguing that conclusion "is no reason by itself to oppose" it).

224. See Editorial, *On the Low Road to November*, N.Y. Times, June 1, 2006, at A24.

225. 152 Cong. Rec. S5409 (daily ed. June 5, 2006) (statement of Sen. Allard).

226. See, e.g., 152 Cong. Rec. S5534 (daily ed. June 7, 2006) (statement of Sen. Frist) ("Nothing in the amendment . . . stops States from passing civil union laws It simply protects the States from having civil unions imposed on them from activist courts.").

227. 152 Cong. Rec. S5441 (daily ed. June 6, 2006) (statement of Sen. Brownback); see also 152 Cong. Rec. S5414 (daily ed. June 5, 2006) (statement of Sen. Brownback) (stating amendment would allow legislatures, but not courts, to define marriage differently).

Amendment would preclude state legislatures from creating civil unions. “Make no mistake,” Senator Kennedy admonished, “a vote in support of this amendment . . . is a vote against civil unions”²²⁸ Other Democratic opponents of the Amendment were less willing to assume the worst, but were nonetheless troubled by the profound uncertainty. Senator Leahy, for instance, noted that, “[a]lthough the President and some Senate supporters contend that this proposed amendment binds only judges and not State legislatures and that it prohibits only marriage but not civil unions or partnerships, that is not clear in the language”²²⁹ To many Democratic Senators, the profound uncertainty was reason enough to vote against the Amendment:

Would this amendment outlaw civil unions? . . . [That] does seem like an important question for supporters of this amendment to get their stories straight on. . . . The Senate and State legislatures—not to mention the American people—deserve clear and reliable answers to these questions before they are asked to decide whether to amend the Constitution.²³⁰

At least one Republican Senator—Senator Warner—agreed that the Amendment does not “speak[] with the clarity to which the American people are entitled.”²³¹ He noted that the Amendment’s supporters “have stated that it is their intent that this second sentence will leave to the several States the decision of whether to recognize relationships other than marriage, such as civil unions”²³² “But if that is the case,” he queried, “why not simply state that in plain English that is understandable for the millions upon millions of Americans who are interested in this amendment?”²³³ In other words, “[w]hy not simply say that the power to recognize or to prohibit relationships other than marriage shall be reserved to the several States?”²³⁴

228. 152 Cong. Rec. S5465 (daily ed. June 6, 2006) (statement of Sen. Kennedy); see also 152 Cong. Rec. S5524 (daily ed. June 7, 2006) (statement of Sen. Obama) (stating that similar state amendments took away domestic partnership benefits); 152 Cong. Rec. S5474 (daily ed. June 6, 2006) (statement of Sen. Feinstein) (“[I]f [the amendment] were to prevail . . . it is very likely all . . . domestic unions of any civil kind would be wiped out, as well.”).

229. 152 Cong. Rec. S5530 (daily ed. June 7, 2006) (statement of Sen. Leahy); see also, e.g., *id.* at S5528–29 (statement of Sen. Durbin) (“[T]he language is vague and overbroad. . . . There was simply no consensus [at the committee hearings] on how the courts might interpret [it]. Some of the witnesses predicted courts would read it to ban civil unions.”).

230. 152 Cong. Rec. S5454–55 (daily ed. June 6, 2006) (statement of Sen. Feingold).

231. *Id.* at S5449 (statement of Sen. Warner).

232. *Id.*

233. *Id.*

234. *Id.* Senator Warner further suggested: “Or why not simply drop the second sentence altogether if it is confusing? Either option would clearly allow the 50 States to work their will on the issues of civil unions or domestic partnerships.” *Id.* That claim is, of course, highly suspect—and it indicates confusion even among those who were aware of the ambiguity.

Another Republican Senator—Senator Inhofe—essentially agreed that the Amendment is ambiguous, but voted for it anyway: “I have listened to many of my colleagues . . . talk about some of the ways the language should be legally changed Maybe this isn’t worded exactly right. But this is the only show in town. It is the only opportunity that we will have to do anything.”²³⁵ To Senator Inhofe, doing something was apparently more important than knowing what it was that he was doing.

But much to Senator Inhofe’s chagrin, nothing was done. At the close of the debate, the Amendment failed on a procedural vote, receiving forty-nine yeas and forty-eight nays.²³⁶

Still, the failure in the Senate once again did not stop the House of Representatives from holding its own debate and vote.²³⁷ The House debate tiresomely mirrored all of the previous congressional debates. The Amendment’s supporters claimed that it would allow the state legislatures to create civil unions,²³⁸ whereas many of its opponents claimed that it would “bar[] States from granting pretty much any legal partnership such as civil unions,”²³⁹ and other opponents claimed that, at the very least, it was unacceptably ambiguous on the issue: “[T]his bill jeopardizes not just same-sex marriage . . . but domestic partnership and civil union laws The proposal before us is so poorly drafted that legal experts disagree on exactly what effect it will have on those laws.”²⁴⁰ Ultimately, the Amendment gained 236 votes—well over a majority, but less than the two-thirds required by the Constitution.²⁴¹

II. THE LACK OF AN ORIGINAL PUBLIC MEANING OF THE FEDERAL MARRIAGE AMENDMENT

When the Democrats gained a majority of both Houses in the 2006 congressional elections, the FMA was dropped from the legislative agenda. For now, anyway, it has been defeated. But let us imagine what would have happened if its sponsors had succeeded in making it the

235. 152 Cong. Rec. S5523 (daily ed. June 7, 2006) (statement of Sen. Inhofe).

236. See *id.* at S5534.

237. The FMA was brought directly to the House floor by the House leadership, without having been considered in committee. 152 Cong. Rec. H5300 (daily ed. July 18, 2006) (statement of Rep. Kolbe).

238. See, e.g., *id.* at H5314 (statement of Rep. Musgrave); *id.* at H5296 (statement of Rep. Gingrey).

239. *Id.* at H5307 (statement of Rep. Lee); see also, e.g., *id.* at H5301 (statement of Rep. Conyers) (stating Amendment would deny benefits of civil unions and domestic partnerships); *id.* at H5298 (statement of Rep. Nadler) (“[W]hen they tell you this is only about marriage, don’t believe it.”).

240. *Id.* at H5288 (statement of Rep. McGovern); see also *id.* at H5293 (statement of Rep. Baldwin) (“[Civil union] laws would certainly be threatened if this amendment were to pass.”). Opponents also introduced a number of letters from advocacy organizations bemoaning the ambiguity. See, e.g., *id.* at H5291 (letter from the Human Rights Campaign); *id.* (letter from the National Council of Jewish Women).

241. See *id.* at H5320.

Twenty-Eighth Amendment to the Constitution. Surely a case challenging the constitutionality of civil unions under the new Amendment would quickly have found its way into court. Let us further imagine that that case were to arrive on the desk of a conscientious, committed originalist judge.

In the days of the “old originalism,” our originalist judge would have searched the recent historical materials canvassed above for evidence of the original intent of the framers. In so doing, she would naturally have been dubious of the claims by the FMA’s opponents that it would ban civil unions; since they were not the people who voted for the Amendment and gave it the force of law, their intentions do not matter. Rather, she would have focused on the numerous statements of the Amendment’s sponsors insisting that they intended their bill to have no effect on legislatively created civil unions. Indeed, the sponsors envisioned that future judges would do just that. Representative Musgrave declared that the public confusion over the reach of the FMA was inconsequential because “[f]uture courts will have no doubt about what the legislative intent was.”²⁴² Echoed Judge Bork: “It was hoped that this objection could be avoided by making the intention of the sentence clear in the debates that would surround the amendment in Congress and, if sent to the states, in the ratification debates.”²⁴³

Still, to the extent that “original intent” originalists looked to the intent of the *drafters* of the provision,²⁴⁴ our judge would have been perplexed, as the principal drafters had differing intentions. In addition, there are indications that even those drafters and framers who publicly expressed an intent to leave the civil unions issue to the states may not have been honest about their actual intentions, and many other framers who remained silent may well have supported the Amendment because they intended (or at least hoped) that notwithstanding the moderate politicking of its sponsors, it would ultimately be used to strike down civil unions. As such, the intent of the framers would have been quite difficult to discern.

But in any event, now that original intent originalism has been largely abandoned,²⁴⁵ our hypothetical originalist judge would instead seek the original public meaning of the Amendment: the meaning that the Amendment had at the time that it was adopted. In articulating how she would go about doing that, one must be careful not to assume that all

242. Cooperman, *Little Consensus*, *supra* note 32.

243. May 13, 2004 Hearing, *supra* note 65, at 18.

244. See, e.g., Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *S. Tex. L. Rev.* 455, 456 (1986) (“The standard of interpretation applied by the judiciary must focus on the text and the drafter’s original intent.”). But see Berger, *supra* note 2, at 640–41 (arguing that, while drafters’ intentions and understandings are usually dispositive, that is only true when they are in accord with those of ratifiers).

245. See *supra* notes 3–7 and accompanying text.

originalists would endorse the same approach. Originalism, even in its “original meaning” incarnation, is a very broad tent. Originalists disagree in important ways about the meaning of “original meaning.” To simplify somewhat, those various originalists who espouse fidelity to the principle of original public meaning tend to use that term to express three related, but conceptually distinct, notions: original expected application, original public understanding, and original, objective textual meaning. These are not three distinct schools of thought as much as they are three ranges on the continuum of originalist theory; they often bleed together, and many originalists have at times made statements consistent with more than one of them.²⁴⁶ But it is helpful to separate them as a conceptual framework for approaching the originalist endeavor.

A. *Original Expected Application*

The narrowest form of original meaning jurisprudence is what Jack Balkin calls “original expected application.”²⁴⁷ The premise of original expected application originalism is not only that the meaning of a constitutional provision is determined by “the meanings that words had at the time they were adopted” as “read in light of [the provision’s] underlying principles,” but also that “the concepts and principles underlying those words must be *applied* in the same way that they would have been applied when they were adopted.”²⁴⁸ Thus, the original meaning of a constitutional provision is determined and constrained by the expectations of the framing generation as to how that provision would be applied to particular problems. If the Framers would have expected the Constitution to permit something, then it is permitted today, and if they would have expected it to preclude something, then it is precluded today.

This principle is distinct, at least conceptually, from “original intent originalism.” It seeks to apply the original public meaning of the words that the Framers enacted, rather than the subjective, private intentions that motivated the decision to enact them. But one consequence of its defining the notion of original meaning narrowly, such that constitutional questions must be answered the same way today as they would have been answered at the time of the framing, is that it essentially posits that in certain circumstances the judge need not *articulate* the original meaning at all. In a sense, it treats the first step of the traditional two step originalist inquiry—(1) what was the original meaning?; (2) how does that meaning apply to the problem at hand?—as sometimes unnecessary. If we can determine how the framing generation would have expected the constitutional provision to apply to the practice at issue, then there is

246. Justice Scalia, for instance, has at various points endorsed all three. See *infra* notes 251–252, 275, 299 and accompanying text.

247. See Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comment.* (forthcoming 2007) (manuscript at 5–7, on file with the *Columbia Law Review*) [hereinafter Balkin, *Abortion*].

248. *Id.* at 6.

no reason to ascertain or articulate the original meaning. We already know the answer to the ultimate question posed in step two, so we need not bother with step one.²⁴⁹ The Framers' original expectations that the provision would (or would not) apply to a particular practice are incontrovertible evidence that the original meaning of the provision—whatever it may be—is such that it would (or would not) bar that practice. To interpret the Constitution to allow a practice that the Framers expected would be prohibited, or vice versa, is to impermissibly change the meaning of the Constitution.²⁵⁰

This brand of originalism is often practiced by Justice Scalia.²⁵¹ He has repeatedly endorsed the proposition that if the Framers expected a practice to be constitutional then it necessarily remains constitutional today.²⁵²

On this theory, to determine whether civil unions are constitutional, our judge would need to ascertain how the American public would have expected the FMA to apply to civil unions. It is not just the expectations of the framers themselves that matter; that would just be a form of original intent jurisprudence. What matters on this theory is the *public* meaning of the text as conclusively established by the shared expectations of everyone—both supporters and opponents of the Amendment—about its likely effect.²⁵³

249. See Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *Geo. L.J.* 569, 581 (1998) (explaining, but not endorsing, this principle).

250. See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 *St. Louis U. L.J.* 555, 556 (2006) (explaining, but not endorsing, this principle).

251. See *id.* at 556–58; see also Balkin, *Abortion*, *supra* note 247 (manuscript at 6–7); Mitchell N. Berman, *Originalism and its Discontents (Plus a Thought or Two About Abortion)*, 24 *Const. Comment.* (forthcoming 2007) (manuscript at 5–7, on file with the *Columbia Law Review*); Greenberg & Litman, *supra* note 249, at 572, 574–82. Justice Scalia once remarked that he rejects any “manner of interpretation that permits application of the [constitutional] provision to evolve over time.” Antonin Scalia, D.C. Circuit Judge, *Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), in *Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, Original Meaning Jurisprudence: A Sourcebook* 101, 103 (1987).

252. For instance, the fact that the Framers understood the death penalty not to be cruel and unusual punishment is, to Justice Scalia, permanently dispositive of the question whether the death penalty is constitutional under the Eighth Amendment. See Antonin Scalia, *Response*, in *A Matter of Interpretation*, *supra* note 6, at 129, 145 [hereinafter *Scalia, Response*]. Often, Justice Scalia determines the original expected application by asking whether the framing generation engaged in a practice shortly after ratification. If so, then they obviously had not expected that practice to be precluded, in which case the practice remains permissible today. Thus, for instance, the fact that the early Congresses and Presidents engaged in public prayer is permanently dispositive of the question whether the Establishment Clause allows government-sanctioned displays of religion, and we can reach that conclusion without having to articulate the original meaning of the Establishment Clause. See *McCreary County v. ACLU*, 545 U.S. 844, 885–905 (2005) (Scalia, J., dissenting).

253. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *Const. Comment.* (forthcoming 2007) (manuscript at 25, on file with the *Columbia Law Review*) [hereinafter *Balkin, Constitutional Redemption*] (explaining that original expected

But that is a task that simply cannot be performed. The only conclusion that can possibly be drawn from the exhaustive evidence set out in Part I of this Article is that the American public (and the Congress, for that matter) did not know and could not have known what to expect. Some liberals, libertarians, and federalist conservatives *opposed* the FMA because they expected it to *ban* civil unions, and other liberals, libertarians, and federalists *opposed* it even though they expected it to *allow* civil unions. Some moderates *supported* it because they expected it to *allow* civil unions, but other moderates *opposed* it because they expected it to *ban* civil unions. Some social conservatives *supported* it because they expected it to *ban* civil unions (notwithstanding what its sponsors had been saying), other social conservatives *opposed* it because they expected it to *allow* civil unions, and still other social conservatives *supported* it *despite the fact* that they expected it to *allow* civil unions. On top of that, each side repeatedly accused the other of intentionally lying about how the Amendment would apply to civil unions. And not surprisingly, a great many frustrated observers from across the political spectrum threw up their hands and announced that they simply had no idea what effect the Amendment would have on civil unions; they *had no* expectations about its application.

In the face of this historical record, our judge would be at a loss. Any effort to cut through the rhetoric in pursuit of the “true” expectations would be futile. To begin with, there is no way that our judge would be able to conclude that the FMA’s opponents were correct when they accused its sponsors of lying about their actual expectations for the Amendment’s effects on civil unions. It would be quite a remarkable form of expectations originalism that ignored the repeated, consistent, and facially earnest public statements of the framers about the effect of their amendment. The historical record yields its doubts, to be sure, but it does not even come close to proving the existence of a massive, coordinated coverup on the part of the FMA’s supporters.

It might be more plausible for our judge to reach the opposite conclusion: that it was the *opponents* of the FMA who were lying when they insisted that they expected it to ban civil unions. They knew full well that it would not ban civil unions, and they were intentionally misrepresenting its moderate effects in order to scare moderates away from voting for it. But that argument will not work either. If the opponents were intentionally muddying the waters, they were unquestionably successful at it. So much of the public (and even the Congress) was deceived or at least confused by their allegations that there were no shared public expectations about the Amendment’s effects on civil unions.

And in any event, fairly read, the historical record does not yield the conclusion that the FMA’s opponents were lying about their expecta-

application asks “how the framing generation would have expected the text would be applied”).

tions. The FMA's opponents had many reasons to legitimately fear that the Amendment would operate to ban civil unions and that it was in fact the Amendment's *supporters* who were being disingenuous when they promised otherwise.

For one thing, of course, two of the three principal drafters of the Amendment asserted that it would preclude civil unions. In addition, the plain language of the second sentence of the original version of the FMA was most naturally read to do so. And even after the second sentence was revised, the first sentence continued to lend itself to an extremely plausible interpretation that the states could not grant the substantive equivalent of marriage to gay couples, regardless of what label they chose to place upon it. As Professor Dale Carpenter wrote at the time:

Once the revised amendment is ratified, opponents of civil unions can be expected to argue that legislatures cannot circumvent the substance of the amendment by giving same-sex couples everything marriage confers under a different title. . . . A person could not be convicted of Treason on the testimony of one witness, rather than the constitutionally required two witnesses, simply by calling the same offense 'Schmeason.'²⁵⁴

Indeed, from the very beginning of the civil union debate in Vermont, social conservative opponents had tirelessly criticized civil unions as no different from marriage.²⁵⁵ And in other contexts courts had already recognized that a "civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage."²⁵⁶

254. Dale Carpenter, *Four Arguments Against a Marriage Amendment That Even an Opponent of Gay Marriage Should Accept*, 2 U. St. Thomas L.J. 71, 93 (2004). That argument would not, of course, have been a slam dunk. To many people, civil unions, by creating a "separate but equal" institution, are inherently degrading and inferior (and thus not identical) to marriage. See, e.g., Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 Vt. L. Rev. 149, 242 (2000) (arguing that "Vermont's separate but equal system of marriage ought to be held unconstitutional"); Evan Wolfson, *Interview: Why the Boy Scouts Case Went Down*, *Gay & Lesbian Rev. Worldwide*, Jan.-Feb. 2001, at 15, 17 (noting that civil unions do "not assure people the full respect and legal protections that marriage has traditionally received in this country").

255. See, e.g., David O. Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 Vt. L. Rev. 61, 64-67 (2000) (arguing that, in finding right to civil unions, Vermont Supreme Court had actually redefined marriage); Mello, *supra* note 254, at 208 ("Homosexual or lesbian marriage, by whatever label you substitute for its name, is not a civil right; it is a moral wrong." (quoting Richard Baldwin, *Not Right to Redefine Marriage*, *Rutland Herald*, Mar. 18, 2000, at 8)); Andrea Lafferty, *Editorial, Constitution Should Ban Gay Marriage*, *Columbus Dispatch*, June 24, 2006, at A12 ("Civil Unions are homosexual marriages.").

256. *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 417-18 (Sup. Ct. 2003). Other courts, however, had taken the Vermont legislature at its word and concluded that a civil union should not be treated as a marriage. See, e.g., *Burns v. Burns*, 560 S.E.2d 47, 48-49 (Ga. Ct. App. 2002) (concluding that under Vermont law, civil union does not bestow same status as civil marriage, and holding that Full Faith and Credit Clause did not require Georgia to recognize Vermont civil union as marriage).

In addition, a number of state attorneys general had already formally concluded that their state defense of marriage acts—which precluded recognition of same-sex marriages performed out of state, but said nothing about civil unions—should be read to bar recognition of out-of-state civil unions as well. Their theory was that a ban on same-sex marriage naturally applies to other relationships that provide the rights, even if not the label, of marriage.²⁵⁷ Social conservatives had pushed that theory in state courts as well.²⁵⁸ In addition, using this same reasoning, they had also aggressively argued in courts around the country that local domestic partnership laws are trumped by state laws banning gay marriage²⁵⁹ and that state domestic partnership laws are unconstitutional under state constitutional amendments banning gay marriage²⁶⁰ even when those marriage bans apply on their face only to “marriage” and not to civil unions or domestic partnerships. Similarly, they had argued in state courts that state constitutional marriage bans preclude any argument that same-sex couples are constitutionally entitled to enter into civil unions, because “the term ‘marriage’ should be interpreted to include both marriage licenses and those rights, responsibilities, benefits and burdens that flow from marital status.”²⁶¹

257. See Op. Att’y Gen. No. 00-017, at 8–9 (Ill. Dec. 29, 2000) (opining that, because “difference between a civil union in Vermont and a same-sex marriage . . . is merely a matter of nomenclature,” “Vermont same-sex civil unions are equivalent to same-sex marriages, for purposes of [the] Illinois law” that provides that “‘marriage between 2 individuals of the same sex is contrary to the public policy of this State’” (quoting Illinois Marriage and Dissolution of Marriage Act, 750 Ill. Comp. Stat. 5/213.1 (West 1998)); Op. Att’y Gen. No. 2000-129, at 5, 12 (Ala. Apr. 20, 2000) (opining that recognizing Vermont civil union would run afoul of Alabama Marriage Protection Act, which provides that “‘marriage contracted between individuals of the same sex is invalid in this state’” (quoting Alabama Marriage Protection Act, Ala. Code § 30-1-19 (1998))).

258. See, e.g., Plaintiffs-Appellants Brief at *5, *Alons v. Iowa Dist. Court for Woodbury County*, 698 N.W.2d 858 (Iowa 2005) (No. 03-1982), 2004 WL 4912311 (arguing that Iowa courts should not recognize Vermont civil unions because “the people of Iowa have enacted a law specifically preserving marriage for couples comprised of one man and one woman” and Vermont civil unions “do not comport with this definition of marriage”).

259. See Brief of Appellees at *25–*30, *Devlin v. City of Phila.*, 862 A.2d 1234 (Pa. 2004) (No. 43 EAP 2003), 2003 WL 23515737 (arguing that state law banning gay marriage preempts life partner provisions of Philadelphia’s Fair Practices Ordinance); Brief in Support of Affirmance for Amicus Curiae Pennsylvania Catholic Conference at *7–*8, *Devlin*, 862 A.2d 1234 (No. 43 EAP 2003), 2003 WL 23515742 (arguing that local “life partnership” ordinance ran afoul of state ban on gay marriage because it “effectively created a new class of marital status” and “create[d] a subset of marriage for homosexual partners”).

260. See *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 696–97 (Ct. App. 2005) (rejecting social conservatives’ argument that California defense of marriage amendment “protects the institution of marriage itself, which they contend requires that the myriad of rights, benefits, and obligations associated therewith must be reserved only for married persons”).

261. Supplemental Brief of Amicus Curiae Hawaii Catholic Conference, *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (No. 20371); see also Defendant-Appellant’s Supplemental Reply Brief, *Baehr*, 994 P.2d 566 (No. 20371).

What is more, during the various campaigns in the states, contemporaneous with the FMA, to amend state constitutions to ban same-sex marriage, it was a common tactic for the sponsors and supporters of those amendments to disingenuously claim on the campaign trail that the amendments would have no effect on civil unions when, in fact, the proposed constitutional language explicitly foreclosed them.²⁶² This campaign of misinformation led to a number of these ballot initiatives passing easily, even though exit polls showed that a substantial majority of the voters actually favored allowing gays and lesbians to enter into civil unions.²⁶³

All of these events surely gave FMA opponents and the American public reason to doubt the genuineness of (or at the very least, the ability to follow through on) the promises about civil unions made by the sponsors and supporters of the Amendment. Indeed, the Marriage Amendment Project—an organization that had been created by the Arlington Group to promote the FMA and that had been promising that the FMA did not reach civil unions—was housed in the offices of the Family Research Council.²⁶⁴ The Family Research Council had been at the forefront of the grassroots effort to pass the Amendment. But at the same time, not only was it publicly opposed to civil unions,²⁶⁵ but it also initially denounced the FMA for failing to ban civil unions.²⁶⁶ Subsequently, it suddenly changed its tune (perhaps after having been informed of the likelihood that the FMA would actually go further than its sponsors were letting on), and then fervently insisted that Congress pass the FMA without any change in wording despite the known ambiguity,²⁶⁷ while at the same time participating as an *amicus curiae* in state court litigation arguing that domestic partnerships and civil unions are inconsistent with bans on same-sex “marriage.”²⁶⁸

262. See Thomas Oliphant, Editorial, *The Gay Marriage Deception*, *Boston Globe*, Nov. 7, 2004, at D11.

263. See *id.*; Liptak, *supra* note 192.

264. See Russell Shorto, *What’s Their Real Problem with Gay Marriage? (It’s the Gay Part)*, *N.Y. Times*, June 19, 2005, § 6 (Magazine), at 34, 36–37.

265. See Peter Sprigg, Family Research Council, *Questions and Answers: What’s Wrong with Letting Same-Sex Couples “Marry”?* 7, available at http://www.dvstudios.com/ccn/Questions_Answers.pdf (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*) (arguing against civil unions on ground that legal benefits of marriage should be restricted to heterosexual partnerships because only heterosexual partnerships are socially beneficial).

266. See Ponnuru, *Jitters*, *supra* note 39, at 32; Kurtz, *supra* note 48.

267. See Press Release, Family Research Council, *FRC Urges Senators to Support the Marriage Protection Amendment* (Nov. 2, 2005) (on file with the *Columbia Law Review*) (“Today, the Family Research Council urged Senators on the Judiciary Committee to support the Marriage Protection Amendment and to oppose any changes in its language in ‘markup’ sessions this week.”).

268. See *Same Sex Marriage Benefits Fought Here in Pennsylvania*, Pa. Citizen, May 2004, at 4, 4.

And finally, the FMA's opponents could rationally have expected that it might operate to ban civil unions because it was never rewritten to eliminate the ambiguity, despite the fact that it would have been simple to do so. Time and time again, critics of the ambiguous language proposed alternate phrasing that would have definitively and explicitly allowed civil unions.²⁶⁹ Yet the only revision that was ever made to the Amendment served only to give the illusion of increased clarity while in fact leaving the essential ambiguity in place. As Senator Warner lamented on the Senate floor, if the Amendment truly was intended to "leave to the several States the decision of whether to recognize relationships other than marriage, such as civil unions," then "why not simply state that in plain English . . . ?"²⁷⁰

The answer to that question is the key to understanding the FMA. Saying so "in plain English" would have given the social conservatives no reason to hope that the Amendment would be interpreted to meet their goals, which would have caused them to abandon their support. The fact that the sponsors repeatedly refused to address the civil unions issue in plain English—the fact that they kept coming back again and again with the same proposal despite being fully aware of its profound ambiguity—surely made it reasonable for opponents to believe that the sponsors may have been up to something untoward. Or at the very least, it was not unreasonable for them to believe that the sponsors embraced the ambiguity as a necessary means of holding together a disparate coalition that had differing expectations about its application. There was, accordingly, no shared expectation of the application of the FMA to civil unions. Original expected application does not yield an answer.

B. *Original Public Understanding*

Because it is often practiced by the originalist with the most power and the loftiest pulpit—Justice Scalia—original expected application must be taken seriously. But it would be a mistake to assume, as many commentators seem to do, that original expected application is the prevailing academic model of originalism. In fact, most academic originalists have rejected original expected application as a misunderstanding of original meaning.²⁷¹ They believe that the expectations of the framing generation as to the specific application of a constitutional provision are

269. For one suggested phrasing, see Balkin, *Balkanization*, *supra* note 104. Similarly, many opponents of civil unions who were unhappy with the ambiguity proposed alternative language that would have unequivocally banned them. See, e.g., Knight, *supra* note 167; Rice, *supra* note 71.

270. 152 Cong. Rec. S5449 (daily ed. June 6, 2006) (statement of Sen. Warner); see also Carpenter, *supra* note 254, at 93 ("If the purpose of the revised second sentence is to make it clear that legislatures—but not courts or executives—may grant same-sex couples 'the legal incidents' of marriage, why not just say so directly rather than by negative implication?").

271. See Berman, *supra* note 251, at 3–4; Michael W. McConnell, *The Importance of Humility in Judicial Review*, 65 *Fordham L. Rev.* 1269, 1284 (1997) [hereinafter

often compelling evidence of the original public meaning of that provision, but are not dispositive.²⁷² Originalists generally care about what the people thought the text *meant*, not necessarily how they thought it would apply to a particular set of facts. It is possible that the framing generation misunderstood the way in which the principle that they enacted would apply to particular facts, or that their understanding of the facts was mistaken, or that the world has changed enough that the principle now applies differently to those same facts.²⁷³ Because originalism is premised on the notion that, “[i]n ratifying the document, the people appropriated it, giving its text the meaning that was publicly understood,”²⁷⁴ what matters to most originalists is the original understanding of the principle that was embodied in the text, not the narrow original expectations of how that principle would apply in particular situations.²⁷⁵

Thus, many modern, sophisticated originalists seek to uncover the “public understanding” of the meaning of the constitutional provision:²⁷⁶ “what the original language actually meant to those who used the terms in question;”²⁷⁷ the “meaning of the provision to the public on whose behalf it was ratified.”²⁷⁸ They recognize that the Framers and the peo-

McConnell, Importance of Humility] (explaining that very few originalists take position that Framers’ expectations are controlling).

272. See, e.g., Michael J. Perry, *The Constitution in the Courts: Law or Politics?* 43 (1994) (“That the ratifiers may not have believed . . . that the practice did not violate the directive—is not determinative.”); Barnett, *An Originalism*, *supra* note 6, at 622; Whittington, *New Originalism*, *supra* note 1, at 610–11.

273. See Green, *supra* note 250, *passim*; Greenberg & Litman, *supra* note 249, *passim*.

274. Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 60 (1999) [hereinafter Whittington, *Constitutional Interpretation*].

275. When Ronald Dworkin pointed out this distinction, see Ronald Dworkin, Comment, *in A Matter of Interpretation*, *supra* note 6, at 115, 115–16, Justice Scalia claimed that he too believes that public meaning, rather than expected application, controls, see Scalia, Response, *supra* note 252, at 144. Sometimes, Justice Scalia does indeed seem to endorse this proposition. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 379, 382 (1993) (Scalia, J., concurring) (surmising that, although “the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification,” “a ‘frisk’ prior to arrest [that] would have been considered impermissible in 1791” may be permissible today in light of changes in the habits of criminals in carrying concealed weapons). See generally *Printz v. United States*, 521 U.S. 898, 910 (1997) (Scalia, J.) (seeking “original understanding of the Constitution”). But usually, he does not. See *supra* note 251 and accompanying text.

276. Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *Tex. L. Rev.* 331, 339 (2004).

277. Stephen G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 *Mich. L. Rev.* 1081, 1081 (2005).

278. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 *Va. L. Rev.* 669, 675 (1991) [hereinafter Perry, *Legitimacy*]; see also Akhil Reed Amar, Foreword: *The Document and the Doctrine*, 114 *Harv. L. Rev.* 26, 29 (2000) (“What counts as text is the document as understood by the American People who ratified and amended it . . .”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *Geo. Wash. L. Rev.* 1127, 1136 (1998) (“Originalism is the idea that the words

ple often could not agree amongst themselves on how they expected the provision to apply to “particular fact situations,” but they believe that the people nonetheless understood a single public meaning, or “major premise,” reflected in the constitutional language.²⁷⁹

Applying this theory, our hypothetical originalist judge would not be stumped by the fact that the people had differing expectations about whether the FMA would ban civil unions. Undeterred, our judge would endeavor to discern the principle that the FMA enacts—the shared public understanding of the meaning of its words—and then apply that principle herself to resolve the question whether civil unions are constitutional.

To determine the public’s shared understanding of provisions of the original Constitution, originalists consult a wide array of historical evidence, including “public discussion,” the “records of the Philadelphia convention, records of ratifying conventions, the newspaper accounts of the day, the Federalist Papers, the Anti-Federalist Papers,” and the “decisions of the early courts, as well as treatises by men who . . . were thoroughly familiar with the thought of the time.”²⁸⁰ Updating those sources for a modern-era amendment would mean looking at, among other things, the public discussion of the amendment, newspaper accounts, editorials and political blogs—the best of which could be thought of as *The Federalist* and the Anti-Federalist Papers of the twenty-first century—congressional debates and hearings, judicial decisions, and law review articles.

Our judge would look to all of those sources to determine the public understanding of the meaning of the FMA. But of course, the people are concerned with, and thus talk about, the real-world effects of constitutional amendments, not their abstract meanings. The people (and the legislators) care what an amendment will do, not what it means. As such, “it is hard to ascertain what constitutional provisions mean without reference to expected applications.”²⁸¹ As a practical matter, expected application is often the best measure of original meaning; our best clue for what the people thought a constitutional provision *meant* was what they thought it would *do*.²⁸² Indeed, the people’s *own* understanding of what the provision meant was likely shaped primarily by their expectations of how it would be applied to particular practices.²⁸³ Thus, in practice, original expected application will often determine original meaning, even for

of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.”).

279. Bork, Tempting, *supra* note 7, at 162–63.

280. *Id.* at 144, 165; see also Scalia, Lesser Evil, *supra* note 10, at 852, 856 (noting that originalist interpretation requires consulting these sources).

281. John O. McGinnis & Michael B. Rappaport, Original Interpretive Principles as the Core of Originalism, 24 *Const. Comment.* (forthcoming 2007) (manuscript at 6, on file with the *Columbia Law Review*).

282. See *id.*

283. See *id.* (manuscript at 7).

those who reject the notion that original expected application is necessarily dispositive.²⁸⁴

It follows that if there was public disagreement on expected application, then it is quite likely that there was no public agreement on original meaning either. And so it is here. Those who thought that the FMA would allow civil unions must have thought (to the extent that they considered its textual meaning at all) that it protects only the *word* “marriage.” Those who thought that it would ban civil unions must have thought that it protects the *institution* of marriage.

That is, in fact, just what the history shows. Those legal experts and commentators who thought carefully about and parsed out the actual text of the FMA reached sharply differing conclusions about its meaning. The profound disagreement recounted above among the drafters themselves, among the law professors called to testify in congressional hearings, and among the bloggers and interest groups all reflected a demonstrable (indeed, undeniable) lack of public consensus about the meaning of the language of the FMA.²⁸⁵

That disagreement about the meaning of the text (not just its likely application) was both widespread and publicly acknowledged. The *Washington Post*, for instance, ran a story explaining that “more than 100 members of Congress have co-sponsored the proposed amendment, and White House aides say President Bush is about to endorse it. Yet there is no consensus—even among its authors—about what the text means.”²⁸⁶ The *Post* story continued, “Though it is just two sentences long, the amendment’s possible interpretations are a matter of furious debate among constitutional scholars and political activists, with some contending that it would allow Vermont-style civil unions and others saying it would not.”²⁸⁷ Even *Wikipedia*, perhaps the ultimate measure of what information (and misinformation) is widely available to the public, notes that “legal scholars still question[] whether civil unions would be permitted” by the language of the FMA.²⁸⁸ The inescapable conclusion is that

284. See Scalia, Response, *supra* note 252, at 144 (noting that these “two concepts chase one and another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance”); Balkin, Constitutional Redemption, *supra* note 253 (manuscript at 26–27) (“Today’s original meaning originalists often view original expected applications as very strong evidence of original meaning, even (or perhaps especially) when the text points to abstract principals or standards.”).

285. Before the Amendment was revised, the public disagreement centered on the meaning of the second sentence, not the first. But it was equally as deep and widespread.

286. Cooperman, Little Consensus, *supra* note 32.

287. *Id.*

288. Federal Marriage Amendment, Wikipedia, at http://www.en.wikipedia.org/wiki/Federal_Marriage_Amendment (last modified Feb. 21, 2008) (on file with the *Columbia Law Review*). Indeed, the history of edits to the *Wikipedia* entry on the FMA evinces a profound and ongoing confusion about whether and to what extent the Amendment would operate to ban civil unions. See Revision History of Federal Marriage Amendment, Wikipedia, at http://en.wikipedia.org/w/index.php?title=Federal_Marriage_Amendment

there was no “general and publicly shared meaning[] of the text at the time”²⁸⁹ Original public understanding thus does not yield an answer either.

C. *Original, Objective-public-meaning Textualism*

As some of its leading proponents have explained, “originalism as a theory of constitutional interpretation is still trying to work itself pure.”²⁹⁰ Over the last decade, scholarship on the vanguard of originalist thought has been moving the theory steadily away from the history and toward the text.²⁹¹ The newest generation of originalists seek neither the original intention of the Framers nor the original understanding of the people.²⁹² Rather, they seek to determine how the words of the Constitution “would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted.”²⁹³ Some of its proponents have labeled this theory “original, objective-public-meaning textualism.”²⁹⁴

The distinction between this revised originalism and the thinking that preceded it is that the concern is no longer with how the words of the Constitution were *actually* understood by the Framers, the ratifiers, the public, or anyone else, but rather with how an objective, hypothetical reader *should* have and likely *would* have understood them had he been fully informed. These originalists “do not regard the search for original meaning as a search for historically concrete understandings. Instead, [they] conceive of the inquiry in hypothetical terms”²⁹⁵ As Gary Lawson, perhaps the leading advocate of this theory, explains:

[It] is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence.²⁹⁶

&action=history (last visited Feb. 27, 2008) (on file with the *Columbia Law Review*) (showing numerous revisions to Federal Marriage Amendment entry on *Wikipedia*).

289. Balkin, *Constitutional Redemption*, supra note 253 (manuscript at 21).

290. Kesavan & Paulsen, supra note 6, at 1127.

291. See *id.* at 1139–44 (noting that originalist thought has moved away from positions taken by Judge Bork and Justice Scalia).

292. See *id.* at 1132.

293. *Id.*

294. *Id.* (emphasis omitted).

295. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 *Notre Dame L. Rev.* 1, 25 (2001).

296. Gary Lawson, *Delegation and Original Meaning*, 88 *Va. L. Rev.* 327, 398 (2002) [hereinafter Lawson, *Delegation*].

Accordingly, objective meaning textualists place significantly less weight on the type of historical evidence outlined in Part I of this Article than do other originalists. As Lawson explains, “[i]f the object of originalist inquiry is a concrete, subjective understanding—either of some privileged group of founders or ratifiers or some more amorphous general public—then careful exegesis of historical sources becomes the *sine qua non* of originalist inquiry.”²⁹⁷ But if, as this theory holds, “the proper object of originalist inquiry is something a bit more hypothetical, such as the understanding that the general public would have had if all relevant information and arguments had been brought to its attention, historical sources remain relevant and probative but are inconclusive.”²⁹⁸ What matters more is evidence of the general meaning of the words and phrases used in the constitutional text; dictionaries, rather than *The Federalist* and the like, are the primary sources of constitutional meaning. As one scholar has explained, it “can be very disappointing for critics of originalism—and especially for historians” to read recent originalist scholarship, because they “expect to see a richly detailed legislative history only to find references to dictionaries” and “common contemporary meanings”²⁹⁹ This newest originalism is largely a variant of textualism.

If our originalist judge were to pursue this line of thinking in interpreting the FMA, then she would not be discouraged by the fact that there was no actual, shared public understanding of the meaning of the text any more than she would be deterred by the fact that there was no single intent of the Framers and no shared public expectation of how the Amendment would apply to civil unions. Rather, she would opine that, due to imperfect information, misleading rhetoric, or flawed interpretation, the true meaning of the text of the FMA had been wrongly understood by one side or the other.³⁰⁰ Her task would be to use the tools of textualist interpretation to determine which side had it right.

297. *Id.* at 341 n.51.

298. *Id.*

299. Barnett, *An Originalism*, *supra* note 6, at 621. Justice Scalia has asserted that he employs a constitutional interpretation very much like this. See Scalia, *Common-Law Courts*, *supra* note 6, at 38 (claiming to use historical sources like *The Federalist* only as evidence of standard contemporary usage of the words in Constitution). But in fact, he usually uses historical sources more directly to prove the actual original understanding and expected application of constitutional provisions. See William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 *Geo. Wash. L. Rev.* 1301, 1303–07, 1312–14 (1998) [hereinafter Eskridge, *Supreme Court*]; Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 *Am. J. Juris.* 255, 279–82, 296–97 (2002).

300. See Gary Lawson & Guy Seidman, *The First “Establishment” Clause: Article VII and the Post-Constitutional Confederation*, 78 *Notre Dame L. Rev.* 83, 91–92 (2002) (noting possibility that majority, and conceivably even unanimous, understanding of constitutional provision held by public at time of enactment might not be actual objective public meaning because people could have been unaware of, have undervalued, or have refused for political reasons to acknowledge particular feature of the text). Perhaps the

But that too would be a fruitless quest. Having conducted the extensive research necessary to draft Part I of this Article, I am, I would like to think, fully informed of all of the possible arguments about the meaning of the Amendment. And yet I do not know which meaning is the “correct” one. Fully comprehended, the text does not yield an answer.³⁰¹ It only begs the question.

Textual analysis stumbles when the dispute centers on interpreting a word whose meaning was hotly contested in contemporary discourse, as was true of the word “marriage” during the debate over the FMA. To some, marriage was (and is) “a one-flesh communion of persons consummated and actualized in the reproductive-type acts of spouses”—a committed, divinely sanctioned sexual union of a man and a woman.³⁰² To others, marriage was (and is) “at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family”; its essence does not depend on the sex of the participants.³⁰³ The Amendment was proposed precisely because, in the words of one of its backers, “our cultural consensus on the meaning of marriage has been lost.”³⁰⁴ Its backers were “seeking to *establish*, in the fundamental law, the essential meaning of marriage as the union only of a man and a woman.”³⁰⁵ But the

most compelling example of the extent to which originalists of this stripe are willing to deviate from the historical sources is a recent essay by Steven Calabresi and Gary Lawson concluding that textual and intratextual analysis establishes the proper meaning of the words of Article III, even though Calabresi and Lawson are willing to concede that the historical sources convincingly indicate that the framing generation actually understood Article III to have a different meaning. See Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 *Colum. L. Rev.* 1002 (2007). It is worth noting that, in endorsing an interpretation favored by the political left, Calabresi and Lawson’s essay serves as a compelling counterweight to those who would argue that originalists selectively employ their theory only as a means to conservative political ends.

301. Perhaps practitioners of this brand of originalism could have concluded that the original FMA, before revision, had an objective meaning. Professor Volokh’s reading of the original language of the second sentence strikes me as so compelling as a matter of pure text, and the contrary readings offered by the Amendment’s backers seem so weak, that this might be a rare example of a constitutional provision with a discernable, objective textual meaning that runs contrary to the meaning asserted by its sponsors. (To reach this conclusion, however, one would have to say that a great many intelligent people, including Judge Bork, were objectively wrong about the meaning of the text.) The revised Amendment is not susceptible to the same argument.

302. Bradley, *supra* note 43, at 748.

303. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954–55 (Mass. 2003). See generally Coolidge & Duncan, *supra* note 255 (discussing competing visions of definition of marriage at issue in same-sex union dispute); Joan E. Schaffner, *The Essence of Marriage*, 66 *Geo. Wash. L. Rev.* 195 (1997) (reviewing Mark Strasser, *Same-Sex Marriage and the Constitution* (1997)) (same).

304. Kurtz, *supra* note 48.

305. Hadley Arkes, *Sleight of Hand*, *Nat’l Rev. Online*, Aug. 14, 2001, at <http://www.nationalreview.com/comment/comment-arkesprint081401.html> (on file with the *Columbia Law Review*) (emphasis added). See generally Mae Kuykendall, *Gay Marriages*

Amendment does not so much define the term as prescribe a rule with a meaning and scope that are dependent upon which definition we choose to adopt. Does the mandate that “marriage in the United States shall consist only of the union of a man and a woman” mean that the government may bestow recognition and benefits upon loving, committed, romantic relationships only between members of the opposite sex, or does it mean only that no union except that of a man and a woman can be labeled by the state as a “marriage”? The answer to that question depends on which of the two understandings of “marriage” is correct, a question manifestly begged, but not answered, by the text of the Amendment.³⁰⁶

Because our language, our law, and our culture did not at the time share a definition of the key disputed term in the FMA, there is no way to objectively determine the original meaning of the Amendment through textual analysis. The mere fact that so many intelligent, informed people, including the Amendment’s authors themselves, disagreed on the meaning of the text is compelling evidence that these words, at that time, in that context, did not have a single, objective meaning with regard to this issue. Thus, original, objective-public-meaning textualism also fails to yield an answer.

III. THE FALSE PROMISE OF ORIGINALISM

The foregoing establishes that, whatever strand of originalism one chooses to pursue, there was no original public meaning of the Federal Marriage Amendment, at least not one that could answer the most obvious and important question posed by its interpretation. What, if anything, does that tell us about the viability of originalism as a means of constraining judicial discretion in interpreting the rest of the Constitution?

I submit that, while it of course *proves* nothing, it nonetheless casts a great deal of light on the limits of originalism. In seeking the original public meaning of the very recent FMA, we do not need to confront many of the substantial obstacles that usually challenge the originalist enterprise: the fact that most of the historical materials casting light on constitutional meaning are profoundly unreliable (the extant records of the

and Civil Unions: Democracy, the Judiciary and Discursive Space in the Liberal Society, 52 Mercer L. Rev. 1003 (2001) (arguing that gay marriage and civil unions debate, as it unfolds in courts, legislatures, and society, is all about evolution of language and discourse of marriage).

306. Ironically, to choose the more liberal definition—marriage is a loving union of two people—is to produce the more conservative result—only opposite-sex loving unions can be recognized. And to choose the more conservative definition—marriage is an opposite-sex union—is to produce the more liberal result—same-sex unions are not marriages and hence are not affected by the first sentence of the Amendment. This irony perhaps helps to explain why many liberals read the text to ban same-sex civil unions and many conservatives read it to allow them.

state ratification of the Constitution and the Bill of Rights, for example, are woefully incomplete and were intentionally manipulated and selectively edited by partisans³⁰⁷); the fact that the Framers probably never discussed or even thought about the precise question at bar (and likely never thought about anything bearing even a slight resemblance to it);³⁰⁸ the fact that the world has changed so much since the framing that it often is maddeningly anachronistic to ask how the Framers would have thought that their provision would apply to the modern practice in question;³⁰⁹ and the fact that the passage of time makes it increasingly difficult, if not impossible, to avoid infusing the search for original meaning with our own subjective, modern understandings.³¹⁰ In the case of the FMA's application to civil unions, the historical record is complete and unaltered, the "framers" actively discussed the question, and the question was every bit as central to the world in which they were living as it is in ours, since they *are* us and their world *is* our world. What is more, the FMA is a narrow amendment, targeted at and facially capable of covering only a small category of issues—unlike, say, the textually expansive Equal Protection, Privileges or Immunities, and Due Process Clauses. And yet we still cannot discern its original public meaning.

Put simply, if we cannot even find the original public meaning of (1) a very narrow amendment designed to confront a single subject, (2) debated in the last few years, such that none of the evidence has been lost, and such that (3) the question is one with as much relevance in the Framers' world as in our own, (4) with a public record far more detailed, rich, and accurate than had previously been generated by American constitution-making, and (5) with regard to a central question posed and expressly discussed ad nauseam in that debate, then we surely cannot expect to routinely find and apply the original public meaning of (1) capacious, open-ended provisions (2) debated more than a century or two ago, (3) where the historical record is much more sparse and unreliable, (4) with regard to a question never contemplated by the drafters and ratifiers, (5) as applied to a world very different from the one that they knew.

307. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1, 12–24, 36 (1986).

308. See, e.g., Farber, *supra* note 17, at 1093–95 (noting that many contemporary issues could not even have been conceived of at time of Framing); H. Jefferson Powell, *Rules for Originalists*, 73 *Va. L. Rev.* 659, 664–65 (1987) [hereinafter Powell, *Rules*] (“[T]he vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders.”).

309. See, e.g., Eskridge, *Supreme Court*, *supra* note 299, at 1310–11; Powell, *Rules*, *supra* note 308, at 673.

310. See, e.g., Frederick Mark Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 *Vand. L. Rev.* 613, 634–36 (1997).

Indeed, the lesson of the FMA is that the problem with originalism is not just that it is difficult (or even impossible) to determine the original meaning of constitutional provisions given the passage of time. The problem is that, when it comes to constitutional provisions that addressed a controversial subject about which the American people cared deeply at the time of enactment, there probably never was a single original meaning to begin with. The truth isn't out there, and it never was. The FMA thus teaches that originalist interpretation cannot keep its promise to limit judicial discretion in the very cases in which that discretion is most threatening.

Of course, that is a lot of weight to place on one datum. It is risky business to attempt to generalize universal truths about constitutional interpretation from the particularities of one constitutional provision. And that would seem to be especially true when the provision at issue not only is uniquely recent (and thus the product of a very different era of law-making from the rest of the Constitution), but also was not even enacted in the first place. I must therefore of course concede the possibility that the lack of an original public meaning is peculiar to this particular amendment and tells us nothing about the rest of the Constitution. But I believe that there is nothing unique about the FMA in this respect; its lack of an original meaning is related neither to its recent origins nor to its failure to become law. It is, instead, an inherent, nearly unavoidable feature of constitutional provisions addressing highly controversial subjects.

To begin with, the fact that the FMA was not ratified by the states is not particularly relevant. It is extremely likely that, had the Amendment received sufficient support in Congress, it would have easily been ratified by the states. As one Senator explained, "45 out of 50 States have either adopted constitutional amendments or passed laws . . . defin[ing] marriage as the union of a man and a woman. To amend the Constitution, you have to have . . . three-fourths of the State [sic]. We are already over three-fourths of the States."³¹¹ And there is no reason to believe either that a shared public meaning would have somehow emerged during the state ratification process or that the states would have declined to ratify due to the ambiguity on the civil unions question. After so many years in which a spirited debate failed to yield a single shared meaning, it is hard to imagine that the people would somehow have settled (or insisted) upon one during the state ratification process. Why should we expect more of the state legislatures (each of which might of course have reached a different understanding of the constitutional meaning, to the extent that any understanding was ever reached at all) than of the Congress? Indeed, at this same time, state law same-sex marriage bans were being passed around the country extremely quickly and overwhelm-

311. 152 Cong. Rec. S5414 (daily ed. June 5, 2006) (statement of Sen. Brownback).

ingly,³¹² often with little thought given to (or a with complete misunderstanding of) the effect that they would have on civil unions.³¹³

Still, even if the lack of ratification by the states makes little difference, perhaps the FMA is unrepresentative because it did not even receive the necessary two-thirds vote in Congress. Maybe the fact that it fell short in Congress in part as a result of impassioned denunciations of its ambiguity tells us that vague provisions lacking a shared public meaning will not make it into the Constitution. Indeed, maybe the FMA was just a political stunt. Maybe its own proponents did not really want to see it passed; they just wanted to force votes on a controversial wedge issue before national elections. If that is so, then they probably paid much less attention to the proposed language and its likely effects than they would have had they been serious about amending the Constitution. The FMA did, after all, bypass many of the legislative mechanisms—like full committee consideration and markups—that are designed to avoid this kind of profound uncertainty.

But this argument too, I think, misses the mark. To begin with, it is not as though the Amendment was drafted one day and voted on the next, without any consideration of its meaning. The process dragged on for years, with countless hearings and debates exploring its textual meaning.³¹⁴ In addition, the FMA's supporters really did want to see it enacted, even if they also relished the political value of forcing their opponents to cast unpopular votes.³¹⁵ And it did receive majority votes in both Houses of Congress.³¹⁶ The reason that it did not receive two-thirds support had nothing to do with its ambiguous wording (indeed, the ambiguity only broadened its support); it was just that there was not quite enough political support for amending the Constitution to address the gay marriage issue.

312. See *id.* at S5415 (noting that average percentage of “yes” votes for same-sex ballot referenda around the country was astounding 71.5%).

313. See *supra* notes 262–263 and accompanying text.

314. See, e.g., 152 Cong. Rec. S5417 (daily ed. June 5, 2006) (statement of Sen. Brownback) (responding to argument that FMA was “being rushed to the floor and we really don’t understand the ramifications of this particular constitutional amendment” by “point[ing] out how much we have discussed this issue” and “point[ing] out that we have had nine hearings on this subject from 2003, 2004, and 2005 . . . with legal experts and scholars of [sic] what does this two-sentence constitutional amendment mean”).

315. See, e.g., *id.* at S5414 (statement of Sen. Brownback) (“Some say this is something that was brought up by Congress in an election year . . . because we are concerned about elections. But . . . that is not the case. I view this as foundational to this society, to the future of the Republic. I think I am in pretty good company.”); Amy Fagan, *Marriage Bill Backed by Romney*, Wash. Times, June 23, 2004, at A1 (noting Representative DeLay’s long-term, carefully crafted plan to successfully enact Amendment). Indeed, it would be difficult to overestimate the passion that committed social conservatives bring to this issue. See, e.g., Shorto, *supra* note 264, at 37 (describing anti-gay marriage movement).

316. See *supra* notes 236 and 241 and accompanying text.

It is true that the Amendment was rushed to the floor for hurried discussion and debate. And it is true that its supporters were often motivated by considerations of politics as much as (or more than) considerations of policy. And it is true that there was not as much attention paid to clarifying the meaning of the language as there could have been. And it is true that much of what both supporters and opponents said about the Amendment may well have been propaganda, rather than reasoned, honest, dispassionate analysis of textual meaning. That is to say, the debate may indeed have been characterized by cynical politicking: supporters claiming that the Amendment means something other than what they think it really means in order to trick others into supporting it, all the while believing that once it is enacted, it will likely be found to have a different meaning; and opponents claiming that the Amendment means something other than what they think it really means in order to trick others into opposing it, all the while believing that if they are unsuccessful in defeating it, it will likely be found to have a different meaning. But—and this is the crucial point—none of this distinguishes the FMA from other provisions of the Constitution addressing controversial subjects.

The original Constitution was also drafted and ratified in a climate of haste, propaganda, and political divisiveness, and was adopted in part for political expediency. Representative Livingston, for instance, questioned the usefulness of the ratification debates as a measure of constitutional meaning because “they were called in haste, they were heated by party, and many adopted [the Constitution] from expediency.”³¹⁷ Indeed, it is well known that “the battle waged over ratification in the press and at the state conventions was quintessentially political, characterized by defenses and attacks that were alternately genuine, hyperbolic, and obfuscatory.”³¹⁸ As one leading historian has explained, the “ratification can be depicted as a cacophonous debate” riddled with “squibs, parodies, wildly fantastic predictions, and demagogic rhetoric.”³¹⁹

The Anti-Federalists “described the Constitution’s provisions in wildly hyperbolic terms in attempts to hasten its demise.”³²⁰ The Federalists, for their part, “frequently exaggerated the degree of autonomy they expected and intended the Constitution to leave to the states in a successful effort to allay localist fears.”³²¹ Federalists who had advocated aggressively behind closed doors for a strong federal government

317. 5 *Annals of Cong.* 635 (1796).

318. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 *UCLA L. Rev.* 217, 244–45 (2004) [hereinafter Smith, *Sources*].

319. Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *Fordham L. Rev.* 1587, 1600–01 (1997) [hereinafter Rakove, *Fidelity*].

320. Smith, *Sources*, supra note 318, at 248.

321. Powell, *Rules*, supra note 308, at 687; see also Smith, *Sources*, supra note 318, at 246 (noting that “there is little doubt that most prominent Federalists hoped to circumscribe state authority more severely than their polemics let on”).

when hammering out the text of the Constitution turned around and disingenuously spoke of the Constitution as preserving a substantial degree of state autonomy when promoting it to the public.³²² Indeed, Madison himself later cautioned against use of *The Federalist* as evidence of constitutional meaning because “it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates.”³²³

Not surprisingly, this atmosphere of propaganda, haste, and gamesmanship produced a Constitution whose language was profoundly ambiguous and whose meaning was, even at the time, admittedly obscure. In some state ratifying conventions, the language clearly meant different things to different speakers.³²⁴ And the problem only deepened across state lines. As Justice Story long-ago explained, “[i]n different States and in different conventions, different and very opposite objections are known to have prevailed Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies to remove local objections, or to win local favor.”³²⁵ Both the Anti-Federalists and the Federalists agreed that many of the crucial provisions of the Constitution were, to use Madison’s own description of his handiwork, “obscure and equivocal.”³²⁶ The records of the North Carolina ratification convention recount the frustration of one opponent of the Constitution who

observed that gentlemen of the law and men of learning did not concur in the explanation or meaning of this Constitution. For his part, he said, he could not understand it, although he took great pains to find out its meaning, and although he flattered himself with the possession of common sense and reason

322. See Smith, Sources, supra note 318, at 248.

323. Letter from James Madison to Edward Livingston (Apr. 17, 1824), in 3 Letters and Other Writings of James Madison, 1816–1828, at 435, 435–36 (Philadelphia, J.B. Lippincott & Co. 1865); see Eskridge, Supreme Court, supra note 299, at 1309 (“*The Federalist’s* assertions are not necessarily representative of the views of others or even of their own authors . . . [b]ecause they were propaganda documents, seeking (often disingenuously) to rebut the arguments of the Anti-Federalists . . .”).

324. See Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 585 (2003) [hereinafter Nelson, Interpretive Conventions] (“Because the states had different concerns and different backgrounds, interpretations that prevailed in one state might have been rejected in others.”).

325. 1 Joseph Story, Commentaries on the Constitution of the United States § 406 (Boston, Hilliard, Gray, & Co. 1833).

326. *The Federalist* No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961); see Nelson, Interpretive Conventions, supra note 324, at 521 (“James Madison and other prominent founders did not consider the Constitution’s meaning to be fully settled at the moment it was written. They recognized that it contained ambiguities”); id. at 525 (“During the ratification debates, Anti-Federalists complained that the Constitution’s language was ambiguous and obscure.”).

From the contrariety of opinions, he thought the thing was either uncommonly difficult, or absolutely unintelligible.³²⁷

Yet political considerations prompted patriots to vote for it anyway. Edmund Randolph, for instance, lamented at the Virginia convention: "My objection is, that the [Constitution] is ambiguous, and that that ambiguity may injure the states. . . . But, sir, are we to reject it, because it is ambiguous in some particular instances? . . . [I]ts adoption is necessary to avoid the storm which is hanging over America" ³²⁸

A similar story can be told about the Bill of Rights. As one prominent constitutional historian has famously concluded, "the Bill of Rights was more the chance product of political expediency on all sides than of principled commitment to personal liberties."³²⁹ Madison, the primary author and congressional advocate of the Bill of Rights, had been adamantly opposed to the entire concept during the ratification of the original Constitution.³³⁰ His eventual support for the amendments was purely political—"dictated by the fact that he had to do so or lose his political hide in Virginia."³³¹ He and other Federalists had promised a bill of rights to the Anti-Federalists in return for their votes to ratify the Constitution, and he was begrudgingly making good on his promise. He was "not advocating them for their substance," but rather only because it was "politically expedient."³³² He could personally say little more in their favor than that they were "neither improper nor altogether useless."³³³ The rest of the Congress, and the state legislatures, showed little interest in the amendments or their wording, and thus the Bill of Rights was "adopted hastily, casually, virtually (it seems) without interest or reflec-

327. Andrew Bass *Thinks the Constitution Is "Uncommonly Difficult, or Absolutely Unintelligible"*; Maclaine and Iredell Respond: July 29, 1788, *in* 2 *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification* 897 (1993); see also Theophilus Parsons, *Notes of Convention Debates* (Jan. 21, 1788), reprinted in 6 *The Documentary History of the Ratification of the Constitution* 1294, 1297 (2000) (statement of Samuel Thompson at Massachusetts convention) ("The Constitution is in doubtful terms; it can't be understood."); *The Daily Advertiser*, June 22, 1789, reprinted in 11 *Documentary History of the First Federal Congress of the United States of America* 895, 902 (1992) (statement of Rep. Elbridge Gerry on June 17, 1789) (insisting that Constitution "was in many parts obscure and unintelligible").

328. *The States Rights Debate* 160 (Alpheus Thomas Mason ed., 2d ed. 1972).

329. Leonard W. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression*, at xxi-xxii (1963).

330. See Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 *Tex. L. Rev.* 435, 461-63 (1996) [hereinafter Finkelman, *Intentionalism*] (reviewing Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996)).

331. Merrill Jensen, *Book Review*, 75 *Harv. L. Rev.* 456, 458 (1961) (reviewing Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960)).

332. Finkelman, *Intentionalism*, *supra* note 330, at 464.

333. 1 *Annals of Cong.* 453 (1789).

tion.”³³⁴ Not surprisingly, then, the finished product was riddled with ambiguities.³³⁵

Finally, the Fourteenth Amendment—the source of most of the contentious modern individual rights decisions of the Supreme Court—was, of course, also enacted out of a sense of urgency in a highly political environment. Its rights-bearing clauses were “little discussed or debated at the time,”³³⁶ and its language was, even then, recognized to be highly ambiguous and indeterminate.³³⁷ Indeed, scholars have suggested that its authors and sponsors—whose remarks are most often looked to today as proof of its original meaning—may have intentionally misrepresented its meaning on the floor of the Congress, “endeavoring to bring a wooden horse into the Constitution” in order to commit “fraud on the nation.”³³⁸

None of this should be at all surprising. The “widely accepted theory that ambiguity enables compromise” is a “staple of public choice literature.”³³⁹ This theory posits that ambiguity is often a natural result of the legislative process. Drafting text that can be read to support two or more inconsistent positions allows legislators and interest groups with divergent goals to join together to provide enough support to enact a law. Each group “hope[s] that its position will ultimately prevail, and ambiguity thereby expands the circle of winners in legislative battles, at least temporarily.”³⁴⁰

334. Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 *Harv. J.L. & Pub. Pol’y* 391, 397 (1996).

335. To take just one example, Leonard Levy explains that the congressional debate on the Religion Clauses of the First Amendment “was apathetic and unclear: ambiguity, brevity, and imprecision in thought and expression characterized the comments of the few members who spoke. That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment is doubtful.” Leonard W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* 147 (1986).

336. Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 *Harv. J.L. & Pub. Pol’y* 457, 459 (1996).

337. See, e.g., William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 2–5 (1988) (noting that quality historical scholarship has reached widely differing conclusions on original meaning of Fourteenth Amendment); Rosenthal, *supra* note 6, at 42 (noting that meaning of Due Process Clause was “amorphous and undeveloped” at the time).

338. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 *Stan. L. Rev.* 5, 137 (1949).

339. Mark Moller, *Class Action Lawmaking: An Administrative Law Model*, 11 *Tex. Rev. L. & Pol.* 39, 91 (2006).

340. Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 *Stan. L. Rev.* 627, 641 (2002); see also William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 *Va. L. Rev.* 275, 288 (1988) (“[A legislative] strategy [where compromise is impossible] will be to support an ambiguous law, with details to be filled in later by courts or agencies. . . . [T]he legislator will be able to assure each group that it won, and . . . blame a court or agency if subsequent developments belie that assurance.”).

This theory holds especially true in constitutional law. The Constitution is particularly susceptible to this phenomenon because of the daunting supermajority required to enact or amend it. The greater the degree of agreement necessary in order to enact a potentially controversial law, the greater the degree of ambiguity necessary to achieve the requisite agreement. Those provisions of the Constitution that had little potential for controversy—either because of widespread political agreement or because their subject matter simply did not provoke the interest of the American people—may well have been drafted in concrete terms with a shared public meaning. But when it came to provisions that addressed high-profile issues on which the American people were not overwhelmingly of one mind, substantial ambiguity was unavoidable.³⁴¹ The requirements of two-thirds support in both Houses of Congress and ratification in three-quarters of the states naturally push potentially controversial constitutional language in the direction of vague or ambiguous directives that mean very different things to the various groups with divergent interests that must join together to enact them.³⁴²

341. One might initially suppose that the Eighteenth Amendment is inconsistent with this theory. One law professor wrote in 1928 that “[n]ational prohibition is the largest political issue the American people have grappled with since the Civil War.” Howard Lee McBain, *Prohibition Legal and Illegal* 14 (1928). Robert Post explains that “national prohibition was divisive from the start.” Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 *Wm. & Mary L. Rev.* 1, 5–6 (2006). And yet the language of the Eighteenth Amendment seems straightforward and unambiguous. But in fact, the Eighteenth Amendment was enacted during a brief window in which national prohibition enjoyed overwhelming support among the American people as a result of the momentary confluence of the interests of the conservative religious temperance crusaders, the liberal progressive reformers, and the business community. This was heightened by the frenzied nationalist zeal of World War I, which featured a spirit of personal sacrifice (conserving the food supply was essential, and using precious grains to make alcohol was considered wasteful) and anti-German sentiment (the American brewing industry was dominated by despised German immigrants). See Richard F. Hamm, *Shaping the Eighteenth Amendment* 240 (1995); David E. Kyvig, *Repealing National Prohibition* 5–13 (Kent State Univ. Press 2000) (1979); Post, *supra*, at 12–18. Congress hastily enacted the Eighteenth Amendment without holding committee hearings and with very little debate. See Hamm, *supra*, at 240. And the amendment was, in fact, highly ambiguous on several important fronts, from the question whether the ban on “intoxicating liquors” would include beer (many of the amendment’s supporters assumed that it would not, as had been the case with many state prohibition laws, see Kyvig, *supra*, at 13), to the question whether the states would be entitled to draft and enforce less draconian prohibition laws than the federal law (“key members of the body that created the [amendment’s] language disagreed” on this point and “the vagueness of the language allowed the dries to push the most stringent interpretation” successfully in subsequent litigation, Hamm, *supra*, at 249).

342. See Rosenthal, *supra* note 6, at 1–2 (noting that, in drafting “controversial piece[s] of legislation . . . language sometimes is chosen precisely because of its indeterminacy,” and observing that, “[w]hen it comes to crafting constitutional text, highly general and ambiguous text may be better able to obtain the requisite supermajority support than a more specific proposal because it means, if not all things to all people, many things to most”).

In the case of the Federal Marriage Amendment, the ambiguity appears to have been the necessary result of the fact that the Amendment needed the support of two constituencies—moderate conservatives and social conservatives—with diametrically opposed viewpoints on the civil unions issue. Since Americans were roughly evenly divided into three camps—those who supported gay marriage, those who opposed gay marriage but supported civil unions, and those who opposed both gay marriage and civil unions³⁴³—the only hope of obtaining supermajority support for a gay marriage ban was to phrase it in such an equivocal way that *all* gay marriage opponents (both those who supported civil unions and those who opposed them) could read it as adopting their position. It is this phenomenon that accounts for the textual ambiguity.

This phenomenon is hardly unique to the FMA.³⁴⁴ As for the original Constitution, Paul Finkelman explains that, on many occasions at the Philadelphia convention, “the delegates labored to create language that was not designed to clarify, but rather to obfuscate in order to confuse the electorate,” because they “self-consciously believed that they had to hide what they were doing in order to win ratification.”³⁴⁵ For instance, the use of vague language allowed the Northern delegates to tell their constituents that the Constitution did not support slavery and the Southern delegates to tell their constituents that it did.³⁴⁶ As for the Bill of Rights, Madison confessed that intentional ambiguity was the name of the game; he reported that in crafting the broad, open-ended language of the Bill of Rights “[e]very thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided.”³⁴⁷ The people could all agree to support constitutional protection for the freedom of speech, for instance, only because the vague and lofty First Amendment does not clarify what

343. See PollingReport.com, *supra* note 35.

344. See, e.g., Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 6 (1996) (arguing against “notion that the Constitution had some fixed and well-known meaning at the time of its adoption” in part on ground that “[b]oth the framing of the Constitution in 1787 and its ratification by the states involved . . . agreements to disagree”); Powell, *Rules*, *supra* note 308, at 670 (“[T]here is evidence that the original founders may have employed this strategy of refusing to decide what the text meant more often than we might think.”).

345. Finkelman, *Intentionalism*, *supra* note 330, at 445.

346. See Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* 34–36 (2d ed. 2001).

347. Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 12 *The Papers of James Madison* 272 (Charles F. Hobson et al. eds., 1979); see also Daniel L. Dreisbach, *In Search of a Christian Commonwealth*, 48 *Baylor L. Rev.* 927, 962 n.161 (1996) (noting that Framers of Bill of Rights “deliberately chose ambiguous, noncontroversial language that would quickly win acceptance by all”); Rosenthal, *supra* note 6, at 35–36 (“Madison was under considerable pressure to develop formulations that would enjoy wide support in order to defuse the growing political pressure for a new constitutional convention. . . . Perhaps Madison’s use of a novel and as yet not fully defined formulation would help to bridge the gap between the [opposing] camps . . .” (footnotes omitted)).

that freedom entails. Had it attempted to do so, it could never have been enacted; the Framers did not agree on the proper scope of the freedom of speech and had widely divergent understandings of the meaning of the First Amendment.³⁴⁸ And finally, as for the Fourteenth Amendment, one Representative sarcastically said of the author of its textually amorphous rights provisions—Representative Bingham, whom Justice Black called “the Madison of the first section of the Fourteenth Amendment”³⁴⁹—that the Amendment’s “‘euphony and indefiniteness of meaning were a charm to him.’”³⁵⁰ Issues of racial equality and of federal constraints on the states’ ability to interfere with personal liberty were so touchy and divisive in the aftermath of the Civil War that an amendment written in concrete terms, rather than soaring and ambiguous platitudes, would never have stood a chance.

John Hart Ely has explained of American constitutionalism that “[o]ne of the reasons the debate culminates in a vote on an authoritative text is to generate a record of just what there was sufficient agreement on to gain [super]majority consent.”³⁵¹ But originalists are mistaken in assuming that the fact that there was a successful vote means that there was indeed agreement on the meaning of the text. In other words, there is serious reason to question the underlying premise of originalist thought that the “Constitution had to be drafted so as to be comprehensible to the public that must give effect and authority to it. In ratifying the document, the people appropriated it, giving its text the meaning that was publicly understood.”³⁵² When it came to controversial subjects, the constitutional language that emerged from the drafting process was generally capable of supporting more than one meaning, and the people were able to ratify it only because they did *not* agree on which of its possible meanings was correct.

As such, what makes the Federal Marriage Amendment different from the potentially controversial provisions of the original Constitution, the Bill of Rights, and the Reconstruction amendments is not that it was uniquely lacking in an original public meaning. Rather, it is that we have so much evidence *substantiating* the lack of an original public meaning.

On virtually every important constitutional question, the historical sources are mixed, such that advocates on each side can find evidence

348. See Rodney A. Smolla, Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation, 54 Duke L.J. 1623, 1634–35 (2005) (“[A]mong those select Framers who thought about the [meaning of the First Amendment] at all, different Framers thought different things.”).

349. *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

350. Fairman, *supra* note 338, at 19 (quoting 2 *Sixty Years of Public Affairs* 41 (1902)).

351. John Hart Ely, *Democracy and Distrust* 17 (1980).

352. Whittington, *Constitutional Interpretation*, *supra* note 274, at 60; see also, e.g., Meese, *Original Intent*, *supra* note 3, at 5 (noting that originalism “assume[s] that the Constitution possessed a discernable meaning, intended and understood by those who framed, proposed, and ratified its various parts”).

that their preferred meaning was the original public one.³⁵³ But typically, when dealing with older provisions, the record is also sparse, such that advocates can dismiss the slim contrary evidence as either aberrational or misconstrued, and can be genuinely convinced that theirs is the true original meaning.³⁵⁴

Here, the jig is up. There is simply too much evidence on both sides of the civil unions question to reach a confident conclusion either way. None of the evidence has been lost to history, and there was just plain more of it to begin with. This is the age of information. While we may have fewer personal letters and diaries to draw upon in interpreting recent events than ancient ones, we have far more extensive, complete, and word-for-word accurate records of legislative deliberations and public discussion. Thus, the FMA provides an incontrovertible demonstration of what is likely a near-universal truth of constitutional interpretation: There was no publicly shared original meaning of the provisions of the Constitution that addressed subjects that were, or had the potential to be, highly controversial at the time of enactment.

But what about original, objective-public-meaning textualism? It appears to be targeted at avoiding precisely this objection. It does not care whether there was, in fact, a shared public meaning. It seeks only to determine the meaning that the public would have understood had it been fully educated (and not misled). Yes, objective-public-meaning textualism fails in interpreting the FMA, but could that be seen as the peculiar result of the fact that the FMA uniquely seeks to define a contentious term, unlike the rest of the Constitution, which uses settled terms to establish fixed law?

In a word, no. The Constitution is not composed entirely of settled terms with clear, objective meanings. Jefferson Powell has noted “the incredible linguistic creativity of the founders” and the “new and utterly non-standard uses the founders made of” language.³⁵⁵ Madison himself remarked that “no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas,” and he explained that the inherent ambiguity of language is magnified by “the complexity and novelty of the objects defined” in the Constitution.³⁵⁶

353. See, e.g., Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 *Wake Forest L. Rev.* 909, 909–13 (1998) (explaining that judges and scholars have reached wildly divergent conclusions on original meaning of Fourteenth Amendment).

354. See, e.g., Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1, 10–21 (2006) [hereinafter Barnett, *Ninth Amendment*] (noting that scholars have articulated and defended five distinct originalist models of meaning of Ninth Amendment); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 *Const. Comment.* 271, 278 (2005) (noting that thinness of historical evidence of original meaning naturally makes outcome of originalist inquiry unpredictable).

355. Powell, *Rules*, *supra* note 308, at 679.

356. *The Federalist* No. 37 (James Madison), *supra* note 326, at 198.

Original, objective-public-meaning textualism might well be successful in interpreting some of the more technical provisions of the Constitution. But it is the rights-bearing provisions—principally the Bill of Rights and the various clauses of Section 1 of the Fourteenth Amendment—that most concern originalists who worry about judicial activism.³⁵⁷ These are the most open-ended and textually vague provisions in the charter—the provisions that least lend themselves to a purely textualist interpretation. Looking up “due” and “process” in an eighteenth- or nineteenth-century dictionary is not likely to help ascertain the objective meaning of the Due Process Clauses, nor is a comprehensive analysis of how those words were typically used in contemporary discourse. “Due process,” “equal protection of the law,” “freedom of speech,” “establishment of religion,” “privileges and immunities,” and the like are often terms of art whose content was defined, if at all, through practice and historical context. As such, their original objective meaning, to the extent that they ever had one, can be ascertained only by examining the historical evidence of the actual intent and understanding of the Framers and the public. The inquiry necessarily collapses back into an examination of the drafting history, the ratification debates, and the public discussion of the meaning and effect of the amendment.³⁵⁸ In other words, as prominent originalists Steven Calabresi and Saikrishna Prakash have explained, “everyone agrees” that “there is a range of genuine textual ambiguity about the original meaning” of the principal rights-bearing clauses, such that “the constitutional text, read alone, can give only incomplete answers as to the original understanding. The originalist inquiry, then, has usually been pushed back from purely textual arguments to arguments based on evidence from the Constitution’s enactment and post-enactment history.”³⁵⁹

It follows, as Caleb Nelson explains, that when the history fails to yield a single publicly shared understanding of constitutional meaning, the original objective-public-meaning textualist will usually be at a loss:

357. See, e.g., Bork, *Tempting*, supra note 7, at 17–18, 129, 353.

358. See, e.g., Nelson, *Interpretive Conventions*, supra note 324, at 557 (noting that “modern originalist scholarship often uses the actual understandings expressed by individual framers or ratifiers as evidence of the ‘original meaning’—the meaning that an objectively reasonable person, using words in the way that people used them at the time of the framing . . . , would have understood the Constitution to have”); Rakove, *Fidelity*, supra note 319, at 1594–95 (noting that it “is true in all the interesting cases” that original textual meaning is ambiguous, which forces originalists to turn to evidence of actual historical understanding of that meaning).

359. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 556 (1994) (emphasis omitted); see also, e.g., Barnett, *Ninth Amendment*, supra note 354, at 7 (arguing that, because language of Ninth Amendment is so open-ended, its original public meaning can be determined only by looking to original public understanding); Kesavan & Paulsen, supra note 6, at 1197–1204 (arguing that, for original, objective-public-meaning textualists, evidence of drafting history is not only relevant, but is often more helpful than dictionaries).

Most of the framers and ratifiers were smart people who were familiar with the art of reading and writing legal documents. If a significant number of them genuinely understood a constitutional provision in a certain way, they probably had some objective basis for their interpretation. When they were sharply divided about the best interpretation of some provision, one might therefore expect to find objectively reasonable arguments on both sides. Thus, in the very cases where divisions among the framers and ratifiers make the “original [understanding]” indeterminate, the “original meaning” is likely to be similarly indeterminate.³⁶⁰

As such, however useful this methodology might be in interpreting other provisions of the Constitution, it falters in interpreting the very provisions that are the primary target of originalism’s constraining promise.³⁶¹

CONCLUSION

The promise of originalism, however genuinely powerful the draw of its siren song, is ultimately a false one. In the cases in which the fear of judicial discretion is most acute, judges cannot render their decisions on the basis of the original public meaning of the Constitution for the simple reason that there never was such a meaning. Thus, whether they like it or not, judges are forced to look elsewhere in order to answer the most provocative questions of constitutional law. Originalism quite often cannot meaningfully constrain judicial discretion.

To be sure, although the most famous and most influential originalists emphatically make the promise that this Article has sought to discredit, not all originalists have joined them. As Keith Whittington notes, the recent generation of academic originalists place “less emphasis on the capacity of originalism to limit the discretion of the judge” than their forebears.³⁶² Whittington himself agrees that originalism is “unlikely to provide the type of restraints on judicial decision making favored by some of its advocates” and that it “cannot be expected to free judges from the exercise of contestable interpretive judgment.”³⁶³ Whittington thus cautions that “[o]ur expectations for an originalist jurisprudence must be lowered so that it can be evaluated more realistically and advocated more persuasively.”³⁶⁴

360. Nelson, *Interpretive Conventions*, *supra* note 324, at 557 (footnote omitted).

361. Nelson further explains that, since the Framers did not agree on a shared set of interpretive conventions, it is impossible to say that those provisions that lacked a shared public meaning and were textually ambiguous nonetheless had a single original meaning that naturally emerged from the application of universally accepted interpretive rules. See *id.* at 560–78.

362. Whittington, *New Originalism*, *supra* note 1, at 608; see also John Harrison, *Forms of Originalism and the Study of History*, 26 *Harv. J.L. & Pub. Pol’y* 83 (2003).

363. Whittington, *Constitutional Interpretation*, *supra* note 274, at 4.

364. *Id.*

Indeed, originalists have long acknowledged the inherent subjectivity in the second prong of the originalist endeavor: applying the original public meaning to a contemporary problem. Even Judge Bork has conceded that “two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results.”³⁶⁵ That is especially true when the original meaning is articulated at a high level of generality.³⁶⁶ Most originalists agree that judges should state the principle reflected in the constitutional provision at the level of generality on which the provision was originally understood to operate—itsself an aspect of its original meaning.³⁶⁷ Of course, the higher the level of generality, the more indeterminate the second stage of the originalist inquiry will be, and thus the less capable originalism will be of fulfilling its promise to constrain judicial discretion.³⁶⁸

365. Bork, *Tempting*, supra note 7, at 163.

366. See Barnett, *Trumping Precedent*, supra note 8, at 264, 268–69.

367. See, e.g., Bork, *Tempting*, supra note 7, at 149–50; Whittington, *Constitutional Interpretation*, supra note 274, at 187; McConnell, *Importance of Humility*, supra note 271, at 1280. Objective-public-meaning textualists seek the level on which the provision is objectively read to operate. See Barnett, *An Originalism*, supra note 6, at 644–45.

368. See, e.g., Berman, supra note 251, at 8 & n.26 (noting that reading original meaning at high level of generality “sacrifice[s] originalism’s pretensions to serious historical inquiry and its promise to impose meaningful constraints on judges”); Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427, 432 n.25 (1997) (making similar observation). To some liberal- or libertarian-leaning originalists, this is a good thing. See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 *U. Cin. L. Rev.* 7, 23 (2006) (arguing that flexibility that comes from higher levels of generality “is not a bug” of originalism; rather, “[i]t’s a feature”). Higher levels of generality allow the Court to keep up with changing social mores and they justify—rather than reject—the Court’s major rights decisions of the past half century. See, e.g., Balkin, *Constitutional Redemption*, supra note 253 (manuscript at 26) (claiming that Fourteenth Amendment’s broad language legitimizes results in major cases); Perry, *Legitimacy*, supra note 278, at 710 (arguing that “modern constitutional decisions found most objectionable by Robert Bork and many others are, in the main, consistent with an originalist approach to constitutional adjudication”). See generally Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 *Const. Comment.* (forthcoming 2007) (manuscript at 5, on file with the *Columbia Law Review*) (noting that, at the second stage of the inquiry, originalists “occasionally smuggle doctrine, consequences, prudence, construction with a ‘liberty presumption,’ practice, and political morality through the back door to keep originalism palatable or to translate its historical commands for our time”). But see Calabresi, supra note 277, at 1091–95 (criticizing high-level-of-generality theories of originalism for failing to address problem of judicial subjectivity).

Some scholars have taken the level of generality concept to its limit, concluding that the original meaning of some constitutional provisions was entirely nonoriginalist: The provisions were originally understood to delegate power to the judiciary to establish (rather than just apply) their core principles. See Balkin, *Constitutional Redemption*, supra note 253 (manuscript at 33) (Section 1 of Fourteenth Amendment); Rosenthal, supra note 6, *passim* (Due Process Clauses); Whittington, *New Originalism*, supra note 1, at 611 (noting possibility “that the founders merely meant to delegate discretion to future decisionmakers to act on a given subject matter with very little guidance as to how that discretion should be used or on the substantive content of the principles on which those decisionmakers should act”). In these instances, the “abstract text may be subject to judicial manipulation, but its meaning is historically determined.” *Id.* That is to say, there

It is therefore a misconception of originalism that it necessarily promises (or that to succeed it must be able to produce) a conclusive answer to every constitutional question, wholly untainted by judicial discretion.³⁶⁹ No constitutional theory could be held to such a standard, and no sophisticated theorist would be arrogant enough to make such a promise.

Indeed, some unconventional originalists are even willing to acknowledge substantial indeterminacy in the first stage of the originalist inquiry—identifying the original meaning of the constitutional provision. Michael Perry, for instance, has conceded that “often there will be available a range of historically plausible readings—some broader, some narrower—of the . . . original meaning” such that “[o]riginalist judges can, and often will, disagree among themselves as to the original meaning of a constitutional provision.”³⁷⁰

Gary Lawson has helpfully suggested that, in order to evaluate the efficacy of originalism, we need to ascertain the “standard of proof” to which we should hold applications of the theory.³⁷¹ If we demand one hundred percent certainty about the original meaning, then originalism can never deliver. If, on the other hand, we are satisfied with applying whichever meaning seems most likely to be the original one, then originalism will virtually always be capable of resolving cases by reference to historical norms; “[t]here almost always will be a *best* answer, even if that answer does not command a high degree of confidence.”³⁷² To the extent that originalists have confronted this issue, they have tended toward the middle ground that originalism need only be able to determine that a particular meaning is more likely than not the original public one.³⁷³ Other originalists temper the threat of indeterminacy by arguing that, whatever the standard of proof, originalism need not be able to identify the one “true” meaning in order to constrain judges, because even if it cannot determine which meaning is correct, it can still helpfully narrow the universe of potential meanings by ruling out meanings that were demonstrably not the original understanding of the people at the time of ratification.³⁷⁴

These arguments reflect a sophisticated understanding of some of the limits of originalism. But they are still premised on the notion that there was a true original meaning of the Constitution. Why would we

was a shared original meaning, it was just a nonoriginalist one; the text was collectively understood to delegate to the judiciary the authority to determine its core principles. This argument, of course, differs from the argument that I am making here.

369. See, e.g., Lawson, Delegation, *supra* note 296, at 340 n.47.

370. Perry, Legitimacy, *supra* note 278, at 715.

371. See Gary Lawson, Legal Indeterminacy: Its Cause and Cure, 19 Harv. J.L. & Pub. Pol’y 411, 418 (1995).

372. *Id.* at 421.

373. See, e.g., Barnett, An Originalism, *supra* note 6, at 649–50.

374. See, e.g., Lash, *supra* note 276, at 339–40; Thomas B. McAfee, Originalism and Indeterminacy, 19 Harv. J.L. & Pub. Pol’y 429, 431 (1995).

care about the standard of proof necessary to establish a “fact” that never existed? There is no point in demanding any particular degree of persuasiveness in our ability to fool ourselves. And while it is certainly true that originalism can identify some meanings that are demonstrably not rooted in history, there is little logic in labeling those meanings as “wrong” answers if we understand that the question is pointless and has no “right” answer.³⁷⁵

What is more, while these modern originalists have shown a great deal of humility in their thought, they can go only so far in making concessions to reality before originalism ceases to have any meaning. If originalists really mean to concede that their theory is profoundly limited and chronically indeterminate—such that most of the hard questions of constitutional interpretation will have to be resolved by reference to values other than those demonstrably memorialized in the text—then they have reneged on its promise.³⁷⁶ That is certainly something that the standard bearers of the originalist movement are unwilling to do. Judge Bork, for instance, insists that it will only be on “rare occasions” that a judge “cannot discover what a constitutional provision means.”³⁷⁷ Justice Scalia similarly decrees that, for “the vast majority of questions,” judges can indeed “find the correct historical answer.”³⁷⁸ Even moderate originalists generally believe that the “Constitution is not radically indeterminate.”³⁷⁹

Indeed, if they believed otherwise, they wouldn’t be originalists. To walk too far down the path of qualifying the promise of originalism is to abandon the entire *premise* of originalism—that the Constitution “has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”³⁸⁰ The ability to “provide reasonably determinable answers” is “a *sine qua non* for originalism.”³⁸¹

375. As Alexander Bickel once said, “[n]o answer is what the wrong question begets.” Alexander M. Bickel, *The Least Dangerous Branch* 103 (1962).

376. See Rebecca L. Brown, *History for the Non-Originalist*, 26 *Harv. J.L. & Pub. Pol’y* 69, 73–74 (2003) (noting that notion of originalism constraining judicial discretion “obviously depends on some objective claim to truth in historical inquiry”).

377. Bork, *Tempting*, *supra* note 7, at 165.

378. Scalia, *Lesser Evil*, *supra* note 10, at 863; see also Scalia, *Common-Law Courts*, *supra* note 6, at 45 (arguing that original meaning is usually “easy to discern and simple to apply”).

379. Whittington, *Constitutional Interpretation*, *supra* note 274, at 207; see also *id.* at 162; Barnett, *An Originalism*, *supra* note 6, at 649–50 (arguing that recent scholarship has determined original meaning of even open-ended and obscure constitutional provisions).

380. Scalia, *Lesser Evil*, *supra* note 10, at 854.

381. Paul Horwitz, *Book Note, The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 *Alb. L. Rev.* 459, 476 (1998); see also Rakove, *Fidelity*, *supra* note 319, at 1588 (“Originalism makes little sense if we lack confidence in our capacity to produce reasonably authoritative conclusions about the original meanings, intentions, and understandings underlying particular provisions of the Constitution.”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781, 793 (1983) (explaining that originalism “requires both definite answers (because it is part of a legal system in which judgment is awarded to

In fact, many originalists believe that if a judge cannot ascertain the original meaning of a constitutional provision, she should treat it like an “ink blot” on the Constitution, in Judge Bork’s famous phrase. That is to say, if she cannot tell what the original framing supermajority decided, she must respect the will of the current majority that enacted the statute under review, rather than allow her own (unelected) will to undermine democracy.³⁸² But if the original meaning of the most litigated provisions of the Constitution is consistently unknowable (indeed, nonexistent), then originalism is not a theory of judicial review at all; it is an abdication of judicial review. Judges cannot serve as an effective bulwark of individual liberty against the tyranny of the majority if they routinely decline to enforce virtually all constitutional rights. It is implicit in the mandate that “[i]t is emphatically the province *and duty* of the judicial department to say what the law is”³⁸³ that the answer cannot routinely be “we don’t know.”³⁸⁴

one side or the other) and clear answers (because it seeks to constrain judges and thereby to avoid judicial tyranny”).

382. See, e.g., Bork, *Tempting*, supra note 7, at 166–67 (“If the meaning of the Constitution is unknowable . . . judges must stand aside and let current democratic majorities rule . . .”); Whittington, *Constitutional Interpretation*, supra note 274, at 5–14, 204–12; Michael W. McConnell, *On Reading the Constitution*, 73 *Cornell L. Rev.* 359, 361 (1987) (arguing that where judge “cannot *tell* whether a challenged governmental action is forbidden by the Constitution, then he is free to leave the determination of the legal rule to the elected authorities”); William J. Michael, *When Originalism Fails*, 25 *Whittier L. Rev.* 497, 506–07, 515 (2004) (“[W]hen originalism fails, there is no reason to have unelected, unaccountable judges, who are very much removed from the people, decide important social issues.”); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 *Const. Comment.* 289, 296 n.18 (2005) (arguing that “indeterminacy implies broader *political*, democratic discretion, not broader *judicial* discretion”).

383. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

384. To be sure, there may be some instances in which an honest originalist judge would be capable of deciding a case even under an ambiguous and controversial constitutional provision. Under the FMA, for instance, a state law granting “marriage” rights to same-sex couples would clearly be unconstitutional. But that is not because the FMA has a single original meaning; rather, it is because the same result is commanded under any of the competing understandings of its possible meaning. Whether one interprets the FMA to reserve only the word “marriage” to opposite-sex couples, or instead to reserve the entire institution of marriage to opposite-sex couples, it is violated by a statute that allows same-sex couples to “marry.” Thus, an originalist judge could feel comfortable declaring that a same-sex marriage statute violates the original meaning of the FMA, even though she could not articulate just what that original meaning is. The same is surely true of paradigm cases under other vague rights-granting clauses. Under any plausible candidate for the original meaning of the Equal Protection Clause, it would surely be unconstitutional to fine African Americans for being black; under any plausible candidate for the original meaning of the Speech and Press Clauses, it would surely be unconstitutional to impose a prior restraint on the publication of anti-government newspaper editorials; et cetera.

But those are the easiest of the easy cases. If originalists are correct that “constitutional construction”—the process of giving content to ambiguous constitutional provisions that lack a clear original meaning—generally must be carried out by democratic institutions, not judges, see, e.g., Whittington, *Constitutional Interpretation*,

Originalism thus depends upon the premise that the original meaning of the Constitution is generally knowable, which in turn depends upon the premise that there was indeed an original meaning of the Constitution in the first place—that, in Justice Scalia’s words, there is a “correct historical answer.”³⁸⁵ That is the premise upon which originalism bases its promise generally to be able to prevent judges from undermining democratic government. Yet the premise is flawed, and thus the promise is false.

To be fair, I offer no alternative to originalism here. I confess to being drawn to notions of “soft originalism”—originalism at a high level of generality, tempered with precedent and common law decisionmaking. But I freely admit that any such jurisprudence offers dubious constraints on judicial will. Indeed, I have yet to find a sensible constitutional theory that can do what I am accusing originalism of failing to do—perfectly constrain the will of judges. In this respect, I am certainly taking the easy way out. But sometimes it doesn’t take a theory to beat a theory³⁸⁶; some theories beat themselves. Or more accurately in these circumstances, some theories are beaten by reality. Perhaps there is a workable jurisprudence that would eliminate undesirable judicial subjec-

supra note 274, at 204–08, and if I am correct that virtually all of the most litigated constitutional provisions lack an original meaning, then judges are limited to acting only in this lilliputian category of simple cases. *Marbury*, however, seems to presuppose that judges have a duty to determine and enforce the meaning of the Constitution in most cases—not just the easiest ones. (Indeed, the meaning of the constitutional provision at issue in *Marbury* itself was anything but clear. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 30–33.) Cf. Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 Minn. L. Rev. 612, 624 (2006) (arguing that “the ratification debates suggest something of a consensus (at least between warring Federalist and Anti-Federalist camps) that case-by-case adjudication in the courts would play a central role in assigning fixed constitutional meaning when the text of the Constitution was ambiguous”). And originalism, as I have noted, seems to presuppose the existence of a discoverable original meaning of virtually every constitutional provision.

385. Scalia, *Lesser Evil*, supra note 10, at 863. Even those originalists who justify originalism on grounds other than its potential to overcome judicial activism are dependent on this premise. Whether originalism is defended on the ground that it makes pragmatic sense because principles that initially enjoyed broad supermajority support are likely to produce net benefits, see John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw. U. L. Rev. 383, 385–89 (2007), or on the ground that the Constitution is a social contract, and the bargain actually struck by the people can only be enforced by giving the contract the meaning that the people who agreed to it understood it to have, see, e.g., Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119, 1121–22 (1998), or on the ground that the Constitution is law, and our legal system presupposes that all written sources of law will be interpreted according to their original meaning, see, e.g., Balkin, *Constitutional Redemption*, supra note 253 (manuscript at 3–7), it is necessarily premised on the notion that there exists a knowable original meaning.

386. But see Barnett, *An Originalism*, supra note 6, at 617 (“It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative.”); Scalia, *Lesser Evil*, supra note 10, at 855 (“You can’t beat somebody with nobody.”).

tivity, and perhaps there is not. But the answer does not lie in originalism. In reality, judges often cannot do the only thing that originalists believe that, in theory, they are justified in doing—resolve constitutional disputes on the basis of the original public meaning of the constitutional text.³⁸⁷

Returning to the Federal Marriage Amendment, Judge Bork, the great originalist, dismissed liberals' concerns about its textual ambiguity by opining that if "there were any ambiguities, courts that are inclined toward civil unions would resolve them in that direction."³⁸⁸ Eugene Volokh wisely replied: "I actually agree with Judge Bork that courts that are inclined toward civil unions would resolve ambiguities in favor of validating legislatively enacted civil unions. But my question is: What about courts that are inclined against civil unions?"³⁸⁹ Despite the promise of originalism, the potential for judicial subjectivity persists.

387. This does not mean, of course, that historical inquiry is pointless and evidence of original meanings is irrelevant. "Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation." Farber, *supra* note 17, at 1086. Even nonoriginalists care about history and seek to learn as much as they can about original meaning. See James E. Fleming, *Original Meaning Without Originalism*, 85 *Geo. L.J.* 1849, 1849 (1997). But to the nonoriginalist, historical indeterminacy is not debilitating, because historical meaning is not dispositive. See Brown, *supra* note 376, at 79.

388. Cooperman, *Little Consensus*, *supra* note 32.

389. Posting of Eugene Volokh to *The Volokh Conspiracy*, http://volokh.com/2004_02_15_volokh_archive.html (Feb. 17, 2004, 16:16 EST) (emphasis omitted) (on file with the *Columbia Law Review*).