Washington University
Law Quarterly

VOLUME 82 NUMBER 3 2004

PAST AND PRESENT PROPOSED AMENDMENTS TO THE UNITED STATES CONSTITUTION REGARDING MARRIAGE*

EDWARD STEIN**

Proposals to amend the Constitution to prohibit same-sex marriage were recently actively discussed and voted on in the U.S. Congress. This Article situates arguments for these proposals within the history of attempts to amend the Constitution related to marriage by providing the first detailed, synthetic analysis of such previously proposed amendments. This examination reveals 133 previously proposed amendments to the Constitution relating to marriage, consisting primarily of proposals to prohibit interracial marriage, proposals to prohibit polygamy, and proposals to empower Congress to make uniform laws concerning marriage and divorce. By tracing the arguments made in support of these

---

* An earlier version of this Article appeared as: Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, Issues in Legal Scholarship (Aug. 2004), *at* http://www.bepress.com/ils/iss5/. Where this Article appears on-line, it does so with the permission of The Berkeley Electronic Press.

** Associate Professor of Law and Co-Director of the Program in Family Law, Policy and Bioethics, Benjamin N. Cardozo School of Law. B.A., Williams College; J.D., Yale Law School; Ph.D. (in Philosophy), M.I.T. This project was presented on March 12, 2004 at the annual conference of the Association for Law, Culture and Humanities, held at University of Connecticut Law School. Thanks to my co-panelists Ariela Dubler, Joanna Grossman, and Jill Hasday for their comments and encouragement. A draft of this paper was presented to the LGBT Law Faculty Workshop of Greater New York on May 20, 2004. Thanks to all the participants for their comments and support, including Donna Dennis, Katherine Franke, Suzanne Goldberg, Elizabeth Hillman, and Nan Hunter for particularly useful suggestions. Thanks also to Barton Beebe, Richard Bierschbach, Kris Collins, Dan Crane, Mitchell Engler, William Eskridge, Myriam Gilles, Morris Kaplan, Melanie Leslie, Sharon Marcus, Kevin Stack, and Stewart Sterk for useful comments and suggestions related to this project. Jason Cubert, Olga Giller, Svetlana Merkis, and Mary Ellen Reilly provided excellent research assistance on this project. Payam Danialzadeh, Katrina Chu, and Sabrina Chu also helped out in the final stages of this project. Also, thanks to Lynn Wishart and her staff at Cardozo's library for their tremendous help and support.

amendments, this Article reveals a strong resonance between prior attempts to constitutionalize aspects of the institution of marriage and current proposed amendments. The Article also argues that, in hindsight, the previously proposed amendments were not necessary because state and federal legislatures and courts were able to address problems relating to marriage without amending the Constitution and without destabilizing the delicate balance of power between states and the federal government. Against this background, the Article concludes that current proposals to amend the Constitution are similarly neither necessary nor wise.

TABLE OF CONTENTS

INTRODUCTION

In the middle of July 2004, the United States Senate debated the following amendment to the United States Constitution introduced by Senator Wayne Allard:

> 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.[1]

President George W. Bush has at various times expressed support for this type of amendment to the Constitution.[2] Earlier this year, attention to the topic of same-sex marriage was heightened due to the prospect that Massachusetts would soon be marrying same-sex couples[3] and to events in various places across the country including San Francisco, where over four thousand same-sex couples were married,[4] and Multnomah County, Oregon, where approximately three thousand same-sex couples were married.[5] The President's first public endorsement of such a constitutional

---

1. S.J. Res. 30, 108th Cong. (2004). The text of S.J. Res. 30 and the other 138 proposed constitutional amendments regarding marriage can be found in the Appendix of this Article. The proposals are listed chronologically and numbered sequentially. After each footnote citation of a proposed amendment, this number will appear in brackets for easy reference to the Appendix, e.g., S.J. Res. 30, 108th Cong. (2004) [App. #137]. For a discussion of the debate on S.J. Res. 30, see Susan Milligan, *Few Attend Gay Marriage Debate; Senate Vote Looms on Proposed Ban*, BOSTON GLOBE, July 13, 2004, at A2.

In the preceding Congress, Congressman Ronald Clifford "Ronnie" Shows introduced H.R.J. Res. 93, 107th Cong. (2002) [App. #134], which, using broader language, would also have prohibited same-sex marriages. In May 2003, Congresswoman Marilyn Musgrave proposed the same amendment as Congressman Shows did in 2002. H.R.J. Res. 56, 108th Cong. (2003) [App. #135].

As this Article was going to press, Senator Wayne Allard proposed the "Marriage Protection Amendment." S.J. Res. 1, 109th Cong. (2005) ("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."). This proposed amendment is not included in the Appendix or otherwise included in this Article.

2. *See, e.g.*, *Bush's Remarks on Marriage Amendment*, N.Y. TIMES, Feb. 25, 2004, at A18 ("Today I call upon the Congress to promptly pass and to send to the states for ratification an amendment to our Constitution defining and protecting marriage as a union of a man and woman as husband and wife."); Adam Nagourney & David D. Kirkpatrick, *Urged by Right, Bush Takes on Gay Marriages*, N.Y. TIMES, July 12, 2004, at A1 (discussing similar remarks made by President Bush on July 10, 2004, in his weekly radio address, which was devoted exclusively to promoting a constitutional amendment prohibiting same-sex marriage).

3. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (holding that not allowing same-sex couples to marry violates equal protection under the Massachusetts Constitution); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (advisory opinion holding that a legal scheme that would allow same-sex couples to enter civil unions would not remedy the constitutional violation identified in *Goodridge*).

4. *See* Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs From 46 States*, N.Y. TIMES, Mar. 18, 2004, at A26 (discussing report of county assessor-recorder's office). These marriages were invalidated by the California Supreme Court in *Lockyer v. San Francisco*, 95 P.3d 459 (Cal. 2004). Still pending before a trial court in San Francisco are various consolidated cases concerning the constitutionality of California's prohibition on same-sex marriages. *See, e.g.*, Lee Romney, *Same-Sex Marriage Court Fight Takes Shape*, L.A. TIMES, Sept. 4, 2004, at B6.

5. *See* Li v. State, No. 0430-03057, 2004 WL 1258167, at *10 (Or. Cir. Ct. Apr. 20, 2004) (holding that failure to grant same-sex couples marriages or civil unions violates state constitution, ordering state to record marriages already performed, and ordering county to stop marrying same-sex couples until appeals court or state legislature settles the matter), *certified appeal accepted*, 95 P.3d

amendment further increased attention to same-sex marriages and public interest reached an even higher level in May 2004 when Massachusetts began marrying same-sex couples.[6]

Critics of amendments prohibiting same-sex marriage have suggested that such proposed amendments are unprecedented.[7] It is certainly true that, *if enacted*, a constitutional amendment to prohibit same-sex marriage would be unprecedented. However, such proposed amendments are not the first time Congress has considered a constitutional amendment relating to marriage (nor the first time Congress has considered a constitutional amendment that would prohibit same-sex marriage[8]). Through 2001, one hundred and thirty-three amendments directly related to the regulation of marriage have been proposed in Congress.[9] Seventy-seven[10] of these

---

730 (Or. 2004); *Gay Weddings Halted But Marriages Stand*, WASH. POST, Apr. 21, 2004, at A11 (reporting that 3,022 same-sex couples were married in Oregon between March 3, 2004 and April 20, 2004).

6. Same-sex couples began marrying in Massachusetts on May 17, 2004. *See* Pam Belluck, *Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004, at A1. However, the Massachusetts legislature has taken the first step in amending the state constitution to say that only the union of one man and one woman shall be recognized as marriage. *See* H.B. 3190, 183d Gen. Court, Reg. Sess. (Mass. 2003). To become a part of the state's constitution, the next legislative session must also approve this amendment and then the amendment must be approved by a voter referendum. MASS. CONST. amend. art. XLVIII, ch. IV § 4-5.

7. *See, e.g.*, *Legal Threats to Traditional Marriage: Implications for Public Policy, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 148 (2004) (statement of Rep. John Conyers) ("never until this day have we sought to legislate discrimination into our nation's most sacred charter").

8. The first proposed constitutional amendment that would have prohibited same-sex marriage was S.J. Res. 68 introduced in 1886. *See* S.J. Res. 68, 49th Cong. (1886) [App. #14] ("The only institution or contract of marriage within the United States . . . shall be that of the union in marriage of one man with one woman.") As I will argue below, this proposed amendment and others like it did not have as their primary purpose the prohibition of same-sex marriages. *See infra* text accompanying notes 240–44.

9. My source for citations to the proposed amendments to the Constitution is a three-volume collection edited by John R. Vile. *See* PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 1787–2001 (John Vile ed., 2002) [hereinafter PROPOSED AMENDMENTS]. One hundred thirty-three of the proposed amendments listed in the Appendix to this Article were originally listed in Vile's three-volume collection (however, unlike Vile's list, the Appendix provides the text of these proposed amendments). The other amendments listed in the Appendix are five recently-proposed amendments concerning same-sex marriage. I do not include two proposed amendments that are included in the list of amendments dealing with marriage and family from Vile's index. *See id*. at 1760. Specifically, I do not include the proposal by President Ulysses S. Grant in his annual message to Congress on December 7, 1875, to introduce a constitutional amendment to prohibit polygamy because this amendment does not seem to have been formally introduced on the floor of either the House or Senate. *Id.* at 396 (proposed amendment # 1399, according to the numbering system used by Vile in PROPOSED AMENDMENTS). I also do not include S.J. Res. 72 (1941) because the proposed amendment is not concerned, like the others discussed herein, with requirements on entrance to or exit from a marriage. *See* S.J. Res. 12, 77th Cong. (1941). I also do not include in my list proposed amendments relating to abortion, the right to life, or the status of fetuses. Starting in 1972 with H.R.J. Res. 1186, 92d Cong. (1972), there have been hundreds of proposed amendments that relate to abortion. *See*

proposed amendments would have given Congress the power (in some cases, the exclusive power[11]) to make uniform laws concerning marriage and/or divorce in the United States. Fifty-five[12] of these proposed amendments would have prohibited polygamy across the country; and three[13] of these amendments would have prohibited marriage between whites and blacks throughout the country.[14]

None of these proposed constitutional amendments have come to a vote in either the House or the Senate and, as a result, none have reached the stage of being considered for ratification by the states (three-fourths of the states are needed to approve an amendment to the Constitution).[15] However, some of these proposed amendments were the subject of hearings and testimony in Congress, reports from congressional committees, and statements and debates on the floor of Congress.[16]

Proposals concerning marriage do not make up a particularly significant percentage of attempts to amend the Constitution. Between 1789 and 2001, there have been well over eleven thousand attempts to

---

PROPOSED AMENDMENTS, *supra*, at 1785–87 (collecting citations to proposed amendments relating to abortion). Not one of the proposed amendments relating to abortion has ever made it out of committee. For a brief discussion of proposed amendments concerning abortion, see RICHARD BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?, 187–88 (1993) [hereinafter AMENDING AMERICA].

10. The proposed constitutional amendments listed in the Appendix to this Article are divided into three general "Topics." Seventy-seven of the amendments concern the topic of federal jurisdiction over marriage laws and are denoted with a "J." Fifty-five concern a ban on polygamy and are denoted with a "P," and three would have prohibited interracial marriages and are denoted with a "R."

11. *See, e.g.*, S.J. Res. 40, 56th Cong. (1899) [App. # 44].

12. *See infra* entries in Appendix labeled "P" (for polygamy amendments).

13. *See infra* entries in Appendix labeled "R" (for race amendments).

14. The numbers do not add up as it might seem they should—that is, seventy-seven plus fifty-five plus three is greater than one hundred thirty-three—because some of the proposed amendments deal with more than one of the mentioned subjects. *See infra* text accompanying notes 168–70. Also, H.R.J. Res. 281, 78th Cong. (1944) [App. # 129], which concerns marriage evasion and interstate recognition of marriages and divorces, is not included in either of the three types of amendments but is included among the amendments in the Appendix. For discussion of state marriage evasion laws, see *infra* text accompanying notes 158–61 and note 161.

15. Article V provides the requirements for ratification:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V.

16. Those proposed constitutional amendments that were subject to congressional hearings are denoted with an "h" in the "history" portion of the Appendix. Those amendments that spawned committee reports are denoted with an "r."

amend the Constitution,[17] of which twenty-seven of these amendments have been ratified by the states[18] and an additional five more have been approved by two-thirds of both houses of Congress but not ratified by the states.[19] What the proposed amendments concerning marriage lack in number, they make up for in relevance to present attempts to amend the Constitution to prohibit same-sex marriage. Current proposals to amend the Constitution should not be examined in a vacuum. Prior attempts to amend the Constitution provide both a historical and theoretical context for considering recently proposed amendments prohibiting same-sex marriage, especially since amending the Constitution is serious business, as both advocates and opponents of amending the Constitution regarding same-sex marriage claim to agree.[20]

This Article examines the proposed amendments prohibiting same-sex marriage against the history of attempts to amend the Constitution related to marriage. In particular, this Article provides the first detailed, synthetic analysis of previously proposed amendments about marriage. By tracing the arguments made in support of these amendments and comparing them

---

17. *See* RICHARD DAVIS, CONG. RESEARCH SERV., NO. 85-36 GOV, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA INTRODUCED IN CONGRESS FROM THE 91ST CONGRESS, 1ST SESSION THROUGH THE 98TH CONGRESS, 2ND SESSION, JANUARY 1969–DECEMBER 1984, at 8 (1985), *reprinted in* 3 PROPOSED AMENDMENTS, *supra* note 9, at 1263 (giving the number of proposed amendments from 1789 to 1990 as 10,431); 3 PROPOSED AMENDMENTS, *supra* note 9, at 1663–64 (giving the number of proposed amendments from 1991 to 2001 as 831). In this report, Davis identifies some of the difficulties with accurately determining the number of proposed constitutional amendments: "The count of proposed amendments to the Constitution must be considered approximate because of inadequate indexing in early years and separate counting of amendments in the nature of a substitute. Further, during at least some of this period [1789–1984], it was common for dozens of identical resolutions to be introduced." DAVIS, *supra*, at app. F, *reprinted in* 3 PROPOSED AMENDMENTS, *supra* note 9, at 1535. Following Vile's method of compilation in PROPOSED AMENDMENTS, if the same amendment was formally proposed more than once, I count it more than once, even when it was proposed in the same session and the same house. *See, e.g.*, H.R.J. Res. 140, 49th Cong. (1886) [App. #11]; H.R.J. Res. 143, 49th Cong. (1886) [App. # 12].

18. *See* U.S. CONST. amend. I to XXVII.

19. The five proposed amendments to the Constitution that passed both houses of Congress but were not ratified by enough states to be enacted dealt, respectively, with titles of nobility (proposed in 1810), slavery (proposed in 1861), child labor (proposed in 1924), equal rights on the basis of sex (proposed in 1972), and the status of the District of Columbia (proposed in 1978). *See* AMENDING AMERICA, *supra* note 9, at 301–03. A sixth amendment that dealt with congressional representation (proposed in 1789) was not originally ratified but was enacted over two centuries later in 1994 as the twenty-seventh amendment. *See* U.S. CONST. amend. XXVII.

20. *See Defense of Marriage Act*: *Hearing Before the Subcommittee on the Constitution of the House Comm. on the Judiciary*, 108th Cong. (2004), 2004 WL 684208 (F.D.C.H.) (statement of Rep. Steve Chabot on March 30, 2004 in support of the amendment) ("[A]mending the Constitution is clearly a tremendous responsibility. . . . [W]e should treat it seriously."); *id*. at 13 (statement of Rep. Tammy Baldwin in opposition to the amendment) ("Amending the Constitution is a radical action that should only be undertaken when absolutely necessary."); *Bush's Remarks on Marriage Amendment*, *supra* note 2, at A18 ("An amendment to the Constitution is never to be undertaken lightly.").

to arguments made for amendments about same-sex marriage, this Article reveals a dramatic resonance between prior proposals about marriage and current proposals about same-sex marriage. This Article also suggests that, in hindsight, the previously proposed amendments were ill-advised and unnecessary. State and federal legislatures and courts were able to address problems relating to marriage without amending the Constitution and without destabilizing the balance of power between states and the federal government. Against this background, this Article concludes that current proposals to amend the Constitution are similarly neither necessary nor wise. While the principal focus of this Article is descriptive and collective, its conclusion is partly normative insofar as the commonalities that emerge between past and current attempts to amend the Constitution counsel against passing an amendment to prohibit same-sex marriage.

Part I of this Article explains why advocates of some proposals for regulating marriage at the national level believe it necessary to advance their proposals by attempting to amend the Constitution. They chose this particular strategy in part because of the view that family law is state law. Although the justifications supporting this view have been called into question, this view has been widely embraced and is accepted by advocates (and opponents) of constitutional amendments relating to marriage. Part II surveys the subject matter of the various proposed amendments to the Constitution and describes the historical contexts in which they were proposed. Part III considers the arguments that have been made for these proposed amendments and shows the connections among these different proposals and the arguments for them. Part IV reviews the recent attempts to amend the Constitution to prohibit same-sex marriage and shows how the arguments for the proposed amendments parallel arguments made in favor of prior attempts to amend the Constitution about marriage. Part V concludes with some observations about what lessons can be learned from the history of previous attempts to amend the Constitution concerning marriage, noting particularly that, in hindsight, constitutional amendments were not necessary to protect the country or the institution of marriage. Rather, state and federal legislatures and courts have adequately dealt with various difficulties facing the institution of marriage. With respect to the subjects of each of the three types of proposed amendments concerning marriage, a national consensus was reached relating to the perceived problems *without* amending the Constitution. Further, the conclusion notes that attempts to amend the Constitution about marriage have been hindered in part by concerns about federalism. In the past, Congress was wise to avoid amending the Constitution and thereby to avoid permanently shifting the balance of power between states and the

national government in the area of family law. Congress would be wise to avoid doing so now.

Two interesting and important questions relating to family law and civil rights are whether same-sex couples have a fundamental right to marry[21] and whether prohibiting same-sex couples from marrying is unconstitutional because it constitutes discrimination—either on the basis of sex[22] or on the basis of sexual orientation.[23] Although courts, executives, legislators, activists, and scholars are weighing in on these questions with increasing frequency, this Article does not take a position on the constitutionality of prohibiting same-sex couples from marrying or on the public policy issues relating to legalizing same-sex marriages or, instead (or additionally), giving legal recognition and benefits to same-sex couples by creating civil unions[24] or domestic partnerships.[25] Rather, this

---

21. *See, e.g.*, Dean v. Dist. of Columbia, 653 A.2d 307, 331 (D.C. 1995) (finding no fundamental right to marry a person of the same sex); Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993) (same); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973) (same); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) (same); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (same). *But see, e.g.*, Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998) (finding a fundamental right to the "recognition of one's choice of a life partner"), *vacated as moot by* Brause v. Dep't of Health & Soc. Serv., 21 P.3d 357, 358 (Alaska 2001); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *13 (Wash. Super. Ct. Sept. 7, 2004) (same on the basis of violation of state constitution's privileges and immunities clause); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at **7–11 (Wash. Super. Ct. Aug. 4, 2004) (finding Washington marriage law prohibiting same-sex marriages violated state constitution's privileges and immunities clause and denied substantive due process rights); WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 123–52 (1996) (arguing that the fundamental right to marry includes the right to marry a person of the same sex).

22. *See, e.g.*, *Baehr*, 852 P.2d at 59 (embracing the view that denying same-sex couples recognition for their relationships is a form of sex discrimination); *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (same). *But see, e.g.*, *Baehr*, 852 P.2d at 70 (Heen, J., dissenting) (rejecting sex-discrimination argument applied to prohibition on same-sex marriage); Baker v. State, 744 A.2d at 880 n.13 (Vt. 1999) (same); *Singer*, 522 P.2d at 1190–97 (same). For discussion of the sex-discrimination argument generally, see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001).

23. *See, e.g.*, *Goodridge*, 798 N.E.2d. at 961 (finding that prohibiting same-sex couples from marrying discriminates on the basis of sexual orientation and violates equal protection); *Li*, 2004 WL 1258167, at *7 (same); Baker v. State, 744 A.2d at 880 (same); *cf. Dean*, 653 A.2d at 360 (Ferren, J., dissenting). *But see, e.g.*, Standhardt v. Superior Court, 77 P.3d 451, 464 (Ariz. Ct. App. 2003); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114, at *16 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (appeal pending); *Singer*, 522 P.2d at 1196.

24. *See, e.g.*, VT. STAT. ANN. tit. 15, §§ 1201–1207 (Supp. 2000) (creating civil unions for same-sex couples which provide all the rights, benefits and obligations associated with marriage).

25. *See, e.g.*, CAL. FAM. CODE § 297 (West 2004) (operative on January 1, 2005) (bestowing on domestic partnerships almost all of the rights, benefits, duties and obligations of marriage in California); HAW. REV. STAT. § 572C-1 (2003) (creating reciprocal beneficiaries that "extend certain rights and benefits . . . presently available only to married couples to couples composed of two individuals . . . legally prohibited from marrying under state law"); N.J. STAT. ANN. § 26:8A-1 (West

Article is narrower in that it focuses on the history of attempts to amend the Constitution relating to marriage because of its relevance to current[26] attempts to amend the Constitution to prohibit same-sex marriage. One can be opposed to such proposed amendments without accepting any of the arguments for the legal recognition of same-sex marriage.[27] This Article steers clear of the arguments for the legal recognition of same-sex relationships in order to focus on what previously proposed constitutional amendments tell us about the current proposed amendments regarding same-sex marriage.

I. MARRIAGE LAW AS STATE LAW

Advocates for nationwide changes to marriage laws typically consider amending the Constitution in part because of the widely-accepted view that, in the United States, for the most part, family law is state law.[28] The Supreme Court has said that "domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States"[29] and that "'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'"[30] The Court has justified this view in various ways. In particular, the Court has appealed to the Tenth Amendment[31] by saying,

---

2004) (creating domestic partner benefits that provide some subset of benefits associated with marriage).

26. Until 2002, no proposed constitutional amendment was clearly intended to address same-sex marriages. Some of the proposed constitutional amendments would have prohibited same-sex marriages, although it seems clear that they would have done so unintentionally. See *infra* text accompanying notes 240–44 and note 242 for discussion of whether these proposed amendments intentionally prohibited same-sex marriage. See entries in Appendix labeled "G" for amendments that would limit marriages to couples of the opposite sex.

27. *See, e.g.*, *Defense of Marriage Act*, *supra* note 20, at 14 (testimony of former Congressman Bob Barr, a conservative opponent of same-sex marriage who opposes amending the Constitution to prohibit same-sex marriages). For discussion of arguments against amending the Constitution to prohibit same-sex marriage, see, for example, Mae Kuykendall, *The President, Gay Marriage, and the Constitution: A Tangled Web*, 13 WIDENER L.J. 799 (2004).

28. For a powerful argument that the historical and theoretical support for the view that family law is state law is rather weak, see Jill Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998). Some of the discussion in this Part draws on and engages Hasday's article.

29. Sosna v. Iowa, 419 U.S. 393, 404 (1975); *see also* Santosky v. Kramer, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) ("[T]he area of domestic relations . . . has been left to the States from time immemorial, and not without good reason.").

30. Rose v. Rose, 481 U.S. 619, 625 (1987) (quoting *In re* Burrus, 136 U.S. 586, 593–94 (1890)); *see also* United States v. Yazell, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements.").

31. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

"the power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States . . . . to the legislature of [each] State. Absent a specific constitutional guarantee, it is for that legislature, not . . . this Court, to select from among possible laws."[32] In other contexts, as Jill Hasday has shown, the Court has simply asserted that family law is state law and justified this by appeal to history.[33]

The view that family law is state law—however it is justified—is rarely disputed by advocates and legislators. It is no wonder then that many of those concerned about the institution of marriage have proposed amendments to the Constitution instead of proposing federal laws. Although the process of passing a law is much easier than amending the Constitution,[34] a law may still be found unconstitutional. Advocates of federal marriage laws are worried that such laws would be in tension with the thesis that family law is state law and for this reason would be found unconstitutional. Reaching marriage laws by amending the Constitution sidesteps this tension.

The history of the federal government's involvement in family law is, however, much more complicated than the Supreme Court and others would have us believe.[35] The federal government has regulated family law in a host of ways, including, for example, family law related to slavery and to the freed slaves during the Reconstruction Era,[36] family law in the District of Columbia and the Territories,[37] family law in the context of welfare and social security,[38] taxes,[39] child custody and support,[40] and in

---

32. Labine v. Vincent, 401 U.S. 532, 530 (1971).

33. *See* Hasday, *supra* note 28, at 1301–19.

34. Passing a bill requires a majority of both the House and the Senate and the President's approval (or, in case of a presidential veto, two-thirds of both the House and the Senate), while amending the Constitution requires approval of two-thirds of both the House and the Senate *and* two-thirds of the states.

35. *See* Hasday, *supra* note 28, at 1301–19; Jill Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).

36. *See* Hasday, *supra* note 28, at 1319–53.

37. *See* U.S. CONST. art. IV, § 3 (territories); *id.* § 8, cl. 17 (authority over seat of government).

38. *See, e.g.*, 42 U.S.C. § 601 et seq. (2000) (providing block grants to states for temporary assistance to families in need to, inter alia, "prevent and reduce the incidence of out-of-wedlock pregnancies" and "encourage the formation and maintenance of two-parent families"); Hasday, *supra* note 28, at 1381–85.

39. *See, e.g.*, Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998) (arguing that federal tax code takes a prescriptive stance towards family relationships).

40. *See, e.g*, 28 U.S.C. § 1738A (2000) (codifying Parental Kidnapping Prevention Act); 28 U.S.C. § 1738B (2000) (codifying Full Faith and Credit for Child Support Orders Act); 42 U.S.C.

the context of interstate recognition of same-sex marriages.[41] In fact, under federal law, there are well over a thousand benefits, rights, or privileges associated with marriage.[42] Further, the Supreme Court has intervened with state regulation of marriage on several occasions.[43]

Although Congress and the federal courts are involved in family law in various ways, the idea that family law is state law has survived. The basic idea is that each state has the power to determine who can marry within its borders and what benefits, rights, duties, and obligations are associated with marriage. This basic idea is clearly wrong insofar as the Constitution limits what states can do with respect to marriage laws. Further, the federal government and the federal courts have not as "scrupulously refrained from interfering with state answers to domestic relations questions"[44] as typically claimed. Despite these qualifications, the federal government and the federal courts have, in many contexts and to a great extent, "le[ft] the States free to experiment with various remedies [which] ha[ve] produced novel approaches and promising progress"[45] in relation to marriage.

The approach to family law that gives the states considerable latitude with respect to family law is supported by three related considerations. First, there are differences among the states regarding social norms and social practices relating to families. These differences may justify different laws for different states. Second, the states are useful laboratories for

---

§§ 651–669 (2000) (codifying Child Support Enforcement Act); *see also* Hasday, *supra* note 28, at 1380–81.

41. Defense of Marriage Act, ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C) (defining marriage for purposes of federal law as between one man and one woman and permitting states to not recognize same-sex marriages from other states). For discussion, see *infra* text accompanying notes 205 & 219–21.

42. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-97-16, CATEGORIES OF LAWS INVOLVING MARITAL STATUS (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf (reporting 1,049 federal statutes and regulations relating to marriage, ranging from Social Security and taxes to education and immigration); U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), *available at* http://www.gao.gov/newitems/d04353r.pdf (updating prior count to 1,130 as of December 2003).

43. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987) (overturning Missouri prison regulations restricting marriage for prisoners on ground it violated the fundamental right to marry); Zablocki v. Redhail, 434 U.S. 374 (1978) (overturning Wisconsin law putting restrictions on marriage for people in arrears on child support obligations on ground that it violated the fundamental right to marry); Loving v. Virginia, 388 U.S. 1 (1967) (overturning Virginia law prohibiting interracial marriages because, inter alia, it violated the fundamental right to marry). For other cases in which the Supreme Court has intervened into other aspects of family law besides marriage, see Hadsay, *supra* note 28, at 1302 n.7.

44. Santosky v. Kramer, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting).

45. *Id.*

trying different ways of dealing with social situations,[46] especially given the complicated nature of family law and the delicate balance between state interests and family privacy. These two considerations combine to support a form of moral pluralism about how states should structure familial relations. This moral pluralism resonates with a theme of Justice Blackmun's now vindicated[47] dissent in *Bowers v. Hardwick*.[48]

Even if marriage should be left to the states, the power of states to control access to marriage and to determine the terms of marriage is constrained by the Constitution. In a line of cases, starting with *Loving v. Virginia*, the Supreme Court has affirmed the existence of a fundamental right to marry arising from the Due Process Clause of the Fourteenth Amendment.[49] The existence of a fundamental right to marry does not, however, entail that *any* restriction on the right to marry violates the Constitution. The Court has described the limitations imposed by the Due Process Clause as follows:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[50]

Although various restrictions on the right to marry have been held unconstitutional,[51] federal courts have upheld some restrictions on this fundamental right, for example, restrictions on the number of people a person can be married to at the same time;[52] restrictions on the sex of the

---

46. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandies, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . . .").

47. Lawrence v. Texas, 539 U.S. 558 (2003) (explicitly overruling *Bowers v. Hardwick*).

48. Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) ("[T]here may be many 'right' ways of conducting [intimate] relationships, and . . . much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.").

49. *See supra* note 43.

50. *Zablocki*, 434 U.S. at 386.

51. *See supra* note 43; *cf.* T.E.P. v. Leavitt, 840 F. Supp. 110 (D. Utah 1993) (striking down—without reaching the issue of the fundamental right to marry—state law prohibiting persons with AIDS from marrying on grounds that it violated Americans with Disabilities Act); Israel v. Allen, 577 P.2d 762 (Colo. 1978) (striking down—without reaching the issue of the fundamental right to marry—state law against incestuous marriages as applied to adopted siblings but also without reaching the issue of the fundamental right to marry).

52. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1879) (upholding polygamy prosecution); Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985) (upholding polygamy laws).

people a person can marry;[53] restrictions on marriages by minors;[54] and restrictions on prison guards marrying inmates.[55] State courts have also upheld restrictions on marriage, including, prohibitions on incestuous marriages;[56] prohibitions on polygamous marriages;[57] prohibitions on getting married without being tested for venereal diseases;[58] and prohibitions on same-sex marriages.[59] In general, restrictions on the right to marry will be upheld as satisfying the Due Process Clause if they can be justified by appeal to a compelling state interest. In the words of the Supreme Court, "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[60]

Restrictions on marriage must also satisfy the Equal Protection Clause. The bulk of the Supreme Court's opinion in *Loving v. Virginia* relied on and articulated the argument that anti-miscegenation laws made use of racial classifications in a prohibited manner.[61] Even though there was a sense that Virginia's law treated whites and blacks equally (neither could marry outside of their race and both could marry within their race),[62] the Supreme Court held that the mere equality of laws was not enough to pass constitutional muster.[63] The Court held that Virginia's prohibition on

---

53. *See, e.g.*, Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (denying equal protection and due process challenge to prohibition on same-sex marriage), *affirmed on different grounds by* 673 F.2d 1036 (9th Cir. 1982).

54. *See, e.g.*, Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981) (upholding parental consent requirement for marriages by minors against due process and equal protection challenges).

55. *See, e.g.*, Keeney v. Heath, 57 F.3d 579 (7th Cir. 1995) (upholding rule that prohibited prison guards from becoming socially involved with prisoners against challenge that it violated right to marry).

56. *See, e.g.*, State v. Sharon H., 429 A.2d 1321 (Del. Super. Ct. 1981); State *ex rel*. Miesner v. Geile, 747 S.W.2d 757 (Mo. Ct. App. 1988). *But see Israel*, 577 P.2d 762.

57. *See, e.g.*, Barlow v. Blackburn, 798 P.2d 1360 (Ariz. Ct. App. 1990).

58. *See, e.g.*, Peterson v. Widule, 147 N.W. 966 (Wis. 1914). *But see T.E.P.*, 840 F. Supp. at 110.

59. *See, e.g.*, Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Morrison v. Sadler, No. 49A02-0305-CV-447, 2005 WL 107151 (Ind. Ct. App. Jan. 20, 2005); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (appeal pending); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). *But see, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); People v. West, 2004 WL 1433528 (N.Y. Just. Ct. June 10, 2004); Li v. State, No. 0430-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004).

60. *Zablocki*, 434 U.S. at 388.

61. *Loving*, 388 U.S. at 7–12.

62. *See, e.g.*, Naim v. Naim, 87 S.E.2d 749 (Va. 1955), *vacated by* 350 U.S. 891 (1955), *reaffirmed by* 90 S.E.2d 849 (Va. 1956); Pace v. Alabama, 106 U.S. 583, 585 (1883).

63. *Loving*, 388 U.S. at 8 ("[W]e reject the notion that the mere 'equal application' of a statute

interracial marriages violated equal protection because its underlying purpose was the perpetuation of white supremacy.[64] Equal protection arguments have also been made against laws that prohibit same-sex marriage. Various courts have rejected such arguments,[65] but several state courts have embraced arguments for the recognition of same-sex relationships based on the equal protection provisions of *state* constitutions, not the United States Constitution.[66]

Accepting, often explicitly, that family law is state law and that the United States Constitution provides only limited constraints on what states can do in the context of marriage and family law, advocates of nationalizing some or all aspects of marriage law have proposed amendments to the Constitution. Sometimes, advocates of nationalized marriage law have adopted a two-pronged approach for achieving their goals: proposing to amend the Constitution and trying to get the various states to pass uniform laws regarding family law.[67] Other times, they have tried to get Congress to pass a law that attempted to accomplish the desired goal without amending the Constitution.[68] In any event, discussions of the various proposed amendments to the Constitution that relate to marriage have taken place against the mostly unquestioned acceptance of the idea that the Constitution requires that family law is state law. Having considered why advocates of federal marriage laws propose

---

containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations. . . . ").

64. *Id.* at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

65. *See, e.g.*, Dean v. Dist. of Columbia, 653 A.2d 307, 361, 364 (D.C. 1995) (opinion of Terry, J. & opinion of Steadman, J.); *Lewis*, 2003 WL 23191114, at **16–23; *Singer*, 522 P.2d at 1191.

66. *See, e.g.*, Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743, at *5 (Alaska Super. Ct. Feb. 29, 1998); Baehr v. Lewin, 852 P.2d 44, 63–68 (Haw. 1993); *Goodridge*, 798 N.E.2d at 961–68; *Li*, 2004 WL 1258167, at *8; Baker v. State, 744 A.2d 864, 905 (Vt. 1999); *Andersen*, 2004 WL 1738447, at *7–*11.

67. When jurisdictional amendments were proposed, related bills were typically introduced in tandem. For example, along with S.J. Res. 5, 68th Cong. (1923), a bill was introduced that would become law if and when the proposed amendment was ratified. This bill would have allowed divorce on the grounds of adultery, cruelty, desertion for one year, incurable insanity, and conviction for an infamous crime. It also would have required parental consent to the marriage of boys between the ages of 18 and 21 and girls between the ages of 16 and 18. *See* NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 149–50 (1962); *Uniform Divorce Bill*, 9 J. OF SOCIAL HYGIENE 170 (1923), *reprinted in* SELECTED ARTICLES ON MARRIAGE AND DIVORCE 241 (Julia Johnsen ed., 1925); *see also* 69 CONG. REC. 10,064 (1928) (reprinting articles by Iredell Mears opposing proposed jurisdictional amendments); *Capper for Federal Law on Marriage and Divorce*, N.Y. TIMES, Dec. 7, 1937, at 1. For further discussion see *infra* text accompanying notes 147–67.

68. *See, e.g.*, DOMA, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

constitutional amendments, the next Part turns to the historical context of the previously proposed amendments to the Constitution related to marriage.

II. HISTORICAL BACKGROUND OF PROPOSED CONSTITUTIONAL AMENDMENTS

As mentioned above, one hundred and thirty-three proposed amendments to the United States Constitution concerning marriage were introduced before 2002. These proposed amendments divide into three main clusters: amendments that would have prohibited marriages between whites and non-whites (the *Race Amendments*); amendments that would have prohibited marriage to—and typically marriage-like cohabitation with—more than one person at a time (the *Polygamy Amendments*); and amendments that would have given Congress the power to pass uniform marriage and/or divorce laws (the *Jurisdictional Amendments*). Sections A, B, and C of this Part, respectively, discuss the text and context of these three types of proposed amendments in the order that they were first proposed. Section D then shows how the three types of proposed amendments are interconnected in various ways. In particular, section D discusses some proposed amendments that address more than one of these subjects, for example, an amendment that would give Congress the power to pass uniform marriage and divorce laws and would also prohibit polygamy. But first, this Part provides some brief background observations.

The first ten amendments to the United States Constitution—known collectively as the Bill of Rights—were proposed shortly after the Constitution was adopted and were ratified just over two years later.[69] The next two amendments to the Constitution were proposed and ratified during the ten years beginning in 1794.[70] The next three amendments—known collectively as the Reconstruction Amendments—were passed between 1865 and 1870 after the Civil War. The Thirteenth Amendment made slavery and "involuntary servitude" illegal,[71] and the Fifteenth

69. U.S. CONST. amend. I to X (proposed in 1789 and ratified by three-quarters of the states in 1791).

70. U.S. CONST. amend. XI (concerning suits against states, proposed in 1794 and ratified in 1795); U.S. CONST. amend XII (concerning election of the President and the Vice-President, proposed in 1803 and ratified in 1804).

71. U.S. CONST. amend. XIII, § 1 (proposed and ratified in 1865) ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

Amendment prohibited race discrimination concerning access to voting.[72] The most complicated of the Reconstruction Amendments was the Fourteenth Amendment, which said, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[73]

In the aftermath of the passage of the Reconstruction Amendments, the number of constitutional amendments that were proposed increased and their scope expanded[74] in part because, as Nancy Cott has aptly observed, "[v]ast changes could be envisioned as the union reconstituted itself politically."[75] Even after Reconstruction, interest in changing the Constitution did not remain constant (see Table 1, below). For example, after the Eighteenth Amendment[76] (which prohibited the manufacture, sale or transportation of alcohol) was repealed in 1933,[77] attempts to amend the Constitution were scaled back.[78]

Just as the frequency and types of proposals to amend the Constitution changed over time,[79] so too did proposals to amend the Constitution related to marriage. The first proposals to amend the Constitution concerning marriage came in the 1870s against the backdrop of Reconstruction.[80] During each of the next five decades more than twenty constitutional amendments relating to marriage were proposed. Table 1 shows the number of proposed amendments relating to marriage in each

---

72. U.S. CONST. amend. XV, § 1 (proposed in 1869 and ratified in 1870) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

73. U.S. CONST. amend. XIV, § 1 (proposed in 1866 and ratified in 1868).

74. *See* AMENDING AMERICA, *supra* note 9, at 197.

75. NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 79 (2000).

76. U.S. CONST. amend XVIII (proposed in 1917 and ratified in 1919).

77. U.S. CONST. amend. XXI (proposed and ratified in 1933) (repealing prohibition).

78. *See* AMENDING AMERICA, *supra* note 9, at 197.

79. *See, e.g.*, HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 19–25 (1897), *reprinted in* 3 PROPOSED AMENDMENTS, *supra* note 9, at 19–25.

80. H.R.J. Res. 54, 42d Cong. (1871) [App. # 1]; H.R.J. Res. 2779, 46th Cong. (1879) [App. # 2]. Given the historical context, it is not surprising that the first proposed amendment concerning marriage related to race. *See infra* text accompanying notes 85–94.

decade and, for comparison, the number of amendments proposed and approved in that decade, regardless of subject.

As Table 1 indicates, the vast majority of the constitutional amendments concerning marriage were proposed between Reconstruction and the repeal of prohibition. This historical context is the backdrop for the following discussion of the types of proposed constitutional amendments regarding marriage.

TABLE 1: NUMBER OF PROPOSED AMENDMENTS RELATING TO MARRIAGE BY DECADE COMPARED TO TOTAL NUMBER OF AMENDMENTS PROPOSED AND PASSED[81]

Decade	Number of Proposed Marriage Amendments	Total Number of Proposed Amendments	Number of Amendments Passed by Both House & Senate
1870s	2	179	0
1880s	22	262	0
1890s	21	264	0
1900s	26	271	1
1910s	29	467	3
1920s	22	402	1
1930s	4	639	1
1940s	6	365	1
1950s	0	696	0
1960s	1	2,586	3
1970s	0	2,021	3
1980s	0	870	0
1990s	0	635	1
2000s	5	72 (partial)*	0

* The total number of proposed amendments for the first decade of the 21st century includes only those proposed through the first part of the 107th Congress. All five amendments related to marriage proposed in the present decade were proposed after that, so they are not included in the partial total.

A. The Race Amendments

State laws prohibiting interracial marriage have a long history in the United States. Although most colonies prohibited interracial marriage and

81. *See* 3 PROPOSED AMENDMENTS, *supra* note 9.

most states at some time had laws prohibiting interracial marriages,[82] interracial-intimate relationships have persisted throughout the history of the United States.[83] From 1887 to 1948, thirty states (out of forty-eight) had laws prohibiting interracial marriage.[84]

When Congress was discussing what eventually became the Fourteenth Amendment, many congressmen, as well as President Andrew Johnson, expressed concerns that this amendment would have the effect of depriving the states of the power to prohibit interracial marriages.[85] Proponents of the Fourteenth Amendment argued that the amendment would not render unconstitutional a law that prohibited interracial marriage so long as the law treated a black person who married or tried to marry a white person the same way it treated a white person who married or tried to marry a black person.[86] Once the amendment passed, some

---

82. There are twelve exceptions. Specifically, Alaska, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, New York, Vermont, Wisconsin, Kansas, New Mexico, and Washington never had laws restricting interracial marriage. The last three prohibited interracial marriages when they were territories, but repealed them when they became states. The District of Columbia also never prohibited interracial marriages. *See* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE 253–54 (2002).

83. *See, e.g.*, MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH (1999); RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE (2001); SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY (Martha Hodes ed., 1999).

84. In addition to those states mentioned that never had such laws, see *supra* note 83, Illinois (1874), Iowa (1851), Maine (1883), Massachusetts (1843), Michigan (1883), Ohio (1887), Pennsylvania (1780) and Rhode Island (1881) had laws prohibiting interracial marriages but repealed them before 1948 (as indicated). WALLENSTEIN, *supra* note 82, at 253–54. Arkansas, Florida, Louisiana, Mississippi, and South Carolina repealed their anti-miscegenation laws during the Reconstruction Era, only to reinstate them sometime thereafter. *See* PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH CENTURY SOUTH 289 n.19 (1995).

85. *See, e.g.*, RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY AND ADOPTION 249–50 (2003); *see also* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA 136 (1985); Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1235 (1966).

86. See, for example, Sen. Trumbull's discussion of the 1866 Civil Rights Act, which adopted basically the same language as was subsequently adopted by section one of the Fourteenth Amendment:

> [I]f the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discrimination in punishments on account of color; and unless the Senator from Kentucky wants to punish the Negro more severely for marrying a white person than a white person for marrying a Negro, the bill will not interfere with his law.

CONG. GLOBE, 39th Cong., 1st Sess. 420 (1866); *see also* KENNEDY, *supra* note 85, at 252 ("[T]he politicians who framed the Fourteenth Amendment did not intend to render illegal statutes prohibiting interracial marriage. During debates held prior to congressional passage of the Fourteenth Amendment, its proponents repeatedly denied that it would affect the legality of properly drafted

people were still worried about its effect on anti-miscegenation laws. Precisely this worry led Congressman Andrew King to propose the first constitutional amendment that directly addressed marriage.[87] This proposed amendment would have prohibited interracial marriage throughout the United States.[88] In the preamble to his proposed amendment, Congressman King justified it by saying that "the second clause of the first section of the fourteenth amendment of the Constitution deprives the States of the power to prohibit by law the intermarriage of the white and colored races."[89]

The legislative history of the Fourteenth Amendment suggests that King's interpretation of that amendment was wrong at the time.[90] Shortly after the ratification of the Fourteenth Amendment, two state supreme courts did hold that this amendment had the effect of overturning state laws prohibiting interracial marriage.[91] However, one of those courts reversed itself on this issue five years later,[92] and the state legislature of the other state reinstated the prohibition of interracial marriages two decades later.[93] Every other court that considered this issue before 1948 agreed that the Fourteenth Amendment allowed such prohibitions so long as whites and blacks were both equally prohibited from intermarrying.[94] Congressman King's primary argument for a constitutional amendment prohibiting interracial marriages was thus undercut by the accepted interpretation of the Fourteenth Amendment that it did not affect the constitutionality of state laws against interracial marriage. This settled interpretation of the Fourteenth Amendment did not, however, put an end to further attempts to amend the Constitution to prohibit interracial marriage.

---

antimiscegenation laws."); Avins, *supra* note 85. *See generally* WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 133 (1988).

87. H.R.J. Res. 54, 42d Cong. (1871) [App. # 1].

88. *Id*.

89. *Id*.

90. *See, e.g.*, KENNNEDY, *supra* note 85, at 252; NELSON, *supra* note 86; Avins, *supra* note 85.

91. *See* Burns v. State, 48 Ala. 195 (1872); Hart v. Hoss, 26 La. Ann. 90 (1874).

92. Green v. State, 58 Ala. 190 (1877) (overruling *Burns*).

93. *See* COTT, *supra* note 75, at 101, 259 n.72 (discussing laws relating to interracial marriage in Alabama and Louisiana).

94. *See, e.g.*, Pace v. Alabama, 106 U.S. 583 (1883); *In re* Hobbs, 12 F. Cas. 262 (C.C.N.D. Ga. 1871) (No. 6,550); State v. Gibson, 36 Ind. 389 (1871); State v. Jackson, 80 Mo. 175 (1883); State v. Hairston, 63 N.C. 451 (1869); Doc Lonas v. State, 50 Tenn. 287 (1871); Frasher v. State, 3 Tex. Ct. App. 263 (1877); *see also* COTT, *supra* note 75, at 98–101. For a discussion of the way such cases understand the power of the federal government to repeal state anti-miscegenation law, see Hasday, *supra* note 28, at 1365–70.

Two additional amendments to the Constitution that would have prohibited interracial marriage were proposed in 1912 and 1928 respectively. In 1912, in response to the high profile marriage of Jack Johnson, an African-American boxer, to a white woman in Chicago,[95] Congressman Seaborn Roddenbery proposed a constitutional amendment concerning interracial marriage. Like King's 1871 amendment, Roddenbery's amendment would have prohibited interracial marriage throughout the nation. Roddenbery's amendment went further, defining "negroes and persons of color" as people with "any trace of African or Negro blood."[96] Despite an impassioned plea on behalf of his proposed amendment,[97] the resolution died in the House Judiciary Committee. A similar fate befell Senator Coleman Blease's 1928 proposed constitutional amendment which went beyond the two earlier proposals in that it not only prohibited interracial marriages, it also required Congress to set a punishment for a person who either attempted to marry a person of a different race or attempted to perform such a marriage.[98]

In 1948, the California Supreme Court overturned that state's anti-miscegenation law in the landmark case of *Perez v. Lippold*, in part on the basis of the Equal Protection Clause of the Fourteenth Amendment.[99] The California Court also rejected the argument that anti-miscegenation laws treated blacks and whites equally, arguing as follows:

> It has been said that a[n anti-miscegenation] statute . . . does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race. The decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. . . . Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry.[100]

---

95. *See* Denise Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529 (1999). Johnson was ultimately prosecuted under the Mann Act and as a result spent a year in prison. For a brief story of his life, see GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES 1800–1917, at 1–5 (1995).

96. H.R.J. Res. 368, 62d Cong. (1912) [App. # 74].

97. 49 CONG. REC. 502-04 (1912).

98. S.J. Res. 65, 70th Cong. (1928) [App. # 120].

99. Perez v. Lippold, 198 P.2d 17, 27 (Cal. 1948). The *Perez* court also held that the California law prohibiting interracial marriages was unconstitutional because it was "too vague and uncertain to be [an] enforceable regulation[] of a fundamental right." *Id*. at 29.

100. *Id.* at 20–21 (citation omitted).

Between 1948 (the year *Perez* was decided) and 1967, thirteen states repealed their prohibitions on interracial marriages.[101] Then, in 1967, the Supreme Court decided *Loving v. Virginia*,[102] which held that laws prohibiting interracial marriage were unconstitutional on both equal protection[103] and due process grounds.[104] Although *Loving* had the effect of preventing states from enforcing their bans on interracial marriage, some states did not repeal these anti-miscegenation laws until decades later.[105]

B. The Polygamy Amendments

Between 1879 and 1924, fifty-five constitutional amendments concerning polygamy were proposed. A typical polygamy amendment was House Joint Resolution 50 (proposed in 1883), which said, "Polygamy, being incompatible with our civilization, is forever prohibited in the United States and all places under its jurisdiction."[106] Several of these amendments concerning polygamy also disenfranchised polygamists and prohibited them from holding national elected office.[107] These amendments, although directed at polygamy generally, were motivated in part by anti-Mormon sentiments. For this reason, this section offers a brief legal and cultural history of anti-Mormon and anti-polygamy attitudes as they relate to attempts to amend the Constitution to prohibit polygamy.

Joseph Smith founded the Church of Jesus Christ of Latter-day Saints in 1830 in Fayette, New York.[108] Due to emerging public sentiment

---

101. The states that did so were Arizona, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *See* WALLENSTEIN, *supra* note 82, at 254.

102. Loving v. Virginia, 388 U.S. 1 (1967).

103. *Id*. at 7–12.

104. *Id*. at 12.

105. For example, Alabama did not repeal its prohibition of interracial marriages until the year 2000. *See* ALA. CONST. amend. 667 (repealing ALA. CONST. art. IV, § 102, which stated, "The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.").

106. H.R.J. Res. 50, 48th Cong. (1883) [App. # 6].

107. *See, e.g.*, H.R.J. Res. 87, 47th Cong. (1882) [App. # 3] (disqualifying polygamists from voting or holding office). Two amendments concerning polygamy would not have prohibited polygamy but would have *only* disenfranchised polygamists. *See* H.R.J. Res. 112, 56th Cong. (1900) [App. # 47]; H.R.J. Res. 68, 57th Cong. (1901) [App. # 56]. These two amendments are denoted "P**" in the Appendix.

108. JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 5 (1987). For other useful discussion of polygamy, see RICHARD S. VAN WAGONER, MORMAN POLYGAMY: A HISTORY (1989); JAMES B. ALLEN & GLEN M. LEONARD, THE STORY OF THE LATTER-DAY SAINTS (1976); and COTT, *supra* note 75, at 105–31.

against them, the members of Smith's church, also known as Mormons, soon began a westward migration. In 1843, while the Mormons were primarily based in Missouri, Illinois and Ohio, Smith had what he described as a revelation from God—which became known as the "Revelation on Celestial Marriage"—that Mormon men should have multiple wives.[109] Although this revelation did not become official church doctrine for several years, even before it did, Mormonism became commonly associated with polygamy. This association with polygamy was in part responsible for the spread of strong anti-Mormon sentiments.[110]

In 1844, Joseph Smith was arrested in Illinois. While he was under the protection of state law enforcement officials, he was murdered by an anti-Mormon mob.[111] This, in part, hastened the Mormons' continued move westward. Many of the Mormons finally settled in the area that eventually became Utah. They soon became the most powerful political force in region. In 1850, the Territory of Utah was formed by Congress (although with significantly smaller borders than had been desired by the Mormons who made the request for territorial status). The Mormon's religious leader Brigham Young became governor of the territory.[112]

In 1852, church leaders declared that polygamy had been ordained by God.[113] Shortly thereafter, Congress, using its power to make laws for the territories and possessions of the United States,[114] began passing laws against polygamy as well as other laws designed to reduce the power of the Mormons. From 1862 until 1887, Congress passed a series of increasingly strong anti-polygamy laws.[115] President Ulysses Grant, in his annual address to Congress, described polygamy as a "flagrant . . . crime against decency and morality" and told Congress that "polygamy should be banished from the land."[116] In 1876, the Supreme Court added its voice to the national discussion of polygamy when it decided *Reynolds v. United*

---

109. SARAH BARRINGER GORDON, THE MORMAN QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 22 (2002).

110. GROSSBERG, *supra* note 85, at 121–22.

111. GORDON, *supra* note 109, at 24–25.

112. *Id*. at 25–26.

113. GROSSBERG, *supra* note 85, at 122.

114. U.S. CONST. art. IV, § 3.

115. *See, e.g.*, Morrill Act, ch. 125, § 1, 12 Stat. 501 (1862); Poland Act, ch. 469, § 3, 18 Stat. 253 (1874); Edmunds Act, ch. 46, §§ 1–10, 22 Stat. 30 (1882) (codified at 48 U.S.C. § 1461) (repealed 1983); Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (codified at 28 U.S.C. §§ 633, 660) (repealed 1978); *see also* Mary Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887*, 13 YALE J.L. & FEMINISM 29, 37–45 (2001) (discussing these laws); Hasday, *supra* note 28, at 1357–64 (same).

116. President Ulysses S. Grant, Seventh Annual Message (Dec. 7, 1875), *reprinted in* 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS: 1790–1966, at 1316 (Fred Israel ed., 1967).

States, which held that polygamy prosecutions were constitutionally permissible and, in particular, that such prosecutions did not restrict religious liberty.[117] The Court in *Reynolds* effectively denied that there is a right to marry more than one person at the same time.[118]

In 1890, the Mormon church bowed to the pressure applied by Congress and the courts over the previous dozen or so years. The then leader of the Mormon church, Wilford Woodruff, after he allegedly received a message from God encouraging him to do so, released a "manifesto" that advised Mormons not to "contract[] any marriages forbidden by the law of the land."[119] This "manifesto" was widely interpreted by Mormons and non-Mormons alike as an official retreat, albeit a somewhat vague one, from the church's endorsement of polygamy.[120]

Once the church had officially retreated from endorsing polygamy, the United States government rolled back many of the sanctions against the Mormon Church.[121] There was still some polygamy-based resistance to statehood for Utah and Utah was only admitted to the Union in 1896, after it included in its constitution a rule against polygamy, a provision it retains today.[122]

Fifty-five proposed constitutional amendments relating to polygamy were proposed despite the fact that polygamy has never been legal in any state, including Utah.[123] Although Congress passed a series of increasingly strong laws against polygamy in the Territories, there was concern about what would happen if Utah (or some other territory) became a state and legalized plural marriages. Even after the Territory of Utah passed a law against polygamy and ultimately drafted a state constitution that contained a provision prohibiting polygamy, members of Congress were still concerned about the possibility that, after it obtained statehood, Utah would amend its Constitution to allow polygamy.[124] Thirty-five

---

117. Reynolds v. United States, 98 U.S. 145, 161–67 (1878).

118. *Id*. at 166 ("the statute . . . is constitutional"); *see also* Potter v. Murray City, 760 F.2d 1065, 1070–71 (1985).

119. EMBRY, *supra* note 108, at 12.

120. *See* GROSSBERG, *supra* note 85, at 125; GORDON, *supra* note 109, at 220.

121. *Id*.

122. UTAH CONST. art. III ("Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but *polygamous or plural marriages are forever prohibited*.") (emphasis added).

123. See proposed amendments in the Appendix denoted with "P".

124. *See, e.g.*, 19 CONG. REC. 166 (1887) (statement of Sen. Dolph) ("When a State is once admitted into the Union, no matter how the admission is secured, Congress cannot reconsider its action and the State must retain its power of self-government and its place in the Union.").

constitutional amendments relating to polygamy were proposed in the twenty-eight years after Utah became a state.[125] Several of these proposals came on the heels of Utah's election of Brigham Roberts, a self-proclaimed polygamist, to Congress in 1899. The House of Representatives expelled Roberts in 1900 and the mere mention of Roberts' name became a call for amending the Constitution to prohibit polygamy, to disenfranchise polygamists, and to bar them from holding public office.[126]

Although various hearings were held concerning these proposed amendments and, on several occasions, reports were issued concerning them, none of these proposed amendments ever came to a vote on the floor of either house. Polygamy, however, remains illegal in every state—that is, no state allows a person to be legally married to more than one person at the same time.[127] Despite this, in some communities in Utah and neighboring states, there is tacit acceptance of polygamous marriages.[128] Occasionally, there is an official crackdown on polygamy and some polygamists are arrested and prosecuted and some children of polygamists are taken away from their parents. The wisdom of this sort of enforcement remains a subject of dispute[129] and some aspects of the law in Utah relating to polygamy have shifted over the past decades.[130]

C. The Jurisdictional Amendments

Since the founding of the United States, there have been differences among the states regarding (a) the requirements for entry into marriage (e.g., the minimum age for a person to be married,[131] whether persons of different races can marry each other,[132] and under what circumstances a

125. See proposed amendments in the Appendix denoted with "P" after 1894.

126. *See* AMENDING AMERICA, *supra* note 9, at 195.

127. *See, e.g.*, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 64–65 (2d ed. 1988).

128. *Id*. at 66–67; Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES, Feb. 28, 1999, (Magazine), at 53.

129. *See, e.g.*, Egan, *supra* note 128; Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003); Ralph Nader, *The Law v. Plural Marriages*, 31 HARV. LEGAL REC. 10 (1960).

130. For example, although restrictions on polygamy have been upheld in the face of constitutional challenges—see Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985), Smith v. State, 6 S.W.3d 512 (Tenn. Crim. App. 1999)—Utah courts have ruled that polygamy is not a per se bar to adoption, see *In re* Adoption of W.A.T., 808 P.2d 1083 (Utah 1991), nor a per se bar to custody of a child, see Sanderson v. Tyson, 739 P.2d 623 (Utah 1987).

131. *See, e.g.*, CLARK, *supra* note 127, at 88–98.

132. *See infra* notes 82–86 and 99–105 and accompanying text.

divorced person can remarry[133]), (b) the benefits and obligations of marriage,[134] and (c) the procedures and requirements for dissolving or annulling a marriage.[135] In light of these differences, couples wishing to marry or to divorce will sometimes travel from their home state to take advantage of marriage or divorce law in another state that is favorable to their circumstances.[136] Over the years, commentators have decried the myriad legal differences among marriage and divorce laws in the various states.[137] Their concerns have led to attempts to encourage the passage of uniform state marriage and divorce laws and to attempts to give Congress jurisdiction over marriage and divorce laws. This section surveys these issues as they relate to proposed constitutional amendments related to marriage.

Divorce in the American colonies took various forms and did not change until several decades after the colonies became states. In some states, divorce was a matter for the legislature; if a person wanted to divorce, he or she would have to petition the state legislature for a private act granting a divorce.[138] Some states would only grant a divorce from bed and board, whereby the couple would live separately but would remain legally married and thus could not remarry.[139] In other states, the civil courts had jurisdiction over divorce but, under the laws of such states, the grounds for granting divorce were typically limited.

Starting with the post-Civil War years, both the number of divorces and the percentage of marriages that ended in divorce dramatically increased in

---

133. *See, e.g.*, HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 20, 73, 258 (2000).

134. *See, e.g.*, CLARK, *supra* note 127, at 250–58 (support obligations of spouses generally, 265–66 (duty to furnish necessaries), 370–74 (spousal tort immunity), 390–98 (right to sue for loss of consortium).

135. *See, e.g.*, CLARK, *supra* note 127, at 125–48 (annulment), 496–528 (grounds for divorce and defenses), 529–88 (procedures for divorce).

136. *See* Payne v. Payne, 214 P.2d 495, 495 (Colo. 1950) (involving couple who left their home state to avoid age restrictions on marriage); Eggers v. Olson, 231 P. 483, 483–84 (Okla. 1924) (involving a couple who left their home state because of restrictions on marriage between a Native American and an African-American); Leefield v. Leefield, 166 P. 953, 953 (Or. 1927) (involving couple who left their home state to avoid restrictions on marrying a cousin); Pennegar v. State, 10 S.W. 305, 305 (Tenn. 1889) (involving couple who left their home state to avoid prohibition on marrying a person with whom one had previously committed adultery).

137. *See, e.g.*, MARY E. RICHMOND & FRED S. HALL, MARRIAGE AND THE STATE (1929); *see also* H.R. REP. NO. 52-1290, at 3 (1892), *microformed on* CIS No. 3045-H.r.p. 1290 (Cong. Info. Serv.) (minority opinion included in the House Comm. on the Judiciary's adverse report on H.R.J. Res. 46, 52d Cong. (1892) [App. # 27]) ("In the several States the law differs as to the . . . grounds of divorce, and the result is that we have a constant tide of immigration from State to State by persons seeking to evade the obligations of the marriage relation and the divorce laws of their own States.").

138. BLAKE, *supra* note 67, at 34–47.

139. *See, e.g.*, HARTOG, *supra* note 133, at 12, 35–37.

America. In 1860, there were 7,380 divorces, which constituted just over one divorce for every one thousand legally intact marriages.[140] In 1900, there were 55,751 divorces, which amounted to four divorces for every one thousand marriages.[141] In 1920, these numbers increased to 167,105 divorces, which was almost eight divorces for every one thousand marriages.[142] While this rate of divorce is low compared to recent decades,[143] the rate of increase in the number of divorces during the latter part of the nineteenth century was dramatic. This increase in divorce and the associated social and political developments, led to concern about the breakdown of the American family that was manifest both locally and nationally. At the local level, many states felt pressure from lobbying groups to tighten divorce laws to keep marriages and families together.[144] At the national level, the concern was with so-called "migratory divorces" in which either spouse (or both) would leave their home state to travel to a state with more liberal divorce laws, obtain a divorce in the more liberal state, and return home after the marriage was dissolved.[145] Some states with these liberal divorce laws intentionally set themselves up as "divorce mills" and reaped many economic benefits as a destination for migratory divorces.[146]

On January 24, 1881, the New England Divorce Reform League was formed. Under the leadership of Reverend Samuel Dike,[147] the league's secretary, this group began to lobby for reform of marriage and divorce laws at the national level. In 1884, Dike went to Congress to press for a national study of the frequency of divorce. Despite obtaining unanimous approval of the Senate and a positive report from the House Judiciary Committee, Dike's proposal failed both that year and again in 1886.[148]

---

140. PAUL H. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 90–92 (1959).

141. *Id*.

142. *Id*.

143. Today, approximately half of first-time marriages end in divorce. *See* ROSE M. KREIDER & JASON M. FIELDS, U.S. DEP'T OF COMMERCE, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 18 (2002), *available at* http://www.census.gov/prod/2002pubs/p70-80.pdf.

144. *See, e.g.*, BLAKE, *supra* note 67, at 130–51; LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES *passim* (1980); GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 108–29 (1991).

145. *See* BLAKE, *supra* note 67, at 152–72.

146. On "divorce mills," see generally, COTT, *supra* note 75, at 24–55 and RILEY, *supra* note 144, at 85–107, 135–44.

147. Dike's divorce-related activism began when he was fired for refusing to officiate at the wedding of a divorced member of his parish. *See* NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 89 (1999).

148. *See* BLAKE, *supra* note 67, at 133.

Finally, in 1887, Congress authorized a national study of marriage and divorce.[149]

The first attempt to amend the Constitution to give Congress the power to regulate marriage came in 1884, when two New York Congressmen separately proposed different amendments for this purpose.[150] As support for passing uniform state laws began to weaken, the strategy of amending the Constitution gained momentum.[151] Between 1884 and 1906, senators and representatives proposed thirty amendments to give Congress the power to pass laws regarding marriage and/or divorce.[152] During that time, support for uniform marriage and divorce laws waxed and waned.

In 1906, there were increased efforts both to draft model marriage and divorce laws that would be passed by the various states and also to pass a constitutional amendment giving Congress the power to make national marriage and divorce laws. In that year, Governor Samuel Pennypacker of Pennsylvania sponsored a National Congress on Uniform Divorce Laws. Its charge was to draft uniform laws related to marriage and divorce to be adopted by the states.[153] Although this and subsequent bodies drafted various uniform laws relating to marriage and divorce, few states adopted any of these laws. For example, one important proposed model law dealt with the problem of married couples leaving their home state to obtain a divorce from another jurisdiction on a ground that was not permitted in their home state.[154] Although advocates of divorce reform and many others supported this proposed uniform law, only New Jersey, Delaware and Wisconsin adopted it and support for this uniform law was withdrawn in 1928.[155]

---

149. A REPORT OF MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867–1886 (Carroll D. Wright ed., 1891). For discussion, see BLAKE, *supra* note 67, at 134–35 and RILEY, *supra* note 144, at 79–80.

150. H.R.J. Res. 80, 48th Cong. (1884) [App. # 7]; H.R.J. Res. 84, 48th Cong. (1884) [App. # 8].

151. *See* BLAKE, *supra* note 67, at 145 ("As the effort to get uniform state legislation petered out, the alternative strategy of seeking a Federal law began to attract more support.").

152. See proposed amendments in Appendix denoted with "J" between 1884 and 1906.

153. *See* BLAKE, *supra* note 67, at 140–41.

154. *See id*. at 144. Section 21 of the proposed model law stated, in part:

> Full faith and credit shall be given in all the courts of this state to a decree of annulment of marriage or divorce by a court of competent jurisdiction in another State . . . when the jurisdiction of such court was obtained in . . . conformity with the conditions prescribed in . . . this act. . . . Provided, That if any inhabitant of this state shall go into another state. . . in order to obtain a decree of divorce for a cause which occurred while the parties resided in this State, or for a cause which is not ground for divorce under the laws of this state, a decree so obtained shall be of no force or effect in this state.

PROCEEDINGS OF THE ADJOURNED MEETING OF THE NATIONAL CONGRESS ON UNIFORM DIVORCE LAWS 131 (1906), *quoted in* BLAKE, *supra* note 67, at 144.

155. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

Also in 1906, President Theodore Roosevelt, in his annual message to Congress, argued that "the whole question of marriage and divorce should be relegated to the authority of the National Congress . . . [because] surely there is nothing so vitally essential to the welfare of the nation, nothing around which the nation should so bend itself to throw every safeguard, as the home life of the average citizen."[156] In part in response to Roosevelt's remarks, and to Samuel Dike's efforts, Congress authorized a second study of the number of divorces in the United States.[157]

Just as attempts to unify marriage and divorce law across the nation through either uniform state laws or federal constitutional amendments failed in the first decade of the twentieth century, later attempts to draft uniform laws also had very limited success. For example, in 1912, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Marriage Evasion Act, which would have, in part, prohibited a couple from getting married in a state where they were not residents unless their home state permitted them to marry.[158] Only Vermont, Massachusetts, Louisiana, Illinois and Wisconsin adopted the Uniform Marriage Evasion Act in whole or in part.[159] Other attempts to use model laws to unify marriage and divorce law in the first half of the 1900s also met with limited success and only a few states adapted such uniform laws. As a result of the states' lackluster response to proposed uniform marriage and divorce laws, many of the uniform laws were withdrawn.[160] This is precisely what happened to the Uniform Marriage Evasion Act in 1943.[161]

---

294 (1959); *see also* BLAKE, *supra* note 67, at 145.

156. Theodore Roosevelt, Sixth Annual Message to the Senate and House (Dec. 3, 1906), *reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS: 1790–1966, at 2218 (Fred Israel ed., 1967).

157. BLAKE, *supra* note 67, at 140; WILLIAM L. O'NEILL, DIVORCE IN THE PROGRESIVE ERA 53 (1967).

158. PROCEEDINGS OF THE TWENTY-SECOND ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 125–30 (1912). The Uniform Act stated in part:

> No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void.

Id.

159. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-THIRD ANNUAL CONFERENCE 147 (1943) [hereinafter HANDBOOK OF COMMISSIONERS 1943].

160. See BLAKE, *supra* note 67, at 130–51. On the uniform divorce law movement generally, see RILEY, *supra* note 144, at 108–29.

161. *See* HANDBOOK OF COMMISSIONERS 1943, *supra* note 159, at 147. The Massachusetts version of the Uniform Marriage Evasion Act, MASS. GEN. LAWS ch. 207, §§ 11–12 (2002), remains in force. Although it was rarely enforced in the past several decades, this law has received attention in the aftermath of *Goodridge v. Dep't of Pub. Health*. Massachusetts is interpreting this law as

As attempts to get the various states to pass uniform marriage and divorce laws failed, so too did attempts to give Congress the power to pass uniform marriage and/or divorce laws despite repeated attempts over the years.[162] Such amendments failed, it seems, due to opposition from both sides of the political spectrum. On one hand, liberals and women's rights activists wanted to weaken the requirements for divorce, in part to give women more freedom to get out of unhappy marriages. They were concerned that a uniform law would have the effect of making it harder to get out of marriages because women trapped in bad marriages would have no escape hatch of the sort traditionally provided by states such as Nevada.[163] On the other hand, "[c]onservatives were torn between their hatred of divorce and their fear of strong federal action."[164] Specifically, they were worried that national marriage and divorce laws would mean it would become easier for couples in many states to get divorced. For example, representatives from South Carolina, a state that granted divorces only in a very limited set of instances, were concerned that national marriage and divorce laws would force their state to weaken its divorce laws.[165] Similarly, conservative southerners were worried that a national marriage law would require the legalization of interracial marriage across the country.[166] In sum, liberal and conservative advocates of uniform marriage and divorce laws were unable to work together because of their inherent differences. As Lynne Halem observed:

> Liberals dreamed of a national divorce law which would relax legal restraints and extend the ground for divorce. Conservatives wanted to draw in the reins, stiffening controls and limiting the grounds.

---

prohibiting non-resident same-sex couples from getting married in Massachusetts. *See* Cote-Whitacre v. Dep't of Pub. Health, No. 04-2656-G, 2004 WL 2075557, at **15–16 (Mass. Super. Ct. Aug. 18, 2004). The Massachusetts Supreme Judicial Court has granted a direct appellate review of the trial court's denial of plaintiffs' motion for preliminary injunction against the enforcement of the state's marriage evasion law. Cote-Whitacre v. Dep't of Pub. Health, No. 2004-P-1627 (Mass. Jan. 25, 2005).

162. Senator Arthur Capper, speaking on behalf of S.J. Res. 28, 80th Cong. (1947) [App. # 32], noted that the amendment he was proposing was similar to one proposed in 1884, H.R.J. Res. 80, 40th Cong. (1884) [App. # 7]. *See* 93 CONG. REC. 334 (1947). Capper, a Republican from Kansas, proposed eleven jurisdictional amendments to the Constitution between 1923 and 1947. For a brief discussion of Capper's proposed amendments, see BLAKE, *supra* note 67, at 148–50. Only Congressman Frederick Gillett, a Republican from Massachusetts, proposed more constitutional amendments. Between 1897 and 1924, he proposed fourteen constitutional amendments (ten regarding polygamy and four regarding jurisdiction).

163. *See* HALEM, *supra* note 144, at 40; RILEY, *supra* note 144, at 135.

164. O'NEILL, *supra* note 157, at 246–47.

165. *See Uniform Laws as to Marriage and Divorce: Hearings on H.J. Res. 48* [App. # 84] *Before the House Comm. on the Judiciary*, 64th Cong. 8 (1916) (statement of Congressman Richard Whaley that South Carolina preserved the "sanctity of the home . . . better than . . . any [other] State").

166. MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE, AND THE LAW 46 (1972).

> Unable to reconcile these discrepancies, the movement was never able to establish any momentum within the Congress, although it was revived again and again.[167]

D. "Two-for-the-Price-of-One" Amendments

The different types of proposed amendments to the Constitution were not, as it might seem from the discussion thus far, unrelated. These seemingly distinct proposals were often linked and the historical contexts that led to each of these amendments overlapped in various ways. Furthermore, four of the proposed constitutional amendments concerning marriage made specific textual links among polygamy, interracial marriage and/or uniform marriage laws; thus, the proposals attempted to deliver two substantive changes to the Constitution regarding marriage for the price of just one constitutional amendment.

Senate Joint Resolution 2, proposed by Senator Joseph Dolph in 1887, would have given Congress the "power to legislate upon the subjects of marriage and divorce by general laws applicable alike to all the States and Territories" and, in the very same sentence, declared that "neither bigamy nor polygamy shall exist or be permitted within the United States."[168] Similarly, House Joint Resolution 170, proposed by Congressman Martin Madden in 1910, dealt with a plethora of issues including income taxes, liability of employers for injuries to employees, and excluding "the yellow race" from citizenship. This amendment also would have given Congress the power to pass laws that punished bigamy and polygamy and to "make laws respecting . . . marriage, divorce, and alimony, which laws shall be of a general nature and uniform in operation throughout the United States."[169] House Joint Resolution 162, proposed by Congressman Ernest Gibson in 1928, would have given Congress the power to make uniform marriage and divorce laws while reserving "the power to legislate concerning the relation between persons of different races" to the states.[170]

These proposed amendments specifically linked a jurisdictional amendment to an amendment to prohibit either interracial marriage or

---

167. HALEM, *supra* note 144, at 40; RHEINSTEIN, *supra* note 166, at 46 ("Opposition [to these amendments] united liberals with southern defenders of states' rights and racists who would not be satisfied with a federal law that would not also forbid interracial marriages."); RILEY, *supra* note 144, at 134–35; O'NEILL, *supra* note 157, at 250–52.

168. S.J. Res. 2, 50th Cong. (1887) [App. # 15]. Senator Dolph proposed a similar amendment two years later. S.J. Res. 5, 51st Cong. (1889) [App. # 23].

169. H.R.J. Res. 170, 61th Cong. (1910) [App. # 72].

170. H.R.J. Res. 162, 70th Cong. (1928) [App. # 122].

polygamy. It is not a coincidence that the different types of proposed amendments were linked textually in some instances. As the next Part argues, advocates of these different types of amendments justified their proposals in much the same way, regardless of which type of amendment they were advocating. The desire to amend the Constitution relating to marriage, although it took different forms, stemmed from the same motives and was justified by its various advocates in similar ways.

III. JUSTIFICATIONS FOR THESE PROPOSED AMENDMENTS

The previous Part argued that although there are some differences among the historical pressures that surrounded attempts to amend the Constitution regarding interracial marriages, polygamy, and uniform marriage and divorce laws, a handful of the proposed amendments actually addressed more than one of these issues. This suggests that similar motives were behind the three different types of constitutional amendments. Building on this observation, this Part argues that the justifications given by advocates of the three types of proposed amendments had much in common.

Specifically, there are several common strands of argument present in the justifications offered for these three types of amendments. First, advocates of these amendments cited threats to the nation, to the foundations of the republic, and to our democratic form of government. Second, they appealed to public health and morality concerns so great as to warrant amending the Constitution. Third, advocates of these amendments expressed concern that the states lacked the political will to pass laws necessary for the preservation of marriage. Such advocates argued that, because states were simply unwilling or unable to pass important laws concerning marriage, a constitutional amendment relating to marriage was necessary. Fourth, they argued that judges cannot be trusted with issues as important as those relating to marriage. And, fifth, they argued that the profound importance of marriage generally warrants enshrining certain rules about marriage in the Constitution.

Additionally, sometimes the justifications offered for the three types of amendments were interconnected, namely, part of the reason why one might favor giving Congress the power to pass uniform marriage and divorce laws was to effect the prohibition of polygamy or interracial marriage throughout the country. Some evidence of this can be seen in the four proposed amendments concerning marriage that explicitly conjoin

two of the three different types of amendments.[171] Further evidence of this interconnectedness can be found in the arguments made by supporters of the various amendments. It is to such evidence that I now turn.

Defenders and opponents of constitutional amendments giving Congress the power to pass uniform marriage and divorce laws sometimes justified their proposals by appeal to concerns about polygamy or interracial marriage. Consider, for example, Congressman George Washington Taylor's description of the intent of House Joint Resolution 279, proposed in 1900, which would have given Congress the "power to enact uniform laws on the subject of marriage and divorce."[172] According to the *New York Times*, Congressman Taylor's purpose in proposing this amendment went "considerably beyond a mere uniformity of such laws, and [was] expressly designed to reach polygamy, and put an end to it."[173] As another example, consider Senate Joint Resolution 29, proposed by Senator James Kyle in 1892, which would have given Congress "the exclusive power to regulate marriage and divorce in the several states, Territories and the District of Columbia."[174] Among the reasons Senator Kyle offered in support of his amendment was that a uniform law regarding marriage would put an end to "the fear that once admitted [as a state, Utah] might enact laws upon the marriage question inimical to the best sentiment of our people."[175] President Theodore Roosevelt expressed this same sentiment when he expressed support for giving Congress the power to make marriage and divorce law on the grounds that "it would confer on the Congress the power at once to deal radically and efficiently with polygamy."[176]

Finally, consider House Joint Resolution 46, proposed in 1892, which would have given Congress the power "to make and establish uniform laws regulating . . . marriage and divorce in the various States."[177] After holding hearings, the House Committee on the Judiciary issued a report opposing the adoption of this resolution. A minority of the committee added their own statement to the report defending the proposed amendment. Both the majority and the minority opinions in the report

171. *See supra* notes 168–70 and accompanying text.

172. H.R.J. Res. 279, 56th Cong. (1900) [App. # 50].

173. *Bill Against Polygamy: Congressman Tayler* [sic] *Introduces Measure to Make Laws on Marriage and Divorce Uniform*, N.Y. TIMES, Dec. 8, 1900, at 2.

174. S.J. Res. 29, 52d Cong. (1892) [App. # 28].

175. 52 CONG. REC. 790 (1892).

176. Roosevelt, *supra* note 156, *reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS: 1790–1966, at 2194 (Fred Israel ed., 1967).

177. H.R.J. Res. 46, 52d Cong. (1892) [App. # 27].

made arguments that related to other topics of proposed constitutional amendments relating to marriage. Part of the minority report's argument in favor of the proposed jurisdictional amendment was that "it is possible for one man to have as many lawful wives as there are States in the Union"[178] due to differences in the divorce law among the various states and to the fact that some states did not recognize divorces from other states. Since "[t]he spirit of our institutions is opposed to polygamous marriages,"[179] the minority argued for national uniformity in marriage and divorce laws in order to preserve the institution of monogamous marriage.[180]

The majority of the committee, in its report opposing that same proposed amendment, also made a connection between uniform marriage and divorce laws and the subject of one of the other types of amendments, namely, interracial marriage. The majority argued as follows:

> If Congress were given power to legislate upon the subjects of marriage and divorce it would soon extend that power by construction to all the domestic relations; and who can doubt that there soon would be a law enacted securing the right of marriage between any man and woman of lawful age, without regard to race, color, or previous condition, and thus to encourage the mixing of races.[181]

This same objection to giving Congress the power to pass uniform marriage laws was made again thirty years later. An article by Iredell Mears, a lawyer in Washington, D.C., was read into the *Congressional Record* as part of the debate on Senate Joint Resolution 40 and House Joint Resolutions 35 and 162.[182] Mears opined that "26 states have laws prohibiting intermarriages between white persons and persons of African, Monogolian, Malayan, or Indian descent" and that these states' "[e]xperience teaches them that the intermarriage of races is detrimental to both [races] and injurious to society."[183] In light of this, he argued that the proposed jurisdictional amendments would undercut state prohibitions of interracial marriage.

---

178. H.R. REP. NO. 52-1290, at 3 (1892) (minority opinion included in The House Comm. on the Judiciary's adverse report on H.R.J. Res. 46, 52d Cong. (1892) [App. #27]).

179. *Id*. (same).

180. *Id*. at 5.

181. *Id*. at 2 (majority opinion).

182. S.J. Res. 40, 70th Cong. (1927) [App. # 119]; H.R.J. Res. 35, 70th Cong. (1927) [App. # 121]; and H.R.J. Res. 162, 70th Cong. (1928) [App. # 122].

183. 69 CONG. REC. 10,064 (1928).

In sum, both advocates and opponents of amendments giving Congress the power to pass national marriage laws justified their views in part by appeal to specific issues regarding the regulation of marriage, namely to polygamy and interracial marriage.[184] This suggests that these three types of amendments are connected in interesting ways. Further evidence of the conceptual interconnectedness of these three types of amendments is that they were justified by similar arguments. The subparts that follow consider the specific arguments made by advocates of the various types of amendments.

A. Threat to the Nation

Advocates of many of the proposed constitutional amendments concerning marriage justified their proposals by referencing the importance of the institution of marriage to the stability of the United States as a nation. Polygamy, interracial marriage, and the lack of uniformity among the marriage and divorce laws of the various states were each said to threaten the very foundation of the country's democratic form of government. Consider the following example. On February 2, 1900, the House Committee on the Judiciary held hearings on House Joint Resolution 69,[185] which would have prohibited polygamy. Reverend William R. Campbell defended the proposed amendment "solely on the ground of our self-preservation as a Republican form of government."[186] He continued:

> [R]epublican institutions cannot rest on polygamist aristocracy. . . . [T]here is a danger of polygamy spreading throughout the country and becoming a menace to the monogamist home upon which our American institutions are founded. . . [A] constitutional amendment is the only way to remedy this menace to the home and our institutions.[187]

Similarly, Senator Dolph, speaking on the floor of the Senate in 1887 on behalf of Senate Joint Resolution 2,[188] which would have given

---

184. Nancy Cott discusses the way that, during the post-Civil War era, people connected slavery and polygamy as well as polygamy and divorce reform. COTT, *supra* note 75, at 72–75, 111–15.

185. H.R.J. Res. 69, 56th Cong. (1899) [App. # 43].

186. *Proposed Amendment to the Constitution Prohibiting Polygamy: Hearing on H.J. Res. 69 Before House Comm. on the Judiciary*, 55th Cong. 26 (1900), *microformed on* CIS No. 56-HJ-T.1 (Cong. Info. Serv.).

187. *Id.*

188. S.J. Res. 2, 50th Cong. (1887) [App. # 15].

Congress power to pass uniform marriage laws and would have prohibited polygamy, argued that "the importance of [his proposed amendment] in a national point of view . . . [is that t]he family is the foundation of human governments, the institution upon which the character, stability, and prosperity of nation more than upon any other depend."[189]

The idea that polygamy was a threat to the United States was not, of course, original to the supporters of the proposed constitutional amendments prohibiting polygamy. The political theorist, Francis Lieber, who was an advisor to President Lincoln during the Civil War and was an eminent law professor of his time,[190] argued that monogamy was essential to the American form of government.[191] The Supreme Court, in *Reynolds v. United States*, cited Lieber for precisely this point.[192] As Nancy Cott has shown, Lieber opposed the admission of Utah as a state and argued this in a polemical article in a popular magazine.[193] Specifically, Lieber wrote that "monogamic marriage . . . is one of the pre-existing conditions of our existence as civilized white men. . . . Strike it out, and you destroy our very being; and when we say *our*, we mean our race."[194]

Supporters of amendments prohibiting interracial marriages also supported their proposal with talk of threats to the nation. In support of House Joint Resolution 368, which would have "forever prohibited" intermarriage between Caucasians and "any and all persons of African descent or having any trace of African or Negro blood,"[195] Congressman Roddenbery said, "No blacker incubus ever fixed its slimy claws upon the social body of this Republic than the embryonic cancer of negro marriage

---

189. 19 CONG. REC. 166 (1887).

190. *See, e.g.*, Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107 (1995). Interestingly, in 1865, after the end of the Civil War, Lieber published a short treatise in which he proposed seven amendments to the Constitution that dealt variously with allegiance to the United States government, secession, treason, the abolition of slavery, and full citizenship for former slaves. *See* FRANCIS LIEBER, AMENDMENTS OF THE CONSTITUTION, SUBMITTED TO THE CONSIDERATION OF THE AMERICAN PEOPLE (New York, Loyal Publ'g Soc'y 1865).

191. *See* FRANCIS LIEBER, ESSAYS ON PROPERTY AND LABOUR AS CONNECTED WITH NATURAL LAW AND THE CONSTITUTION OF SOCIETY 18–19 (New York, Harper & Bros. 1842).

192. Reynolds v. United States, 98 U.S. 145, 165–66 (1878) (citing Lieber on the incompatibility of polygamy and certain forms of government).

193. COTT, *supra* note 75, at 114.

194. *The Mormons: Shall Utah Be Admitted into the Union?*, PUTNAM'S MONTHLY, Mar. 1855, at 234–36. This article was unsigned but was written by Lieber. *See* COTT, *supra* note 75, at 114. Lieber's invocation of white supremacy in this quotation further underscores the connections among the three types of proposed constitutional amendments discussed above. *See supra* text accompanying notes 168–84.

195. H.R.J. Res. 368, 62d. Cong. (1912) [App. # 74].

to white women. . . . No more voracious parasite ever sucked at the heart of pure society, innocent girlhood, or Caucasian motherhood."[196]

Other advocates of amending the Constitution concerning marriage went so far as to appeal to the very concrete threat to the continued vitality of the United States, arguing that the failure to enact the proposed amendment would lead to another civil war. Mrs. Fanny Carpenter of the New York Federation of Women's Clubs, testifying on behalf of amending the Constitution to prohibit polygamy, stated: "[T]his proposed amendment would be a peaceful adjustment of what otherwise may some time be a most serious difficulty, a disruptive element in the heart of the nation, which unchecked might produce a second secession and consequently civil war."[197] An 1886 report of the House Judiciary Committee argued that "a union between the Asiatic type [i.e., polygamous] and European-American type [i.e., monogamous] of civilized life would be incompatible and fatal to our peace and progress."[198] The threat of war also loomed in the 1892 minority report on another proposed amendment to prohibit polygamy:

> [E]very conflict of law has a tendency to create inharmony of feeling between the citizens of the several States. This is especially true when the conflict relates to the social and family relations of our people. This conflict of law involves more than the mere social and family conditions, for property rights become involved, passions are aroused, and in the history of the nations of the earth we find that nations have gone to war over more trivial matters.[199]

Thus, appealing to threats, whether abstract or concrete, to the character and stability of the nation was central to arguments for the various proposed Constitutional amendments.

---

196. 49 CONG. REC. 503-04 (1912).

197. *Polygamy: Hearing on H. J. Res. 40 Before the House Comm. on the Judiciary*, 57th Cong. 9 (1902), *microformed on* CIS No. HJ-57-D (Cong. Info. Serv.).

198. H.R. REP. NO. 49-2568, at 7 (1886), *microformed on* CIS No. 2442-H.r.p. 2568 (Cong. Info. Serv.) (report to accompany H.R. Res. 176, after considering H.R. Res. 16, 50, 140 & 143). Note that the use of the term "Asiatic" to refer to a polygamous culture was common for the time. *See, e.g.*, *Reynolds*, 98 U.S. at 164 ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."); COTT, *supra* note 75, at 114–16, 137–38. The racial/ethnic characterization of polygamy as well as the invocation of the specter of the Civil War again underscores the connection between proposed amendments to prohibit interracial marriage and proposed amendments to prohibit polygamy.

199. H.R. REP. NO. 52-1290, at 5 (1892) (minority opinion).

B. Public Health and Morality

Many of the proposed constitutional amendments were also justified by appeals to public health and morality. In general, the practices of polygamy, interracial marriage, and marrying or divorcing in another state to avoid comparatively restrictive laws in one's home state were described as risks to public health and as threats to public morality. References to public health and morality were meant to justify constitutional amendments prohibiting such "unhealthy" and "immoral" marriages and divorces.

As an example of this mode of argument, consider some further remarks by Congressman Roddenbery on the floor of the House in favor of his proposed amendment to prohibit interracial marriage: "Intermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant to the very principles of a pure Saxon government. It is subversive of social peace. It is destructive of moral supremacy."[200] Roddenbery continued:

> [I]f this policy is long indulged by these States and countenanced by our Federal Government permitting by law the sombre-hued, black-skinned, thick-lipped, bull-necked, brutal-hearted African to walk into the office of a magistrate and demand an edict of the courts of his State, guaranteeing him legal wedlock to a white woman, if this proceed henceforth and onward, I challenge any man of wisdom and insight into the future to assert that my language portends a more calamitous culmination than a far-seeing statesman would prophesy. Let us uproot and exterminate now this debasing, ultrademoralizing, un-American, and inhuman leprosy.[201]

A similar appeal to the public morality and the future of the nation was common in discussion of amendments to prohibit polygamy. The preamble to House Joint Resolution 50, which was proposed in 1883 by Congressman William Rosecrans, justified the prohibition of the "barbarian practice" of polygamy in part because it would cause "great injury of the future well-being and liberties[,] . . . interests, and good name of the whole people."[202]

Appeals to public health and morality were also made by advocates of amendments to give Congress the power to pass uniform marriage and

---

200. 49 CONG. REC. 503 (1912).
201. *Id.*
202. H.R.J. Res. 50, 49th Cong. (1883) [App. # 6].

divorce laws. Senator Dolph, arguing on behalf of Senate Joint Resolution 2,[203] said that "[f]ree-and-easy divorce is destructive of morality and good government [and] injurious . . . to the best interests of society."[204] The same argument, combined with concerns about threats to the nation, was repeated in testimony before the House Committee on the Judiciary when it was considering later versions of an amendment to give Congress jurisdiction over marriage laws.[205] Consider, for example, the statements of two clergymen, testifying before the House Committee on the Judiciary in 1916 and 1918, respectively. The first stated, "Family is the corner stone of society. Weaken that stronghold of morality [as divorce does] and society goes down by its own weight."[206] Two years later, the second opined, "The happiness, the safety, the well-being of our Nation depends directly the stability and well-being of the home."[207]

Similar arguments were made by various witnesses at a hearing on November 1, 1921, before a subcommittee of the Senate Judiciary Committee considering Senate Joint Resolution 31;[208] Reverend Richard Wylie and Reverend Renwick Martin testified about the importance of protecting the "moral sanctity" of the family against the lenient marriage and divorce laws of some states.[209] In general, advocates of the various constitutional amendments concerning marriage frequently appealed to public health and public morality to justify the amendments they proposed.

C. Need for Federal Action

Another common argument made by proponents of amendments to the Constitution relating to marriage was that federal action is necessary to address certain serious problems because the states lacked the will to solve

---

203. S.J. Res. 2, 50th Cong. (1887) [App. # 15].

204. 19 CONG. REC. 165 (1887).

205. H.R.J. Res. 48, 64th Cong. (1916) [App. # 84]; H.R.J. Res. 187, 65th Cong. (1917) [App. # 94]. These proposals were identical.

206. *Uniform Laws as to Marriage and Divorce: Hearing on H.J. Res. 48 Before the House Comm. on the Judiciary*, 64th Cong. 30 (1916), *microformed on* CIS No. H152-12 (Cong. Info. Serv.) (statement of Monsignor Russell on Apr. 12, 1916).

207. *Uniform Laws as to Marriage and Divorce: Hearing on H.J. Res. 187 Before the House Comm. on the Judiciary*, 65th Cong. 15 (1918), *microformed on* CIS No. H205-20 (Cong. Info. Serv.) (statement of Rev. Manning, Rector of an Episcopal Church, on Oct. 2, 1918, testifying in support of the resolution).

208. S.J. Res. 31, 67th Cong. (1921) [App. #102].

209. *Marriage and Divorce: Amendment of the Constitution of the United States: Hearing on S.J. Res. 31 Before the House Comm. on the Judiciary*, 67th Cong. 9, 12 (1921), *microformed on* CIS No. SJ-67-I (Cong. Info. Serv.) [hereinafter *Hearing on S.J. Res. 31*].

them. Speaking in favor of his proposed amendment to prohibit interracial marriage, Congressman Roddenbery stated:

> If the power, political and otherwise, of the African in [the Northern] States is [such] . . . that [these states cannot deal with intermarriage] by State constitutional amendments or State legislation, we are ready, from the southern country . . . to join you in adopting a . . . constitutional amendment that will make [such intermarriage] impossible.[210]

His argument was that since certain northern states might not be able to muster the necessary political power to address the problem of interracial marriage, Congress should pass an amendment to do what those states are unable to do.

The need for federal action was especially prominent in arguments for amendments to give Congress jurisdiction over marriage law. Testifying before Congress in 1920, a Mr. Moody of the International Committee on Marriage and Divorce argued for an amendment to give Congress jurisdiction over marriage and divorce saying that the states had failed to deal with this situation on their own by passing uniform state laws:

> [A] deplorable condition exists with reference to the various divorce laws in the different States. [T]housands of divorces are being issued annually good only in one State if at all. . . . [A]fter the failure of our state divorce laws, after 40 years of steady endeavor of the American Bar Association to amend them; after 30 years of endeavor of . . . the Commissioners on Uniform State Laws; . . . after this long bitter experience of trying to get the state legislatures to amend the laws of the States relating to marriage and finding every state legislature to which we went opposed to an amendment of state laws on this subject, we have taken the only feasible method. We appeal to our Federal Congress.[211]

Similarly, Senator Kyle, speaking on behalf of Senate Joint Resolution 29,[212] defended an amendment to give Congress jurisdiction to pass uniform marriage and divorce laws by expressing concern about polygamy

---

210. 49 CONG. REC. 503 (1912). I have omitted a reference in Roddenbery's speech to Jack Johnson. *See supra* note 95.

211. *Marriage and Divorce Laws: Hearing on S.J. Res.* 55 *Before the Sen. Comm. on the Judiciary*, 66th Cong. 23 (1920), *microformed on* CIS No. 66SJ-T.2 (Cong. Info. Serv.); *see also Hearing on S.J. Res. 31*, *supra* note 209, at 7 (statement of Rev. Wylie).

212. S.J. Res. 29, 52d Cong. (1892) [App. # 28].

in Utah. He said, "[O]nce admitted [to the United States, Utah] might enact laws upon the marriage question inimical to the best sentiment of our people."[213] Kyle's concern, which persisted in Congress after Utah was admitted to the Union, was that even if Utah did not originally legalize polygamy, it simply would lack the political will to ensure that polygamy would remain illegal. Kyle concluded that a constitutional amendment was needed to prevent this possible future legalization of polygamy.

This same form of argument was made by Fanny Carpenter in 1902 on behalf of amending the Constitution to prohibit polygamy. She argued that:

> There may come a time when polygamy will be too lightly considered, when party power and aggrandizement may belittle the terrible force of it and influence the repeal or modification of these protective laws; or public opinion, swayed by insidious depleting of the moral forces, may become less strong against polygamy.[214]

Despite the different content of the various proffered amendments regarding marriage, advocates of these amendments often argued that federal action warranted the ratification of the proposed amendment because the states either lacked the political will or might lack such will in the future.

D. Concerns about Judges

Some of the advocates of the proposed constitutional amendments expressed concerns about leaving important matters relating to families in the hands of judges. Again, the testimony of Fanny Carpenter on behalf of amending the Constitution to prohibit polygamy provides an illustrative example. She said, "Day by day [polygamy's] quiet power would be exercised in our courts as cases arise, and day by day would the strength and influence of this evil be dissipated."[215] Another concern about leaving important matters in the hands of judges was expressed in testimony by Canon Chase of the Christ Church in his testimony in support of House Joint Resolutions 75 and 108.[216] He said that keeping divorce in "the hands

---

213. 23 CONG. REC. 792 (1892).

214. *Polygamy: Hearing on H.J. Res. 40 Before the House Comm. on the Judiciary*, 57th Cong. 8 (1902), *microformed on* CIS No. HJ-57D (Cong. Info. Serv.) [hereinafter *Hearing on H.J. Res. 40*].

215. *Id*. at 9.

216. H.R.J. Res. 75, 66th Cong. (1919) [App. # 98]; H.R.J. Res. 108, 66th Cong. (1919) [App. # 99].

of less responsible judges in the [state] court[s] . . . has led to the ease of divorce that have been a very serious evil."[217] In general, just as advocates of the proposed constitutional amendments regarding marriage wanted to prevent states from undermining marriage, they also wanted to prevent judges from doing the same thing. This was part of the concern behind the first attempt to amend the Constitution to prohibit interracial marriage[218] and it continued to play a motivating role in other attempts to amend the Constitution related to marriage.

E. Enshrining an Important Principle

Related to, but broader than, the argument that the federal government must take action by passing a constitutional amendment related to marriage, some advocates of these proposed amendments argued that certain very important concepts warrant being enshrined in the Constitution and that marriage is such a concept. In its report in favor of House Joint Resolution 176, which would have prohibited polygamy,[219] the House Judiciary Committee said: "The evils of the Mormon system are deeper than can be cured by ordinary legislation. To punish the offender may be accomplished by law, but to extirpate the system, to eradicate it from this Union . . . will require a change in the Constitution."[220]

Fanny Carpenter, also testifying in favor of an amendment to prohibit polygamy, echoed this argument:

> We realize that an amendment to the Constitution of the United States is a serious thing. It is difficult, and it is well that it should be difficult, to add an amendment to the important fifteen which already exist, but this proposed antipolygamy amendment concerns a matter of such vital importance that it seems to demand this very grave action.[221]

Advocates of constitutional amendments to give Congress the power to pass uniform marriage and divorce laws made similar arguments about the importance of their amendments. For example, Senator Joseph Ransdell,

---

217. *Uniform Marriage and Divorce Laws: Hearing on H.J.R. 75 & H.J.R. 108 Before the House Comm. on the Judiciary*, 66th Cong. 8 (1920), *microformed on* CIS No. H234-Pt.1-11 (Cong. Info. Serv.).

218. *See supra* notes 85–96 and accompanying text.

219. H.R.J. Res. 176, 49th Cong. (1886) [App. #13].

220. H.R. REP. NO. 49-2568, at 7 (1886), *microformed on* CIS No. 2442 H.r.p. 2568 (Cong. Info. Serv.).

221. *Hearing on H.J. Res. 40*, *supra* note 214, at 7.

speaking in support of Senate Joint Resolution 109,[222] said, "The remedy by constitutional amendment is drastic, but the malady is so fatal that nothing short of it will prove efficacious."[223] A similar sentiment is evident throughout the previously quoted remarks of Congressman Roddenbery in support of his proposed amendment to prohibit interracial marriage.[224] In fact, his remarks were made during a discussion of a bill to appropriate funds for a bridge over the Snake River in Wyoming. He interrupted that discussion in order to impress upon his colleagues in Congress the "vitality and momentousness" of his proposed amendment.[225] Undergirding his entire remarks was the sentiment that the prohibition of interracial marriages is of such extreme importance that this prohibition must be enshrined in the Constitution.

F. Summary

Advocates of the three distinct types of proposed constitutional amendments concerning marriage made similar arguments for their proposals. They appealed to the survival of the nation and the institution of marriage, to public health and morality, to the impotence of state legislatures, to the problems with relying on judges to deal with marriage and the family, and to the general paramount importance of marriage. The very same tropes repeat themselves over the almost one hundred years of congressional discussion regarding the one hundred and thirty-three proposed amendments concerning marriage. These tropes reveal the themes that unify the various prior attempts to amend the Constitution relating to marriage.

IV. SAME-SEX MARRIAGE

Advocates of lesbian and gay rights first began to make legal arguments for same-sex marriage in the early 1970s.[226] Around the same time, the threat of same-sex marriage was used as an argument against changes in civil rights laws generally and the Equal Rights Amendment

222. S.J. Res. 109, 63d Cong. (1914) [App. #82].

223. *Against Absolute Divorce: Senator Ransdell Proposes Constitutional Amendment to Stop It*, N.Y. TIMES, Feb. 5, 1914, at 8 (quoting Senator Ransdell).

224. *See supra* text accompanying notes 96–97, 195–96, 210.

225. 49 CONG. REC. 504 (1912).

226. Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

(ERA), which would have guaranteed equal rights on the basis of sex.[227] In the early 1990s, same-sex marriage became a legislative concern in Congress. The impetus was a legal challenge to Hawaii's marriage law brought by several same-sex couples who had been denied marriage licenses. In 1994, the Hawaii Supreme Court held in *Baehr v. Miike* that prohibiting same-sex couples from marrying was a form of sex discrimination that raised equal protection concerns under the equal rights amendment of Hawaii's state constitution.[228] Although that case was remanded[229] and not ultimately resolved until 1999,[230] the threat that Hawaii would legalize same-sex marriage spurred lobbying efforts on behalf of various laws addressing same-sex marriage. These lobbying efforts led to legislative enactments at both the state and federal level, including: (a) various state laws explicitly prohibiting same-sex marriage;[231] (b) various state laws denying recognition to same-sex marriages from another jurisdiction;[232] (c) various state constitutional amendments prohibiting same-sex marriage and denying recognition to same-sex marriages (and, in some cases, other forms of same-sex

---

227. *See* 118 CONG. REC. 9,096-97 (1972) (testimony of Prof. Paul Freund against the ERA); *id.* at 9,315 (testimony of Sen. Ervin against the ERA). For discussion of the ERA, see AMENDING AMERICA, *supra* note 9, at 140–43. For a discussion of how lesbian and gay rights issues affected the ERA, see JANE MANSBRIDGE, WHY WE LOST THE ERA 128–29, 144–45 (1986).

228. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

229. Baehr v. Miike, No. Civ. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996) (finding sex-based classification unconstitutional and in violation of the equal protection clause of Hawaii's state constitution).

230. *See* Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999) (holding that an amendment to Hawaii's state constitution—HAW. CONST. art. 1, § 23 (1998), which gave the state legislature the "power to reserve marriage to opposite-sex couples"—mooted the state constitutional challenge to Hawaii's marriage laws).

231. *See, e.g.*, MICH. COMP. LAWS ANN. § 551.1 (West Supp. 2004) ("A marriage contracted between individuals of the same sex is invalid in this state."); VA. CODE ANN. § 20-45.2 (Michie 2004) ("A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable."). Virginia recently supplemented its prohibition on same-sex marriage with a law that denies any sort of legal formalization of a same-sex relationship, resulting in perhaps the most comprehensive state law against same-sex relationships in the country:

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

2004 Va. Acts ch. 983 (codified at VA. CODE ANN. § 20-45.3 (2004)).

232. *See, e.g.*, KAN. STAT. ANN. § 23-115 (Supp. 2003) ("It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.").

relationships) from other jurisdictions;[233] and (d) the federally enacted Defense of Marriage Act ("DOMA").[234] DOMA is a federal law that (i) defines marriage as "a legal union between one man and one woman as husband and wife"[235] and (ii) says no state shall be required to recognize "a relationship between persons of the same sex that is treated as a marriage under the laws of [an]other State."[236] After the highest courts of Vermont and Massachusetts held in the cases of *Baker v. State*[237] and *Goodridge v. Department of Public Health*,[238] respectively, that their states had to recognize same-sex relationships, more states passed anti-same-sex marriage laws and amendments (sometimes called "mini-DOMAs"). At the time of this writing, forty states have enacted such provisions.[239] After *Baehr*, *Baker*, and *Goodridge*, opponents of same-sex marriage began the push for a constitutional amendment prohibiting same-sex marriages.

The resulting proposals for constitutional amendments were not the first such proposals to prohibit same-sex marriages. In fact, some proposed constitutional amendments dealing with polygamy would have limited marriage to one man and one woman. For example, Senate Joint Resolution 3, introduced in 1887, read as follows: "The only institution or contract of marriage within the Untied States, or any place subject to their jurisdiction, shall be that of the union in marriage of one man with one woman: and bigamy or polygamy is forever prohibited."[240]

This amendment and another like it,[241] by permitting only marriages between one man and one woman, would have prohibited same-sex

---

233. *See, e.g.*, ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); NEB. CONST. art I, § 29 ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

234. DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). For discussion of DOMA, see WILLIAM ESKRIDGE, EQUALITY PRACTICE 32–39 (2002).

235. DOMA § 3, 110 Stat. at 2419 (codified at 1 U.S.C. § 7).

236. *Id.* § 2 (codified at 28 U.S.C. § 1738C).

237. Baker v. State, 744 A.2d 864 (Vt. 1999).

238. Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003).

239. The only states that do *not* have laws or constitutional provisions banning recognition of same-sex marriages are: Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin, and Wyoming. The District of Columbia also does not have such a law or constitutional provision. While some of these states do allow the solemnization of same-sex marriages, (Massachusetts) or provide other forms of recognition for same-sex relationships (New Jersey and Vermont), some of the remaining states have marriage laws that specifically do not allow the solemnization of same-sex marriages. *See, e.g.*, WYO. STAT. ANN. 20-1-101 (Michie 2003) ("Marriage is a civil contract between a male and a female person.").

240. S.J. Res. 3, 50th Cong. (1887) [App. # 16].

241. S.J. Res. 68, 49th Cong. (1886) [App. #14].

marriages. However, these amendments were probably not *intended* to prohibit same-sex marriages as such marriages were not a major political concern in the late nineteenth century,[242] and many other constitutional amendments prohibiting polygamy were written in such a way that they actually allowed same-sex marriages. Consider, for example, House Joint Resolution 116, which stated in part:

> 1. Polygamy shall not exist or be lawful within the United States or any place subject to their jurisdiction.
>
> 2. Polygamy shall constitute a marriage relation by contract or in fact, existing at the same time between one person of either sex and more than one person of the other sex.[243]

While this amendment would have prohibited a man from marrying more than one woman, and a woman from marrying more than one man, it would *not* have prohibited a man from marrying one or more men or a woman from marrying one or more women. It seems, however, that the drafters of this amendment and others like it[244] intended to prevent a person from having more than one spouse at the same time. That they did not bother to explicitly prohibit a man from marrying more than one man or a woman from marrying more than one woman suggests that same-sex marriages were not a serious political concern at that time. That amendments prohibiting polygamy sometimes would have prohibited same-sex marriages and sometimes would not have done so (and in fact sometimes would have allowed a person to have more than one same-sex

---

242. Some historians and other scholars have pointed to historical evidence of romantic relationships between people of the same sex, some even of marriage-like character. JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994); ESKRIDGE, *supra* note 21, at 15–50. That such relationships existed does not mean that many Americans (or their elected representatives) were of aware of such relationships or that such relationships were of concern to them. In fact, in 1887, most Americans did not possess anything like our contemporary concept of a sexual orientation. *See, e.g.*, DAVID HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS IN GREEK LOVE (1990); JONATHAN KATZ, THE INVENTION OF HETEROSEXUALITY (1995). However, some scholars have argued that, at least in certain communities, many people were aware of same-sex relationships. *See* Sharon Marcus, *The Queerness of Victorian Marriage Reform*, *in* LOOKING FORWARD/LOOKING BACK: FEMINIST SCHOLARS AND THE WOODROW WILSON FOUNDATION (Carol Berkin et al. eds., forthcoming 2005). For further discussion of the claim that the concept of a sexual orientation is of recent vintage, see Lawrence v. Texas, 539 U.S. 558, 566-70 (2003), and EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION 71–116 (1999).

243. H.R.J. Res. 116, 50th Cong. (1888) [App. # 21].

244. *See, e.g.*, H.R.J. Res. 176, 49th Cong. (1886) [App. #13]; H.R.J. Res. 45, 50th Cong. (1888) [App. #17]; H.R.J. Res. 55, 57th Cong. (1901) [App. # 54].

spouse) suggests that these amendments were not written with any intention to effect same-sex marriages.

Returning to contemporary amendments prohibiting same-sex marriage, two different types of amendments of this sort have been recently proposed. The first such amendment, House Joint Resolution 93, proposed in 2002 by Congressman Ronald Clifford "Ronnie" Shows stated:

> 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.[245]

Congresswoman Marilyn Musgrave proposed this same amendment in the next Congress as House Joint Resolution 56.[246] After some discussion of this proposed amendment on the floor of Congress and in hearings, Senator Wayne Allard proposed another amendment, Senate Joint Resolution 30, which stated:

> 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 woman.[247]

On July 14, 2004, the Senate, after more than three days of debate on this proposal to amend the Constitution, voted 50 to 48 against bringing the proposal to a vote.[248] On September 30, 2004, the House voted 227 to 186 in favor of the amendment, far short of the 290 votes necessary to adopt it.[249] Further attempts to amend the Constitution to prohibit same-

---

245. H.R.J. Res. 93, 107th Cong. (2002) [App. #134].

246. H.R.J. Res. 56, 108th Cong. (2003) [App. # 135]; *see also* S.J. Res. 26, 108th Cong. (2003) [App. # 136].

247. S.J. Res. 30, 108th Cong. (2004) [App. #137]; *see also* S.J. Res. 40, 108th Cong. (2004) [App. #138].

248. *See* Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, at A1. In the days before the procedural vote on whether to bring the amendment to a vote, some Senators considered an alternative amendment that would have simply said, "marriage is the union of a man and a woman." Carl Hulse, *Senate Republicans Split on Wording Gay-Marriage Ban*, N.Y. TIMES, July 13, 2004, at A14.

249. *See* Sheryl Gay Stolberg, *Same-Sex Marriage Amendment Fails in House*, N.Y. TIMES, Oct. 1, 2004, at A14.

sex marriage are still likely as advocates of such amendments have vowed to continue attempts to ratify such an amendment.[250]

To understand these proposed constitutional amendments, it is useful to contrast them with DOMA. First, the amendments are broader than DOMA. The amendments go beyond insuring that federal law does not recognize same-sex marriages and that no state will be required to give full faith and credit to same-sex marriages from other jurisdictions. The proposed amendments would insure that no state would be able to recognize same-sex marriages. So, for example, while DOMA is perfectly consistent with the result in *Goodridge*,[251] the proposed constitutional amendments would amount to a federal constitutional override of *Goodridge*, because an amendment to the United States Constitution trumps a state constitution. While DOMA lets each state decide for itself what to do about same-sex marriage, the proposed constitutional amendments effectively strip states of the power to enact laws concerning marriage between people of the same sex.

Second, the proposed constitutional amendments would, unlike DOMA (and unlike state mini-DOMAs), be immune to constitutional challenge. Advocates of the proposed constitutional amendments about same-sex marriage have argued that the federal courts, especially after the recent "gay-friendly" outcome in *Lawrence v. Texas*,[252] might find DOMA to be unconstitutional.[253] Similarly, opponents of same-sex marriages have expressed concern about the constitutional challenges to mini-DOMAs. For example, in testimony before Congress, Nebraska's Attorney General expressed concern about his attempts to defend Nebraska's mini-DOMA[254]—a state constitutional amendment that states, in part, "[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or

250. *Id*. at A14; Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, *supra* note 248, at A1; David D. Kirkpatrick & Sheryl G. Stolberg, *Backers of Gay Marriage Ban Use Social Security as a Cudgel*, N.Y. TIMES, Jan. 25, 2005, at A17.

251. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

252. Lawrence v. Texas, 539 U.S. 558 (2003) (finding sodomy laws unconstitutional).

253. *See generally Defense of Marriage Act: Hearing Before the Subcommittee on the Constitution of the House Comm. on the Judiciary*, 108th Cong. (2004), 2004 WL 684208 (F.D.C.H.) (discussing constitutionality of DOMA).

254. *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts* Goodridge *Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of the Senate Comm. on the Judiciary*, 108th Cong. (2004), LEXIS, FDCH Political Transcripts File, Mar. 3, 2004 (testimony of Jon Bruning, Attorney General of Nebraska, expressing concern about constitutional challenge to Nebraska's mini-DOMA and using this concern as argument for amendment prohibiting same-sex marriage because it would preempt such constitutional challenges by defining same-sex marriages out of existence).

recognized in Nebraska"[255]—against constitutional challenges. The challenge he referred to is *Citizens for Equal Protection v. Bruning*.[256] Nebraska sought a dismissal of plaintiffs' constitutional challenge on grounds that the plaintiffs had no standing, that the case was not ripe, and that they failed to state a claim of a bill of attainder. The court denied the state's motion to dismiss, but in so doing did not reach the issue of the amendment's constitutionality.[257]

The arguments made in support of the proposed constitutional amendments prohibiting same-sex marriage are the same types of arguments made in support of previous attempts to amend the constitution relating to marriage. Advocates of the proposed constitutional amendments argue that same-sex marriages are a threat to the nation. Speaking on the floor of the Senate, Senator Rick Santorum said:

> [W]e put a lot in the Constitution that are building blocks of society, certain freedoms, certain truths that we establish in the Constitution. I cannot imagine anything more fundamentally important to the stability of our society than having stable families in which to raise stable children, and anything that undermines that, to me, undermines the core of who we are as Americans.[258]

Senator John Cornyn expressed similar sentiments on behalf of the proposed amendments saying that "[w]hat we are seeking to preserve is the fundamental bedrock of society, the wellspring of families."[259]

Advocates of the proposed amendments also appealed to morality and public health considerations. President Bush appealed to both of these concerns and the threat to society, saying:

> The union of a man and woman is the most enduring human institution, . . . honored and encouraged in all cultures and by every religious faith. Ages of experience have taught humanity that the commitment of a husband and wife to love and to serve one another promotes the welfare of children and the stability of society.

---

255. NEB. CONST. art. I, § 29.

256. Citizens for Equal Protection v. Bruning, 290 F. Supp. 2d 1004 (D. Neb. 2003).

257. *Id.* at 1011. Note, however, the constitutionality of DOMA was upheld in *Wilson v. Ake*, No. 8:04-cv-1680-T-30TBM, 2005 U.S. Dist. LEXIS 755 (M.D. Fla. Jan. 19, 2005), and *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

258. 149 CONG. REC S15,925 (daily ed. Nov. 25, 2003) (statement of Sen. Santorum).

259. 150 CONG. REC. S2,836 (daily ed. Mar. 22, 2004) (statement of Sen. Cornyn).

> Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society.[260]

Congressman Mike Pence, speaking on the floor of Congress, made the same sort of arguments:

> Ordained by God, confirmed by law, marriage is the glue of the family and the safest harbor for children. Congress should heed President Bush's courageous moral leadership, pass the marriage amendment, and affirm the confidence of the American people in our ability to defend their most cherished of institutions.[261]

Congressman Roscoe Bartlett, also speaking on the floor of Congress, made an explicitly religious argument:

> [T]here seems to be some confusion as to what constitutes marriage. In the Christian community, and we are a Christian Nation, you can affirm that by going back to our Founding Fathers and their belief in how we started, among Christians, marriage is generally recognized as having started in the Garden of Eden. You may go back to Genesis to find that and you will note there that God created Adam and Eve. He did not create Adam and Steve. A union between other than a man and a woman may be something legally, but it just cannot be a marriage, because marriage through 5,000 years of recorded history has always been a relationship between a man and a woman.[262]

Advocates of amending the Constitution to prohibit same-sex marriage also cite the need for federal action and emphasize the importance of enshrining marriage in the Constitution. President Bush said, "The amendment process has addressed many serious matters of national concern, and the preservation of marriage rises to this level of national importance."[263] Professor Katherine Spaht, testifying before the Senate Judiciary Committee also emphasized the need for federal action saying that "[t]he only safety that can be afforded traditional marriage is the safe

---

260. *Bush's Remarks on Marriage Amendment*, *supra* note 2, at A18.

261. 150 CONG. REC. H518 (daily ed. Feb. 24, 2004). Congressman Pence repeated this same argument several months later adding reference to the other main arguments made by the amendment's supporters. 150 CONG. REC. H7,891 (daily ed. Sept. 30, 2004) ("[M]arriage . . . was ordained by God, instituted in the law, . . . is the glue of the American people, and the safest harbor to raise children. Let us adopt the rule, defend the institution of marriage, and ensure that our society's most cherished social institution is defined by we the people and not unelected judges.").

262. 150 CONG. REC. H7,894 (daily ed. Sept. 30, 2004) (statement of Rep. Bartlett).

263. *Bush's Remarks on Marriage Amendment*, *supra* note 2, at A18.

harbor of the United States Constitution."[264] And Maggie Gallagher, President of Institute for Marriage and Public Policy said, "A federal marriage amendment is the only way to sustain a common national definition of marriage, which is worthy of its status as a fundamental civilization."[265]

One of the most frequently made arguments in favor of the proposed amendments describes them as necessary to keep judges from deciding such an important matter. President Bush expressed this concern by saying that "a few judges and local authorities are presuming to change the most fundamental institution of civilization. . . . Activist courts have left the people with one recourse[:] . . . our nation must enact a constitutional amendment to protect marriage in America."[266] Professor Spaht put the same concern as follows: "If this body does not approve a federal constitutional amendment defending marriage, the courts will take this issue away from the American people and they will abolish traditional marriage."[267]

All of these arguments for prohibiting same-sex marriage in the Constitution were central arguments in favor of amending the Constitution about marriage in the past. However, what is perhaps the most frequent argument made for amending the Constitution to prohibit same-sex marriage involves children. Often as part of other arguments for these proposed amendments, Senators, Congressmen and others speaking on behalf of the current proposed amendment argue that same-sex marriages harm children or put them at risk.[268] While advocates for prior constitutional amendments regarding marriage did not frequently refer to children when arguing on behalf of their proposals, they did on occasion appeal to the likely effects on children if their amendments were not enacted. For example, in 1877 Senator Dolph, in support of giving Congress jurisdiction over marriage, argued that the amendment was important to the "training of offspring," suggesting that the divorce laws in

---

264. *Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before Senate Comm. on the Judiciary*, 108th Cong. (2004), 2004 WL 576639 (F.D.C.H.) (testimony of Prof. Spaht on Mar. 23, 2004).

265. *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts* Goodridge *Decision and the Judicial Invalidation of Traditional Marriage Laws?*, *supra* note 254 (testimony of Maggie Gallagher on Mar. 3, 2004).

266. *Bush's Remarks on Marriage Amendment*, *supra* note 2, at A18.

267. *Proposed Constitutional Amendment to Preserve Traditional Marriage*, *supra* note 264 (testimony of Prof. Spaht on Mar. 23, 2004).

268. *Proposed Constitutional Amendment to Reserve Traditional Marriage: Hearing Before Senate Comm. on the Judiciary*, 108th Cong. (2004), 2004 WL 576638 (F.D.C.H.) (testimony of Reverend Richard Richardson on Mar. 23, 2004).

some states lead to poorly educated and morally deficient children.[269] In support of a similar proposed amendment, Senator Kyle referred to the negative effects on "thousands of innocent children"[270] of having differing state laws about marriage and divorce. In particular, he was concerned with these children being "stigma[tized] as illegitima[te]" and getting stuck in "endless litigations as to [their] property rights."[271] Also, Congressman Roddenbery warned his colleagues that, without a constitutional amendment prohibiting interracial marriage, "when your great-grandson goes to take himself a companion for life he will wonder and not know whether the bride for his young manhood is a pure American girl or corrupted by a strain of kinky-headed blood."[272] And a report of the House Judiciary Committee recommending the adoption of a constitutional amendment to prohibit polygamy said, "It is a wrong done to the unborn issue of these marriages, whose unhappy birth, without their consent, is clouded by a partial bastardy, and whose bitter dissent is fruitless and unavailing."[273] While arguments about children were not as prominent in past debates about amending the Constitution regarding marriage as they are in present debates, such arguments were occasionally made in the past.

In sum, arguments made by advocates of constitutional amendments prohibiting same-sex marriage are familiar and are of the same character as arguments made by advocates of prior attempts to amend the Constitution relating to marriage. This, coupled with the fact that some of the polygamy amendments would have also prohibited same-sex marriages, suggests that current attempts to amend the Constitution to prohibit same-sex marriages are cut from the same cloth as prior attempts to amend the Constitution related to marriage.

CONCLUSION

Current efforts to amend the United States Constitution to prohibit same-sex marriages need to be considered in the context of prior attempts to amend the Constitution related to marriage. This Article has shown that advocates of amendments prohibiting same-sex marriage make use of the same types of arguments used by advocates of amending the Constitution

269. 19 CONG. REC. 165, 166 (1887).
270. 23 CONG. REC. 792 (1892).
271. *Id*.
272. 49 CONG. REC. 503 (1912).
273. H.R. REP. NO. 49-2568, at 10 (1886), *microformed on* CIS No. 2442-H.r.p. 2568 (Cong. Info. Serv.).

to prohibit interracial marriage and polygamy and to give Congress jurisdiction over marriage and divorce law.

Despite the failure of all of the previous attempts to amend the Constitution relating to marriage, the dire consequences described by advocates of these proposed constitutional amendments did not occur. Although interracial marriages are now permitted in all states, the nation has not erupted into a civil war and public health has not been adversely affected. Rather, from the time that the first constitutional amendment prohibiting interracial marriage was proposed (1871) to the Supreme Court's landmark 1967 decision finding the prohibition on interracial marriage unconstitutional,[274] the nation has gradually come to accept marriages between people of different races.[275] In some states, interracial marriages have always been permitted; in other states, such prohibitions were repealed through the legislative process; and, in other states, such prohibitions were invalidated by a decision of a state or federal court.[276] Although the process involved in overturning prohibitions on interracial marriages was slow—causing serious harm to racial minorities (and others)—the gradual character of this process allowed a national consensus to emerge.[277] Before 1967, although there were difficulties involving interstate recognition of interracial marriages performed in states that allowed such marriages, the various states found ways of dealing with such issues.[278]

Similarly, the failure to enact a constitutional amendment dealing with polygamy or uniform marriage and divorce laws did not lead to the national crises that advocates of such amendments predicted.[279] Utah could have repealed its constitutional amendment prohibiting polygamy, but over one hundred years later it still has not done so and no other states have decided to legalize polygamy. Throughout the nation's history, the various states have crafted and continually revised laws concerning

274. Loving v. Virginia, 388 U.S. 1 (1967).

275. *See* KENNEDY, *supra* note 85, at 70–161.

276. *See supra* notes 82, 84, 99 & 101 and accompanying text.

277. For an interesting visual representation of how laws against interracial marriage were gradually eliminated, see http://www.lovingday.org/map.htm (last visited July 15, 2004).

278. *See* Andrew Koppelman, *Same-Sex Marriage, Choice of Law and Public Policy*, 76 TEX. L. REV. 921, 949–62 (1998).

279. Some, however, might claim that the percentage of marriages that end in divorce and the number of cohabiting couples who are not married in themselves constitute a national crisis of sorts. *See, e.g.*, Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1 (2003) (discussing, in part, arguments made by members of the so-called "marriage movement").

marriage and divorce.[280] Although there have been and continue to be differences among states concerning who can get married, the rights, benefits and duties associated with marriage, and the rules regarding divorce, for the most part, these interstate differences have proven manageable and with respect to many issues related to marriage there has been a convergence among the states. For example, previously the marital relationship involved a great deal of gender asymmetry—that is, men and women were treated differently by marriage laws. Married women could not own property and inheritance laws treated married men and women differently.[281] Over time, gender differences in marriage have been eliminated, although the states did this through different means and at different times. The same sort of national consensus emerged—albeit quite gradually—with respect to the availability of no-fault divorce, that is, whether one of the parties to a marriage had to prove that the other was at fault in order to get a divorce.[282] As with interracial marriages, there were some difficulties involved with interstate recognition of divorce, but these difficulties also proved manageable and neither the nation nor the institution of marriage was destroyed or damaged as a result.[283] This shows that the institution of marriage in the United States is more adaptable and robust than advocates of constitutional amendments concerning marriage have suggested. The institution of marriage in America has survived potential crises and many changes over the past few centuries despite the absence of constitutional amendments relating to marriage.

One could argue that part of the reason why marriage has been able to evolve effectively in the context of changing roles of men and women and improvements in race relations is that individual states have, for the most part, been able to make changes to their marriage laws independently and at their own pace. In many instances, particular changes in marriage laws at the state level have, after being tested in some small number of states, been adopted by other states. California's adoption of no-fault divorce was

---

280. *See, e.g.*, COTT, *supra* note 75 *passim*; RILEY, *supra* note 146 *passim*; HALEM, *supra* note 146 *passim*.

281. *See, e.g.*, MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986); CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT (1987).

282. *See, e.g.*, COTT, *supra* note 75, at 205–07; RILEY, *supra* note 144, at 161–68; HALEM, *supra* note 144, at 234–87. Note, however, that a handful of states have passed so-called covenant marriage laws which allow a couple to opt for a marriage that, in effect, can only be dissolved if one party proves fault. *See* ARK. CODE ANN. § 9-11-803 to -811 (Michie 2002); ARIZ. REV. STAT. § 25-901 to -906 (2000); LA. REV. STAT. ANN. §§ 9:307, :275 (West 2000).

283. *See, e.g.*, HARTOG, *supra* note 133, at 242–86.

followed by the loosening of the requirements for divorce nationwide.[284] The California Supreme Court's decision in *Perez v. Lippold* was a precursor to *Loving v. Virginia*.[285] Although family law is not at all the exclusive province of the states, to the extent that family law has remained state law, this has been a good thing for the continued vitality of marriage.

Looked at a different way, almost all Americans today would agree it is good that the Constitution was never amended to prohibit interracial marriages. Although it took a disturbingly long time, the nation reached a consensus about marriage and race. Even the Supreme Court did not speak definitively on interracial marriage until the majority of states had decided to allow such marriages.[286]

Looking back at debates about the proposed constitutional amendments concerning marriage, one can see that federalist concerns recur as significant arguments against amending the Constitution. Opponents of the various proposed amendments expressed concerns that a constitutional amendment relating to marriage would shift the delicate balance of power between the states and the federal government.[287] In contrast, in the context of current attempts to amend the Constitution, some have suggested that the fact that the Constitution could be amended to prohibit same-sex marriage itself establishes that such an amendment is consistent with federalist commitments. For instance, Gregory Coleman, the former Solicitor General of Texas, testifying before the Senate Judiciary Committee, said that because "[t]he relationship between the states and the federal government is defined by the Constitution, . . . a constitutional amendment cannot violate principles of federalism and state's rights."[288] This is wrong. At a formal level, it is of course permissible to amend the Constitution to give Congress jurisdiction over marriage or some aspect of

284. *See generally supra* note 279.

285. Perez v. Lippold, 198 P.2d 17, 27 (Cal. 1948).

286. In 1955, the Supreme Court deferred reaching the question of the constitutionality of prohibitions on interracial marriages. Naim v. Naim, 350 U.S. 891 (1955) (remanding constitutional challenge to Virginia's anti-miscegenation law because of "the inadequacy of the record" and "the failure of the parties to bring . . . all questions relevant to the disposition of the case"). When the Court remanded *Naim*, interracial marriages were prohibited in twenty-six states and legal in twenty-two. In 1967, when the Court finally reached the issue, interracial marriages were legal in thirty-three states and prohibited in seventeen. This is not to defend the Court's decision (or lack thereof) in *Naim*, but simply to note that the Court appears to have deferred reaching the issue until a majority of states had rejected anti-miscegenation laws.

287. *See, e.g.*, BLAKE, *supra* note 67, at 150; O'NEILL, *supra* note 157, at 231–52.

288. *What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of the Senate Comm. on the Judiciary*, 108th Cong. (2003), LEXIS, Federal News Service, Sept. 3, 2003 (testimony of Gregory Coleman on Sept. 4, 2003).

it. The fact that the Constitution allows for an amendment does not establish that such an amendment fits with principles at the core of our form of government. In particular, the fact that the Constitution could be amended to prohibit same-sex marriage does not establish that such an amendment is consistent with the policies that underlie federalism. Conversely, amending the Constitution to address marriage unwisely upsets the balance of power between states and the federal government in the context of family law.

While previous attempts to amend the Constitution relating to marriage have failed to pass either the House or the Senate, it would be a mistake to infer that attempts to amend the Constitution in the near future will also fail. However, as the nation and our representatives continue to debate the proposed amendments relating to same-sex marriage, we should take note that the very same arguments that are being made today did not persuade Congress to approve any of the previously proposed one hundred and thirty-three amendments to the Constitution relating to marriage.

Although it took the nation a shamefully long time to reach a consensus on interracial marriages, there were almost two centuries of interracial marriages in the United States before that issue was finally resolved at the national level. In contrast, the first legal same-sex marriages in the United States were solemnized just months ago. Different states are dealing with demands for the recognition of same-sex relationships in different ways.[289] Rather than making use of the extraordinary measure of amending the Constitution to decide this issue, it is better to let this issue percolate through the courts and the various state legislatures.

---

289. *See supra* notes 3–6, 21–25, 231–33, 239 and accompanying text.

APPENDIX*

	Date	Citation	Topic	Hist.	Text of Amendment
1	12/11/1871	H.R.J. Res. 54, 42d Cong., 2d Sess.	R		1. It shall not be lawful for the white inhabitants of the United States, either male or female, to contract bonds of matrimony or enter into the marriage relation, with the African of other colored inhabitants of the United States; and all such marriages are hereby forever prohibited. [section 2, concerning segregated schools, is omitted]
2	12/10/1879	H.R.J. Res. 2779, 46th Cong., 2d Sess.	P		1. Polygamy shall not exist within the limits of the United States or any place subject to their jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation.
3	1/9/1882	H.R.J. Res. 87, 47th Cong., 1st Sess.	P		1. Neither bigamy, polygamy, nor the having or possessing of more than one legal husband or one legal wife at the same time, by any resident, inhabitant, or citizen of or within the United States, shall be tolerated or allowed within the several States and Territories of the United States. 2. Every marriage, or so-called marriage, solemnized or entered into by whatever ceremony or means soever, during the existence of a legal prior marriage, or the living and cohabiting together as a man and wife of any male and female resident, inhabitant, or citizen of the United States, either said male or female having at the time a living legal husband or legal wife, is unlawful and void and is hereby prohibited. 3. Any male or female resident, inhabitant, or citizen of any of the several States and Territories who shall violate the foregoing section shall be guilty of a felony, and shall be disqualified from voting or holding any office or position of honor and trust within any of the States or Territories within the United States, or by virtue of any law of the United States.

* This Appendix makes use of the following abbreviations: "E" for an amendment relating to the evasion of state marriage or divorce laws; "G" for an amendment relating to whether persons of the same-sex may marry; "J" for an amendment relating to Congress's jurisdiction over marriage ("J*" for an amendment relating to Congress's jurisdiction over divorce but not marriage); "P" for an amendment relating polygamy ("P**" for an amendment that would have disenfranchised polygamists but not prohibited polygamy); "h" to indicate that there were hearings held concerning this amendment; "r" to indicate that a report was issued concerning this amendment.

	Date	Citation	Topic	Hist.	Text of Amendment
					4. Congress shall have power to enforce this article by appropriate legislation.
4	3/13/1882	H.R.J. Res. 166, 47th Cong., 1st Sess.	P		1. Neither polygamy nor bigamy shall exist within the United States, or in any place subject the jurisdiction of the same. And no person convicted of the crime of polygamy or bigamy shall be eligible to any office under the United States or any State, or be qualified as a voter in any State, Territory, or other place within the jurisdiction of the United States. 2. Congress shall have power to enforce the provisions of this article by all appropriate legislation.
5	12/10/1883	H.R.J. Res. 12, 48th Cong., 1st Sess.	P		*See* H.R.J. Res. 87, 47th Cong. 1st Sess. (Jan. 9, 1882) [#3]
6	12/11/1883	H.R.J. Res. 50, 48th Cong., 1st Sess.	P		1. Polygamy, being incompatible with our civilization, is forever prohibited in the United States and all places under its jurisdiction. 2. Congress shall have power to enforce this by appropriate legislation.
7	1/8/1884	H.R.J. Res. 80, 48th Cong., 1st Sess.	J		Congress shall have power, and it shall be its duty, by appropriate legislation, to make and establish uniform laws regulating marriage and divorce in the several States and Territories of the United States, and for the enforcement thereof, and to prescribe penalties for the violation thereof. The several courts of the respective States and Territories shall have jurisdiction of all actions brought thereunder in such courts, by the citizens thereof, in the manner and to the extent prescribed by the legislatures of the several States and Territories respectively.
8	1/8/1884	H.R.J. Res. 84, 48th Cong., 1st Sess.	J		Amend Article I, § 8, ¶ 4 to read as follows [the change is in **bold]**: To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies **and marriage and divorce,** throughout the United States.
9	12/21/1885	H.R.J. Res. 16, 49th Cong., 1st Sess.	P	r	*See* H.R.J. Res. 87, 47th Cong., 1st Sess. (Jan. 9, 1882) [#3]
10	1/5/1886	H.R.J. Res. 50, 49th Cong., 1st Sess.	J	r	*See* H.R.J. Res. 84, 48th Cong., 1st Sess. (Jan. 8, 1884) [#8]

	Date	Citation	Topic	Hist.	Text of Amendment
11	3/16/1886	H.R.J. Res. 140, 49th Cong., 1st Sess.	P	r	*See* H.R.J. Res. 50, 48th Cong., 1st Sess. (Dec. 11, 1883) [#6]
12	3/22/1886	H.R.J. Res. 143, 49th Cong., 1st Sess.	P	r	*See* H.R.J. Res. 50, 48th Cong., 1st Sess. (Dec. 11, 1883) [#6]
13	5/24/1886	H.R.J. Res. 176, 49th Cong., 1st Sess.	P	r	1. The marriage relation, by contract or in fact, between one person of either sex and more than one person of the other sex shall be deemed polygamy. Neither polygamy nor any polygamous association or cohabitation between the sexes shall exist or be lawful in any place within the jurisdiction of the United States or of any State. 2.The United States shall not, nor shall any State, make or enforce any law which shall allow polygamy or any polygamous association or cohabitation between the sexes, but the United States and every State shall prohibit the same by law within their respective jurisdictions. 3. The judicial power of the United States shall extend to the prosecution of the crimes of polygamy and of a polygamous association or cohabitation between the sexes under this article; and Congress shall have power to declare by law the punishment therefor. 4. Nothing in the Constitution or in this article shall be construed to deny to any State the exclusive power, subject to the provisions of this article, to make and enforce all laws concerning marriage and divorce within its jurisdiction, or to vest in the United States any power respecting the same within any State.
14	6/2/1886	S.J. Res. 68, 49th Cong., 1st Sess.	P & G		1. The only institution or contract of marriage within the United States, or any place subject to their jurisdiction, shall be that of the union in marriage of one man with one woman; and bigamy or polygamy is forever prohibited, any law, custom, form, or ceremony, civil or religious, to the contrary notwithstanding. 2. No state shall pass any law, nor allow any custom, form, or ceremony of marriage, except in obedience to and conformably to the institution of marriage as herein defined and established; but otherwise, the regulation, within each State, of marriage and divorce, and

	Date	Citation	Topic	Hist.	Text of Amendment
					civil and criminal jurisdiction over those subjects, shall belong to the several states as heretofore. 3. Congress shall have the power to enforce this article by appropriate legislation.
15	12/12/1887	S.J. Res. 2, 50th Cong., 1st Sess.	J & P		Congress shall have power to legislate upon the subjects of marriage and divorce by general laws applicable alike to all the States and Territories, and neither bigamy nor polygamy shall exist or be permitted within the United States or any place subject to their jurisdiction.
16	12/12/1887	S.J. Res. 3, 50th Cong., 1st Sess.	P & G		The only institution or contract of marriage within the Untied States, or any place subject to their jurisdiction, shall be that of the union in marriage of one man with one woman: and bigamy or polygamy is forever prohibited.
17	1/5/1888	H.R.J. Res. 45, 50th Cong., 1st Sess.	P	r	*See* H.R.J. Res. 176, 49th Cong., 1st Sess. (May 24, 1886) [#13]
18	1/9/1888	H.R.J. Res. 49, 50th Cong., 1st Sess.	P	r	1. Neither polygamy nor polygamous association or cohabitation between the sexes shall exist or be lawful in any place within the jurisdiction of the United States or of any State. 2. The marriage relation, by contract or in fact, between one person of either sex and more than one person of the other sex, shall be deemed polygamy. 3. Every State shall prohibit by law within its jurisdiction polygamy and polygamous association or cohabitation between the sexes, and shall enforce the same. If any State shall fail or refuse to pass and to enforce such laws, it shall be the duty of Congress to pass laws for the suppression and punishment of the crimes of polygamy and polygamous association or cohabitation between the sexes in such State, and to provide for their enforcement through the judicial power of the United States.
19	1/10/1888	H.R.J. Res. 64, 50th Cong., 1st Sess.	P		*See* H.R.J. Res. 176, 49th Cong., 1st Sess. (May 24, 1886) [#13]

	Date	Citation	Topic	Hist.	Text of Amendment
20	1/10/1888	H.R.J. Res. 67, 50th Cong., 1st Sess.	P		*See* H.R.J. Res. 50, 48th Cong., 1st Sess. (Dec. 11, 1883) [#6]
21	2/21/1888	H.R.J. Res. 116, 50th Cong., 1st Sess.	P	r	1. Polygamy shall not exist or be lawful within the United States or any place subject to their jurisdiction. 2. Polygamy shall constitute a marriage relation, by contract or in fact, existing at the same time between one person of either sex and more than one person of the other sex. 3. Congress shall have power concurrent with the several States to enforce this article within the States by appropriate legislation.
22	1/5/1889	H.R.J. Res. 247, 50th Cong., 2d Sess.	J	r	The Congress shall have power to make a uniform law of marriage and divorce.
23	12/4/1889	S.J. Res. 5, 51st Cong., 1st Sess.	J & P		*See* S.J. Res. 2, 50th Cong., 1st Sess. (Dec. 12, 1887) [#15]
24	12/18/1889	H.R.J. Res. 23, 51st Cong., 1st Sess.	P		*See* H.R.J. Res. 176, 49th Cong., 1st Sess. (May 24, 1886) [#13]
25	1/13/1890	H.R.J. Res. 64, 51st Cong., 1st Sess.	J		*See* H.R.J. Res. 247, 50th Cong., 2d Sess. (Jan. 5, 1889) [#22]
26	1/7/1892	H.R.J. Res. 23, 52d Cong., 1st Sess.	J	r	The Congress shall have power to pass laws regulating marriage and divorce throughout the United States.
27	1/11/1892	H.R.J. Res. 46, 52d Cong., 1st Sess.	J	r	The Congress shall have power to make and establish uniform laws regulating the subject of marriage and divorce in the various States and Territories of the United States, and to enforce the same by appropriate legislation. The courts of the several States and Territories shall have complete and exclusive jurisdiction of all cases arising between persons who were citizens of the same State or Territory at the time the alleged cause of action arose.
28	1/13/1892	S.J. Res. 29, 52d Cong., 1st Sess.	J		The Congress shall have exclusive power to regulate marriage and divorce in the several States, Territories and the District of Columbia.

	Date	Citation	Topic	Hist.	Text of Amendment
29	2/1/1892	H.R.J. Res. 77, 52d Cong., 1st Sess.	P		1. Polygamy shall never exist within the United States, or any place subject to their jurisdiction. 2. Congress shall have power to make all needful laws to enforce this article and punish its violation.
30	4/12/1894	S.J. Res. 73, 53d Cong., 2d Sess.	J		*See* S.J. Res. 29, 52d Cong., 1st Sess. (Jan. 13, 1892) [#28]
31	12/17/1895	H.R.J. Res. 35, 54th Cong., 1st Sess.	J*		The Congress shall have power to establish uniform laws on the subject of divorce throughout the United States.
32	1/23/1896	H.R.J. Res. 97, 54th Cong., 1st Sess.	J		*See* S.J. Res. 29, 52d Cong., 1st Sess. (Jan. 13, 1892) [#28]
33	3/24/1897	H.R.J. Res. 40, 55th Cong., 1st Sess.	J		*See* S.J. Res. 29, 52d Cong., 1st Sess. (Jan. 13, 1892) [#28]
34	3/27/1897	H.R.J. Res. 43, 55th Cong., 1st Sess.	J*		*See* H.R.J. Res. 35, 54th Cong., 1st Sess. (Dec. 17,1895) [#31]
35	2/6/1899	H.R.J. Res. 354, 55th Cong., 3d Sess.	P	r	*See* H.R.J. Res. 176, 49th Cong., 1st Sess. (May 24, 1886) [#13]
36	12/4/1899	H.R.J. Res. 1, 51st Cong., 1st Sess.	P	r	*See* H.R.J. Res. 176, 49th Cong., 1st Sess. (May 24, 1886) [#13]
37	12/4/1899	H.R.J. Res. 10, 56th Cong., 1st Sess.	P		1. Polygamy is hereby declared to be an offense against the United States, and forever prohibited within them or any place subject to their jurisdiction, and no person engaged in the practice thereof shall hold any office of honor, trust, or profit under the United States or any State. 2. Congress shall have power to provide for the punishment of said offense and to otherwise enforce this article by appropriate legislation.

	Date	Citation	Topic	Hist.	Text of Amendment
38	12/5/1899	H.R.J. Res. 42, 56th Cong., 1st Sess.	J*		*See* H.R.J. Res. 35, 54th Cong., 1st Sess. (Dec. 17, 1895) [#31]
39	12/5/1899	H.R.J. Res. 45, 56th Cong., 1st Sess.	P		1. Neither polygamy nor polygamous cohabitation shall exist within the United States or any place subject to their jurisdiction. 2. Polygamy or polygamous cohabitation, whether practiced within the bounds of a State or a Territory of the United States, shall be treated as a crime against the peace and dignity of this Republic. 3. No person shall be Senator or Representative in Congress, or elector, or President, or Vice-President, or hold any other office of honor or emolument, whether civil or military, under the United States or under any State or Territory thereof, or be permitted to vote at any election for any of said officers in either State or Territory who shall be found guilty of polygamy or polygamous cohabitation; but Congress may, by a vote of two-thirds of each House, remove such disability in any specific case. 4. The Congress shall have power to enforce the provisions of this article by appropriate legislation.
40	12/6/1899	S.J. Res. 5, 56th Cong., 1st Sess.	J	r	*See* S.J. Res. 29, 52d Cong., 1st Sess. (Jan. 13, 1892) [#28]
41	12/6/1899	S.J. Res. 22, 56th Cong., 1st Sess.	J	r	The Congress shall have power to establish uniform marriage and divorce laws throughout the United States and to provide penalties for violations thereof.
42	12/7/1899	H.R.J. Res. 56, 56th Cong., 1st Sess.	J		That the Congress shall have power to establish uniform laws on the subject of marriage and divorce throughout the United States.
43	12/11/1899	H.R.J. Res. 69, 56th Cong., 1st Sess.	P		That neither polygamy nor polygamous cohabitation shall exist within the United States or any place subject to its jurisdiction. That polygamy and polygamous cohabitation, whether practised within the bounds of a State or Territory of the United States, shall be treated as a crime against the peace and dignity of this Republic. That no person shall be Senator or Representative in Congress or eligible to

	Date	Citation	Topic	Hist.	Text of Amendment
					President or Vice-President or hold any other office of honor or emolument, whether civil or military, under the United States or under any State or Territory thereof, or be permitted to vote at any election for any such officers in either State or Territory who shall be found guilty of polygamy or polygamous cohabitation; but Congress may, by a vote of two-thirds of each House, remove such disability in any specific case. That Congress shall have power to enforce the provisions of this article by appropriate legislation.
44	12/13/1899	S.J. Res. 40, 56th Cong., 1st Sess.	J	r	The Congress, as the highest law-making power of a Christian nation, shall have exclusive power to regulate marriage and divorce in the several States, Territories, and the District of Columbia
45	12/20/1899	H.R.J. Res. 93, 56th Cong., 1st Sess.	P		*See* H.R.J. Res. 45, 56th Cong., 1st Sess. (Dec. 5, 1899) [#39]
46	1/4/1900	H.R.J. Res. 107, 56th Cong., 1st Sess.	J		*See* S.J. Res. 22, 56th Cong., 1st Sess. (Dec. 6, 1899) [#41]
47	1/8/1900	H.R.J. Res. 112, 56th Cong., 1st Sess.	P**		1. No person shall be a Senator or Representative in Congress, or elector for President or Vice-President, or hold any other office of honor, trust, or profit under the United States or under any State who shall be found guilty of polygamy or polygamous cohabitation; but Congress may, by a vote of two-thirds of each House, remove such disability. 2. The Congress shall have power to enforce the provisions of this article by appropriate legislation.
48	1/25/1900	H.R.J. Res. 137, 56th Cong., 1st Sess.	P		That neither polygamy nor polygamous cohabitation being by the law of Christ governing the marriage relation shall exist within the United States or any place subject to its jurisdiction. That polygamy or polygamous cohabitation, whether practiced within the bounds of a State or a Territory of the United States, shall be treated as a crime against the peace and dignity of this Republic. That no person shall be

	Date	Citation	Topic	Hist.	Text of Amendment
					Senator or Representative in Congress, or eligible to President or Vice-President or hold any other office of honor or emolument, whether civil or military, under the United States or under any State or Territory thereof, or be permitted to vote at any election for any of such officers in either State or Territory, who shall be found guilty of polygamy or polygamous cohabitation; but Congress may, by a vote of two-thirds of each House, remove such disability in any specific case. That Congress shall have power to enforce the provisions of article by appropriate legislation.
49	3/15/1900	H.R.J. Res. 203, 56th Cong., 1st Sess.	P	h	That neither polygamy nor polygamous cohabitation, being condemned by the law of Christ governing the marriage relation shall exist within the United States or any place subject to its jurisdiction. That polygamy and polygamous cohabitation, whether practiced within the bounds of a State or Territory of the United States, shall be treated as a crime against the peace and dignity of this Republic. That no person shall be Senator or Representative in Congress or eligible to President or Vice-President or hold any other office of honor or emolument, whether civil or military, under the United States or under any State or Territory thereof, or be permitted to vote at any election for any such officers in either State or Territory at any election for any such officers in either State or Territory who shall be found guilty of polygamy or polygamous cohabitation; but Congress may, by a vote of two-thirds of each House, remove such disability in any specific case. That Congress shall have the power to enforce the provisions of this article by appropriate legislation.
50	12/7/1900	H.R.J. Res. 279, 56th Cong., 2d Sess.	J		Congress shall have power to enact uniform laws on the subject of marriage and divorce.
51	12/2/1901	H.R.J. Res. 7, 57th Cong., 1st Sess.	J		*See* H.R.J. Res. 279, 56th Cong., 2d Sess. (Dec. 7, 1900) [#50]

	Date	Citation	Topic	Hist.	Text of Amendment
52	12/2/1901	H.R.J. Res. 29, 57th Cong., 1st Sess.	J		*See* H.R.J. Res. 56, 56th Cong., 1st Sess. (Dec. 7, 1899) [#42]
53	12/3/1901	H.R.J. Res. 40, 57th Cong., 1st Sess.	P		*See* H.R.J. Res. 203, 56th Cong., 1st Sess. (Mar. 15, 1900) [#49]
54	12/6/1901	H.R.J. Res. 55, 57th Cong., 1st Sess.	P		*See* H.R.J. Res. 176, 49th Cong., 1st Sess. (May 24, 1886) [#13]
55	12/6/1901	H.R.J. Res. 57, 57th Cong., 1st Sess.	J*	h	*See* H.R.J. Res. 35, 54th Cong., 1st Sess. (Dec. 17, 1895) [#31]
56	12/10/1901	H.R.J. Res. 68, 57th Cong., 1st Sess.	P**		*See* H.R.J. Res. 112, 56th Cong., 1st Sess. (Jan. 8, 1900) [#47]
57	1/22/1902	H.R.J. Res. 135, 57th Cong., 1st Sess.	J		*See* H.R.J. Res. 56, 56th Cong., 1st Sess. (Dec. 7, 1899) [#42]
58	12/1/1902	H.R.J. Res. 211, 57th Cong., 2d Sess.	J*		2. Congress shall have power to establish uniform laws on the subject of divorces throughout the United States. 3. Congress shall have the power to enforce this article by appropriate legislation.
59	1/5/1903	H.R.J. Res. 240, 57th Cong., 2d Sess.	P		No state shall legalize bigamy or polygamy or any contract for bigamous or polygamous association, nor authorize the descent or distribution of property at the death of any man to his children by any woman to whom he has or shall not have been joined in lawful wedlock.
60	1/31/1903	H.R.J. Res. 258, 57th Cong., 2d Sess.	P		No person shall willfully and knowingly contract a second marriage while the first marriage, to the knowledge of the offender, is still subsisting and undissolved. Any person who shall willfully and knowingly contract a second marriage while the first marriage, to the knowledge of the offender, is still subsisting and undissolved shall never thereafter hold, occupy, or enjoy any office of honor or profit under the United States. Congress shall make all laws necessary and proper to carry the foregoing powers into execution.

	Date	Citation	Topic	Hist.	Text of Amendment
61	2/5/1903	S.J. Res. 164, 57th Cong., 2d Sess.	P		*See* H.R.J. Res. 258, 57th Cong., 2d Sess. (Jan. 31, 1903) [#60]
62	1/28/1904	H.R.J. Res. 97, 58th Cong., 2d Sess.	J*		*See* H.R.J. Res. 211, 57th Cong., 2d Sess. (Dec. 1, 1902) [#58]
63	12/14/1905	S.J. Res. 9, 59th Cong., 1st Sess.	J	r	*See* S.J. Res. 22, 56th Cong., 1st Sess. (Dec. 6, 1899) [#41]
64	5/9/1906	S.J. Res. 56, 59th Cong., 1st Sess.	P		1. Neither polygamy nor polygamous cohabitation shall exist in the United States or any place subject to its jurisdiction. 2. The practice of polygamy or polygamous cohabitation within the bounds of a State or Territory of the United States or any place subject to its jurisdiction shall be treated as a crime against the United States. 3. Congress shall have power to enforce the provisions of this article by appropriate legislation, but nothing in this article shall be construed to deny to any State the exclusive power, subject to the provisions of this article, to make and enforce all laws concerning marriage and divorce within its jurisdiction or to vest in the United States any power respecting the same within any State.
65	12/5/1906	H.R.J. Res. 191, 59th Cong., 2d Sess.	J		*See* S.J. Res. 22, 56th Cong., 1st Sess. (Dec. 6, 1899) [#41]
66	12/2/1907	H.R.J. Res. 1, 60th Cong., 1st Sess.	J		*See* S.J. Res. 22, 56th Cong., 1st Sess. (Dec. 6, 1899) [#41]
67	12/2/1907	H.R.J. Res. 2, 60th Cong., 1st Sess.	J		*See* S.J. Res. 22, 56th Cong., 1st Sess. (Dec. 6, 1899) [#41]
68	12/16/1907	S.J. Res. 13, 60th Cong., 1st Sess.	P		1. Polygamy shall not be permitted in the United States. 2. The Congress shall have power to enforce this article by appropriate legislation.
69	1/7/1908	S.J. Res. 19, 60th Cong., 1st Sess.	P		1. Neither polygamy nor polygamous cohabitation shall exist in the United States or any place subject to its jurisdiction. 2. The practice of polygamy or polygamous

	Date	Citation	Topic	Hist.	Text of Amendment
					cohabitation within the bounds of a State or Territory of the United States or any place subject to its jurisdiction shall be treated as a crime against the United States. 3. Congress shall have power to enforce the provisions of this article by appropriate legislation.
70	1/29/1908	S.J. Res. 46, 60th Cong., 1st Sess.	P		1. Polygamy and polygamous cohabitation shall not be permitted in the United States. 2. The Congress shall have power to enforce this article by appropriate legislation.
71	12/7/1908	H.R.J. Res. 199, 60th Cong., 2d Sess.	J		The Congress shall have power to establish uniform laws regulating marriages and divorces throughout the United States.
72	3/12/1910	H.R.J. Res. 170, 61th Cong., 1st Sess.	J & P		1. Congress is hereby empowered to provide by law for the punishment of kidnapping, pandering, bigamy, polygamy, and conspiracy in restraint of trade, concurrent with the legislatures of the several States . . . . 3. Congress is further empowered to make laws respecting . . . marriage, divorce, and alimony, which laws shall be of a general nature and uniform in operation throughout the United States . . . .
73	3/22/1912	H.R.J. Res. 277, 62d Cong., 2d Sess.	P		1. Polygamy shall be prohibited in the United States and in all territory under their jurisdiction. 2. Congress shall have power to enforce by appropriate legislation the provisions of this article.
74	12/11/1912	H.R.J. Res. 368, 62d Cong., 3d Sess.	R		Intermarriage between negroes or persons of color and Caucasian [sic] or any other character of persons within the United States or any Territory under their jurisdiction is forever prohibited, and the term ‘negroes’ or ‘persons of color’ as here employed shall be held to mean any and all person of African descent or having any trace of African or negro blood.
75	6/2/1913	H.R.J. Res. 91, 63d Cong., 1st Sess.	P		That Congress shall have power to prohibit polygamy and polygamous cohabitation in all the States, Territories, and dependencies of the United States, and to enforce such prohibition by appropriate legislation.

	Date	Citation	Topic	Hist.	Text of Amendment
76	7/24/1913	H.R.J. Res. 110, 63d Cong., 1st Sess.	J		The Congress shall have power to establish uniform laws on the subject of marriage and divorce for the United States and to provide penalties for violation thereof.
77	10/28/1913	H.R.J. Res. 144, 63d Cong., 1st Sess.	P		1. Polygamy shall not exist within the United States or any place subject to their jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation.
78	12/20/1913	S.J. Res. 91, 63d Cong., 2d Sess.	P		*See* H.R.J. Res 2779, 46th Cong., 2d Sess. (Dec. 10, 1879) [#2]
79	1/13/1914	S.J. Res. 96, 63d Cong., 2d Sess.	P		1. Polygamy and polygamous cohabitation shall not exist within the United States or any place subject to their jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation.
80	1/24/1914	H.R.J. Res. 200, 63d Cong., 2d Sess.	P		1. Neither polygamy nor polygamous cohabitation shall exist within the United States or any place subject to their jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation.
81	1/24/1914	H.R.J. Res. 201, 63d Cong., 2d Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
82	2/4/1914	S.J. Res. 109, 63d Cong., 2d Sess.	J	r	1. Absolute divorce with the right to remarry shall not be permitted in the United States, or in any place within their jurisdiction. Uniform laws in regard to marriage and to separation from bed and board without permission to remarry shall be enacted for the United States and all places subject to them. 2. Congress shall have power to enforce this article by appropriate legislation.
83	12/6/1915	H.R.J. Res. 9, 64th Cong., 1st Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
84	12/7/1915	H.R.J. Res. 48, 64th Cong., 1st Sess.	J	h	*See* S.J. Res. 22, 56th Cong., 1st Sess. (Dec. 6, 1899) [#41]
85	1/5/1916	S. 3000, 64th Cong., 1st Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]

	Date	Citation	Topic	Hist.	Text of Amendment
86	2/3/1916	H.R.J. Res. 138, 64th Cong., 1st Sess.	J*		Congress may pass a law regulating the granting of divorces and providing for the custody and maintenance of the children of divorced parties and adjusting the alimony between the said parties and fixing the grounds upon which divorces may be granted and the causes for which divorces may be granted.
87	4/14/1916	H.R.J. Res. 200, 64th Cong., 1st Sess.	J		Congress shall have power to establish and enforce by appropriate legislation uniform laws as to marriage and divorce: *Provided*, That every State may by law exclude, as to its citizens duly domiciled therein, any or all causes for absolute divorce in such laws mentioned.
88	4/14/1916	H.R.J. Res. 201, 64th Cong., 1st Sess.	J		The Congress shall have power to establish uniform laws on the subject of marriage and divorce for the United States and to enforce penalties for violation thereof: *Provided*, That nothing herein contained shall prevent any State from abolishing absolute divorce by the vote of a majority of its duly qualified electors voting at a regular election.
89	5/1/1916	H.R.J. Res. 213, 64th Cong., 1st Sess.	J*		The Congress may define and limit the causes for divorce from the bonds of matrimony and the conditions under which suits may be brought for divorce. The States may enact and enforce laws authorizing divorces to be granted, but any part thereof that shall be in contravention of any law enacted by the Congress shall be void. Any State may, however, prohibit divorces for any and all of the causes for divorce defined by any law enacted by the Congress and impose restrictions in addition to those imposed by the Congress on the granting of divorces. Any divorce granted pursuant to any valid law of any State after the Congress shall have defined the causes for divorce shall be valid everywhere.
90	5/3/1916	H.R.J. Res. 216, 64th Cong., 1st Sess.	J*		The Congress may define and limit the causes for divorce from the bonds of matrimony and the conditions upon which suits therefor may be maintained. But no divorce shall be granted in any State except under and as authorized by its laws, which may permit or prohibit divorces for any and all the causes therefor defined by Congress

	Date	Citation	Topic	Hist.	Text of Amendment
91	4/12/1917	S.J. Res. 34, 65th Cong., 1st Sess.	J		*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
92	4/16/1917	H.R.J. Res. 55, 65th Cong., 1st Sess.	J		*See* H.R.J. Res. 201, 64th Cong., 1st Sess. (Apr. 14, 1916) [#88]
93	12/7/1917	H.R.J. Res. 177, 65th Cong., 2d Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
94	12/13/1917	H.R.J. Res. 187, 65th Cong., 2d Sess.	J	h	*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
95	1/11/1918	H.R.J. Res. 213, 65th Cong., 2d Sess.	J*		The Congrss may define and limit the causes for divorce from the bonds of matrimony and the conditions under which applications therefore may be granted. Divorces obtained in compliance with the requirements of the Congress shall be valid everywhere. But no divorce shall be granted in any State except under and as authorized by its laws, which may permit or prohibit divorces for any and all the causes therefor defined by Congress.
96	4/5/1918	S.J. Res. 147, 65th Cong., 2d Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
97	5/28/1919	H.R.J. Res. 74, 66th Cong., 1st Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
98	5/28/1919	H.R.J. Res. 75, 66th Cong., 1st Sess.	J*	h	The Congress may define and limit the causes for divorce from the bonds of matrimony and the conditions under which applications therefore may be granted. Divorces obtained in compliance with the requirements of the Congress shall be valid every-where. But no divorce shall be granted in any state except under and as authorized by its laws, which may permit or prohibit divorces for any and all the causes therefore defined by the Congress.
99	6/9/1919	H.R.J. Res. 108, 66th Cong., 1st Sess.	J	h	*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]

	Date	Citation	Topic	Hist.	Text of Amendment
100	6/12/1919	S.J. Res. 55, 66th Cong., 1st Sess.	J	h	*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
101	4/11/1921	H.R.J. Res. 8, 67th Cong., 1st Sess.	J		*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
102	4/19/1921	S.J. Res. 31, 67th Cong., 1st Sess.	J	h	*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
103	4/25/1921	H.R.J. Res. 83, 67th Cong., 1st Sess.	J	h	The Congress shall have power to establish uniform laws on the subjects of marriage, and divorce from the bonds of matrimony throughout the United States.
104	5/24/1921	H.R.J. Res. 131, 67th Cong., 1st Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
105	5/27/1921	H.R.J. Res. 137, 67th Cong., 1st Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
106	1/23/1923	H.R.J. Res. 426, 67th Cong., 4th Sess.	J		The Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage or by divorce.
107	1/23/1923	S.J. Res. 273, 67th Cong., 4th Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
108	12/5/1923	H.R.J. Res. 6, 68th Cong., 1st Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
109	12/5/1923	H.R.J. Res. 9, 68th Cong., 1st Sess.	J		Congress shall have power to make uniform laws on marriage and divorce and the care and custody of children affected by divorce or annulment of marriage: *Provided*, That any State may, as to its citizens or persons residing therein, by law prohibit absolute divorce for any or all causes and may limit or prohibit remarriage.

	Date	Citation	Topic	Hist.	Text of Amendment
110	12/5/1923	H.R.J. Res. 40, 68th Cong., 1st Sess.	J		*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
111	12/6/1923	S.J. Res. 5, 68th Cong., 1st Sess.	J	h	*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
112	12/20/1923	H.R.J. Res. 109, 68th Cong., 1st Sess.	J		*See* H.R.J. Res. 83, 67th Cong., 1st Sess. (Apr. 25, 1921) [#103]
113	1/3/1924	H.R.J. Res. 114, 68th Cong., 1st Sess.	P		*See* S.J. Res. 96, 63d Cong., 2d Sess. (Jan. 13, 1914) [#79]
114	1/3/1924	S.J. Res. 53, 68th Cong., 1st Sess.	J		*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
115	12/7/1925	H.R.J. Res. 30, 69th Cong., 1st Sess.	J		*See* H.R.J. Res. 83, 67th Cong., 1st Sess. (Apr. 25, 1921) [#103]
116	4/18/1921	S.J. Res. 31, 67th Cong., 1st Sess.	J		*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
117	12/10/1925	H.R.J. Res. 58, 69th Cong., 1st Sess.	J		*See* H.R.J. Res. 200, 64th Cong., 1st Sess. (Apr. 14, 1916) [#87]
118	1/8/1926	H.R.J. Res. 110, 69th Cong., 1st Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
119	12/15/1927	S.J. Res. 40, 70th Cong., 1st Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
120	1/5/1928	S.J. Res. 65, 70th Cong., 1st Sess.	R		The marriage of a white person with a negro or mulatto shall be unlawful and void. Congress shall provide by law for the punishment of parties attempting to contract such marriage, and for the punishment of the officer of the law, or minister or any other person qualified to perform the marriage ceremony, who shall attempt to or perform such ceremony.

	Date	Citation	Topic	Hist.	Text of Amendment
121	12/5/1927	H.R.J. Res. 35, 70th Cong., 1st Sess.	J		*See* H.R.J. Res. 83, 67th Cong., 1st Sess. (Apr. 25, 1921) [#103]
122	1/13/1928	H.R.J. Res. 162, 70th Cong., 1st Sess.	J & R		The Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage or by divorce, but the power to legislate concerning the relation between persons of different races is hereby reserved to and may be exercised by the several States.
123	1/16/1930	S.J. Res. 123, 71st Cong., 2d Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
124	12/6/1937	S.J. Res. 234, 75th Cong., 2d Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
125	1/11/1938	H.J. Res. 558, 75th Cong., 3d Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
126	1/17/1939	S.J. Res. 44, 76th Cong., 1st Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
127	2/10/1941	S.J. Res. 36, 77th Cong., 1st Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
128	1/21/1943	S.J. Res. 24, 78th Cong., 1st Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
129	5/12/1944	H.R.J. Res. 281, 78th Cong., 2d Sess.	E		1. No person shall marry in a State in which he is not domiciled unless he is legally qualified to marry in the State of his domicile. No marriage contracted in a foreign country by a person who has a domicile in the United States shall be valid in the United States unless such person was legally qualified, immediately prior to such marriage, to marry in the State of his domicile. An action for separation or divorce shall be brought only in the State in which the parties

	Date	Citation	Topic	Hist.	Text of Amendment
					to the action last maintained a matrimonial domicile. An action for annulment of a marriage shall be brought only in the State in which the marriage was contracted. A divorce granted in a foreign country to citizens of the United States shall not be valid in the United States unless the last matrimonial domicile of the parties to the action was in the country in which such divorce was granted. A restriction upon marriage contained in a decree granting a divorce shall be given full faith and credit in all States of the United States. As used in this section, the term 'State' includes, in addition to the several States of the United States, the District of Columbia. 2. The Congress shall have power to enforce this article by appropriate legislation.
130	3/13/1945	S.J. Res. 47, 79th Cong., 1st Sess.	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
131	2/14/1945	H.R.J. Res. 102, 79th Cong., 1st Sess.	J		The Congress shall have power to establish uniform laws with respect to marriage and divorce.
132	1/15/1947	S.J. Res. 28, 80th Cong. 1st Sess	J		*See* H.R.J. Res. 426, 67th Cong., 4th Sess. (Jan. 23, 1923) [#106]
133	1/24/1963	H.R.J. Res. 176, 88th Cong., 1st Sess.	J*		1. The laws of the State, territory, Commonwealth or possession of the United States in which a marriage is contracted shall be the controlling law in any proceeding for the dissolution of such marriage instituted in any other State, territory, Commonwealth or possession of the United States. 2. The Congress shall have power to enforce this article by appropriate legislation.
134	5/15/2002	H.R.J. Res. 93, 107th Cong., 2d Sess.	G		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.

	Date	Citation	Topic	Hist.	Text of Amendment
135	5/21/2003	H.R.J. Res. 56, 108th Cong., 1st Sess.	G	h	*See* H.J. Res 93, 107th Cong., 2d Sess. (May 15, 2002) [#134]
136	11/25/2003	S.J. Res. 26, 108th Cong., 1st Sess.	G	h	*See* H.J. Res 93, 107th Cong., 2d Sess. (May 15, 2002) [#134]
137	3/23/2004	S.J. Res. 30, 108th Cong., 2d Sess.	G	h	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.
138	3/23/2004	S.J. Res. 40, 108th Cong., 2d Sess.	G	h	*See* S.J. Res. 30, 108th Cong., 2d Sess. (Mar. 23, 2004) [#137]