

The Proposed Anti-Gay Marriage Amendment: The Constitution, the Law of Standing, and Liberal-Democratic Values

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This Article considers the proposed federal constitutional amendment banning same-sex marriage, both in terms of existing legal doctrine and in terms of liberal-democratic values. With regard to doctrine, the article shows that the amendment would not be enforceable because neither a private nor a public plaintiff would have standing to bring suit to enforce it. In the alternative, even if standing were somehow found to exist for a future plaintiff, a court ruling enforcing the amendment would violate well-established practices of tolerance that are central to a liberal-democratic political culture.

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I. INTRODUCTION

The heated debate over the legal status of same-sex marriage has frequently obscured basic underlying legal and political questions concerning civil rights. Now that opponents of same-sex marriage have proposed a constitutional amendment that purports to eliminate, once and for all, the possibility of such marriages, the confusion has grown worse, for it is by no means clear that an amendment to the United States Constitution could accomplish that end. In this Article, we will argue that the federal law of standing, which determines who may stand before a federal court (and which claims a party may bring), would not permit enforcement of a federal constitutional ban on same-sex marriage. The existing standing tests for legal injury would not be met by a litigant who claimed injury based on the fact that two other people had been married. Moreover, our liberal-democratic political tradition does not recognize *mere offense to one's beliefs or sensibilities* as sufficient basis for governmental intervention, via the federal courts, on behalf of one individual and to the detriment of another. Thus, even an innovation in standing law that would permit suits to enforce a constitutional ban on same-sex marriage would contravene long-standing liberal (lower-case "l") political norms that demarcate the limits of the private and the government's *qua* judiciary's power to enter that area.

Our argument here proceeds in three steps. First, we introduce and briefly analyze the text of the latest proposal in order to set out the parameters of the proposed law change and determine its scope and manner of operation. In particular, we want to show how it goes beyond existing law, including the federal Defense of Marriage Act. Here, some comparison to other constitutional provisions is also appropriate. Second, we review the doctrine of standing as it pertains to noneconomic injury (or attenuated economic injury), which is the category of injury that a putative private plaintiff seeking to enforce the marriage ban would have to claim. This Part explores the various tests the Supreme Court of the United States has developed to adjudicate standing questions: the "legal injury" test originating in the Administrative Procedure Act and the "zone of interests" test, which was designed to determine which particular interests a statutory enforcement scheme such as the Clean Air Act, for example, was intended to protect through court enforcement. In the second Part, we will also address the question of *public* enforcement of a constitutional marriage ban by the U.S. Attorney General. Public enforcement obviously raises different questions as compared to a private

enforcement action, and we will address those questions in turn within the “public enforcement” subsection of Part III.

Finally, Part IV assumes for argument’s sake that standing problems in the public or private context could somehow be overcome (or ignored) and argues that any attempt to enforce a constitutionally instantiated marriage ban would nonetheless run counter to liberal-democratic norms of tolerance, as such norms are articulated by Bollinger and others.¹ In the end, we suggest that in a democracy, there are some things one cannot litigate one’s way out of, despite the fact that one may feel uncomfortable or offended by them. Put another way, this claim amounts to saying that the protection of one’s own privacy afforded by a liberal-democratic regime comes with a corresponding responsibility to tolerate the protection of privacy of others—even when others exercise their privacy in allegedly disagreeable ways. Hardly novel or surprising, this assertion that tolerance is deeply rooted within our legal and political traditions is nonetheless frequently forgotten in the cathected discourse of the marriage debates.

Because this Article focuses on enforcement of a federal constitutional ban on same-sex marriage, there are aspects of the debates and theorizing about marriage that are beyond its scope. For one, there is dispute (even among those who advocate expanded rights for gays and lesbians) over the desirability of preserving the institution of marriage. Some suggest that the notion of marriage is worth preserving and expanding for the benefits it gives,² while others challenge the assumption that only physically intimate, two-person relationships (and not other kinds) ought to receive legal recognition.³ Moreover, even supporters of marriage recognize that the marriage relationship has historically been a site of inequality and loss of status for women, and therefore what we think of as state-sanctioned and regulated marriage needs reforming.⁴ One commentator, Mary Shanley, argues that both private-contractual and state-recognized notions of marriage ought to be promoted, because together they assure the benefits of marriage along with public justice.⁵ David Chambers has surveyed the numerous state

1. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

2. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 448, 452 (1996).

3. See Drucilla Cornell, *The Public Supports of Love*, in JUST MARRIAGE 81, 85 (Mary Lyndon Shanley ed., 2004); Nancy F. Cott, *The Public Stake*, in JUST MARRIAGE *supra*, at 33, 36.

4. See Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, in JUST MARRIAGE, *supra* note 3, at 19, 25, 28.

5. See *id.* at 28.

and federal domains of law that implicate marriage in order to show that there are important reasons for gays and lesbians to fight for inclusion in the institution of marriage, rather than urging people to move beyond that institution.⁶ These and many other questions about the status of marriage swirl around public and scholarly discourse, and important as they are, we do not deal with them here. We are concerned, instead, with the more limited question of how far the federal government may go toward restricting access to marriage for one particular grouping of legal subjects: same-sex partners. As Chambers suggests, “[a]ll desirable changes in family law need not be made at once,”⁷ and in that spirit we focus on the immediate legal issue of the enforceability of a constitutional prohibition while remaining aware that larger questions lie behind that issue.

II. THE PROPOSAL

The most recently proposed text of an amendment to the United States Constitution barring same-sex marriage reads as follows:

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.⁸

The proposed amendment was defeated both in 2004 and again in 2006.⁹ At this writing, despite the failure of previous attempts in Congress, supporters of a same-sex marriage ban amendment continue to advocate for some form of an amendment.¹⁰ The widespread perception that the reelection of President George W. Bush was a referendum on moral values, which was decided in favor of social conservatives, has reinvigorated those efforts.¹¹

6. See Chambers, *supra* note 2, at 448.

7. *Id.* at 491.

8. Federal Marriage Amendment, S.J. Res. 40, 108th Cong. (2004); H.R.J. Res. 106, 108th Cong. (2004).

9. S.R. 40 was withdrawn on July 15, 2004, after a vote to bring the bill to the Senate floor failed. 108th CONG. REC. S8150 (daily ed. July 15, 2004). On September 30, 2004, a vote on H.R. 106 resulted in its defeat, 227 to 186. 108th CONG. REC. H7933 (daily ed. Sept. 30, 2004). On June 7, 2006, the Senate rejected the amendment for a second time. 110 CONG. REC. S5534 (daily ed. June 7, 2006).

10. See Alliance Defense Fund, Marriage Makes Headway Despite Disappointing Senate Vote on Federal Amendment: Good News for Marriage Amendments in Ala., Pa., and U.S. House (June 7, 2006), <http://alliancedefensefund.org/news/pressrelease.aspx?cid=3773>.

11. David Finkel, “It’s a Victory for People Like Us”: Bush Emphasis on Values Drew Ohio Evangelicals, WASH. POST, Nov. 5, 2004, at A3.

The Defense of Marriage Act (DOMA), passed in 1996, already prevents recognition of same-sex marriage for all purposes of federal law.¹² Social Security benefits and federal income tax rules, to take two examples, are dependent on a construction of the term “marriage” for their operation: who is a “spouse,” and what is “marriage” for the purposes of tax liability or Social Security benefits eligibility? Wherever “marriage” appears in federal law, the DOMA supplies exclusively heterosexual meaning, with concrete results such as disallowance of spousal benefits under Social Security programs, or maritally based tax savings under the Internal Revenue Code.¹³ Since principles of federalism arguably prevent the DOMA from interfering when individual states recognize same-sex marriages under their laws, the proposed amendment would reach where federal statutory law cannot (into state-law decisions to permit or recognize same-sex marriage), and therefore amendment supporters argue that the amendment is necessary if same-sex marriage is to be banned altogether.

III. STANDING TO ENFORCE THE MARRIAGE BAN

In this Part we will analyze the claims to standing that would be made by a private plaintiff or a (federal) government plaintiff. With regard to defendants, various categories of actors could conceivably be in violation of the amendment if it were to become law: for example, a state or private official who performed or recognized a same-sex marriage, or a person who entered into a same-sex marriage.

A. *Standing and Private Action*

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.¹⁴

—Justice Powell

The law of standing assumes multiple roles in the American legal system. Concerning individual citizens, standing law governs access to legal redress, as it determines who is eligible to bring suit in a court of

12. See Defense of Marriage Act, Pub. L. No. 104-99, § 3(a), 110 Stat. 2419, 2419 (1996).

13. See, e.g., 26 U.S.C. § 2 (2000); 42 U.S.C. §§ 1381-1383(f) (2000).

14. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted).

law and which issues can properly be heard by various courts.¹⁵ In regard to institutions, standing law helps to enforce the separation of government powers by serving as a constitutional check on the activities of the judiciary.¹⁶ In addition to constitutional limitations, courts have used standing law to develop self-imposed restraints on judicial power.¹⁷ Thus, to suggest that the law of standing plays an important role in American jurisprudence would be quite the understatement, as it is obviously indispensable to the administration of justice on the individual level and central to the proper functioning of government on an institutional level.

Yet, despite its manifest importance, standing law is often criticized as being unintelligible.¹⁸ Scholars have suggested that the “structure of standing law is ill-matched to the task it is asked to perform”¹⁹ and described portions of standing law as amounting to “a large-scale conceptual mistake.”²⁰ Additional criticisms of standing law assert that it is “permeated with sophistry,”²¹ and even the Supreme Court has questioned the viability of standing law, calling it “a word game played by secret rules.”²²

Still, even considering its criticisms, the history and current status of standing law provide a picture of standing coherent enough to enable speculation as to the enforceability of the proposed anti-gay marriage amendment. This portion of the Article attempts to outline the law of standing and suggest that, in the context of current standing law, a proposed constitutional ban on gay marriage would be unenforceable. In doing so, we first proceed to define standing and describe both the constitutional and prudential requirements that that Supreme Court has

15. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Warth*, 422 U.S. 490; *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Baker v. Carr*, 369 U.S. 186 (1962); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

16. See cases cited *supra* note 15; *infra* notes 17-27 and accompanying text.

17. See *infra* notes 29-33 and accompanying text.

18. See *Flast*, 392 U.S. at 129 (Harlan, J., dissenting); 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35 (2d ed. 1983); Abram Chayes, *The Supreme Court, 1981 Term: Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22-23 (1982).

19. William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988).

20. See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167 (1992).

21. DAVIS, *supra* note 18, § 24:35.

22. *Flast*, 392 U.S. at 129.

established as minimum eligibility requirements that must be met before an individual will be granted access to adjudication in the nation's highest court.²³ Second, we highlight the various standing options that are available to individuals beyond the standing offered to those who meet the minimum constitutional and prudential requirements. Lastly, we suggest that an individual attempting to have the Supreme Court enforce a constitutional ban on gay marriage would, in accordance with current standing law, lack standing to bring suit.

In addition, in this Part we will describe the problems associated with public enforcement of the proposed amendment. Certain public entities are often afforded standing to bring suit without first having to meet the minimum constitutional and prudential requirements to which private citizens are subject. For instance, the U.S. Attorney General and the various state attorneys general, in their capacity as protectors of public welfare, are often granted standing without regard to the minimum standing requirements.²⁴ In addition, Congress may grant itself and the several states standing to enforce a constitutional ban on gay marriage by writing into the amendment a stipulation granting themselves and the states the power to enforce the amendment, much like it did in the Eighteenth Amendment (Prohibition), among others.²⁵ We will address the difficulties any such attempt at public enforcement would entail at the end of this Part.

1. Standing and Its Requirements

Black's Law Dictionary defines standing as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.”²⁶ While access to judicial redress of legitimized legal grievances is indeed a right afforded to citizens by our government, this right is neither universal nor omnipresent, as certain minimum requirements must first be met before the exercise of one’s right to make a legal claim can commence.²⁷ Specifically, there are five requirements that must be met

23. This study specifically examines the requirements to meet standing on the Supreme Court level because any issues to be adjudicated regarding the United States Constitution fall under the jurisdiction of the Supreme Court. Necessarily, then, any legal concerns raised by a constitutional amendment banning gay marriage would fall under the Supreme Court’s jurisdiction.

24. See *United States v. California*, 332 U.S. 19, 26-28 (1947); *Fund Manager v. Corbin*, 778 P.2d 1244, 1250-51 (Ariz. Ct. App. 1988); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974).

25. See U.S. CONST. amend. XVIII (repealed 1933).

26. BLACK’S LAW DICTIONARY 1442 (8th ed. 2004).

27. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (determining that Article III of the United States Constitution does

before standing is granted on the federal level: three constitutional requirements and two prudential requirements.²⁸

The Supreme Court, on multiple occasions, has suggested that standing law is rooted in the “case or controversy” requirement articulated in Article III of the United States Constitution.²⁹ According to the Court, the limitation of judicial power to “cases and controversies” serves to “limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.”³⁰ Typically, the Court has interpreted this limitation as prohibiting the Supreme Court from offering advisory opinions.³¹ Additionally, the Court has found that the “case and controversy” requirement of Article III defines “the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”³² In other words, the “case or controversy” requirement of Article III prevents the Supreme Court from encroaching upon those duties traditionally held to be the responsibility of either the executive or legislative branches of the federal government.

Thus, the Supreme Court has promulgated three requirements for standing to ensure that the opinions the Court provides are not advisory in nature and do not infringe upon the powers of the executive and legislative branches of government, thereby bringing the actions of the Court in accord with the “case or controversy” requirements of the Constitution. In order to have standing to bring suit at the Supreme Court level, the plaintiff must (1) be able to show that he or she has suffered an “injury in fact,” which is an injury that is either concrete or imminent; (2) posit a causal connection between this injury and the

not grant a court the *unconditional* power to determine the constitutionality of legislative or executive acts).

28. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); see also *Valley Forge*, 454 U.S. at 474-75.

29. *Flast v. Cohen*, 392 U.S. 83, 94 (1968) (“The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to ‘cases’ and ‘controversies.’”).

30. *Id.* at 95.

31. See, e.g., *id.* at 96 (“Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”).

32. *Id.* at 95.

defendant's conduct; and (3) prove that there exists a high likelihood that the injury will be redressed by the requested relief.³³

Although some question the connection between Article III enumerations of judicial power and the "injury in fact" requirement for standing,³⁴ the requirement clearly protects against Article III prohibited advisory opinions because it provides that the plaintiff will have "such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness."³⁵ This "concrete adverseness," in turn, will "assure that the legal questions presented to the Court will be resolved, not in the rarified atmosphere of a debating society, but in a *concrete factual context* conducive to a realistic appreciation of the consequences of judicial action."³⁶ Hence, the "injury in fact" requirement provides the Court with a tangible and proper question for the Court to resolve "in a form historically viewed as capable of resolution through the judicial process,"³⁷ which, as explained above, protects against advisory opinions.³⁸

The connection between Article III limitations on judicial power and the standing requirement of causation is similarly clear, as it guards against encroachment by the judiciary upon the powers of the executive and legislative branches by requiring a nexus between the alleged injury suffered by the plaintiff and the conduct of the defendant.³⁹ Such a nexus would provide the Court with an illegal or unconstitutional action to correct, the absence of which would transform the Court's opinion to normative speculation as to what the law should be or how the law should be executed, which are responsibilities of the legislature and the executive, respectively, and beyond the scope of the powers of the judiciary.⁴⁰

Furthermore, the redressability requirement of standing assures that Court opinions will neither be advisory in nature nor breach any separation of power boundaries. Much like the "injury in fact" requirement, the redressability requirement provides that the outcome of the Court's decision will be "conducive to a realistic appreciation of the

33. See *Vt. Agency of Natural Res.*, 529 U.S. at 771.

34. See Sunstein, *supra* note 20, at 166.

35. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

36. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added).

37. *Flast*, 392 U.S. at 95.

38. See cases cited *supra* notes 16-27.

39. See *supra* notes 31-32 and accompanying text.

40. See *Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (explaining why separation of powers prevents suits without a nexus between the injury and the challenged action as they are not appropriate for federal adjudication).

consequences of judicial action.”⁴¹ Simply, this means that the Court’s attempt at resolving the issue must actually resolve the issue⁴²; otherwise, the Court’s ruling would hold no practical application, thereby becoming advisory in nature. Also, the Court’s insistence on a redressability requirement for standing enforces the separation of government powers by allowing the Court to deny standing in cases where a ruling would answer a political question,⁴³ which are questions that are political in nature and, thus, according to the Court, the responsibility of the legislature or the executive to answer.⁴⁴

In addition to the three constitutional requirements of standing established by the Supreme Court,⁴⁵ the Court has also fashioned two prudential requirements that serve as self-imposed restraints⁴⁶ on judicial power.⁴⁷ Those two requirements are that a plaintiff (1) must assert his or her own legal rights in the claim and not rely on the legal rights of third

41. *Valley Forge*, 454 U.S. at 472 (noting that the standing requirement serves the purpose of preventing future lawsuits where only some of the facts of the case are actually decided by the court).

42. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). The Court denied standing to a mother bringing suit against a local prosecutor for failing to pursue legal proceedings against the father of her illegitimate child, which she alleged caused her harm in the form of missed child support payments. The Court found that if it required the prosecutor to proceed against the father of the illegitimate child, the father would go to jail under a Texas statute, and the harm of missed payments would go unresolved.

43. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”); *Flast v. Cohen*, 392 U.S. 83, 100 (1968).

44. *See Baker*, 369 U.S. at 217 (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).

45. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

46. *See Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (“Apart from the jurisdictional requirement, this Court has developed a complimentary rule of self-restraint for its own governance. . . .”); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”).

47. *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975) (“The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.”).

parties and (2) must assert a personal and particularized grievance, not a general grievance shared with others.⁴⁸ Particularly, the Court has utilized these prudential requirements of standing as limitations on the Court's power in order to avoid judicial interference with functions more properly belonging to the other branches of government.⁴⁹

2. Standing Options

Though it seems as though the constitutional and prudential requirements for standing promulgated by the Court would work to limit standing on the federal level, the aim of such requirements is to ensure proper access to the courts.⁵⁰ Obviously, a plaintiff meeting both the constitutional and prudential requirements of standing would be afforded proper access to adjudication of legal grievances by the Supreme Court, but the Court has also recognized several additional standing options for individuals seeking to bring suit in a federal court.

One of the options of standing the Court has recognized is congressionally granted standing, also known as a "citizen suit." Entrenched in the Administrative Procedure Act, which confers standing to individuals who are "aggrieved by agency action within the meaning of a relevant statute,"⁵¹ citizen suits arise when an individual is granted

48. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982); *Warth*, 422 U.S. at 499.

49. *Lujan*, 504 U.S. at 576 ("The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 'is, solely, to decide on the rights of individuals.'" Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." (citations omitted)); *Warth*, 422 U.S. at 500 ("Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.").

50. *Warth*, 422 U.S. at 498 ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.").

51. 5 U.S.C. § 702 (2000) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.").

standing through the language of a statute that permits certain classes of individuals to seek judicial enforcement of that statute or a legal right related to that statute.⁵² Recognition by the Supreme Court of congressionally granted standing has occurred enough times that the Court has found it necessary to establish citizen-suit-specific requirements for standing.⁵³ To have standing in a citizen suit, the Court has held that a plaintiff must (1) suffer a judicially cognizable injury in fact⁵⁴ and (2) bring a complaint that is within the “zone of interest” sought to be protected by the statute.⁵⁵ The meaning and significance of the “injury in fact” requirement has already been explained above, and the “zone of interest” requirement simply means that the injury for which a plaintiff is seeking redress must be the type of injury the statute purports to protect against. These requirements ensure that congressional grants of standing remain in concert with constitutional provisions for separation of government powers, much like the minimum constitutional and prudential requirements for standing do in the absence of statutory expressions of standing.⁵⁶

Another option the Supreme Court has recognized is standing as a federal taxpayer.⁵⁷ Standing as a taxpayer allows individuals who pay federal taxes to bring suit in a federal court challenging unlawful or unconstitutional actions of government entities that are funded through the Article I taxing and spending provision of the Constitution.⁵⁸ Thus,

52. See, e.g., *Lujan*, 504 U.S. at 571-73; *Valley Forge*, 454 U.S. at 464; *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970).

53. See *Valley Forge*, 454 U.S. at 475 (referring to the “zone of interest” requirement for citizen suits as the third prudential requirement for standing).

54. See *Lujan*, 504 U.S. at 576 (suggesting that the “injury in fact” requirement was still an essential part to the proper functioning of the Supreme Court in a tri-part government system, and that a congressional grant of standing does not waive this requirement).

55. See *Ass'n of Data Processing*, 397 U.S. at 153 (“It concerns, apart from the ‘case’ or ‘controversy’ test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”).

56. See *Lujan*, 504 U.S. at 577 (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’ It would enable the courts, with the permission of Congress, ‘to assume a position of authority over the governmental acts of another and co-equal department’ and to become ‘virtually continuing monitors of the wisdom and soundness of Executive action.’ We have always rejected that vision of our role. . . .” (citations omitted)).

57. See *Flast v. Cohen*, 392 U.S. 83, 92 (1968) (recognizing the legitimacy of federal taxpayer standing, thereby striking down the belief that the Court’s earlier denial of taxpayer standing in *Frothingham v. Mellon* served as a constitutional ban on federal taxpayer standing).

58. See *id.* at 105-06 (“We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8.

taxpayer standing provides an individual who believes that his or her federal tax money is being spent on government action that is in opposition and/or detrimental to his or her personal interests the opportunity to seek judicial injunction of that action. Similar to the Court's treatment of citizen suits, specific standing requirements have been established by the Supreme Court in determining whether or not an individual is eligible to bring suit as a taxpayer.⁵⁹ To have standing as a taxpayer a plaintiff must (1) "establish a logical link between that status and the type of legislative enactment attacked" and (2) "establish a nexus between that status and the precise nature of the constitutional infringement alleged."⁶⁰

Specifically, the first requirement means that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution,"⁶¹ meaning that the challenged government action must be funded by Congress via its constitutionally granted spending power and not another source of government financial support. Concerning the second requirement, the Court asserted that "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."⁶² In other words, the challenged congressional spending must specifically violate the Constitution and not just be a misuse of government funds. Thus, according to the Court, when both requirements are met and the plaintiff can establish a connection between his or her status as a taxpayer and unconstitutional congressional spending, the "litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction."⁶³

Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.").

59. *See id.* at 101-02 ("[O]ur decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.").

60. *Id.* at 102.

61. *Id.*

62. *Id.* at 102-03.

63. *Id.* at 103.

However, it should be noted that, while the Court has recognized taxpayer standing, meeting the requirements of taxpayer standing has proven to be a difficult task and the Court seems unwilling to broaden the terms of the requirements, thereby making it very difficult to assume standing to bring suit as a taxpayer.⁶⁴ Moreover, the “injury in fact” requirement must also be met before the Court will grant standing to bring suit as a taxpayer.⁶⁵

Additionally, the Court has granted standing to individuals who have not suffered a personal harm or infringement upon their rights, but rather are asserting the rights of third parties.⁶⁶ While such standing is in opposition to the prudential standing requirement that a plaintiff must assert his or her own legal rights,⁶⁷ and while the Supreme Court has stated very clearly that “[o]rdinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party,”⁶⁸ the Court has found that, on occasion, it is appropriate to allow third-party standing.⁶⁹ Before an individual is afforded standing to assert the legal rights of a third party, however, three prerequisite conditions must be met by the plaintiff: (1) there must be a significant relationship between the individual seeking to bring the suit and the third party whose rights are being asserted,⁷⁰ (2) the individual seeking to assert the rights of a third party must be in a better position to assert those rights than the third

64. See *Allen v. Wright*, 468 U.S. 737 (1984). Here, the Court refused to enjoin a statute that was alleged to be discriminating by granting a tax exemption to a racially discriminating school because the respondents, who had never actually attempted to enroll their children in the school, failed to “allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment.” *Id.* at 738. The Court further states that recognition of standing in the absence of direct injury “would transform the federal courts into ‘no more than a vehicle for the vindication of the value interest of concerned bystanders.’” *Id.* at 756; *Frothingham v. Mellon*, 262 U.S. 447 (1923). Here, the Court explained that to rule in favor of a party who has failed to show both that the statute is valid and that she has sustained an injury in fact as a result of the enforcement of a statute would amount to the exercise of “authority over the governmental acts of another and coequal department,” an authority which the court does not possess. *Frothingham*, 262 U.S. at 484.

65. See *Allen*, 468 U.S. at 752-53 (finding that the plaintiff did not have an injury in fact merely because the Government gave aid to discriminatory private schools).

66. See cases cited *infra* note 69.

67. See *Flast*, 392 U.S. at 101.

68. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

69. See *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (discussing cases in which it ruled third party standing to be appropriate); *Barrows*, 346 U.S. at 257-58 (discussing cases where unique situations have arisen that have led the Court to disregard the usual rule).

70. See *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (“The relationship there between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself.”).

party,⁷¹ and (3) the rights of the third party would be diluted if standing is not provided to an individual asserting the party's rights.⁷² Yet, although the Court has recognized third-party standing, gaining standing to assert the legal rights of others remains exceptionally difficult, and the Court will not waver on the requirements it has set to establish third-party standing.⁷³

3. Standing and the Proposed Constitutional Ban on Gay Marriage

According to the current structure of standing law, any individual seeking judicial enforcement of a constitutional ban on gay marriage would, despite all the options available, lack standing to bring suit in the nation's highest Court, thereby rendering a constitutional amendment banning gay marriage unenforceable. Most significantly, such an individual would fail to establish that he or she has suffered a judicially cognizable "injury in fact," which is problematic because a showing of "injury in fact" is a requirement of establishing general standing, citizen suit standing, and taxpayer standing. Furthermore, although a point rendered inconsequential by the failure to present an "injury in fact," the prudential requirement that a plaintiff present a particularized grievance not shared with others would also go unmet. Additionally, a variety of other standing requirements would fail to be established in such a pursuit, including the requirements for third-party standing.

There are several reasons why a plaintiff seeking judicial enforcement of a constitutional ban on gay marriage would fail to assert a judicially cognizable "injury in fact." To begin, it is evident that if a constitutional ban on gay marriage existed and a gay marriage

71. See *id.* at 446 ("In fact, the case for according standing to assert third-party rights is stronger in this regard here than in *Griswold* because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights."); *Barrows*, 346 U.S. at 257 ("But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court.")

72. See *Griswold*, 381 U.S. at 481 ("The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them."); *Barrows*, 346 U.S. at 257 ("Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.")

73. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004) (ruling that standing is improper where it is founded on disputed family law rights that may have a negative effect on a person at the source of the claimed standing).

commenced that was legally recognized in one of the states, it would be a clear violation of the United States Constitution. However, the Court has repeatedly ruled that a violation of the Constitution in and of itself is not sufficient to warrant standing, stating that “an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court,” and that no one will be granted “standing to complain simply that their Government is violating the law.”⁷⁴ Thus, an individual cannot merely claim that a gay marriage has been legally recognized and that such recognition is in violation of the Constitution and that this constitutional violation, in turn, amounts to an “injury in fact.” An “abstract injury in nonobservance of the Constitution”⁷⁵ is an injury that the Court is unwilling to recognize, as a “[r]ecognition of standing in such circumstances would transform the federal courts into ‘no more than a vehicle for the vindication of the value interests of concerned bystanders.’”⁷⁶

Additionally, the Court will not recognize disagreement with certain action or offense taken to certain action as a cognizable “injury in fact,” even if that action is in violation of the United States Constitution. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Supreme Court refused to recognize taking offense to government action as a legitimate “injury in fact,” stating that the respondents failed “to identify any personal injury suffered . . . as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”⁷⁷ Consequently, the Court found that disagreement with conduct, even if the conduct is in violation of the Constitution, is “not an injury sufficient to confer standing under Art. III.”⁷⁸ Therefore, if a gay marriage is legally recognized, being offended by such recognition is not a judicially cognizable “injury in fact,” even if that recognition is in violation of the Constitution. Accordingly, an individual seeking judicial enforcement of a constitutional ban on gay marriage would not be able to show that the legal recognition of a gay marriage has caused him or her to suffer “injury in fact,” and, thus, would lack standing to bring suit on the federal level. The “injury in fact” requirement is, in addition to a general standing requirement, a requirement of both citizen suit standing and taxpayer standing;

74. *Allen v. Wright*, 468 U.S. 737, 754-55 (1984).

75. *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 223 n.13 (1974).

76. *Allen*, 468 U.S. at 756 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

77. 454 U.S. 464, 485 (1982).

78. *Id.*

therefore, an inability to meet this requirement would preclude standing to enforce a constitutional ban on gay marriage under those standing options as well.

Although it is a point rendered superfluous by the inability to establish a judicially cognizable “injury in fact,” satisfying the prudential requirement that grievances sought to be adjudicated on the federal level be particular and not generalized is similarly troublesome for an individual seeking judicial enforcement of a constitutional ban on gay marriage. An allegation that the legal recognition of a gay marriage is in violation of the Constitution is a claim that could be raised by anyone who is concerned that the Constitution be upheld and is, therefore, a shared general grievance.⁷⁹ Likewise, a claim based on taking offense to or disagreeing with the legal recognition of a gay marriage is a claim anyone who opposes gay marriages could raise. As stated above, generalized grievances are barred on the federal level by prudential limitations of judicial power, and the inability to articulate a particularized grievance on the part of individuals seeking judicial enforcement of a constitutional ban on gay marriage thereby denies them standing.

Various additional standing requirements would also go unmet by an individual seeking judicial enforcement of a constitutional ban on gay marriage. Taxpayer standing would be unavailable because legal recognition of a gay marriage would take place in a state court, and state courts are not funded via the congressional Taxing and Spending Clause of the Constitution; thus, the taxpayer standing requirement that a plaintiff “allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution”⁸⁰ would be unfulfilled. Furthermore, even if a significant relationship exists between the plaintiff and the third party whose rights the plaintiff is seeking to assert, third-party standing would be unavailable because any grievance put forth, as explained above, would be generalized and, thus, no person would be in a better position than another to assert a third party’s legal right, a requirement for third-party standing.⁸¹

79. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575-76 (1992) (listing cases where grievances raised only a generalized interest in all citizens).

80. *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

81. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004) (finding the existence of a significant relationship is not enough in and of itself to establish third-party standing).

Additionally, citizen suit standing would be inapplicable under the current language of the proposed amendment. First and foremost, there would be a failure to show a judicially cognizable injury in fact. Second, there is currently no language in the proposed amendment authorizing Congress to enforce the amendment through legislation, which is the avenue by which Congress would establish citizen suit standing. However, the latter problem could easily be defeated simply by writing language into the amendment authorizing Congress to enforce the amendment via legislation, and, in turn, Congress can then establish citizen suit standing, enabling private citizens to enforce the amendment. Still, though, such an addition could not overcome the failure to show “injury in fact,” and despite any additional language permitting statutory enforcement, citizen suit standing would be unavailable.

This is highly unlikely, though, as there has never been a constitutional amendment containing language permitting private enforcement of that amendment, and, hence, there is no precedent for including such language. Additionally, if precedent is overlooked and language permitting private enforcement of the proposed ban on gay marriage is included in the amendment, it is unclear that the inclusion of such language could absolutely overcome the “injury in fact” requirement of standing. If, however unlikely, the included private enforcement language did nevertheless overcome the “injury in fact” requirement of standing, thereby explicitly granting standing to *any* individual seeking to enforce a constitutional ban on gay marriage, it must be conceded that standing to enforce the ban would indeed be available.

Still, this does not render our commentary here or the aim of this Article superfluous, for even if private enforcement were specifically granted in the amendment, such enforcement would be exceedingly difficult at best, because conferred private enforcement of the amendment would, arguably, become analogous to public enforcement of the amendment. Thus, it would encounter the same difficulties, such as unpopularity, hostility, and futility, that public enforcement of the amendment would encounter as described below. Essentially, the claim here rests on the assertion that any enforcement of an amendment which seeks to control and limit the private actions of individuals, as opposed to protect the rights of individuals, will become too problematic to enforce consistently and, ultimately, end in failure.

B. Public Enforcement

Public enforcement is an alternative to private action. The Attorney General of the United States, as head of the Justice Department and the nation's highest law enforcement officer, is authorized to enforce the laws of the United States.⁸² The office of the Attorney General is generally thought to have arisen under the authority granted by the clause in Article II, Section 3 of the Constitution, which directs that the president "take Care that the Laws be faithfully executed."⁸³ Section 35 of the Judiciary Act of 1789 explicitly created the office

to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.⁸⁴

The Attorney General has since grown to become "the head of a great executive department; the great majority of her time necessarily is devoted to directing the policy and administration of the activities of the Department of Justice."⁸⁵ The Attorney General supervises the enforcement of federal criminal law and also oversees civil enforcement of various statutory schemes, such as civil rights and environmental laws. Standing for the United States to sue is sometimes conferred explicitly by statutory text, but reliance can also be placed on the United States Code provision cited above. Either way, standing for the United States as plaintiff is a different matter as compared to a private suit because the stake or interest of the government plaintiff is typically clearer. The question then becomes one concerning the limits of governmental power to intervene and enforce: in what areas and to what extent?

There is only one amendment to the Constitution that is analogous to the proposed marriage ban amendment with regard to morality-based regulation of private behavior: the Eighteenth Amendment,⁸⁶ which prohibited the use and sale of alcoholic beverages from 1920 until its repeal in 1933.⁸⁷ The Eighteenth Amendment stands in contrast to the other amendments, which pertain largely to limits on governmental action that may be taken against individuals (e.g., search and seizure,

82. The Judiciary Act of 1789, 28 U.S.C. §§ 511-512 (2000).

83. U.S. CONST. art. II, § 3.

84. The Judiciary Act of 1789, ch. 20, § 35 (current version at 28 U.S.C. §§ 511-512).

85. H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL*, at xv (1999).

86. *See* U.S. CONST. amend. XVIII (repealed 1933).

87. *See id.* amend. XXI.

religious freedom) or to procedural matters of governmental operation (e.g., the operation of the electoral college or the election of U.S. Senators). In some cases (e.g., the Thirteenth, Fourteenth, and Fifteenth Amendments), the text of the amendment itself confers power on Congress to enforce it, and enforcement has historically involved the Attorney General.

One good example of such enforcement is the area of voting rights, addressed by the Fifteenth Amendment. The Voting Rights Act was directly authorized by that Amendment, and it entrusts the Department of Justice with various aspects of enforcement, including the approval of redistricting plans in some cases.⁸⁸ What is distinctive about constitutionally based federal enforcement schemes is that they are aimed at protecting individual constitutional rights such as the right to vote or the right to be free from illegal government discrimination.

The Eighteenth Amendment stands alone as an example of a constitutional amendment providing public enforcement power to *restrain* the behavior of individuals and to do so on grounds of morality. Thus, it is useful to consider the failed experiment of Prohibition in connection with the current proposal to ban same-sex marriage in the Constitution.

Prohibition was a creature of the Progressive Movement, which entailed “a striving for a more moral society [that] dominated the first two decades of the twentieth century. The prohibitionists viewed alcohol as a major obstacle to this goal because it contributed to crime, pauperism, and insanity.”⁸⁹ The Eighteenth Amendment was ratified in 1917, adopted by all but two states by 1919, and made to take effect in 1920. By its terms, the Eighteenth Amendment prohibited “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States” and both Congress and the states could legislate concurrently on the issue.⁹⁰ Federal law passed under the authority of the Prohibition amendment created a federally controlled enforcement scheme, complete with penalties.⁹¹ According to one commentator, “in the case of liquor three tremendous popular passions are at present satisfied: the passion of the prohibitionists for law, the passion of the drinking classes for drink,

88. See 42 U.S.C. § 1973c (2000).

89. Nora Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 621-22 (1994).

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

91. Volstead Act, Pub. L. No. 66, § 85, 41 Stat. 305 (repealed 1933); see SEAN DENNIS CASHMAN, *PROHIBITION: THE LIE OF THE LAND* 24 (1981).

and the passion of the largest and best-organized smuggling trade that has ever existed for money.”⁹² The problem was that “a large percentage of the population demanded alcohol,” despite the law to the contrary, and those conditions “created the paradigm of a black market.”⁹³ While it is easy to obtain from the historical record a sense of the fervor with which many people advocated the prohibition of alcohol,⁹⁴ it is equally clear that organized trade in illegal liquor flourished throughout the brief lifetime of Prohibition. Some concluded that the federal government could not do an effective job of policing local behavior and that the very federal presence in that realm created a disincentive for states to do the policing themselves.⁹⁵ In his evocative history of Prohibition, Cashman vividly depicts the conflicts in everyday social relations that resulted from the attempts of federal officials to implement a far-reaching and invasive regulatory program on an ambivalent public.⁹⁶ In particular, agents knew there was widespread knowledge of organized efforts to circumvent Prohibition (and to profit from it), and they also knew that individuals often resented regulation in their own private lives.⁹⁷ It is understandable that agents frequently looked the other way (or worse) as violations occurred, given the unpopularity and the futility of the enterprise. In any event, the Twenty-First Amendment repealed the Eighteenth and left enforcement to the states, which in practical effect spelled the end of the government’s attempt to abolish liquor.⁹⁸

Cashman notes that the Eighteenth Amendment created numerous opportunities for conflict with individual rights: to privacy (Fourth Amendment) and to silence in the face of official questioning (Fifth Amendment). The point here is not to analyze intratextual conflict among constitutional provisions, but simply to highlight the (until now) unique conflicts arising there between accepted understandings of the limits of governmental power on the one hand and a new and far-reaching morality-based reform on the other. In the Prohibition case, and in the marriage debates, we see the federal government attempting to insert itself into the moral realm, and doing so with regard to an issue where public opinion is emotionally charged and divided. At the very

92. John Jay Chapman, *Drink and the Tyranny of Dogma*, OUTLOOK, Jan. 16, 1924, at 107-08.

93. Demleitner, *supra* note 89, at 622.

94. See UPTON SINCLAIR, *THE CUP OF FURY* (1956).

95. Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161 (1991).

96. CASHMAN, *supra* note 91, at 7, 28-46.

97. *Id.* at 46-50.

98. See U.S. CONST. amend. XXI.

least, the failure of Prohibition is instructive with regard to current efforts to restructure understandings of privacy via the prohibition on certain marriage relationships. Prohibition was abandoned as a failure after it became clear that morality-based constitutional change, opposed (and ignored) by many members of the public, could not, ultimately, triumph. It was also abandoned because the infeasibility of federal enforcement became clear through a decade of frustration and conflict.

Two lines of reasoning converge here. First, negative or limiting regulation of private conduct based in notions of morality is immediately suspect. This is not to say that laws may never regulate morality: such a statement would be absurd and historically wrong. We suggest, instead, that that kind of regulation must raise suspicion in a liberal-democratic society where preserving a sphere of private conduct protected from government intrusion is centrally important. The Constitution guarantees individual freedom in various dimensions, and when that same Constitution is to be amended to *curtail* freedom, such an act must be recognized as a departure from settled constitutional understanding and scrutinized accordingly. The first issue raised by state regulation of morality, then, is the departure it signals from constitutionalism.

The second issue is one of federalism. The late Justice Brennan argued in an influential article that state constitutions can give greater (though not, of course, lesser) protection than their federal counterpart.⁹⁹ This view flowed from Brennan's general understanding of the role of the courts in upholding human liberty and dignity: multiple sources of such protection, then, could only be a laudable development. His critique makes the intrusion of the federal government into individual rights-related areas previously left to the states even more ill-advised, as the source of freedoms is blocked, narrowing the scope of available liberties. The noted constitutional scholar Cass R. Sunstein, writing on the contemporary marriage debates, echoes Brennan's call for experimentalism at the state constitutional level.¹⁰⁰ Provided that there are "decent floors, based on an understanding of people's minimal entitlements, moral and economic," Sunstein argues, "a great deal of variation should be welcomed."¹⁰¹ Thus conceptualized, federalism can be both productive and protective of notions of individual rights, but a federal trumping of that state government prerogative would lead to the

99. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

100. See Cass R. Sunstein, *Of Federalism and Caste*, in JUST MARRIAGE, *supra* note 3, at 41, 42.

101. *Id.*

opposite result.¹⁰² In other words, morality-based regulation, if it is to be done at all, must typically occur at the state level. We discuss the question of state and federal governmental power with regard to morals regulation more fully below, in Part IV.

C. Summary of Part III

We have shown in this portion of the Article that the law of standing would not countenance a private or public suit to enforce the anti-gay marriage amendment as that amendment has been proposed. There is no recognizable private right of action because there is no right created or conferred by the text of the proposed amendment itself and the tests for the type of injury sufficient to gain legal standing could not be satisfied by a third party complaining about another's marriage. With regard to *public* enforcement, the issue is more complicated, because there is precedent for the conferral of public enforcement powers (and therefore standing for the government to sue) in the case of the Eighteenth Amendment and its scheme for enforcing a prohibition of liquor sales and consumption in the early twentieth century. However, the example of the Eighteenth Amendment (which is the only relevant case in our constitutional history) actually provides support for the opposite conclusion, i.e., that public enforcement of a constitutional marriage ban would *not* be feasible. Thus, with neither private nor public enforcement actions created by it, the proposed marriage ban would be a provision lacking legal effect.

Of course, an unexpected interpretation of law is always a possibility and scholars from the time of the Legal Realists onward have shown how more than the law itself impacts judicial decision making. Moreover, in a cathected case such as this one, where public opinion is often rooted in emotion there is good reason to suspect that extralegal influences might come into play at some point in the adventures of the proposed amendment. In view of that possibility, we spend the remaining space here considering why the marriage ban should not be

102. See Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 21 (2000). Though he reaches a result with regard to public regulation of morality, Robert P. George distinguishes state governments from the federal government by ascribing to the former "general jurisdiction" and to the latter "special jurisdiction." Thus, states have a broad grant of authority to legislate in cases involving morality and the police power, while the federal government is forced to rely on explicit grants of power, such as the interstate commerce clause, for its legislative authority. On this view, states more appropriately legislate matters of morality. We adopt George's distinction here to suggest that generally speaking, morality regulation, if it is to occur at all, must be limited to the state level. Federal attempts to override that prerogative are immediately suspect.

enforced even if the obstacles to standing that we outline here should somehow be overcome.

IV. BEYOND STANDING LAW: TOLERANCE AS A DEMOCRATIC VALUE

Thus far, we have engaged in standard legal analysis of the law of standing, applying existing legal tests set out in case law to the subject-matter at hand: a hypothetical constitutional amendment prohibiting gay marriage. Our analysis and its conclusions have been conventional and doctrinal, proceeding from rule to (new) facts in order to see whether doctrine can accommodate those new facts. One of the underlying assumptions of this type of analysis is that it is strictly bounded by legal reasoning and by precedent. Legal reasoning leads to the “right” answer, and the right answer can only be conceptualized in terms of what existing law recognizes as possible. Excluded from consideration are extrajudicial norms, as well as aspirations arising within a political community at a given point in its history. To be sure, we appreciate the value of standard legal analysis, and we recognize that such interpretive practices structure our legal system and sustain our constitutional tradition.¹⁰³ Moreover, specific legal controversies—including the one we are exploring here—can be addressed and often resolved by considering doctrinal precedent. In *Texas v. Johnson*, for example, the Supreme Court explained that clear and unambiguous precedent compelled them to rule that flag burning is protected speech, thus settling a fiercely contested question.¹⁰⁴ In short, conventional legal analysis remains undeniably crucial in resolving questions of great public importance and that is why we have spent so much time reasoning through the law of standing in relation to the issue at hand. But while that effort is indispensable, we must also step back at this point and ask questions that might be considered broader or more fundamental concerning the regulation of marriage in the contemporary United States. What kinds of activities can be regulated within the scheme of rights established by the Constitution? What limits have been placed or ought to be placed on that regulation? What do we lose, as a society, when we engage in regulation of practices such as marriage? It is to that inquiry that we now turn, beginning with a discussion of tolerance in liberal-democratic theory.

In his classic work on free speech, *The Tolerant Society*, Lee Bollinger considers the accepted rationales for tolerating extremist/

103. See Howard Gillman, *From Fundamental Law to Constitutional Politics—And Back*, 23 LAW & SOC. INQUIRY 185 (1998) (reviewing STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996)).

104. See 491 U.S. 397, 417-18 (1989).

offensive speech and advances a third basis—the value of tolerance in itself—for allowing such speech to go uncensored or unpunished.¹⁰⁵ It is not just the free trade of ideas (the “classical” model, assuming that we protect all or most speech so that the best ideas can be discovered and tested) or the need for a bulwark against censorship to protect a valued inner “core” of speech activity (the “fortress” model, which assumes that the outer realms of extremist speech are protected so that censorship never reaches the core of valuable or important speech) that justifies protecting extremist speech.¹⁰⁶ Rather, we protect it “for the insights and lessons we obtain about ourselves and for the increase in our capacity for toleration generally.”¹⁰⁷ On this view, tolerance is a value in itself. By performing it, we engage in a healthy and instructive social process. The act of tolerance forces us to think about what we tolerate and why we tolerate it and about the line that divides tolerance and intolerance. It provides “a focus on the mind behind the act of intolerance.”¹⁰⁸ We might say that tolerance is intrinsically valuable rather than instrumentally so: we tolerate, at least sometimes, in order to increase our “*capacity* for toleration.”¹⁰⁹ In *Christian Love and Heterosexism*, Cornel West depicts an internal struggle within the individual subject to be tolerant of the sexual difference of others and to confront one’s own impulses to heterosexist intolerance.¹¹⁰ He suggests that all people “have to struggle deeply . . . with their own insecurities and the anxiety that they associate with other people.”¹¹¹ Here, West is illuminating a particular aspect of the dynamics of tolerance within a democracy and describing a differentiated, internal space where part of that dialogue takes place.

Theorists considering the idea of tolerance/toleration consistently emphasize that the concept of tolerance only makes sense in relation to that which one strongly dislikes. As Sullivan, Piereson, and Marcus put it: “Since tolerance refers to a willingness to ‘put up with’ things that one rejects, the term presumes opposition or disagreement. Thus, tolerance means something other than indifference. The problem of tolerance arises when there are grounds for real disagreement.”¹¹²

105. See BOLLINGER, *supra* note 1.

106. *Id.* at 140.

107. *Id.* at 182.

108. *Id.* at 140.

109. *Id.* at 182 (emphasis added).

110. Cornel West, *Christian Love and Heterosexism*, in THE CORNEL WEST READER 401 (1999).

111. *Id.* at 408.

112. John L. Sullivan, James Piereson & George E. Marcus, Political Tolerance and American Democracy 4 (1982).

Similarly, Bollinger remarks in the free speech context that “[i]t is self-restraint toward what we believe to be without social value, or, in Holmes’s words, what we ‘loathe and think to be fraught with death’ that alchemizes the event into something of real value.”¹¹³

The two distinct points we advance here are worth emphasizing. First, tolerance necessarily implies dislike: when we protect that which we *do* like, we are not tolerating, but rather doing something else. It makes no sense to speak about “tolerating” the company of a close friend, or “tolerating” an enjoyable musical performance. The most significant thing about those examples for our purposes here is the fact that we expend no effort in the experience. While effort may be required to create the conditions that make the experience possible (and we undertake that effort in order to obtain the benefits the event will provide), the experience itself requires no effort to endure its course, unless there is something we do not like about it. The second point is related to the first, and it is this: the stronger the aversion to that which is tolerated, the more potentially valuable the experience of tolerance becomes. Bollinger explains that tolerance in liberal-democratic societies exists in tension with *intolerance*: it is at those times when the impulse arises to be intolerant (e.g., to punish, to exclude, to censor) that the society is challenged to practice tolerance instead.¹¹⁴ And when we choose tolerance in such challenging cases, “there does seem to be a shared intuition that the society adds something important to its identity, that it is significantly strengthened.”¹¹⁵

Though he is concerned in *The Tolerant Society* with speech regulation specifically, Bollinger helps us to extend and transpose his thinking to other areas as well by illustrating some of the ways in which the legal system curbs and channels impulses to intolerance, thus establishing a workable balance between tolerance and intolerance, between restraint and license.¹¹⁶ Aggression toward others is a form of behavior that most people find threatening, and as such that behavior generates an impulse to be intolerant of aggression and a desire to prohibit aggression or punish those who practice (or might practice) it. The criminal justice system, Bollinger tells us, instantiates that intolerance in a set of prohibitions and punishments against aggression.¹¹⁷

113. BOLLINGER, *supra* note 1, at 182 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

114. *See id.* at 9.

115. *Id.*

116. *See id.*

117. *See id.* at 116.

At the same time, however, the system contains procedural safeguards that protect a defendant against certain forms of treatment and certain outcomes that we deem unfair, such as trial without counsel or use of illegally seized evidence.¹¹⁸ It sometimes happens that those protections allow a factually guilty person to go free, escaping punishment altogether, and that possibility is known and accepted by those who design and administer the system. Viewed this way, procedural rights amount to an act of tolerance (or a limitation on intolerance) and they carry with them a risk, albeit a risk we are willing to take.

Describing the criminal justice system as a site where tolerance and intolerance meet helps us to see that these two contrary impulses exist fundamentally in tension with each other in many social settings. Thus, it is not the case, as some pro-Enlightenment thinkers have maintained, that all modern democratic societies inevitably develop a greater capacity for tolerance over time and leave intolerance behind once and for all—as if the impulse to intolerance were a relic to be tossed to one side on the path of perfectionism. If intolerance results from our encounters with that which we do not like, then it is hopelessly unrealistic to believe that a robustly pluralist social field such as John Rawls, among others, depicts in contemporary liberalism could *ever* be free of value conflicts and thereby free of intolerant tendencies.¹¹⁹ It is more useful, then, to appreciate the co-presence of tolerant/intolerant impulses and to theorize about the continual negotiation of their constituent tension rather than the supplanting of the latter by the former. The realization that intolerance remains with us does not foreclose all hope that “human progress would result from an unfettered human spirit.”¹²⁰ It merely moves us away from a unilinear, perfectionistic understanding of how that progress might take place.

Bollinger explains that compromise sometimes results from the tolerance/intolerance conflict we are discussing here and that that lesson is hardly aberrant or unimportant:

The feelings must arise and must be controlled in the basic operation of a self-governing political society, where a willingness to compromise and a willingness even to accept total defeat are essential components of the democratic personality. Democracy, like literature, it may be said, requires a kind of suspension of disbelief. At the norm-setting level, as well as at

118. *See id.*

119. JOHN RAWLS, *POLITICAL LIBERALISM* 4 (1996).

120. SULLIVAN, PIERESON & MARCUS, *supra* note 112, at 11.

the enforcement level, a capacity to contain one's beliefs in the interest of maintaining a continuing community is critical.¹²¹

The preceding quotation captures the notion of tolerance as something to be negotiated, in a process whose outcome cannot be known in advance. The contingency of outcome implied there suggests that tolerance is not an absolute value, and while we as a nation and as a society have made undeniable progress from the period where toleration pertained mainly to religious belief to a time where toleration is more broadly defined and applied, it remains true today that these negotiations challenge us in our democratic praxis to develop standards and processes to address new conflicts. One of the goals that should guide us in such an endeavor, perhaps the most important one, is "maintaining a continuing community," as Bollinger says.¹²² Clearly, that project entails more than the preservation of a set of political arrangements or structures. Beyond that goal, "a continuing community" requires enduring value commitments and the continued involvement, or "stake," of those individuals and groups thought to constitute the community. It is worth asking, then, what kinds of tolerance-related practices should be used and what principles underlie them? Below we outline briefly three such practices.

A. *Tolerating the Outcomes of Accepted Procedures*

John Rawls argues for a form of tolerance grounded in political liberalism. He believes that "[t]he political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines."¹²³ Political liberalism seeks to discern the "grounds of toleration" amidst such "reasonable pluralism"; that is, it seeks to answer the following question: "[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens" given the pluralistic divisions cited above?¹²⁴ The kinds of disputes that pertain to such deep and fundamental divisions would be resolved through the exercise of "public reason," which Rawls defines as "citizens' reasoning in the public forum about constitutional essentials and basic questions of justice."¹²⁵ The exercise of public reason would adjudicate divisive questions while leaving intact the value-neutral scheme of political liberalism. The procedurally legitimate exercise of

121. BOLLINGER, *supra* note 1, at 117.

122. *Id.*

123. RAWLS, *supra* note 119, at 3-4.

124. *Id.* at 4.

125. *Id.* at 10.

public reason renders a result which participants in the political community are bound to accept. While this Article is not the place to attempt a fully developed application of Rawls' political liberalism to same-sex marriage debates, we will offer his theoretical framework as a way to begin thinking about tolerance rooted in a form of political practice that adjudicates disputes while refraining from substantive inquiry into values. When "basic questions of justice" are resolved by the Supreme Court, for example, toleration results. The outcome must be tolerated by the losing side because they have agreed in advance to the rules, or else they risk losing the designation "reasonable," in Rawlsian terms, and they risk being excluded from further political deliberation because they are not reasonable.

One might object at this point and ask whether *any* limitation on private choices of marriage partners would be permissible under liberal assumptions of value-neutrality. Polygamy is an example used frequently in this regard. This is certainly a tricky question: to answer "yes" obliges one to explain why one limitation (e.g., saying "no" to polygamy) is permissible while another limitation (e.g., saying "no" to gay marriage) is impermissible. If liberalism allows limitations on pursuit of individualized "goods," then why not allow such limitation wholesale? On the other hand, to deny the possibility of all regulation creates the opposite problem: if *no* regulation is allowed, then the familiar parade of horrors begins: polygamy, child marriage, marriage to animals, etc. The problem here appears to be an inability to regulate things that come with compelling warrants for regulation: the state must stand by helpless, bound by doctrinal constraints.

David Cruz articulates this problem as a new twist on the "right/good" problem: "If one thought that polygamy restrictions tend improperly to align the state with one conception of the good life, further argument might be necessary to show that defending the right (that is, combating sex-based subordination) might justify this limitation on people's choices concerning the good."¹²⁶ Reframing this problem as one of tolerance helps to see how limitation of polygamy and other practices can be accommodated within a liberalist framework. Viewed broadly as Bollinger sees it, tolerance is not merely an occasional activity pursued within liberal-democratic societies, but rather a dialogue intricately bound up with liberal-democratic practice in a multitude of forms, a central conversation of democracy. As we note above, criminal law is an

126. David B. Cruz, *Mystification, Neutrality and Same-Sex Couples in Marriage*, in *JUST MARRIAGE*, *supra* note 3, at 52, 55-56.

example Bollinger uses to illustrate the limits of tolerance: certain activities (usually those harmful to others) are punished, and that punishment is itself an act of intolerance, though in most cases an acceptable one. Polygamy, child marriage, and bestiality can be (and are) regulated through criminal law because we as a society have decided not to tolerate them.¹²⁷ Moreover, those practices injure one of the direct participants (e.g., a child who cannot consent, or a woman subjugated by a gendered power distribution within the family). In Cruz's terms, certain rights "justify . . . limitation on people's choices concerning the good."¹²⁸ The outcome of tolerance-related conversations is open: sometimes we don't tolerate, and sometimes we do. As the following subsections show, while liberalism urges this conversation, so too does it provide arguments within the conversation for tolerance in the case of same-sex marriage.

B. Tolerating the Development of the Personhood of Others

In *Lawrence v. Texas*, the 2003 ruling that found a state antisodomy law violated due process, the Supreme Court articulated a notion of personal liberty rooted in intimate choices through which one's personhood is developed and disclosed.¹²⁹ "Liberty," the Court stated, "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."¹³⁰ The choices we make in our intimate associations help to define our personhood, the Court explained, and therefore the substantive liberty for which the Constitution guarantees privacy protection extends to such personal choices.¹³¹ That reasoning was the basis for the Court's decision to overturn laws criminalizing sodomy (and in particular, the application of such laws to same-sex couples).¹³² From the *Lawrence* ruling, we can apprehend a basis for tolerance in the value of personal liberty. Although the Court specifically disclaims any interest in approving (or even addressing) same-sex marriage, the holding affirms the central place of personal liberty in our scheme of constitutional values and thereby implicitly reminds us that the cost of that value is paid in the currency of tolerance: we cannot expect protection of personal liberty unless we are willing to

127. See BOLLINGER, *supra* note 1, at 116.

128. Cruz, *supra* note 126, at 56.

129. See 539 U.S. 558, 562 (2003).

130. *Id.* at 562.

131. *Id.* at 574.

132. *Id.*

allow that liberty to others who might make different choices as to how they exercise it.

C. Toleration Born of Empathy

As an additional reason why we should cultivate the “tolerant mind,” Bollinger suggests that the conversation of tolerance builds empathy. “Human nature being what it is,” he argues, “shared experience usually provides the basis for empathic and therefore meaningful discussion.”¹³³ Alex Zakaras has found a similar focus on empathy in the writings of Isaiah Berlin on value pluralism. As Zakaras argues, “Berlin believed that good politics follows from proper self-understanding, which is itself bound up with the human capacities for empathy and imagination.”¹³⁴ Berlin’s value pluralism, as reconstructed by Zakaras, holds that when “foreign values do not overlap with our own, they can only be understood through empathetic inquiry.”¹³⁵ This kind of “empathetic inquiry” is part of human nature as Berlin and Zakaras suggest that “[h]uman beings have a unique capacity for insight into the minds and lives of other humans.”¹³⁶ While it is possible for this understanding to elude us, “[a] total failure of understanding either casts our humanity, or the humanity of the other, into doubt.”¹³⁷ Berlin maintains that the constellation of value choices a human being faces are intelligible through her culture and cross-cultural appreciation of values is possible for humans as well—indeed, the “recourse to certain specific conceptual strategies for making our world intelligible” is something that makes us human.¹³⁸

By making a place for empathy and imagination in a world of value pluralism, Berlin underscores the importance of tolerance as a feature of democratic life. The cases where understanding fails, as suggested above, are extreme: Nazism or the torture of children, for example.¹³⁹ While one hopes that no one would place the act of same-sex union in that category, it is easy enough, nonetheless, to see how “conceptual strategies” could make that practice “intelligible” to those outside it. The *Lawrence* Court’s articulation of personhood is a gesture toward precisely that sort of understanding.

133. BOLLINGER, *supra* note 1, at 139.

134. Alex Zakaras, *Isaiah Berlin’s Cosmopolitan Ethics*, 32 *POLITICAL THEORY* 495, 496 (2004).

135. *Id.* at 503.

136. *Id.* at 504.

137. *Id.*

138. *Id.* at 512.

139. *See id.* at 505, 513.

In this concluding Part we have undertaken to provide a defense of tolerance based in liberal-democratic theory as an alternative argument alongside our more straightforward standing analysis of Part II. Thus, we contend in the preceding Part that the proposed federal constitutional amendments seeking to ban same-sex marriage would not be enforceable because they could not confer standing on a private or public (governmental) plaintiff. In Part Three we argue, in the alternative, that even if standing were somehow to be justified and a suit somehow permitted to proceed, the prohibition of same-sex marriage would come at a cost in liberal-democratic values. The failure of tolerance would signal an inability to reconcile pluralistic divisions through political liberalism (the first conception of tolerance we outline above). It would also indicate a violation of the notion of personhood advanced by the Court in *Lawrence*, entailing tolerance in the form of walling off private space where individual notions of the good can develop (the second conception). Finally, it would amount to a failure of tolerance *qua* empathy, a crucially and vitally human quality cultivated in modern democracies that allows for harmonious social life in a world of value pluralism (the third conception). Prohibition of same-sex marriage, then, would do harm to our capacity for tolerance, which would in turn generate deleterious effects for our democracy.