Faulty Federalism

Constitutional Misconceptions in the Newly Emerging Arguments Against Marriage Equality

By David H. Gans

Introduction

With the Supreme Court poised to consider the review of marriage equality rulings by lower courts around the country, opponents of marriage equality have radically changed the thrust of their defense of state laws that deny same-sex couples the right to marry. This change in strategy comes in the wake of a remarkable string of rulings holding that the Constitution requires marriage equality. Since the Supreme Court's 2013 ruling in *United States v. Windsor*,[1] every federal court to consider the issue – with one single exception – has applied the Fourteenth Amendment to strike down state bans on same-sex marriage, recognizing marriage equality as a fundamental constitutional principle.[2] Both in red states and blue, judges have concluded that the Fourteenth Amendment does not permit states to treat gay men and lesbians as second class persons, and that there is simply no compelling or even rational reason for denying same-sex couples the right to marry.[3] As a result of their resounding failure, defenders of discriminatory marriage laws are now pressing a federalism/democracy argument, claiming that the people of a state have the authority to decide whether to place a badge of inferiority on same-sex couples and deny them the right to marry. As documented in this Issue Brief, this argument, which flies in the face of the Constitution's text and history and depends on a tortured reading of Justice Kennedy's opinion in *Schuette v. Coalition to Defend Affirmative Action*,[4] is no more viable than the arguments previously being pressed.

In the Supreme Court's most recent encounter with marriage equality, in 2013, defenders of discriminatory marriage laws claimed that marriage must be limited to different-sex couples in order to ensure "responsible procreation." That argument – which treats marriage as a carrot to discourage irresponsible heterosexual behavior rather than as part of

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[1] 133 S. Ct. 2675 (2013). In a companion case, *Hollingsworth v. Perry*, the Court declined to consider the constitutionality of California's same-sex marriage ban approved by the voters, concluding that proponents of the measure lacked standing to defend it on appeal. 133 S. Ct. 1521 (2013).

[2] *Marriage Rulings in the Courts*, FREEDOMTOMARRY.ORG, http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last visited Sept. 30, 2014).

[3] *See, e.g., Kitchen v. Herbert*, No. 13-4178, – F.3d –, 2014 WL 2868044 (10th Cir. June 25, 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, – F.3d –, 2014 WL 3537847 (10th Cir. July 18, 2014); *Bostic v. Schaefer*, No. 14-1167, – F.3d –, 2014 WL 3702493 (4th Cir. July 28, 2014); *Baskin v. Bogan*, No. 14-2386, – F.3d –, 2014 WL 4359059 (7th Cir. Sept. 4, 2014).

[4] 134 S. Ct. 1623 (2014).

the blessings of liberty – fell flat.[5] While the Justices did not reach the question of whether the Fourteenth Amendment forbids state prohibitions on same-sex marriage, questioning during oral argument exposed the glaring defects in the "responsible procreation" argument, and the argument has been consistently rejected by lower court judges post-*Windsor*. States and their allies are, of course, continuing to make the "responsible procreation" argument. But it is increasingly taking a back seat to a set of far-reaching arguments for denying same-sex couples equal rights that is rooted in misguided notions of federalism and erroneous principles of democratic government.

In the cases now pending before the Supreme Court, defenders of discriminatory marriage laws argue that courts have no business interfering with how state legislatures, through a statute, or the voters of a state, through a state constitutional amendment or other ballot measure, choose to define marriage. For example, in its petition for a writ of *certiorari* in *Herbert v. Kitchen*, Utah argues that the Tenth Circuit's ruling striking down a Utah state constitutional ban on same-sex marriage improperly substituted its judgment for the people of the State of Utah, "weaken[ed] the democratic will and resolve of the People," and established the principle that "citizens seeking social change should use the courts, rather than the democratic process, to achieve it."[6] Indeed, in Utah's view, by virtue of the ruling striking down Utah's state constitutional provision, "millions of [its] voters are being disenfranchised of their fundamental right to retain the definition of marriage that has existed since before the People ratified the United States Constitution."[7] A "fundamental right" to retain a definition? That would certainly be a first. In fact, the Supreme Court has recognized a constitutional right to marry; it has never hinted at a right of the majority to deny marriage rights to a disfavored group of individuals.

But Utah is hardly alone in making this appeal to the political process. Oklahoma's petition for a writ of *certiorari* in *Smith v. Bishop* makes a similar argument, contending that the Tenth Circuit's ruling striking down a similar state constitutional prohibition "thwart[ed] the People's right to decide this important question of social policy for themselves," "intruded deeply into a matter of unquestioned state sovereignty," and "negated the exercise of th[e] fundamental right [of political participation] by more than one million Oklahomans and millions of voters in other States."[8] These claims disrespect the Supremacy Clause of the United States Constitution and the role of the courts in enforcing the Constitution's commands, treating a judge's duty to ensure that states follow the Constitution as akin to an act of voter suppression.

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[5] *See* Jeffrey Rosen, *The Laughable Argument Against Gay Marriage*, THE NEW REPUBLIC (Mar. 26, 2013), *available at* http://www.newrepublic.com/article/112778/supreme-court-gay-marriage-case-2013-laughable-argument).

[6] Petition for a Writ of Certiorari at 28, 32, *Herbert v. Kitchen*, No. 14-124 (U.S. Aug. 5, 2014).

[7] *Id.* at 31.

[8] Petition for a Writ of Certiorari at 17, 18, *Smith v. Bishop*, No. 14-136 (U.S. Aug. 6, 2014).

Similar arguments lead off the petitions for a writ of *certiorari* filed in *Schaefer v. Bostic* and *McQuigg v. Bostic*,[9] seeking review of the Fourth Circuit's ruling striking down a Virginia state constitutional amendment and state laws forbidding same-sex marriage, and *Walker v. Wolf*,[10] seeking review of the Seventh Circuit's recent ruling striking down similar enactments. The central issue, the *Schaefer* petition's opening paragraph argues, is "whether the issue" of marriage equality "will be decided by state citizens or by judges."[11] That petition urges the Supreme Court to hear the case and reverse, claiming that the Fourth Circuit's holding that the right to marry protects all persons regardless of sexual orientation "'demean[s] . . . the democratic process'" and "reduce[s] [freedom]," claiming that "it is the responsibility of voters – not the courts – to decide the issue."[12] The *McQuigg* petition makes nearly identical arguments, urging the Court to "decid[e] whether the People throughout the various States are free to affirm their chosen marriage policy," and to vindicate "a vital issue of democratic self-governance."[13] The *Walker* petition is much the same, scolding the Seventh Circuit for "void[ing] the policy preference of more than a million Wisconsin voters and insert[ing] the policy preferences of three judges."[14]

Indeed, these arguments based on erroneous notions of federalism and democracy are very quickly becoming the leading arguments pressed by opponents of marriage equality. Another example comes from oral arguments recently held before the Sixth Circuit to consider challenges to bans on same-sex marriage enacted by Ohio, Michigan, Tennessee, and Kentucky. In his argument defending marriage discrimination, Eric Murphy, Ohio's State Solicitor, contended that the "fundamental question is not whether Ohio should recognize same-sex marriage, but who should make that important decision of public policy on behalf of the state. In rejecting Ohio voters' decision on this public policy issue, the district court ignored its place within the judicial hierarchy and our constitutional democracy."[15] During oral argument in the companion case from Michigan, Sixth Circuit Judge Deborah Cook appeared sympathetic to this argument, suggesting that striking down that state's law would be "disparag[ing] the voters – the votes of citizens . . . ."[16]

To date, only one federal judge has been persuaded by these gross constitutional misconceptions. Last month, a federal district court in Louisiana – the only federal court to uphold a same-sex marriage ban since *Windsor* – held that to strike down the same-sex marriage ban contained in the Louisiana Constitution and state laws would "demean the

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[9] No. 14-225 (U.S August 22, 2014) [hereinafter *Schaefer* Petition]; No. 14-251 (U.S. Aug. 29, 2014) [hereinafter *McQuigg* Petition].

[10] No. 14-278 (U.S. Sept. 9, 2014) [hereinafter *Walker* Petition].

[11] *Schaefer* Petition at 4.

[12] *Id.* at 4 (quoting *Schuette*, 134 S. Ct. at 1637); *id.* at 26.

[13] *McQuigg* Petition at 2, 13.

[14] *Walker* Petition at 6.

[15] Oral Argument at 0:53, *Obergefell v. Himes*, 14-3057 (6th Cir. Aug. 6, 2014), *available at* http://player.piksel.com/p/w70z36r9.

[16] Oral Argument at 26:28, *DeBoer v. Snyder*, 14-1341 (6th Cir. Aug. 6, 2014), *available at* http://player.piksel.com/p/w70z36r9.

democratic process," concluding that the ban was consistent with the constitutional guarantee of equal protection because there was a legitimate state interest in "addressing the meaning of marriage through the democratic process."[17] This is circular reasoning masquerading as constitutional interpretation.

These arguments, and the District Court's ruling in Louisiana, are based on a fundamentally flawed reading of the Constitution and of last Term's decision in *Schuette v. Coalition to Defend Affirmative Action*, which upheld a state constitutional amendment adopted by the voters in Michigan that prohibited the use of race in university admissions in the state's public universities. *Schuette* held that the Fourteenth Amendment did not forbid the people of Michigan from amending the state Constitution, holding that, because no fundamental right or invidious discrimination was involved, the people had the power to make the choice whether race was or was not considered in the admissions process at state schools. Rejecting the dissent's argument that the matter had to be left to the university's governing board, the majority held that, because no individual rights were being infringed, the state's voters could properly amend their State Constitution "as a basic exercise of their democratic power."[18] In sum, the issue and holding in *Schuette* were narrow ones, upholding a state constitutional amendment on a subject – the use of race as one factor among many in choosing a diverse student body – that has long been held to be a policy matter within the legislative power of state governments.[19]

Justice Kennedy's opinion in *Schuette* made clear that the result would be different were voters to trample on the "right of the individual not to be injured by the unlawful exercise of governmental power" or inflict "hurt or injury . . . on racial minorities by the encouragement or command of laws or other state action."[20] Not a single line in *Schuette* supports the proposition that states could put constitutional protections for fundamental rights and equality under the law up to a vote. But that is the argument that opponents of marriage equality are pressing now to justify discriminatory marriage laws that treat gay men and lesbians as second class persons, unworthy of having their loving relationships recognized.

As this Issue Brief demonstrates, these arguments turn our Constitution on its head, forsaking first principles of constitutional supremacy, federalism, and the role of courts in our constitutional system. At the Founding and in the wake of the Civil War, the Constitution's Framers designed our foundational charter to ensure that states respected fundamental constitutional principles. The Constitution's system of federalism gives states substantial latitude to formulate their own policies and serve as laboratories of democracy. But the Constitution does not permit states to trample on the fundamental rights and equality under

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[17] *Robicheaux v. Caldwell*, Nos. 13-5090, 14-97, 14-327, 2014 WL 4347099, at *1, 4 (E.D. La. Sept. 3, 2014).

[18] *Schuette*, 134 S. Ct. at 1636 (plurality opinion of Kennedy, J.); *id.* at 1646-47 (Scalia, J., concurring); *id.* at 1649-51 (Breyer, J., concurring).

[19] *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

[20] *Schuette*, 134 S. Ct. at 1636, 1637.

the law that the Constitution grants to all persons. Constitutional principles that safeguard liberty and guarantee equality for all are not subject to a vote.

Opponents of marriage equality have asked the Supreme Court to carve out an exception to fundamental principles of constitutional supremacy and equality under the law for all persons, claiming that courts have no authority to strike down discriminatory marriage laws that treat gay men and lesbians as second class persons, and that it should be up to the voters to decide whether to place a badge of inferiority on same-sex couples' relationships, family life, and children. This ignores the very purpose of our foundational charter's protection of rights: "constitutions are framed for the purpose of preventing the people themselves from interfering with what on the whole it is thought fit should be sacred."[21] As the Constitution's text and history detailed below demonstrate, federal courts follow their essential and intended role when they ensure that states respect constitutional rights and prevent the people of a state from harming disfavored minorities.

I. Constitutional Supremacy and Federalism at the Founding

The Constitution was framed against the backdrop of the failure of the Articles of Confederation, which established a "firm league of friendship" among thirteen sovereign, free, and independent states.[22] The Articles created a single branch of the federal government – "the United States, in Congress assembled"[23] – which possessed some powers, but no means of enforcing the Articles' limits on the states, the acts of Congress, or federal treaties. Without any basis for enforcing federal supremacy, state governments, time and again, flouted federal rights and duties. As Madison described it, the "vices" of government under the Articles were many: "[f]ailure of the States to comply with the Constitutional requisitions"; "[e]ncroachments by the States on federal authority"; "[v]iolations of the laws of nations and of treaties"; "[t]respasses of the States on the rights of each other"; "injustice of the laws of States."[24] As Madison explained to Thomas Jefferson, "[t]he mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most ste[a]dfast friends of Republicanism . . . . A reform therefore which does not make provision for private rights, must be materially defective."[25]

The actions of the state governments under the Articles illustrated to the Framers the dangers of factions. As Madison explained in Federalist 10, "our governments are too unstable," the "public good is disregarded in the conflicts of rival parties," and, most troubling,

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[21] CONG. GLOBE, 41st Cong., 2nd Sess. 94 (1869).
[22] ARTICLES OF CONFEDERATION OF 1781, art. III.
[23] *Id.*, art. II.
[24] James Madison, Vices of the Political System of the United States (Apr. 1787), *in* 9 THE PAPERS OF JAMES MADISON 345, 348, 349, 354 (Robert A. Rutland & William M. E. Rachal eds., 1975).
[25] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 5 THE WRITINGS OF JAMES MADISON 27 (Gaillard Hunt. ed., 1904).

"measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[26] In the states, Madison observed, "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."[27] What Madison had seen in the states called "into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."[28]

Thus, when the Constitution was written, a check was deemed necessary to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression." [29] Fearful that legislative majorities in the states would trample on the rights of "the minor party in the community,"[30] the Constitution went to great lengths to check abuses of power by state authority. To that end, Article I, Section 10 of the Constitution forbids states from enacting bills of attainder or ex post facto laws, or impairing the obligations of contracts in order "to prevent state legislatures from exploiting citizens of sister states and foreigners" and "to prevent states lawmakers from ganging up on a minority of their own citizens – in-state creditors, to be specific."[31] Here, "the federal Constitution would in some cases insinuate itself between a state and its own citizens."[32] As constitutional scholar Akhil Amar has written, "[t]he[se] self executing restrictions . . . were considered among the most important provisions of the entire Constitution, and federal courts were to have a special role in policing these restrictions."[33]

Even more important than these specific protections, the Supremacy Clause declared the Constitution to be the "supreme Law of the Land," rendering "any Thing in the Constitution or Laws of any State to the Contrary" null and void.[34] Simply put, the people of a state could not choose to adopt a state Constitution, or state laws, that transgressed the federal Constitution, federal laws, or treaties.[35] Without a supreme federal power overseeing the

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[26] THE FEDERALIST NO. 10, at 45 (Clinton Rossiter ed. 1961).

[27] *Id.* at 48.

[28] Madison, Vices of the Political System of the United States, *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 24, at 354.

[29] THE FEDERALIST NO. 10, at 49 (James Madison).

[30] THE FEDERALIST NO. 78, at 437 (Alexander Hamilton).

[31] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 123 (2005).

[32] *Id.* at 124.

[33] Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 247 n.134 (1985).

[34] U.S. CONST. art. VI, para. 2.

[35] In short, there were some things that the people could not demand of their elected representatives. As Madison later made the point, "to say that the people have a right to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions . . . is not true. Suppose they instruct a representative, by his vote, to violate the constitution; is he at liberty to obey such instructions?" 1 ANNALS OF CONG. 766 (1789).

states, James Madison argued, our system of government would be a "monster, in which the head was under the direction of the members."[36]

It was no accident that this declaration of the Constitution's supremacy was so broadly worded. The Supremacy Clause, as initially introduced by Anti-Federalist Luther Martin, was anemic. It did not declare that the Constitution was the supreme law of the land and would have allowed the people of the state to adopt a State Constitution that conflicted with the Constitution.[37] The Framers recognized that such a system of government would have "inver[ted] . . . the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts,"[38] and they decisively rejected it. In its final form, the text's "implication was continental: one Constitution, one land, one People."[39]

Among the great issues facing the delegates to the Constitutional Convention was how to ensure the Constitution's supremacy not merely on paper but in fact. The Framers recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union and others with the principles of good government . . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them."[40] The Framers' answer was judicial review: courts would ensure that states respected the Constitution's status as paramount law, superior in force to state constitutions or legislative acts, no matter whether those provisions were adopted by state legislators or voters.

To check abuses by state governments, the Framers gave federal courts the duty to enforce the Constitution's commands and maintain the rule of law in justiciable cases before them. The Supremacy Clause, which made the Constitution the "supreme Law of the Land," together with Article III of the Constitution, which gave the federal courts the power to enforce the principle of constitutional supremacy in all cases "arising under this Constitution," ensured that federal courts would serve as a constitutional check on state governments.[41] As John Marshall – soon to become one of our Nation's greatest Chief Justices – observed in the ratification debates in Virginia, "[t]o what quarter will you look for protection from an infringement on the constitution, if you will not give the power the judiciary? There is no other

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[36] THE FEDERALIST NO. 44, at 255.

[37] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1458 (1987) (noting that "when the supremacy clause was first introduced in Philadelphia . . . it pointedly failed to specify the supremacy of the federal Constitution over its state counterparts").

[38] THE FEDERALIST NO. 44, at 255 (James Madison).

[39] Amar, *Of Sovereignty and Federalism*, *supra* note 37, at 1458.

[40] THE FEDERALIST NO. 80, at 443-44 (Alexander Hamilton).

[41] U.S. CONST. art. III, § 2; *id.* at art. VI, para. 2.

body that can afford such a protection."[42] The Constitution's Framers concluded that judicial review by independent judges was essential to preserving freedom and preventing tyranny of the majority. As Seventh Circuit Judge Richard Posner aptly observed in that court's unanimous opinion striking down the Indiana and Wisconsin same-sex marriage bans, "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law."[43]

The Framers understood that constitutional "[l]imitations . . . can be preserved in practice no other way than through medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[44] "[C]ourts of justice" would function as "bulwarks of a limited Constitution," who would "guard the Constitution and the rights of individuals" from "designing men" who have a "tendency . . . to occasion dangerous innovations in the government, and serious oppression of the minor party in the community."[45] Alexander Hamilton's argument in Federalist 78 is the most famous, but hardly the only, defense of judicial review at the Founding. Numerous others made the point that the "Constitution might be violated with impunity, if there were no power in the general government to correct and counteract [unconstitutional state] laws. This great object can only be safely and completely obtained by the instrumentality of the federal judiciary."[46]

Over the course of the debates in Philadelphia, the Framers wrote these bedrock principles of constitutional supremacy, and the judiciary's role in enforcing it, into our foundational charter. As the Convention opened, Madison's preferred solution to constrain the acts of state government was to give Congress a veto over state legislation. As he explained to Thomas Jefferson, it was essential to "arm the federal head with a negative *in all cases whatsoever* on the local Legislatures . . . . The effects of this provision would be not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other; and even from oppressing the minority with themselves by paper money and other unrighteous measures which favor the interest of the majority."[47] But, at the Convention, the Framers rejected Madison's congressional veto in favor of judicial review as the constitutional check on abuses by state governments. As Gouverneur Morris put it, "[a] law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law."[48]

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[42] 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 554 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES].

[43] *Baskin*, 2014 WL 4359059, at *19.

[44] THE FEDERALIST NO. 78, at 434 (Alexander Hamilton).

[45] *Id.* at 437.

[46] 4 ELLIOT'S DEBATES at 157 (Davie); *see also id.* at 156 ("Without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened.").

[47] Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 2 THE WRITINGS OF JAMES MADISON 326-27 (Gaillard Hunt ed., 1901).

[48] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 28 (Max Farrand ed., 1911).

In 1789, during the debates over the Bill of Rights, the Founders reaffirmed the judiciary's critical role in ensuring constitutional supremacy and vindicating individual rights. As James Madison explained, "[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[49] Judicial review was the key to ensuring that the guarantees contained in the Bill of Rights were not "paper barriers . . . too weak to be worthy of attention," but rather that they established real, enforceable limits on the power of government that would operate "against the majority in favor of the minority."[50] In *Marbury v. Madison*,[51] of course, the Supreme Court recognized the power of the courts to strike down legislation that violates the Constitution in deciding cases before them, explaining that enforcing the Constitution's limitations on government power is "the very essence of judicial duty" and necessary to ensure the Constitution's status as "the fundamental and paramount law of the nation."[52] Any other result would have been unfaithful to the Constitution.

II. The Fourteenth Amendment's Limits on the States

The Bill of Rights did not contain any limits on state government, over Madison's objection that state governments should have to respect certain fundamental rights "because it is proper that every Government should be disarmed of powers which trench upon those particular rights."[53] Madison's proposal to add limits on states in the Bill of Rights – which he called "the most valuable amendment in the whole list"[54] of Amendments and prophetically his Fourteenth – narrowly failed in the Senate, but was vindicated three-quarters of a century later with the adoption of the Fourteenth Amendment. Jurists across the ideological spectrum agree that "[w]hen the Fourteenth Amendment was adopted, it can be said that the Constitution assumed its complete Madisonian form"[55] and that "[t]he passage of the Fourteenth Amendment fulfilled James Madison's vision of the structure of American federalism" and "banished the spectre of arbitrary state power, [Madison's] lone fear for our constitutional system."[56]

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[49] 1 ANNALS OF CONG. 457 (1789).
[50] *Id.* at 455, 454.
[51] 5 U.S. 137 (1803).
[52] *Id.* at 177-78.
[53] 1 ANNALS OF CONGRESS 458 (1789).
[54] *Id.* at 784.
[55] Michael McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy. L.A. L. Rev. 1159, 1167 (1992).
[56] William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 536, 537 (1986).

Added to the Constitution in the wake of a bloody Civil War fought over slavery, the Fourteenth Amendment requires states to respect the "privileges or immunities of citizens of the United States" and prohibits them from denying any person "equal protection of the laws" or "life, liberty, or property, without due process of law." These sweeping guarantees protect fundamental rights and outlaw discrimination against all persons, whether black or white, man or women, straight or gay, preventing legislative or popular majorities from oppressing disfavored individuals. The Fourteenth Amendment rejected the notion that protection of fundamental rights or equality under the law should vary from state to state. By requiring states to honor our deepest constitutional values, "[t]he advocates of the Fourteenth Amendment stood in the shoes of the advocates of the Constitution of 1787."[57] The Fourteenth Amendment ensured that one's right to liberty and equality were the same across the nation and did not depend on an individual's state of residence. Whether one lived in Maine, Massachusetts, or Mississippi, fundamental constitutional protections would be guaranteed by the text of the Constitution and not subject to popular vote.

Madison's proposed Amendment dealt with freedom of speech, equal rights of conscience, and the right to jury trial, but did not tackle the issue of slavery. While Madison had recognized the "case of Black slaves in Modern times" as an example of the "danger of oppression to the minority from unjust combinations of the majority,"[58] it fell to the Framers of the Fourteenth Amendment to rid the Constitution of the sin of slavery. It was the Framers of the Fourteenth Amendment who recognized that our Constitution's promise of liberty and equality was radically incomplete without constitutional limitations requiring states to respect fundamental rights and equality under the law for all persons.

To prevent abuse of power by state governments, the Fourteenth Amendment's Framers chose broad, universal language specifically intended to prohibit arbitrary and invidious discrimination and secure substantive liberty and equal rights for all. The breadth of the Fourteenth Amendment was a conscious choice, intended to sweep men and women of all different races and groups into its coverage. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality."[59] Indeed, the Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else,[60] preferring a universal guarantee of equality that secured equal rights to all persons. As written, the Fourteenth Amendment guarantees fundamental rights and equal rights under the law to all men and women, of any race, whether young or old, citizen or alien, gay or straight.

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[57] McConnell, *supra* note 55, at 1168.

[58] James Madison, Notes for the National Gazette Essays, *in* 14 THE PAPERS OF JAMES MADISON 157, 160 (Robert A. Rutland & Thomas A. Mason eds., 1983).

[59] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 260-261 n.* (1998).

[60] *See* BENJAMIN KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46, 50, 83 (1914).

The Fourteenth Amendment's Framers crafted these universal guarantees to bring the Constitution back in line with fundamental principles of liberty and equality as set forth in the Declaration of Independence, which had been betrayed and stunted by the institution of slavery. "[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."[61] After nearly a century in which the Constitution sanctioned racial slavery and permitted states to violate human beings' most fundamental rights, the Fourteenth Amendment codified our Nation's Founding promises of liberty and equality in the Constitution's text, establishing universal guarantees of liberty and equality. As the Amendment's Framers explained time and again, the Fourteenth Amendment's protection of the "privileges or immunities of citizens of the United States" and its guarantees of "equal protection of the law" and "due process of law" were "essentially declared in the Declaration of Independence,"[62] and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it."[63] "The Fourteenth Amendment," the Framers explained, would be "the gem of the Constitution . . . because it is the Declaration of Independence placed immutably and forever in our Constitution."[64]

The Framers of the Fourteenth Amendment acted from experience as well. They knew that states could not be trusted to respect fundamental liberties or basic notions of equality under the law for all persons. They had seen firsthand what Madison had so elegantly described in Federalist 10: rule by factions in the states was incompatible with our most fundamental constitutional protections of liberty and equality.

The Framers were keenly aware that Southern states had long been suppressing some of the most precious constitutional rights of both the slaves and their white allies. As Akhil Amar has observed, "[t]he structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill – not just the rights and freedoms of slaves, but of free men and women too."[65] Flagrant denials of freedom of speech were most often cited, but they were hardly the only violations of fundamental rights that the Fourteenth Amendment was designed to prevent. Slaves could not practice their chosen religion, possess arms, or own property. Fundamental aspects of personal liberty and bodily integrity were denied to the slaves on a daily basis. One of these rights was the right to marry, to raise children, and to form a family. As Senator Jacob Howard observed, "[h]e had not the right to

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[61] *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring).

[62] CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866); *see also id.* at 2459 ("I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or another, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect . . . .").

[63] *Id.* at 2539.

[64] CINCINNATI COM., Aug. 9, 1866, at p.2, col.3.

[65] AMAR, THE BILL OF RIGHTS, *supra* note 59, at 160.

become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend."[66]

Massive violations of liberty and equality continued in the aftermath of the Civil War as newly formed Southern state governments enacted discriminatory Black Codes, which sought to deny African Americans equal rights under the law and to reduce them to a subordinate status. White Unionists, too, needed the equal protection of the laws to ensure that Southern state governments respected their fundamental rights. "[W]hite men," the Framers found, "have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . ."[67] Looking elsewhere in the nation, the Framers of the Fourteenth Amendment saw rampant discrimination against Chinese immigrants, who faced pervasive prejudice and discrimination in the western United States.[68]

The Framers' solution to this sorry state of affairs was to change our Constitution's federal system to secure "the civil rights and privileges of all citizens in all parts of the republic."[69] The Fourteenth Amendment's sweeping guarantees would "keep the States within their orbits" and "keep[] whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country,"[70] while still "leaving to the States as large a scope of independent action as may be consistent with the safety of the Republic and the rights of the citizens."[71]

To ensure the Fourteenth Amendment's status as "supreme Law of the Land," judicial review was necessary. The Fourteenth Amendment's Framers, like their counterparts at the Founding, viewed access to the federal courts as essential to enforcing the Constitution's new guarantees of liberty and equality, recognizing that "the greatest safeguard of liberty and of private rights" is to be found in the "fundamental law that secures those private rights, administered by an independent and fearless judiciary[.]"[72] Not surprisingly, the Framers of the Fourteenth Amendment recognized the right to sue in a court of law for redress of grievances as a fundamental right in the Civil Rights Act of 1866,[73] and enacted Section 1983, to this day one of the most important federal statutes ensuring that individuals have their day in court when they believe that state governments have violated their federal rights. As the Reconstruction Framers explained in creating Section 1983's universal guarantee of access to

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[66] CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).
[67] *Id.* at 1263.
[68] *See* Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1369 n.12, 1368-70 (2007).
[69] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xxi (1866).
[70] CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).
[71] CONG. GLOBE, 41st Cong., 2nd Sess. 3609 (1870).
[72] CONG. GLOBE, 41st Cong., 2nd Sess. 94 (1869).
[73] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (listing "the right to enforce rights in the courts" as one of the "great fundamental rights"); *id.* at 1064 (discussing the "right to prosecute a suit . . . either for the vindication of a right or the redress of a wrong"); *id.* at 1160 ("Is he free who cannot bring a suit in court for the defense of his rights?").

the courts, "[W]hat legislation could be more appropriate than to give a person injured by another under color of . . . unconstitutional State laws a remedy by civil action."[74]

III. Fundamental Rights and Equality Are Not Subject to a Vote

Turning a blind eye to the Constitution's text and the full sweep of its history, opponents of marriage equality argue that it should be up to the people of the states whether to treat same-sex couples as inferior, second class persons and to deny them the right to marry, long recognized as "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[75] In their view, the people should be free to adopt a state constitutional amendment or other ballot measure that places a badge of inferiority on committed, loving, same-sex couples and denies to them a core aspect of human liberty. That is plainly incorrect. The Fourteenth Amendment guarantees of personal, individual rights limit the states, whether state action is in the form of a legislative act or a constitutional amendment adopted by the voters of a state. As the Supremacy Clause makes clear, the Constitution is supreme over state law in all its forms. Consistent with the Constitution's text and history, the Supreme Court has repeatedly rejected the notion that an initiative or state constitutional amendment adopted by the voters should be subject to a watered-down version of the Constitution's individual-rights guarantees. Under our constitutional scheme, "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[76]

The Supreme Court has recognized this principle many times. In 1964, in *Lucas v. Forty-Fourth General Assembly*,[77] the Supreme Court easily dispatched the argument that a reapportionment plan that violated the constitutional principle of one person-one vote could be upheld because it was approved by the voters. Explaining that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be,"[78] the Court held that the fact that the reapportionment plan was adopted by the voters rather than enacted by the legislature was "without federal constitutional significance."[79] In 1996, in *Romer v. Evans*, the Court struck down a state constitutional amendment adopted by the voters of the state as a violation of the equal protection guarantee, concluding that the voter-approved constitutional amendment denied gay men and lesbians rights basic to "ordinary civic life in a free society" in order "to make them unequal to everyone else."[80] This, Justice Kennedy explained, "Colorado cannot do. A State cannot so deem a class of persons a stranger

[74] CONG. GLOBE, 42nd Cong., 1st Sess. 482 (1871).
[75] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
[76] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).
[77] 377 U.S. 713 (1964).
[78] *Id.* at 736-37.
[79] *Id.* at 737.
[80] 517 U.S. 620, 631, 635 (1996).

to its laws."[81] More recently, in 2011, in *Arizona Free Enterprise's Freedom Club PAC v. Bennett*,[82] the Supreme Court struck down an Arizona campaign finance statute adopted by the voters, concluding that the measure unduly burdened political speech without sufficient justification. As Chief Justice Roberts explained, "the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."[83] No sitting Justice subscribes to the view that the voters of a state may approve laws or constitutional provisions inconsistent with the personal, individual rights that the Constitution grants to all.

Read in its context, *Schuette* is perfectly consistent with these first principles of constitutional supremacy and judicial review. Could the people of a state vote to segregate its public schools on the basis of race or deny the right to marry to mixed-race couples? Plainly not. As Justice Kennedy wrote in *Schuette*, "when hurt or injury is inflicted on racial minorities by the encouragement or commands of laws or other state action, the Constitution requires redress by the courts."[84] That same principle applies equally when a state denies the right to marry to loving, committed same-sex couples, demeaning their loving relationships, stigmatizing their children, and denying them the full range of benefits that states provide to married couples to ensure family integrity and security. As Justice Kennedy's opinion in *Windsor* makes clear, the constitutional guarantee of equal protection "withdraws from Government the power to degrade or demean," preventing states from acting to "disparage and to injure" gay and lesbians couples, deny their equal dignity, and treat their loving relationships as "less respected than others."[85]

Under the Fourteenth Amendment, the majority cannot discriminate against any minority group and treat them as disfavored persons. The Fourteenth Amendment guarantees to all persons – regardless of race, sexual orientation, or other group characteristics – equality of rights, including the fundamental right to marry, a right recognized by the framers of the Fourteenth Amendment as part of the "attributes of a freeman according to the universal understanding of the American people[.]"[86] These protections are the "supreme Law of the Land," overriding laws enacted by state legislatures as well as constitutional provisions adopted by the voters. For that reason, it is irrelevant that voters of a state may wish to consign same-sex couples to a second class status. There is no exception to the Fourteenth Amendment's commands for cases in which inequality reflects the will of the majority.

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[81] *Id.* at 635.
[82] *Ariz. Free Enters.'s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).
[83] *Id.* at 2828.
[84] *Schuette*, 134 S. Ct. at 1637.
[85] *Windsor*, 133 S. Ct. at 2695, 2696.
[86] CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

IV. Conclusion

Failing in their other arguments to justify denying the right to marry to same-sex couples, opponents of marriage equality are – with increasing frequency – making a set of far-reaching claims that states, as a matter of federalism and democratic governance and through their legislators or voters, have a sovereign prerogative to discriminate against gay men and lesbians and deny to them the right to marry and the blessings of liberty that go along with this most cherished right. As this Issue Brief shows, those arguments not only misread the Fourteenth Amendment as a matter of substance, but they are also incorrect in terms of constitutional principles of federalism and the role of the courts in enforcing constitutional supremacy going all the way back to the Founding.

Carving out an exception to the Fourteenth Amendment's guarantee of equality under the law and equality of rights to permit the voters of a state to impose a badge of inferiority on committed same-sex couples and their families would be manifestly contrary to our Constitution's protection of individual rights and the role of courts in enforcing the rule of law. Our Constitution's promise of liberty and equality for all persons is not subject to a vote on Election Day; it is a fundamental principle that protects the rights of us all to shape our destiny, to find freedom, to seek out opportunities, and to pursue happiness. That's a lesson that, unfortunately, opponents of marriage equality are badly in need of learning.