

## Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?

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Efforts to amend constitutions at both the state and federal level have proliferated since the Supreme Judicial Court of Massachusetts declared in its 2003 *Goodridge v. Department of Public Health*<sup>1</sup> decision that the exclusion of lesbians and gay men from the benefits and protections of marriage is “incompatible with the constitutional principles of respect for individual autonomy and equality under law.”<sup>2</sup> In the two years following *Goodridge*, three other lower court judges, in California, New York, and Washington, have ruled that those state constitutions likewise guarantee same-sex couples the right to marry.<sup>3</sup> Responding to the recent lesbian and gay victories in state court, opponents of same-sex marriage have successfully lobbied fourteen states to adopt state constitutional amendments that prohibit same-sex marriage.<sup>4</sup> Four other states<sup>5</sup>

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<sup>1</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>2</sup> *Id.* at 941.

<sup>3</sup> *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005); *Woo v. Lockyer*, No. 4365 (Cal. Super. Ct. Apr. 13, 2005), *available at* <http://www.sftc.org/Docs/Marriage%20Final%20Decision.pdf>; *Anderson v. Kings County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004).

<sup>4</sup> Louisiana and Missouri adopted marriage amendments early in 2004. LA. CONST. art. XII, § 15 (adopted Sept. 18, 2004); MO. CONST. art. I, § 33 (adopted Aug. 3, 2004). Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah adopted marriage amendments on November 2, 2004. ARK. CONST. amend. 83; GA. CONST. art. I, § IV; KY. CONST. § 233a; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29. Kansas adopted its marriage amendment on April 5, 2005. KAN. CONST. art. 15, § 16(a).

<sup>5</sup> The four states that adopted marriage amendments before *Goodridge* were Alaska, Hawaii, Nebraska, and Nevada. ALASKA CONST. art. I, § 25; HAW. CONST.

adopted marriage amendments<sup>6</sup> prior to *Goodridge*, but subsequent to similar judicial decisions holding that the Hawaii and Alaska same-sex marriage prohibitions violated state constitutional equal protection and privacy guarantees.<sup>7</sup> In addition to the eighteen states that have already adopted marriage amendments, several others are considering it.<sup>8</sup> Calls for a constitutional response to the judicial articulation of marriage rights have not been limited to the state context. President George W. Bush has advocated strongly for an amendment to the U.S. Constitution that would define marriage in exclusively heterosexual terms.<sup>9</sup>

These state marriage amendments present the potential for at least a latent tension with those states' constitutional equal protection or privacy guarantees. In the case of Alaska and Hawaii, the conflict was patent:<sup>10</sup> the marriage amendments *prohibiting* same-sex marriage followed court cases in both those states holding that the privacy and

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art. I, § 23; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21. Nevada's marriage amendment was struck by a federal district court as violative of the U.S. Constitution, but the decision will almost certainly be appealed to the Eighth Circuit. *See* *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005).

<sup>6</sup> Throughout this Article, I refer to state and federal amendments that define marriage in exclusively heterosexual terms or that prohibit same-sex marriage as "marriage amendments." While I recognize that these amendments might just as well be termed "heterosexual marriage amendments" or "anti-same-sex marriage amendments," I opt for "marriage amendments" for simplicity's sake.

<sup>7</sup> In its consideration of the Hawaii same-sex marriage prohibition, the Hawaii Supreme Court held that the marriage prohibition constituted a gender-based classification and remanded to the lower court to determine whether the state had a compelling interest in prohibiting same-sex marriage. *Baehr v. Lewin*, 852 P.2d 44, 64-67 (Haw. 1993); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (discussing in detail the claim that discrimination on the basis of sexual orientation is gender-based discrimination). Three years later, the trial court determined that the state did not have a compelling interest justifying its same-sex marriage prohibition. *Baehr v. Miike*, No. CIV 91-1394, 1996 WL 694235, \*20-21 (Haw. Cir. Ct. Dec. 3, 1996).

In Alaska, a lower court judge declared same-sex marriage a fundamental right under the state constitution's privacy provision. *See* *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, \*5-6 (Alaska Super. Ct. Feb. 27, 1998).

<sup>8</sup> Alabama, California, Idaho, Illinois, Indiana, Massachusetts, New Jersey, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin all may be considering marriage amendments. *See* Kavan Peterson, *Same-sex unions—a constitutional race*, STATELINE, Sep. 8, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20695>; Cheryl Wetzstein, *States Lining up to Outlaw Same-sex 'Marriage'*, WASH. TIMES, Nov. 9, 2004, at A3.

<sup>9</sup> George W. Bush, President of the United States of America, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

<sup>10</sup> As it will be in Massachusetts, or Washington, for example, if they ultimately ratify their own marriage amendments.

equal protection provisions, respectively, constitutionally *required* that same-sex couples be permitted to marry.<sup>11</sup>

For many, this constitutional conflict is really no conflict at all. After all, it is a well-settled principle of statutory construction that when two provisions speak to the same subject, the later and more specific provision governs over the earlier and more general provision.<sup>12</sup> Not surprisingly, this canon of construction has been described as axiomatic in the constitutional context as well.<sup>13</sup> For example, both the Hawaii and Alaska courts assumed, with little comment, that those states' marriage amendments simply mooted gay and lesbian claims to marriage under the equal protection and privacy provisions.<sup>14</sup> Because the marriage amendment and the equal

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<sup>11</sup> See *Brause*, 1998 WL 88743, at \*5–6; *Baehr*, 1996 WL 694235, at \*19–21.

<sup>12</sup> 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 51.02, at 186–87 (6th ed. 2000) (“Where two statutes are involved each of which by its terms applies to the facts before the court, the statute which is the more recent of the two irreconcilably conflicting statutes prevails. . . . Where a conflict exists the more specific statute controls over the more general one.”). Although this might be an articulation of two separate canons—that is, the canon that later provisions govern over earlier and the canon that specific provisions govern over more general—when I refer throughout this Article to “the” statutory canon, I mean a composite rule of construction that a later and more specific provision governs over a conflicting earlier and more general provision.

<sup>13</sup> 16 AM. JUR. 2d *Constitutional Law* § 63 (2004) (“[I]f there is a conflict between a general and a special or specific provision in a constitution, the special or specific provision must prevail in respect of its subject matter. . . . If there is a real inconsistency between a constitutional amendment and an antecedent provision, the amendment must prevail because it is the latest expression of the will of the people.”). See also *Bess v. Ulmer*, 985 P.2d 979, 988 n.57 (Alaska 1999) (striking language from the proposed Alaska marriage amendment that “[n]o provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex” and remarking that “[t]he objective of the second sentence—harmonization of other provisions of the constitution with the meaning of the first sentence—will be achieved in any event, for a specific amendment controls other more general provisions with which it might conflict”).

<sup>14</sup> See *Brause v. Dep’t of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001) (dismissing a constitutional challenge to the same-sex marriage prohibition because the challenge was effectively mooted by the passage of the marriage amendment). Likewise, the Hawaii court dismissed a constitutional challenge to the same-sex marriage prohibition, commenting that “[t]he marriage amendment validated [the gender restriction in Hawaii’s marriage statute] by taking the statute out of the ambit of the equal protection clause.” *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at \*6 (Haw. Dec. 9, 1999). The Hawaii court’s assumption that the marriage amendment removed the marriage prohibition from the ambit of the equal protection clause is striking, given the considerable legislative ambiguity on precisely this point. See *infra* note 111 for a discussion of the legislative history surrounding the passage of Hawaii’s marriage amendment.

Commentators on the Hawaii and Alaska amendments generally agreed that the amendments effectively mooted efforts to secure same-sex marriage under the states’ equal protection or privacy provisions. *E.g.*, Sam Howe Verhovek, *The 1998 Elections:*

protection or privacy provision both speak to the same subject, the later and more specific marriage amendment was assumed automatically to trump the earlier and more general equal protection or privacy provision.

This Article examines whether there are other ways to approach a constitution that contains two conflicting provisions—a marriage amendment prohibiting same-sex marriage and an equality or privacy provision<sup>15</sup> that has been or could be broadly construed as guaranteeing marriage rights for same-sex couples.<sup>16</sup> *Must* the marriage amendment be interpreted as carving same-sex marriage from the ambit of a constitution's privacy or equal protection provisions? This Article suggests that the answer to this question should not be so simple, and certainly not as simple as the Hawaii and Alaska decisions suggest.

I do not argue that state or federal marriage amendments are themselves *unconstitutional* in light of equal protection or privacy guarantees found elsewhere in the constitution.<sup>17</sup> Rather, I argue

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*The States – Initiatives*, N.Y. TIMES, Nov. 5, 1998, at B1 (“Hawaii voters gave the Legislature authorization to overturn a court ruling and ban same-sex marriages.”); Elaine Herscher, *Same-Sex Marriage Suffers Setback: Alaska, Hawaii Voters Say “No”*, S.F. CHRON., Nov. 5, 1998, at A2 (discussing the amendment as barring marriage but allowing for the possibility that the state supreme court might constitutionally mandate the benefits of marriage); *Final Election Results: Colorado Through Illinois*, USA TODAY, Nov. 5, 1998, at 6A (“Supporters successfully headed off a state Supreme Court ruling that could legalize same-sex marriages.”); Carole Migden, *Challenge Faces the Gay Community*, S.F. EXAMINER, Dec. 22, 1998, at A23 (“Voters in both Hawaii and Alaska recently approved initiatives by a 2 to 1 margin to ban same-sex marriages, rendering moot any court action on the matter.”).

<sup>15</sup> In *Lawrence v. Texas*, the Court struck state laws criminalizing certain sexual conduct between same-sex partners under the Due Process Clause, not as violating a right to privacy, but instead as violating a liberty interest. 539 U.S. 558, 578–79 (2003). See also Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in *CATO SUPREME COURT REVIEW 2002–2003* 21 (James L. Swanson ed., 2003). I use the term “privacy provision” throughout this Article to include constitutional provisions that may be interpreted to protect liberty interests.

<sup>16</sup> The arguments in this Article are intended to apply to both state and federal constitutions. Consequently, when I refer to a constitution (as opposed to the Constitution), I am typically referring to any state or federal constitution that contains internally conflicting provisions, *i.e.*, a marriage amendment and an equality or privacy provision. References to the Constitution refer specifically to the United States Constitution.

<sup>17</sup> Others have argued that a constitutional amendment may itself be unconstitutional by virtue of it contravening certain fundamental constitutional norms. See, *e.g.*, Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 *FORDHAM L. REV.* 1487 (2004) (expounding on theoretical limitations on constitutional amendments grounded in Rawlsian theories of justice and equality); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 *S. CAL. L. REV.* 703 (1980)

that the statutory canon of construction—that a later and more specific provision governs over an earlier and more general provision—is an uneasy fit in the constitutional context. Because the intuition that a marriage amendment automatically trumps an equal protection or privacy provision is largely guided by the intuitive applicability of the canon, it follows that if our canon of construction is suspect in the constitutional context, so ought be our presumption that the marriage amendment *ipso facto* governs.

Part I of this Article suggests that the U.S. Supreme Court's Twenty-first Amendment cases can fairly be read as a model for abandoning the statutory canon in the constitutional context. Instead of employing the canon in its Twenty-first Amendment cases, the Supreme Court has instead articulated an approach in these liquor cases that involves weighing the constitutional interests at stake in any given case in which a later and more specific provision conflicts with an earlier and more general provision. Part II offers a second reason for suspecting that the canon of statutory construction is an inappropriate tool for at least certain constitutional provisions—namely that some constitutional provisions are, properly conceived, atemporal. For these provisions, it makes little sense to view one provision as governing over another by virtue of it being the “later” provision. Although Parts I and II offer some judicial precedent and theoretical basis for dispensing with the canon of construction in the constitutional context, they do not on their own suggest that a judge in fact *should* make the interpretive choice to reject the canon when considering conflicting constitutional mandates relating to same-sex marriage. Part III picks up where Parts I and II leave off by providing a normative framework for considering when a judge should reject the canon. Specifically, I argue that, for reasons of constitutional legitimacy, it may be altogether desirable at some point in the future for a judge to follow the Supreme Court's Twenty-first Amendment model and reject the statutory canon of construction in the marriage context. In other words, to avoid undermining the legitimacy of state and federal constitutions that contain marriage amendments, or more properly, our collective faith in the authority of our constitutions, a judge might plausibly weigh the constitutional interests at stake in any given case and interpret the earlier and more

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(arguing that an amendment might be invalid if it contravenes certain basic notions of human dignity); Jeff Rosen, Note, *Was the Flag Burning Amendment Constitutional?*, 100 YALE L.J. 1073 (1991) (arguing that the flag burning amendment would have been unconstitutional as contravening natural law principles enforceable under the Ninth Amendment).

general constitutional principle of equality or privacy as ultimately governing over the marriage question.

## I

Although the statutory canon of construction—that later and more specific provisions govern over earlier and more general provisions—has often been invoked in the constitutional context, the U.S. Supreme Court’s modern Twenty-first Amendment cases can be read as a model for rejecting the canon in the constitutional context. In offering alternatives to the statutory approach, the Court’s liquor cases illuminate the range of interpretive choices available to a judge when resolving a tension between a marriage amendment and an equal protection or privacy provision. To write, as it did, without any discussion at all, that the Hawaii marriage amendment removed the same-sex marriage prohibition from the ambit of the state equal protection clause, the Hawaii Supreme Court obscured that range of interpretive possibilities.<sup>18</sup> To put it differently, the view that marriage amendments trump other more general equality or privacy provisions is one interpretive choice, but not the *only* plausible choice.

### A. *The Twenty-first Amendment v. the Commerce Clause*

Section 2 of the Twenty-first Amendment, the constitutional amendment repealing Prohibition, provides an interesting case study for exploring the interpretive possibilities open to a judge considering a later and more specific constitutional provision that conflicts with an earlier and more general provision. Section 2 provides that, “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>19</sup> A plain language reading appears to constitutionally validate *any* state law relating to the transportation or importation of liquor into that state. The Commerce Clause, on the other hand, drafted some 150 years before the Twenty-first Amendment, has been interpreted to place certain restrictions on the states’ authority to pass laws that burden interstate commerce. The Commerce Clause provides that Congress shall have the power “[t]o

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<sup>18</sup> See *Baehr*, 1999 Haw. LEXIS 391, at \*6.

<sup>19</sup> U.S. CONST. amend. XXI, § 2.

regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”<sup>20</sup>

Any prohibition on states’ ability to regulate interstate commerce, however, is not contained in the plain text of the Commerce Clause, but is instead inferred by negative implication. Under the so-called dormant Commerce Clause, states are not permitted to regulate interstate commerce because “when a State proceeds to regulate commerce . . . among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.”<sup>21</sup> Without any express textual authority, then, “the doctrine [is] that the commerce clause, by its own force and without natural legislation, puts it into the power of the Court to place limits on state authority.”<sup>22</sup>

How, then, should a court resolve a dormant Commerce Clause challenge to a state law that regulates the importation or transportation of liquor into that state? Should the state law be stricken as violative of the dormant Commerce Clause, or has the state regulation been “saved” by Section 2 of the Twenty-first Amendment? One might plausibly argue that the canons of statutory construction easily resolve any conflict between the two constitutional provisions. Section 2 by its terms prohibits the violation of state importation and transportation laws relating to liquor. As the *later* amendment that deals *specifically* with state regulation of liquor, Section 2 should be regarded as the clearest and latest expression of constitutional intent with respect to the validity of state attempts to regulate interstate commerce in liquor.

Indeed, until the mid-1960s, this was precisely the Supreme Court’s approach to Section 2 and the dormant Commerce Clause. The Court viewed Section 2 as granting states authority “to legislate concerning intoxicating liquors brought from without, *unfettered by the Commerce Clause.*”<sup>23</sup> Just three years after the ratification of the Twenty-first Amendment, the Court in *State Board of Equalization v. Young’s Market Co.*<sup>24</sup> upheld a state statute imposing a licensing fee to import beer into its borders, a fee that according to the Court would have been unquestionably unconstitutional as a direct burden on interstate commerce, were it not for the plain language of Section 2

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<sup>20</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>21</sup> *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1 (1824).

<sup>22</sup> FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WAITE* 18 (1937).

<sup>23</sup> *Ziffirin v. Reeves*, 308 U.S. 132, 138 (1939) (emphasis added).

<sup>24</sup> 299 U.S. 59, 62 (1936).

of the Twenty-first Amendment.<sup>25</sup> Justice Brandeis' language in *Young's Market* explains the Court's early view of the relationship between Section 2 and the dormant Commerce Clause:

The words used [in Section 2] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it.<sup>26</sup>

Three years later, in *Indianapolis Brewing Co. v. Liquor Control Commission*,<sup>27</sup> the Court similarly upheld another state law that discriminated against certain liquor imports, clarifying that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."<sup>28</sup> Although not expressly invoking the statutory canons of construction, the Court's early approach in *Young's Market* and *Indianapolis Brewing* is consistent with the view that Section 2, as the later and more specific constitutional provision, should govern over any question concerning the constitutionality of state liquor import laws.

But the Court signaled a change in its approach to Section 2 beginning with its 1964 case, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,<sup>29</sup> in which the Court considered a challenge to the New York State Liquor Authority's prohibition on the sale of bottled wines and liquors to international travelers at John F. Kennedy International Airport.<sup>30</sup> The Court departed from its previous holdings that the Twenty-first Amendment removes from the ambit of the Commerce Clause all state regulation of the importation or transportation of liquor. Instead, the Court indicated that "[t]o draw a conclusion from [the previous] line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause

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<sup>25</sup> *Id.* at 62.

<sup>26</sup> *Id.*

<sup>27</sup> 305 U.S. 391 (1939).

<sup>28</sup> *Id.* at 394; *see also* Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938) (holding that the rule that "discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by [*Young's Market*]").

<sup>29</sup> 377 U.S. 324 (1964).

<sup>30</sup> *Id.* at 326-27.

wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification.”<sup>31</sup> Rather, “[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same constitution. Like other provisions of the Constitution, *each must be considered in the light of the other*, and in the context of the issues and interests at stake in any concrete case.”<sup>32</sup>

The Court has since characterized its approach in *Hostetter* as a “pragmatic effort to harmonize state and federal powers.”<sup>33</sup> As the Court explained in *Bacchus Imports, Ltd. v. Dias*,<sup>34</sup> where it struck a state excise tax discriminating against imported liquor, the courts must determine in any concrete case “whether the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended.”<sup>35</sup> By espousing this balancing of constitutional interests, the Court in *Bacchus Imports* directly rejected its earlier approach in *Young’s Market*, in which the Court held that Section 2 expressly permits a state to discriminate against out-of-state liquor—even though such discrimination would otherwise have been forbidden by the dormant Commerce Clause.<sup>36</sup> In essence, then, the Court rejected its earlier approach to Section 2 that was consistent with the statutory canon (i.e., Section 2, as the later and more specific provision, governs) and suggested instead that Section 2 and

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<sup>31</sup> *Id.* at 331–32.

<sup>32</sup> *Id.* at 332 (emphasis added). Justice Stevens has criticized the Court’s subsequent understanding of this language in *Hostetter* as qualifying the Court’s earlier holdings that the Twenty-first Amendment leaves state regulation of liquor unfettered by the dormant Commerce Clause. Rather, in Justice Stevens’ view, by indicating that the earlier precedents do not establish that the “Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause,” the Court in *Hostetter* was discussing *Congress’s* power under the Commerce Clause, not *state* power under the dormant Commerce Clause. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 283–84 (1984) (Stevens, J., dissenting). And in any event, in Justice Stevens’ view, this language in *Hostetter* is dicta because the case was decided on other grounds: the Twenty-first Amendment had already been construed as leaving undisturbed Commerce Clause constraints with regard to liquor shipped *through*, rather than to, a state. *Carter v. Virginia*, 321 U.S. 131, 137 (1944). Because the Twenty-first Amendment was not implicated by a shipment through the state (the liquor in *Hostetter* was ultimately shipped out of the country), it was unnecessary to pronounce on the relationship between Section 2 and the Commerce Clause. *Bacchus Imports*, 468 U.S. at 284 (Stevens, J., dissenting).

<sup>33</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980).

<sup>34</sup> *Bacchus Imports*, 468 U.S. 263.

<sup>35</sup> *Id.* at 275–76; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

<sup>36</sup> See *supra* notes 23–28 and accompanying text.

Commerce Clause constitutional interests should be balanced. And although consistently purporting to embrace its earlier holdings that Section 2 grants the states broad regulatory authority over liquor,<sup>37</sup> in this balancing of constitutional interests, the Court has nearly always favored the federal interests embodied in the Commerce Clause over the state interests embodied in Section 2.<sup>38</sup>

I interpret *Bacchus Imports* as the culmination of the Court's post-*Hostetter* approach that Section 2 and Commerce Clause interests should be weighed in any given case. *Bacchus Imports* is significant precisely because it rejects the Court's earlier approach to Section 2—an approach that had viewed Section 2, the later and more specific constitutional provision, as controlling in the liquor commerce context.

Recently, however, the Supreme Court has attempted to recontextualize its holding in *Bacchus Imports*, not as rejecting the statutory canon, but instead as construing Section 2 and the dormant Commerce Clause harmoniously—a reading purportedly grounded in the history of Section 2 and the pre-Prohibition Wilson and Webb-Kenyon Acts.<sup>39</sup> On this reading, because the text of Section 2 closely tracks the language of the Webb-Kenyon Act, legislation that was intended to permit dry states to prohibit liquor imports, the intent of Section 2 must have been similar: primarily to restore to dry states after repeal the same authority to forbid liquor imports they enjoyed pre-Prohibition. For advocates of this reading of Section 2, the provision simply constitutionalized the pre-Prohibition state police power over liquor as reflected in the Webb-Kenyon Act, which in turn ostensibly codified the police power as reflected in the Wilson Act—a police power that included the right to ban, *but not discriminate*

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<sup>37</sup> See *infra* note 45.

<sup>38</sup> The Court, for example, has stricken state price affirmation statutes, which typically require that in-state prices of liquor not exceed prices charged out of state. *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986). And weighing constitutional values, not with regard to the dormant Commerce Clause, but instead with regard to Congress's positive Commerce Clause powers, the Court has also favored federal interests over the state interests embodied in Section 2. *E.g.*, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (invalidating a state liquor law that conflicted with provisions of the Sherman Anti-Trust Act); *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. 97 (1980) (same). *But see* *North Dakota v. United States*, 495 U.S. 423 (1990) (holding that a state liquor regulation impacting federal law with respect to procurement of liquor on federal military bases did not violate the Supremacy Clause, with only Justice Scalia arguing in a concurring opinion that Section 2 of the Twenty-first Amendment is central to the holding that the Supremacy Clause is not violated).

<sup>39</sup> See *Granholt v. Heald*, 125 S. Ct. 1885 (2005).

against, out-of-state liquor.<sup>40</sup> Under this reading, the discriminatory tax in *Bacchus Imports* presented no problem at all under Section 2 of the Twenty-first Amendment because it was precisely this sort of *discriminatory* treatment that Section 2 was never intended to cover. And, to round out the argument, because the statutory canon would be applicable in *Bacchus Imports* only if Section 2 and the Commerce Clause were in conflict, *Bacchus Imports* ipso facto cannot fairly be read as rejecting that canon of construction.

The Court's recent interpretation of *Bacchus Imports*—that it reflects a harmonization of Section 2 and the Commerce Clause—although plausible, is no more plausible than my reading of *Bacchus Imports* as recognizing that the constitutional provisions conflict and then following the earlier and more general of the two. As a preliminary matter, any explanation of *Bacchus Imports* based on the history of Section 2, in turn based on the history of the Webb-Kenyon Act, is spurious.<sup>41</sup> To be sure, many legislators advocating for the Twenty-first Amendment probably viewed Section 2 as permitting dry states to forbid liquor imports and nothing more. Others viewed Section 2 as allowing even wet states to burden interstate commerce so long as out-of-state interests were treated exactly the same as in-state interests. But there were still others, including many of the most prominent anti-prohibitionists, who agitated for repeal in large part

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<sup>40</sup> Before 1900, the Supreme Court frustrated state prohibition by holding under the dormant Commerce Clause that dry states were not permitted to ban liquor imports. See *Leisy v. Hardin*, 135 U.S. 100 (1890). Reacting to *Leisy*, Congress enacted the Wilson Act, which was intended to allow dry states authority to forbid liquor imports. 26 Stat. 313 (1890). The Wilson Act, by its terms, allowed states to regulate imported liquor “to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory.” *Id.* The Supreme Court subsequently upheld the Wilson Act, but again frustrated state prohibition by narrowly construing the Act as not permitting a state to forbid interstate shipments directly to consumers. *E.g., Rhodes v. Iowa*, 170 U.S. 412 (1898). Congress reacted again to protect dry states’ right to prohibit liquor by enacting the Webb-Kenyon Act, which prohibited the shipment of liquor into a state in violation of any state law. 37 Stat. 699 (1913).

There is disagreement as to whether the Webb-Kenyon Act should be interpreted as incorporating the Wilson Act’s rule that a state may not discriminate against out-of-state liquor. A majority on the Supreme Court very recently adopted this view. *Granholtz*, 125 S. Ct. at 1901; see also *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (“Like the Wilson Act and the Webb-Kenyon Act before Prohibition, § 2 enables a state to do to importation of liquor . . . what it chooses to do to internal sales of liquor, but nothing more.”). Others, however, including Chief Justice Rehnquist, Justice Stevens, Justice O’Connor, and Justice Thomas, view the plain language and history of Section 2 of the Twenty-first Amendment and the Webb-Kenyon Act as expressly permitting states to discriminate against out-of-state liquor. See *Granholtz*, 125 S. Ct. at 1919 (Thomas, J., dissenting).

<sup>41</sup> See *supra* note 40.

because they believed the federal government had dramatically overreached during Prohibition; federal involvement in liquor regulation after 1919 had, in their view, trampled state police power, bred government corruption, and resulted in widespread contempt for the law.<sup>42</sup> To many of these anti-prohibitionists, Section 2 might well have been taken at face value: as returning to the states *absolute* control over liquor imports, including a right to discriminate against out-of-state interests.<sup>43</sup> And, indeed, to the extent that Section 2 was intended to return absolute control to the states, Section 2 and the dormant Commerce Clause would have been in direct conflict in *Bacchus Imports* (and the case could consequently be read as rejecting the statutory canon). But to rely on isolated statements of federal legislators<sup>44</sup> or the similarity between Section 2 and the Webb-Kenyon

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<sup>42</sup> For a well-documented discussion of the many motivations behind the repeal movement, see DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION 197–99* (2d ed. 2000).

<sup>43</sup> Professor Brannon P. Denning has collected a number of contemporary newspaper accounts illustrating that the debate over Section 2 of the Twenty-first Amendment was largely between those advocating for federal supervision over liquor and those advocating for state control of liquor *without federal limitation*. Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 308 n.51 (2002).

Justice O'Connor has similarly argued that Section 2 returned "absolute control of the liquor trade to the states" without federal interference. 324 *Liquor Corp.*, 479 U.S. at 356 (O'Connor, J., dissenting). As proposed originally, the Twenty-first Amendment contained a Section 3, which granted the federal government concurrent authority over some aspects of commerce in liquor. That provision was rejected, in Justice O'Connor's view, because it was perceived as undermining the absolute control of liquor commerce vested in the states by Section 2. See *id.* at 354–55 (O'Connor, J., dissenting); see also *Granholm*, 125 S. Ct. at 1909 (Stevens J., dissenting) ("The notion that discriminating state laws violated the unwritten prohibition against balkanizing the American economy—while persuasive in contemporary times when alcohol is viewed as an ordinary article of commerce—would have seemed strange indeed to the millions of Americans who condemned the use of the 'demon rum' in the 1920's and 1930's.").

<sup>44</sup> As the Court has observed, the history of Section 2 is ambiguous in part because the same legislators often said contradictory things about the provision, some comments suggesting a narrow reading of the state power contemplated by the provision and others a broad reading. See 324 *Liquor Corp.*, 479 U.S. at 347 n.10 (noting the conflicting remarks of Senator John James Blaine, the Senate sponsor of the amendment); see also Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1631–35 (2000) (discussing the variety of legislative opinions as to the effect of Section 2). One wonders why so much emphasis is placed on federal legislative intent; at least as important in determining the purposes of Section 2 (and perhaps illustrative of just how fictional claims of Section 2's intent necessarily are) is the intent of the individual delegates in each of the ratifying state conventions or the intent of the

Act to suggest that the sole intent of Section 2 was to only minimally impact the dormant Commerce Clause, neglects the multiplicity of reasons state and federal lawmakers advocated for repeal.

But even if the question of *the* single intent of Section 2 is a coherent one, and even if a thorough examination of the history of repeal vindicates the narrow interpretation of Section 2, this historical exegesis was nevertheless not the basis of the Court's holding at the time it decided *Bacchus Imports*.<sup>45</sup> In *Bacchus Imports*, the Court described the legislative history as "obscur[e]," remarking that "[n]o clear consensus concerning the meaning of [Section 2] is apparent."<sup>46</sup> Despite that lack of consensus, the Court noted that whatever its purpose, "[t]he *central purpose* of the provision was not to empower States to favor local liquor industries by erecting barriers to competition."<sup>47</sup> And then, following *Hostetter*, the Court weighed the state interest (economic protectionism) against the federal interest

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people voting for repeal when the issue was put up for popular vote in many of the states.

<sup>45</sup> More importantly, by consistently reiterating that Section 2 grants near plenary power to the states to regulate liquor commerce, the Court, until *Granholm*, has implicitly rejected any view of Section 2 as narrowly drawn. *E.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514–16 (1996) ("[T]he text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limits whatsoever on other constitutional provisions."); *North Dakota*, 495 U.S. at 431 ("[W]ithin the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system" (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984), which in turn relied on *Young's Market* for the proposition that Section 2 "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause")); 324 *Liquor Corp.*, 479 U.S. at 346 (same); *see also Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 110 (same).

<sup>46</sup> *Bacchus Imports*, 468 U.S. at 274; *see also Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 107 n.10. The Court advocated the *Hostetter* balancing of federal and state interests again in 324 *Liquor Corp. v. Duffy*, but declined to do so on the basis of the legislative history of Section 2. 479 U.S. 335, 346–47 (1987) (arguing that the legislative history is susceptible to both broad and narrow constructions of Section 2). Similarly, holding that the Twenty-first Amendment did not bar application of the Sherman Act to a state pricing system, the Court in *California Retail Liquor Dealers Ass'n* noted the conflicting historical evidence on the purpose of Section 2 and the lack of consensus in the ratifying state conventions as to its thrust. 445 U.S. at 107. *Cf. Craig v. Boren*, 429 U.S. 190, 205–06 (1976) (although the Court noted in dicta the similarity between Section 2 and the Wilson and Webb-Kenyon Acts, *see supra* note 40, and commented on the "framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes," the Court did not explain what that framework was, but instead, relying on its older cases, indicated that "the Amendment primarily created an exception to the normal operation of the Commerce Clause").

<sup>47</sup> *Bacchus Imports*, 468 U.S. at 276 (emphasis added).

(prevention of economic Balkanization). According to the Court, the federal interest was paramount, but not because Section 2 was, by its history, inapplicable to discriminatory state laws.<sup>48</sup> Indeed, by categorizing the empowerment of economic protectionism as not the *central* purpose of Section 2, the Court seemed to acknowledge that Section 2 and the dormant Commerce Clause are in conflict to some degree with respect to discriminatory liquor laws that have some economic motivation. But because there isn't a traditional temperance or other classic Section 2 purpose behind the state law, and because the law violates a *central* tenet of the dormant Commerce Clause, the Court considered the federal interests as embodied in the dormant Commerce Clause controlling over the very weak state Twenty-first Amendment interests.<sup>49</sup> The important point is that the Court weighed constitutional interests precisely because both Section 2 and the dormant Commerce Clause were thought to apply: the two provisions were not read harmoniously, and the case can consequently be read as rejecting the traditional canon of construction.

Beginning with *Hostetter*, then, and culminating with its decision in *Bacchus Imports*, the Court has consistently advocated a balancing of state and federal interests when considering conflicts between Section 2 and the Commerce Clause. This post-*Hostetter* balancing is significant in that it seems to abandon the statutory canon of construction that might otherwise have been thought to apply, and indeed apparently was applied in *Young's Market*, among others, just after Section 2's ratification. This split with *Young's Market* is all the more striking in light of the Court's modern approach, which at least until *Granholm v. Heald*,<sup>50</sup> has apparently not been guided by a historical view of Section 2 as largely harmonious with the dormant Commerce Clause. Rather, acknowledging the ambiguous historical record, the Court has consistently favored federal interests embodied in the earlier and more general dormant Commerce Clause over the state interests embodied in the later and more specific language of Section 2. Not surprisingly, the Court's

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<sup>48</sup> If the Court were persuaded that Section 2, as a matter of history, constitutionalized the pre-Prohibition non-discrimination principle ostensibly codified by the Wilson and Webb-Kenyon Acts, then Section 2 would have been inapplicable to *any* discriminatory law, regardless of whether that discrimination was motivated by economic protectionism, protection of morals, promotion of temperance, or anything else, thus negating the need to engage in any balancing of federal and state interests.

<sup>49</sup> *Bacchus Imports*, 468 U.S. at 276.

<sup>50</sup> See *supra* notes 39–40 and accompanying text .

treatment of Section 2, and its subordination of that later and more specific amendment to the dictates of the earlier and more general<sup>51</sup> Commerce Clause, has lead many commentators to suggest that the Commerce Clause appears to be almost entirely unaffected by the passage of the Twenty-first Amendment.<sup>52</sup>

The Court's treatment of Section 2 and the dormant Commerce Clause is indeed instructive for a judge considering the relationship between a late and specific marriage amendment and an earlier and more general equal protection or privacy provision. Might the judge not weigh constitutional interests in such a case?<sup>53</sup> Might the judge not find the interests of equality or autonomy embodied in the earlier and more general equal protection or privacy provisions

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<sup>51</sup> The generality of the dormant Commerce Clause cannot be overstated. Not only does the provision not mention liquor commerce, it does not even mention state regulation. Putting the point more plainly, considering a challenge to an Indiana law prohibiting all out-of-state shipments to Indiana consumers, Judge Easterbrook framed the issue this way: "This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

<sup>52</sup> *E.g.*, *Healy v. Beer Inst.*, 491 U.S. 324, 349 (1989) (Rehnquist, C.J., dissenting) (criticizing the Court for allowing the states no more freedom to regulate commerce in beer than it does commerce in milk notwithstanding the Twenty-first Amendment); *324 Liquor Corp.*, 479 U.S. at 352–53 (O'Connor, J., dissenting) (observing that "the Court has, over the years, so 'completely distorted the Twenty-first Amendment' that '[i]t now has a barely discernible effect in Commerce Clause cases'" (quoting *Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., dissenting))); Denning, *supra* note 43, at 299–300 ("That courts continue to construe narrowly—nearly to the vanishing point—a specific reservation of state power at federalism's high tide of judicial enforceability, seems particularly worthy of attention."); Douglass, *supra* note 44, at 1644 ("[N]o state liquor laws are immune from potential invalidation under the dormant Commerce Clause . . .").

<sup>53</sup> It might be suggested that the Twenty-first Amendment model is an ill fit in the marriage amendment context. Abandoning the canon of construction with respect to Section 2 narrows its operation, but nevertheless leaves something of Section 2 intact. If the canon were abandoned in the marriage amendment context, however, the marriage amendment would be rendered entirely null. A reading giving effect to all constitutional language is far preferable to one rendering a portion of the document a nullity.

As a preliminary matter, the Supreme Court has not always avoided interpretative strategies that potentially render portions of the Constitution null. See *infra* notes 106–11 and accompanying text for a discussion of the Court's endorsement of an interpretation of the Eighth Amendment that would render portions of the Fifth Amendment a nullity. More importantly, as discussed in Part III, a court might elect to follow the Twenty-first Amendment model if and when the legitimacy of a constitution itself is undermined by the continued vitality of a marriage amendment. In such a case, readings that give effect to the constitution as a whole are preferable to readings that give effect to each and every one of its provisions.

paramount over the interests of defining marriage in exclusively heterosexual terms?<sup>54</sup>

*B. The Twenty-first Amendment v. The Import-Export Clause, the First Amendment, and the Equal Protection Clause*

On the same day the Court decided *Hostetter*, the case that signaled what would become the Court's eventual abandonment of the statutory canon in Commerce Clause cases,<sup>55</sup> the Court also considered a challenge to a Kentucky liquor law under the Constitution's Import-Export Clause.<sup>56</sup> The law at issue in *Department of Revenue v. James Beam Distilling Co.*<sup>57</sup> prohibited the shipment of alcohol into Kentucky unless the importer obtained a permit and paid a tax of ten cents on each proof gallon in the shipment.<sup>58</sup> Striking the Kentucky law as an unconstitutional tax on imports, the

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<sup>54</sup> The *Bacchus Imports* model might be particularly relevant not in a marriage (qua marriage) challenge, but instead an equal protection or due process challenge to the denial of marriage *benefits* for same-sex couples. Some commentators have suggested that the language of the proposed federal marriage amendment, in addition to prohibiting lesbian or gay marriage, may also deny same-sex couples the benefits of marriage (as protected by civil unions, domestic partnerships, or other non-marriage legal arrangements). *E.g.*, Andrew Sullivan, *Bush on Gay Marriage: Uncivil*, NEW REPUBLIC ONLINE, July 13, 2004, [www.cbsnews.com/stories/2004/07/13/opinion/main629390.shtml](http://www.cbsnews.com/stories/2004/07/13/opinion/main629390.shtml); Peterson, *supra* note 8 (reporting that the marriage amendments in Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, and Utah also ban civil unions or other partnership benefits). Assuming that a particular marriage amendment would proscribe both marriage and the benefits of marriage, if a court were to follow *Bacchus Imports* in considering a challenge to the denial of marriage benefits, the court might weigh constitutional interests rather than employ the canon of construction that would otherwise require following the later and more specific constitutional provision. Following *Bacchus Imports*, that court may well find that although within its language, the denial of civil unions was not a *central purpose* of the marriage amendment. And because the equal protection or due process interests would outweigh those non-core marriage amendment interests, the court may well elect to follow the earlier and more general equal protection or due process provision, holding that lesbian and gay couples have a constitutional right to the benefits of marriage, but not marriage itself.

<sup>55</sup> See *supra* notes 29–32 and accompanying text.

<sup>56</sup> The Import-Export Clause provides that:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controll of the Congress.

U.S. CONST. art. I, § 10, cl. 2.

<sup>57</sup> 377 U.S. 341, 342 (1964).

<sup>58</sup> *Id.* at 342.

Court held that it “has never so much as intimated that the Twenty-first Amendment has operated to permit what the Import-Export Clause precisely and explicitly forbids.”<sup>59</sup>

Dissenting, Justice Black criticized both *Hostetter* and *James Beam Distilling*, which held that the Commerce Clause and the Import-Export Clause, respectively, remained largely undisturbed by the Twenty-first Amendment. According to Justice Black, the Court had deprived the states of the power to regulate the liquor business by taxation or otherwise—a power expressly granted the states by the Twenty-first Amendment.<sup>60</sup> Even more telling for our purposes, in his discussion of the Court’s treatment of the Import-Export Clause, Justice Black expressly noted the Court’s abandonment of the statutory canon of construction:

[T]he clause against taxing imports is general . . . . Section 2 of the Twenty-first Amendment, by contrast, is not general in its application. . . . It seems a trifle off to hold that an Amendment adopted in 1933 in *specific* terms to meet a specific twentieth-century problem must yield to a provision written in 1787 to meet a more *general*, although no less important, problem.<sup>61</sup>

The Court’s treatment of constitutional conflicts between the Import-Export Clause and the Twenty-first Amendment has disturbed some commentators,<sup>62</sup> but it is consistent with the Court’s treatment of state liquor regulation cases under the Commerce Clause: notwithstanding the specificity and the timing of Section 2 of the Twenty-first Amendment, it must be considered in light of other earlier and more general constitutional provisions. And most of the time, Section 2 loses.

In addition to the Commerce Clause and the Import-Export Clause, the Court has also considered challenges to state liquor laws on First Amendment and Equal Protection grounds. Each time, Section 2 has failed to save the state regulation of liquor. In *44 Liquormart, Inc. v. Rhode Island*,<sup>63</sup> the Court struck a Rhode Island ban on the advertising of liquor prices by manufacturers, wholesalers, or

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<sup>59</sup> *Id.* at 344.

<sup>60</sup> *Id.* at 346 (Black, J., dissenting).

<sup>61</sup> *Id.* at 347–48 (emphasis added).

<sup>62</sup> Denning, *supra* note 43, at 323 (“Arguably, the [Twenty-first] Amendment necessarily qualified the [Import-Export] Clause . . . .”); David S. Versfelt, Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1584–85 (1975) (“It would not . . . have been so ‘extraordinary’ to conclude that the Twenty-first amendment had ‘repealed’ the export-import clause with respect to intoxicants.”).

<sup>63</sup> 517 U.S. 484 (1996).

shippers from without the state, or by licensed persons within, as violative of the First Amendment.<sup>64</sup> Considering the argument that the Twenty-first Amendment should tilt the Court's analysis in the state's favor, the Court held that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."<sup>65</sup> By holding that the Twenty-first Amendment does not qualify the First Amendment, the Court arguably followed the more general of the two provisions: the sort of commercial speech at issue in *44 Liquormart* (price advertisements) is not "core" speech typically entitled to maximum protection under the First Amendment.<sup>66</sup> Section 2, by contrast, would seem specifically to delegate to the states broad discretion to regulate the liquor industry as each state sees fit.<sup>67</sup> Again, the Court appeared to favor the interests embodied in an earlier and more general constitutional provision, rather than the state's interests in liquor regulation embodied in the later and more specific amendment.

In *Craig v. Boren*,<sup>68</sup> the Court considered an equal protection challenge to an Oklahoma statute prohibiting the sale of "non-alcoholic"<sup>69</sup> beer to males under the age of 21 and to females under the age of 18.<sup>70</sup> Purporting to justify the disparate treatment of males as designed to enhance traffic safety, the state provided statistical evidence establishing that, among other things, of people between the ages of 18 and 21, more men than women were arrested for driving while intoxicated. Although conceding that this had some

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<sup>64</sup> *Id.* at 516.

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) ("I will take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of the 'freedom of speech,' and where *the core offense of suppressing particular political ideas is not at issue*, from the long-accepted practices of the American people.") (emphasis added).

<sup>67</sup> See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106–07 (1980) (stating that the Twenty-first Amendment "grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system"); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987); see also *North Dakota v. United States*, 495 U.S. 423, 431 (1990).

<sup>68</sup> 429 U.S. 190 (1976).

<sup>69</sup> The "non-alcoholic" beer at issue was actually 3.2% alcohol by volume and was therefore within the scope of the Twenty-first Amendment. *Id.* at 192.

<sup>70</sup> *Id.*

statistical significance,<sup>71</sup> the Court nevertheless found the evidence insufficient to justify a gender-based classification. In a complete reversal of its prior cases,<sup>72</sup> the Court held that the Twenty-first Amendment has *no effect whatsoever* on equal protection requirements.<sup>73</sup> It is worth noting that in the Equal Protection context (as in the First Amendment context), as opposed to the Commerce Clause context, the Court did not weigh constitutional interests when considering a conflict with Section 2. Rather, the Court held that state liquor laws, regardless of their specific authorization in the text of Section 2—even liquor laws reflecting a rational legislative judgment borne out by supporting statistical evidence<sup>74</sup>—cannot withstand scrutiny under the earlier-enacted and more general Equal Protection provision if the liquor laws classify on the basis of gender.<sup>75</sup>

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<sup>71</sup> The Court conceded that the disparity in arrests (.18% of females versus 2% of males) “is not trivial in a statistical sense.” *Id.* at 201.

<sup>72</sup> *E.g.*, *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) (“[S]ince the adoption of the Twenty-First Amendment, the equal protection clause is not applicable to imported intoxicating liquor.”); *State Bd. of Equalization v. Young’s Market Co.*, 299 U.S. 59, 64 (1936) (“A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.”); *see also Indianapolis Brewing Co. v. Liquor Control Comm’n*, 305 U.S. 391, 394 (1939) (“[D]iscrimination between domestic and imported intoxicating liquors, . . . is not prohibited by the equal protection clause.”).

<sup>73</sup> *Craig*, 429 U.S. at 208–09 (“We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case.”).

<sup>74</sup> The Court for the first time in *Craig* subjected gender-based classifications to intermediate judicial scrutiny. *Id.* at 197–98. The Court, however, almost unanimously agreed that the statute would have survived under the less exacting rational basis test. *See id.* at 217 (Burger, C.J., dissenting) (indicating that eight members of the Court did not find the statute irrational). The lower court, comprised of a three-judge panel, upheld the law under the rational basis test. *Walker v. Hall*, 399 F. Supp. 1304 (D. Okla. 1975); *see also R. Darcy & Jenny Sanbrano, Oklahoma in the Development of Equal Rights: The ERA, 3.2% Beer, Juvenile Justice, and Craig v. Boren*, 22 OKLA. CITY U. L. REV. 1009, 1045 (1997).

<sup>75</sup> Note that the Court does not resolve the issue in *44 Liquormart* or *Craig* by holding that the state regulations at issue fall outside the scope of Section 2 because the regulations are not related to the “transportation” or “importation” of liquor. Instead, even assuming the applicability of Section 2, the latest and most specific provision that speaks to the state law at issue, the Court held that Section 2 may never trump the earlier and more general dictates of the First Amendment or Equal Protection Clause that would otherwise apply.

*Craig*, unlike *44 Liquormart*, claims a historical basis for reading the earlier and more general Equal Protection provision as controlling. *Craig*, 429 U.S. at 206 (“Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale of liquor is concerned.”). To the extent the *Craig* Court was actually driven by a historical exegesis of Section 2, the *Craig* decision could be

Since the ratification of the Twenty-first Amendment, the Court has considered the relationship between Section 2 and various more general and earlier-enacted constitutional provisions. Whether considering the dormant Commerce Clause,<sup>76</sup> the Commerce Clause,<sup>77</sup> the Import-Export Clause,<sup>78</sup> the First Amendment,<sup>79</sup> or the Equal Protection clause,<sup>80</sup> since the mid-1960s, the Court has consistently favored the earlier and more general provision. Meanwhile, the Court has given little weight—practically none—to the states’ Section 2 authority to regulate liquor, notwithstanding the specificity of Section 2’s text and the later date of its enactment. Regardless of the breadth of state authority to regulate liquor under the text of the Twenty-first Amendment, the cases make clear that the text of that amendment does not “license the States to ignore their obligations under other provisions of the Constitution.”<sup>81</sup> Indeed, the Court has so restricted the effect of Section 2 as to render it nearly null.

The Court’s Twenty-first Amendment cases can be read as abandoning the statutory canon of construction that would have otherwise found Section 2, as the later and more specific provision, controlling in the liquor context. This rejection of the statutory canon illustrates the interpretive choices available to a judge considering a conflict between a marriage amendment and an earlier and more general equal protection or privacy provision. By weighing interests embodied in particular constitutional provisions, irrespective of the provisions’ timing and specificity, the Supreme Court provides a conceptual framework within which a court might find a same-sex marriage ban constitutionally infirm, notwithstanding

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read in ways other than the one I suggest (i.e., the Court did not simply abandon the canon of construction; rather, as a matter of historical interpretation, the later amendment was not intended to qualify the earlier provision, the two provisions are not really in conflict, and thus the canon of construction is simply unnecessary). But if the Court was driven by the *absence* of any historical evidence that Section 2 was meant to qualify the Equal Protection Clause, that would be precisely the time to employ the statutory canon of construction. In other words, if there were no statement in the history of Section 2 one way or the other with respect to its effect on the Equal Protection Clause, as *Craig* seems to suggest, the canon serves as a proxy for that unexpressed intent: the latest and most specific provision is assumed to be the provision the enacting body intended to control.

<sup>76</sup> See *supra* notes 19–54 and accompanying text.

<sup>77</sup> See *supra* note 38.

<sup>78</sup> See *supra* notes 55–62 and accompanying text.

<sup>79</sup> See *supra* notes 63–67 and accompanying text.

<sup>80</sup> See *supra* notes 68–75 and accompanying text.

<sup>81</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

that a constitution may contain a very late and very specific marriage amendment.

## II

The Supreme Court's Twenty-first Amendment cases, as I have interpreted them, may be read as abandoning the traditional canon of construction that later and more specific provisions govern over earlier and more general provisions. But the canon, depending as it does on the timing of constitutional provisions, merits special attention in the constitutional context. As I will argue below, there may be particular reasons—reasons grounded in what might be termed the atemporal nature of at least some constitutional provisions—for suspecting the later-governs-over-earlier canon a particularly ill fit in the constitutional context. First, drawing on the Supreme Court's retroactivity cases, I argue that, because some constitutional principles would seem to declare rather than create law, it makes little sense to conceive of those provisions as coming into existence on the date of ratification; declared law is better thought of as existing before, at, and after ratification. Second, because equal protection provisions and privacy provisions are dynamic, drawing their meaning from an evolving sense of equality and autonomy, those provisions are especially difficult to locate in time; as evolving standards develop, those provisions might well be thought of as “later” than even later-ratified provisions.

The Supreme Court's retroactivity jurisprudence provides an interesting lens through which to consider the temporal dimensions of constitutional law. Specifically, the retroactivity cases illustrate the theoretical difficulty with considering marriage amendments as “later” or equal protection or privacy provisions as “earlier” for purposes of applying the canon of construction that later provisions govern over earlier. The Court's retroactivity cases have wrestled with the extent to which a new judicial rule should apply to conduct that occurred prior to the new rule's announcement. The retroactivity cases decided by the Warren Court and continuing into the 1980s allowed for the prospective application of judicial rules under certain circumstances. For example, the Court in *Linkletter v. Walker*<sup>82</sup> held that the *Mapp v. Ohio*<sup>83</sup> decision extending the Fourth Amendment exclusionary rule to the states would not apply to state criminal

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<sup>82</sup> 381 U.S. 618 (1965).

<sup>83</sup> 367 U.S. 643 (1961).

convictions that had become final prior to the *Mapp* decision.<sup>84</sup> The Court in *Johnson v. New Jersey*<sup>85</sup> later extended the *Linkletter* retroactivity test to the question of whether new rules of criminal procedure ought to apply to defendants whose cases were pending on direct review.<sup>86</sup> As a result of *Linkletter* and *Johnson*, quite a few new rules of criminal procedure were held not to apply to defendants whose convictions had become final or whose cases were pending on direct review when the new rule was articulated. On the civil side, the Court similarly allowed for the selective prospective application of new judicial rules.<sup>87</sup>

Beginning in the 1980's, with *Griffith v. Kentucky*,<sup>88</sup> however, the Court began what would ultimately become an abandonment of its selective prospective application of new precedent in both the criminal and civil contexts.<sup>89</sup> In *Griffith*, the Court held that its holding in *Batson v. Kentucky*<sup>90</sup> should be applied to all cases on direct review, even those cases in which the race-based jury selection occurred *before* the Court formally held that such discrimination violated the Constitution. As the Court explained in *Griffith*, the

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<sup>84</sup> In denying criminal defendants the benefit of the new *Mapp* rule on habeas review, the Court articulated a test for determining whether to allow a new rule of criminal procedure to apply retroactively to cases that had become final before the new rule was announced: weigh the merits and demerits in each case by looking at the purpose of the new rule, the reliance placed on the previous doctrine, and the effect on the administration of justice of a retrospective application of the new rule. *Linkletter*, 381 U.S. at 636.

<sup>85</sup> 384 U.S. 719 (1966).

<sup>86</sup> *Id.* at 728.

<sup>87</sup> *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The *Chevron Oil* Court articulated a test for whether a judicial rule should apply prospectively in the civil context. *Id.* at 106-07. Under the *Chevron Oil* test, a court was to consider whether the decision articulates a new principle of law, whether retroactive application would further or retard the operation of the new rule, and whether retroactive application of the new rule would produce substantial inequitable results. *Id.*

<sup>88</sup> 479 U.S. 314 (1987).

<sup>89</sup> The Court first disfavored prospective application in the criminal procedure context, with its decision in *Griffith*, holding that new rules of criminal procedure should be applied to all cases pending on direct review at the time the new rule was announced. *Id.* at 328. The Court's criminal retroactivity jurisprudence was subsequently applied in the civil context in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). With its decision in *Harper v. Virginia Department of Taxation*, the Court fully incorporated its criminal procedure retroactivity jurisprudence into its civil retroactivity doctrine: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. 86, 97 (1993).

<sup>90</sup> 476 U.S. 79 (1986).

prospective application of judicial precedents is incompatible with the “basic norms of constitutional adjudication.”<sup>91</sup> The Court observed that “[u]nlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis.”<sup>92</sup> And, quoting Justice Harlan, the Court commented that:

[i]f we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court’s assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.<sup>93</sup>

Under *Griffith*, the reasoning of which was later applied in the civil context as well, a court should decide all cases on direct review in light of the court’s best understanding of the law, regardless of whether that understanding was announced before or after the conduct at issue in the case. This requirement that judicial rules be applied to conduct occurring both before and after the announcement of those rules is consistent with the view that judges declare, rather than create, law.<sup>94</sup> The prospective application of

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<sup>91</sup> *Griffith*, 479 U.S. at 322.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 323 (internal quotation marks omitted) (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment)).

<sup>94</sup> *James B. Beam Distilling*, 501 U.S. at 535–36 (noting that the *Griffith* approach “reflects the declaratory theory of law, according to which courts are understood only to find the law, not to make it”) (citations omitted).

The view that judges in some sense declare, rather than create, law is, in fact, fundamental to a court’s day-to-day adjudicative function (quite apart from the question of whether new rules should be applied retroactively to other cases on direct review). Consider the following example: Adjudicating a controversy between *A* and *B*, a court announces new rule *X*. Even though the new rule *X* is announced after the relevant conduct between *A* and *B* has already occurred, by deciding the case and allocating relief as between *A* and *B*, the court treats *X* as though it were the law at the time of the relevant conduct between *A* and *B*. In other words, the court is treated as declaring *X*—the declaration of which poses no theoretical problem when the rule is applied to *A* and *B*. If, on the other hand, the court were construed as creating *X*, the application of *X* to *A* and *B* would be potentially unfair to whichever party had relied on *X*’s absence; after all, on a judge-creation theory, *X* was not the law when the relevant conduct occurred. See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811 (2003) (noting that courts typically decide cases based on what is perceived at the time of adjudication, not the state of the law before adjudication, and indicating that “[t]here is, of course, nothing unusual about such ‘retroactive’ applications of current law; in fact, they occur in the vast majority of cases without discussion or even thought”).

judicial decisions, on the other hand, a practice now thoroughly disfavored by the Court, is consistent with a view of judicial rules as judge-*created*, rather than judge-*declared*.

Justice Scalia has been the most transparent of the justices in describing the neo-Blackstonian underpinnings of the Court's retroactivity jurisprudence. Considering the retroactivity of one of the Court's Commerce Clause decisions, Justice Scalia commented at length:

I share Justice Stevens' perception that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to describe today—whether our [Commerce Clause decision] shall “apply” retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. . . . To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it . . . . Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.<sup>95</sup>

As Justice Scalia observed, even to ask whether the new rule “applies retroactively” is to misunderstand the new rule as being situated in time; asking whether a judicial rule “applies retroactively” is to suggest erroneously that the rule began when it was announced. Judicial law, as *declared* law, properly conceived, is atemporal. Only statutory law or other *created* law, can properly be understood to “apply retroactively,” i.e. to be applied to situations that occurred before the statutory rule was created.

Having described the distinction between declared and created law and the idea that judicial rules, as declared law, should not be prospectively applied, we now return to our hypothetical case of a marriage amendment conflicting with an earlier-ratified equal protection or privacy provision. At first blush, it might appear that constitutional provisions are more like statutory provisions than judicial opinions and thus, like statutory provisions, ought to apply

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<sup>95</sup> *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring). Justice Scalia, joined by Justices Marshall and Blackmun, in considering the retroactive effect of the Court's ruling in *Bacchus Imports*, see *supra* notes 34–49 and accompanying text, commented that the prospective application of judicial rules is inconsistent with the judicial power—“the power ‘to say what the law is,’ not the power to change it.” *James B. Beam Distilling*, 501 U.S. at 549 (Scalia, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

only prospectively.<sup>96</sup> After all, unlike judicial decisions, which declare what the law is, constitutional provisions, like statutory provisions, would seem to create law, and thus present no conceptual difficulty if prospectively applied or treated as coming into existence with ratification. The canon of construction preferring later constitutional provisions over earlier provisions could be applied, and the marriage amendment, as the later provision, would appear to govern over the marriage question.

But if some constitutional provisions were determined not to create law, but instead to declare moral or natural law principles, the process of promulgating at least some “new” constitutional law may have much more in common with judicial decisionmaking than with legislation. Because such constitutional provisions would merely declare, rather than create, those moral principles, it would make as little sense to argue that these provisions were “enacted” on their ratification dates as it would to suggest that judicial rules should apply only after their announcement. In both cases, the declared rule, whether a constitutional provision or a judicial decision, is properly understood atemporally, as applying both before and after its ratification or announcing case. Consequently, certain provisions of a constitution may not sensibly be susceptible to construction by appeal to the canon preferring later-, over earlier-, enacted provisions.

At the federal level, any search in the Constitution for evidence of natural law principles typically begins with the text of the Ninth Amendment: “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people.”<sup>97</sup> Many commentators have seen in these “other” rights retained by the people express textual support in the Constitution for unexpressed, but fully enforceable moral or natural rights.<sup>98</sup> By recognizing and securing rights not enumerated in the

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<sup>96</sup> See Mark Strasser, *Baehr Mysteries, Retroactivity, and the Concept of Law*, 41 SANTA CLARA L. REV. 161, 173–74 (2000) (discussing the strong presumption against the retroactive application of constitutional amendments to validate a previously void law); see also *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311–12 (1994) (“The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student . . . .” (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982))).

<sup>97</sup> U.S. CONST. amend. IX.

<sup>98</sup> See, e.g., STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 173 (1990) (“The Constitution itself does not claim to create or confer rights, it only ‘secures’ them. And the Ninth Amendment explicitly calls upon constitutional interpreters not to ‘deny or disparage’ the existence of rights not stated explicitly in the Constitution’s text.”); see

Constitution, the Ninth Amendment seems to imply that at least some constitutional rights are not created by the Constitution, but instead are retained irrespective of whether they have been articulated.<sup>99</sup> On this reading of the Ninth Amendment, had the framers failed to include provisions securing, for example, freedom of religion or freedom of speech, those human rights would nevertheless have been enforceable constraints against the exercise of governmental power.<sup>100</sup> It follows, then, that it makes little sense to conceive of these provisions as coming into effect in 1791, when the Bill of Rights was ratified; they would exist and would be fully enforceable regardless of ratification at all, much less ratification on any particular date.

Whether one accepts this view of the Ninth Amendment as providing a textual basis for enforcing unenumerated constitutional rights or not,<sup>101</sup> it remains relatively noncontroversial that the framers

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also Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 327, 327 n.2 (Randy E. Barnett ed., 1993); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, in 2 THE RIGHTS RETAINED BY THE PEOPLE, *supra*, at 367, 371–73. Indeed, James Madison felt that the Ninth Amendment was necessary because an enumeration of certain rights in the Bill of Rights might be construed as signaling that any rights not enumerated are not constitutionally protected. See 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1790).

<sup>99</sup> Similarly, the Privileges and Immunities Clause of the Fourteenth Amendment appears to protect certain unenumerated individual rights from governmental encroachment. See U.S. CONST. amend. XIV.

<sup>100</sup> While the Ninth Amendment has recently received significant scholarly attention, it has not played prominently as a textual authority for the Supreme Court's substantive due process jurisprudence. Probably the most famous invocation of the Ninth Amendment as a textual hook for the enforcement of unenumerated constitutional rights is *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court held that unenumerated privacy rights created by various constitutional provisions, including the Ninth Amendment, precluded Connecticut from outlawing birth control for married couples. The Court further noted that the right of privacy, far from being created by the Constitution, is "older than the Bill of Rights." *Id.* at 486. Justice Goldberg, in his famous concurring opinion, made plain the centrality of the Ninth Amendment to the Court's holding. *Id.* at 486–87 (Goldberg, J., concurring) ("My conclusion that the concept of liberty is not so restricted [to the express terms of the Bill of Rights] and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court . . . and by the language and history of the Ninth Amendment.")

<sup>101</sup> Others have argued that, although the Ninth Amendment provides that the enumeration of some rights does not imply the derogation of others, it does not provide an independent basis for the invalidation of legislation enacted pursuant to a delegated power. See, e.g., McAfee, *supra* note 98, at 327. But see Steven Heyman, *Natural Rights and Positive Law*, in 2 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 98, at 381, 381; Mayer, *supra* note 98, at 367.

both spoke and thought in terms of natural rights and viewed the Bill of Rights as, to some degree, recognizing or declaring, rather than creating, those rights.<sup>102</sup> That the framers believed in the a priori existence of certain rights can scarcely be doubted upon a reading of the first sentence of the Declaration of Independence, which provides that all human beings are endowed by a Creator with “certain inalienable rights.” Because certain of the framers apparently intended that some constitutional provisions declare principles of natural or moral law, rather than create that law, it makes little sense to suppose that those principles began to exist only *after* their ratification. For the same reasons animating the Supreme Court’s modern retroactivity jurisprudence, prospective application of constitutional provisions declaring (as opposed to creating) law does not make sense. Every constitutional provision that declares a moral or natural law principle, properly conceived, existed before, during, and after the provision’s ratification.<sup>103</sup> Relying on a “later”

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Still others have argued that the Ninth Amendment is a “rights” analog to the “powers” provision of the Tenth Amendment—that just as the powers not delegated to the federal government remain with the states, the articulation of certain federal rights should not be construed as denying or disparaging rights retained by the people under state law. Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 243, 243 (Randy E. Barnett ed., 1989). President Ronald Reagan’s failed appointee to the United States Supreme Court, Robert Bork, famously referred to the Ninth Amendment as an indecipherable “inkblot” in the Constitution. Bork later settled on the view, discussed above, that the provision protects rights retained by individuals under state law. See Glenn Harlan Reynolds, *Sex, Lies, and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1083 n.134 (1990), for a discussion of the implausibility of Bork’s understanding of the Ninth Amendment.

<sup>102</sup> E.g., Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 101, at 149, 162–63 (“[T]he existence of natural law and natural rights and the latter’s immunity from governmental regulation were accepted by almost all. Natural rights, therefore, were those which required no constitutional protection, and the addition of amendments covering them would only be ‘declaratory’ of their inviolability.”). The irrelevance of the articulation of natural rights principles was argued forcefully by Alexander Hamilton: “The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power.” 1 THE WORKS OF ALEXANDER HAMILTON 113 (H. Lodge ed., 1904).

While my discussion has focused on natural law in the U.S. Constitution, state constitutions, especially early constitutions, contain a great deal of language suggesting that the framers of those constitutions believed they were declaring, and not creating, certain natural law principles. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

<sup>103</sup> Walter Murphy has suggested one instance in which the Supreme Court may have treated constitutional provisions in exactly the atemporal manner that a law-as-declared reading would require. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), in

provision as controlling in a particular case would only make sense when the Court is construing a rule in fact *created* by the Constitution.

While some constitutional provisions declare moral or natural rights, others obviously do not.<sup>104</sup> In determining whether to apply the canon of construction preferring later over earlier constitutional provisions, how, then, should one determine *which* constitutional provisions implicate moral or natural rights and which do not? Fortunately, the constitutional provisions at issue for purposes of this Article—equal protection provisions, privacy provisions, and marriage amendments—are relatively clear cases of the articulation of moral or natural law principles.<sup>105</sup> Equality of treatment under the law, the right to be left alone in familial and sexual matters, and traditional norms of sexuality, to the respective advocates of each,

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considering the constitutionality of segregated schools in the District of Columbia, the Court may well have incorporated some portion of the Fourteenth Amendment's Equal Protection Clause (a later provision) into the Fifth Amendment (an earlier provision). See Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 163, 172 (Sanford Levinson ed., 1995) (stating that, in *Bolling*, the "Supreme Court held that the Fifth Amendment, ratified in 1791, incorporated at least some of the equal protection clause of the Fourteenth Amendment, ratified in 1868. There are, of course, other possible interpretations of *Bolling*, but none quite so intriguing . . ." (citations omitted)).

<sup>104</sup> Compare, for example, the Eighth Amendment prohibition on cruel and unusual punishment with the Article II requirement that the president be at least thirty-five years old. U.S. CONST. amend. VIII; U.S. CONST. art. II, § 1.

<sup>105</sup> State and federal privacy and equal protection provisions have as their archetype the Declaration of Independence and its catalog of the "inalienable rights" that are "endowed by the Creator." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Principles of equality and privacy, whether codified in constitutions or not, are the life-blood of liberal democracy. Inequality, for example, in the form of slavery or denial of the franchise, did not become constitutionally suspect only with the passage of the Thirteenth and Nineteenth Amendments. This inequality was always deeply at odds with the very cornerstone of democracy: that all persons are created equal. The same can be said of principles of privacy; they are grounded not in text but instead are fundamental to the concept of liberty itself.

On the other side, marriage amendments can scarcely be viewed as anything other than collective statements of moral conviction—generally a religious conviction—that same-sex sex is, *and has always been*, deeply immoral. Writing a separate concurrence in *Bowers v. Hardwick*, then-Chief Justice Burger described same-sex sex as "the infamous *crime against nature*," an offense of "deeper malignity than rape, a heinous act the very mention of which is a disgrace to human nature." 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring) (internal quotation marks omitted) (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES \*215). Justice Blackmun, demonstrating the natural law nature of the privacy right at stake, commented in his *Bowers* dissent that "this case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone." *Id.* at 199 (Blackmun, J., dissenting) (internal quotation marks omitted) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

represent bedrock moral or natural law principles. On all sides of the marriage debate, opponents would tend to agree that these principles apply whether we recognize them or not, whether we live up to their ideals or not, and whether they are codified in our constitutions or not. As *declared* principles, these principles are most properly thought of as atemporal; and situated out of time, it makes little sense, for purposes of constitutional interpretation, to view the marriage amendment as “later” or the equal protection or privacy provisions as “earlier.” Consequently, with respect to these constitutional provisions, the canon of construction that prefers *later* and more specific provisions over *earlier* and more general provisions may be an inapt interpretive tool.

There is a second fundamental problem with employing the later-over-earlier canon in the marriage context. To the extent a constitution’s equal protection and privacy provisions are dynamic, drawing their content from evolving notions of equality and autonomy, they may well outgrow other contemporaneous or later provisions of that constitution. In other words, as society evolves, those dynamic provisions also evolve and thus may properly be considered “later” than contemporary and later-ratified constitutional provisions that reflect outdated notions of equality and autonomy.

Consider, for example, the Supreme Court’s Eighth Amendment jurisprudence. In 1972, the Supreme Court, in *Furman v. Georgia*,<sup>106</sup> struck capital punishment as it was then implemented as violative of the Eighth Amendment’s prohibition of “cruel and unusual” punishment. The opinion was badly fractured, and the precise nature of the Court’s holding is difficult to discern, but a majority of the Court plainly embraced the view that the Eighth Amendment is not static, but instead “acquire[s] meaning as public opinion becomes enlightened by a humane justice.”<sup>107</sup> In other words, a majority of the Court considered the Eighth Amendment sufficiently dynamic to *potentially* (though not as of yet) render capital punishment unconstitutional per se.<sup>108</sup> And by recognizing this

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<sup>106</sup> 408 U.S. 238 (1972).

<sup>107</sup> *Id.* at 241 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)) (Douglas, J., concurring). In other words, the content of the Eighth Amendment draws its meaning from “evolving standards of decency that mark the progress of a maturing society.” *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>108</sup> Justices Brennan and Marshall would have rendered capital punishment unconstitutional per se. *Id.* at 304 (Brennan, J., concurring); *id.* at 358–59 (Marshall, J., concurring). Although stopping short of declaring capital punishment unconstitutional per se, Justice White nevertheless indicated that, in his view, the moment capital punishment no longer furthers the social ends it has been deemed

interpretive possibility, the Court allowed that the Eighth Amendment, over time, might outgrow contemporaneous Fifth Amendment provisions<sup>109</sup> that by their terms appear to place a constitutional imprimatur on capital punishment.<sup>110</sup> By drafting the Fifth Amendment procedural protections contemporaneously with the Eighth Amendment at Time One (T<sub>1</sub>), we may assume that the framers viewed at least some instances of capital punishment (presumably those with adequate procedural safeguards) as non-violative of the Eighth Amendment. But, if at Time Two (T<sub>2</sub>), evolving standards of decency have evolved sufficiently, *Furman*

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to serve, it would be prohibited by the Eighth Amendment. *Id.* at 312 (White, J., concurring). In two dissenting opinions, one written by Chief Justice Burger and the other by Justice Powell, each representing the views of the Chief Justice and Justices Blackmun, Powell, and Rehnquist, capital punishment could *in theory* be unconstitutional per se under the Eighth Amendment. *Furman*, 408 U.S. at 382–84 (Burger, C.J., dissenting); *id.* at 433–34 (Powell, J., dissenting). According to Chief Justice Burger, state legislatures would likely invalidate death penalty statutes long before the Eighth Amendment would counsel striking capital punishment. *Id.* at 382–84 (Burger, C.J., dissenting). According to Justice Powell, although it would in theory be possible to hold the death penalty unconstitutional per se, such a holding would be exceedingly unlikely. *Id.* at 433–34 (Powell, J., dissenting). Writing separately, Justice Blackmun indicated that the Eighth Amendment may acquire meaning as public opinion evolves, but he felt that the *Furman* majority was slightly ahead of the public in its treatment of capital punishment. *Id.* at 409–10 (Blackmun, J., dissenting).

<sup>109</sup> The Fifth Amendment contains three clauses, or more accurately, parts of clauses, that would be without effect were the Eighth Amendment to be construed as rendering capital punishment unconstitutional per se:

No person shall be held to answer for a *capital . . . crime*, unless on a presentment or indictment of a Grand Jury; . . .

[N]or shall any person be subject for the same offence to be twice put in jeopardy of *life* or limb; . . .

[N]or be deprived of *life*, liberty, or property, without due process of law.

U.S. CONST. amend. V (emphases added).

<sup>110</sup> That the Court was aware that it was endorsing an interpretive choice that might potentially render portions of the Fifth Amendment null is demonstrated by Chief Justice Burger's and Justice Powell's dissenting opinions, both of which pointed out the Fifth Amendment language providing procedural protections in capital cases. *Furman*, 408 U.S. at 375 (Burger, C.J., dissenting); *id.* at 414 (Powell, J., dissenting). Justice Powell comes the closest to holding that the Fifth Amendment provisions preclude a holding that capital punishment is unconstitutional per se: "[T]he Court is not free to read into the Constitution a meaning that is plainly at variance with its language." *Id.* at 420 (Powell, J., dissenting). But even Justice Powell concedes that the Fifth Amendment text is not dispositive. As noted above, *supra* note 108, Justice Powell allowed that capital punishment could conceivably be unconstitutional per se, albeit by only the most "conclusive of objective demonstrations," a nearly "insuperable" obstacle. *Id.* at 433–34.

suggests that the Fifth Amendment provisions ratified at T<sub>1</sub> may be rendered null.

The *Furman* logic would apply not only to a provision ratified contemporaneously with the Eighth Amendment, but also to one ratified *after* the Eighth Amendment. Assume that a hypothetical amendment to the U.S. Constitution was ratified in 1921, providing that: “Any person duly convicted of treason against the United States shall be put to death.” The hypothetical amendment undoubtedly reflects an understanding in 1921 that capital punishment was not cruel and unusual. If, however, evolving standards of decency in 2006 universally condemn the practice as cruel and unusual, the Court may, under *Furman*, hold that capital punishment is per se unconstitutional notwithstanding the 1921 amendment. In other words, the Eighth Amendment, though earlier ratified, for purposes of constitutional interpretation, may well be considered “later” than our hypothetical 1921 amendment.<sup>111</sup>

By analogy, if equal protection or privacy provisions are understood as dynamic, reflecting society’s evolving standards of equality and autonomy,<sup>112</sup> those provisions might be capable of

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<sup>111</sup> Of course, if there were evidence that the 1921 amendment were intended normatively to condition the Eighth Amendment, the *Furman* interpretive approach would be more problematic. It should be noted, however, that absent evidence to the contrary, the text of the 1921 amendment does not, on its own, compel us to understand it as normatively conditioning the scope of the Eighth Amendment. We might just as well read the 1921 amendment as describing the scope of then-prevailing notions of cruelty (i.e., that the drafters of the 1921 amendment perceived no tension with the Eighth Amendment) without going the further step of concluding that the amendment was meant to preclude any *future* finding that capital punishment violates Eighth Amendment constitutional norms.

The legislative history of the Hawaii marriage amendment illustrates the difficulty of discerning legislative intent on this score (not to mention the problem with discerning the intent of the “people”). The legislative history also counsels against *assuming* that a later-ratified specific marriage amendment ipso facto conditions an earlier equal protection provision. The final version of the Hawaii marriage amendment was the culmination of a long and tortuous compromise between the Hawaii House of Representatives, which wanted expressly to overrule *Baehr’s* holding that the same-sex marriage prohibition constituted gender discrimination under the equal protection provision, *see supra* note 7, and the Senate, which wanted expressly to preserve that holding. For an extended discussion of the legislative history, see David Orgon Coolidge, *The Hawai’i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 42–82 (2000).

<sup>112</sup> The Supreme Court has at various times endorsed both the Due Process and Equal Protection Clauses as dynamic. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 571–73 (2003) (indicating that the laws and emerging traditions of the last half-century are most instructive for purposes of interpreting the Due Process Clause and remarking that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry”) (citation omitted); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669–70 (1966):

nullifying later-ratified provisions of the constitution that reflect earlier (mis)understandings of what the equal protection or privacy provisions require. Just as in *Furman*, the fact that a later-ratified marriage amendment reflects certain assumptions about equality and autonomy at  $T_2$  ought not necessarily preclude prevailing notions of equality and autonomy at  $T_3$  from rendering the marriage amendment inoperative, notwithstanding that the equal protection or privacy provision was *ratified* at  $T_1$ . In other words, when considering a dynamic provision, it makes far more sense to consider it as coming into effect at  $T_3$ , for purposes of applying the later-governing-over-earlier canon, rather than on its date of ratification at  $T_1$ .<sup>113</sup> In the case of dynamic provisions that draw meaning from changing social circumstances, then, ratification dates might be particularly irrelevant for purposes of deciding which of two conflicting provisions should govern. The conceptual difficulty with locating dynamic constitutional provisions in time seriously undermines the utility of the statutory canon.

In addition to the Supreme Court's Twenty-first Amendment cases, which suggest interpretive space for rejecting the canon of construction that later and more specific provisions govern over earlier and more general provisions, we have examined two conceptual problems with applying the canon in the constitutional context. Determining which constitutional provision is "later" than another is particularly difficult, both for provisions that appear to declare moral and natural law principles and for provisions that are dynamic, drawing their meaning from changing social circumstances.

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[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. *Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.*

(emphasis added) (citation omitted).

<sup>113</sup> It makes as little sense to suggest that by passing a marriage amendment, the "people" *must have* intended to condition the Equal Protection Clause, as it does to suggest that by writing procedural protections into the Fifth Amendment, or by passing a subsequent hypothetical amendment, the framers *must have* intended to carve capital punishment from the ambit of the Eighth Amendment. See *supra* notes 106–11 and accompanying text.

## III

I have argued that the Supreme Court's Twenty-first Amendment jurisprudence can be read as a model for rejecting the traditional modes of statutory interpretation in the constitutional context. The Court provides for an interpretive approach permitting a later and more specific amendment to be considered in light of constitutional principles articulated in earlier and more general provisions. Indeed, the Court's Twenty-first Amendment cases illustrate that one provision does not necessarily trump another merely because it is later or more specific. I have also suggested that there may be particular problems in the constitutional context with the statutory canon requiring that later provisions govern over earlier ones.

There may be a basis, then, both grounded in precedent and theoretically sound, for rejecting, at least in the constitutional context, the canon of construction that later and more specific provisions govern over earlier and more general provisions. If so, there may be no basis (or at least less basis) for concluding that marriage amendments *automatically* trump any claim to a same-sex marriage right grounded in a constitution's privacy or equal protection provisions. To be clear, under the interpretive approach I have suggested, judges considering such marriage-right claims have an interpretive choice to make: either follow the marriage amendment or follow the equality or privacy provision. There may be persuasive reasons for choosing one provision over the other, but there is a *choice* to be made—a choice that ought to be deliberate and explained.

Regardless of the theoretical legitimacy of my suggested interpretive alternative, there may be extremely persuasive reasons for rejecting it. To the extent judicial articulation of a same-sex marriage right as constitutionally required has met with widespread backlash, any judicial invalidation of state (or federal) marriage amendments (no matter how justified as an interpretive move) may be perceived as bald judicial activism.<sup>114</sup> And perhaps my interpretive

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<sup>114</sup> Principally, it might be argued that if judges adopted the interpretive approach I suggest in this Article, they would be essentially amending state (and possibly federal) constitutions outside the formal amendment processes established in those documents. Of course, this criticism assumes that the amendment processes articulated in state and federal constitutions are the exclusive ways those documents may be revised. For an alternative to this exclusive view, see Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, *supra* note 103, at 89. As a descriptive matter, it is extremely problematic to contextualize the most fundamental changes in our constitutional regime as

suggestions *should* be rejected to the extent they would commonly be perceived as undermining the democratic processes that gave rise to those state (and perhaps federal) marriage amendments.

But what of the future? If and when future generations come to a more nuanced understanding of the range of human sexualities, and a more inclusive understanding of the fundamental legitimacy of same-sex relationships, might not the continued enforcement of state (and federal) constitutional marriage prohibitions be construed as undermining the principles of equality enshrined in those same constitutions? Might not the continued denial of meaningful access by gays and lesbians to legislative reform on the issue of marriage equality deeply offend the principle of democratic participation also written into those constitutions?

Questions concerning constitutional legitimacy—the people’s collective faith in its state and federal constitutions—are of central importance any time amendments to those constitutions are contemplated. The effect of a potential constitutional amendment on our collective faith in the document, both now and in the future, should play as major a role in the deliberation of a proposed amendment as the particular policy objectives of the amendment itself. Constitutional legitimacy is fragile; ill-conceived amendments may chip away at our faith in our constitutions and ultimately compromise our systems of government.<sup>115</sup>

Unlike statutory compilations, constitutional legitimacy does not depend on any extraconstitutional referent. To determine whether a federal legislative statement, *X*, is good law, one need only determine whether *X* has been passed by both houses of Congress and signed by the President, as spelled out in Article I, Section 7 of the Constitution<sup>116</sup> (or, in the case of a state law, the analogous state constitutional provision). Any proposition that complies with the

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occurring strictly within the framework of Article V. *See, e.g.*, Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION*, *supra* note 103, at 37; Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION*, *supra* note 103, at 63. For a further reason to suppose that Article V (and similar textual provisions for amendment in state constitutions) is not the exclusive means of amendment, see *infra* notes 116–20 and accompanying text.

<sup>115</sup> Advocates of the Federal Marriage Amendment may be well advised to consider the effect of the Eighteenth Amendment on the collective faith in the American constitutional system. *See* KYVIG, *supra* note 42, at 97 (observing that a great deal of the momentum for repeal was based on growing sentiment that the Prohibition Amendment distorted the constitutional system by granting to the federal government the sort of police power traditionally left to the states).

<sup>116</sup> U.S. CONST. art. I, § 7, cl. 2.

requirements of Article I, Section 7 is good (although not necessarily provident) law. There is no extraconstitutional text or process to which constitutions turn for legitimacy. As Frederick Schauer has questioned, given two documents labeled “Constitution of the United States,” one housed at the United States Archives, and the other sketched out on the yellow legal pad on my desk, each claiming to be the Constitution, how does one know which one is *the* Constitution? Whatever the source of constitutional legitimacy of the version contained in the national archives, it comes from something beyond the text. For although we know very well that the constitution on my legal pad is entirely fictive, it, like the version at the archives, claims to be the authentic Constitution.<sup>117</sup>

The important point here is that a constitution’s legitimacy is not grounded in any other validating legal text or principle, and it is likewise not grounded in the text of the constitution itself. The legitimacy of state and federal constitutions is a political fact, what Schauer, following H.L.A. Hart, calls the “ultimate rule of recognition.”<sup>118</sup> A constitution that is not recognized as legitimate by the governed (as a matter of political fact) is not *the* Constitution. A constitution that *is* recognized by the governed as legitimate is *the* Constitution. And, as Schauer explains, once one recognizes that constitutions may be wholly or partially displaced as the rule of recognition itself changes,<sup>119</sup> constitutions necessarily may be amended outside formal amendment mechanisms as social and political contexts alter collective constitutional understandings.<sup>120</sup>

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<sup>117</sup> Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION, *supra* note 103, at 145, 145.

<sup>118</sup> *Id.* at 150. The rule of recognition—the way in which we know whether law is valid or not—for statutes is found in constitutions (a statute is valid if it came into being in accordance with procedural norms articulated in the constitution). Constitutional validity, the ultimate rule of recognition, looks not to another legal principle, but is instead a question of fact. *Id.* at 152.

<sup>119</sup> A constitutional regime may be partially or wholly displaced, for example, by revolution—the people’s choice of a new constitutional regime over an old without complying with the terms of amendment contained in the earlier constitution.

<sup>120</sup> Schauer provides an example:

[I]f the American people came to the realization that the Second Amendment’s seeming protection of the right to keep and bear arms was simply obsolete and unwise in light of the realities of 1994, and if that view were shared by legislative, executive, and judicial officials, and if all proceeded to treat the Second Amendment as a nullity despite the fact that it had not been repealed according to the provisions of Article V, then it would be accurate to say that the Constitution of the United States did not contain the provision designated as “Amendment II” in most versions of the document titled “the Constitution of the United States.” The small *c* constitution would thus have been amended by

If constitutions can be amended outside formal amendment mechanisms as the ultimate rule of recognition changes, it follows that if the ultimate rule of recognition today is sufficiently incongruous with the ultimate rule of recognition when the constitution was drafted, the official constitution (at least its official text), would not necessarily be *the* Constitution. Consequently, if the ultimate rule of recognition is at variance with the constitution's text, rigid adherence to that text would, in a literal sense, be unconstitutional. More importantly, following the text in such a circumstance would violate agreed-upon constitutional norms and would run the risk of undermining our collective faith in the document itself as *the* Constitution.

To the extent a marriage amendment that no longer conforms to the ultimate rule of recognition is enforced, the legitimacy of constitutional governance itself is potentially undermined. The problem is all the more exacerbated when one considers the frailty of the amendment process as a corrective measure: once lodged in the constitution (especially at the federal level), a marriage amendment, even one that has become disfavored since ratification, can be extraordinarily difficult to repeal.<sup>121</sup> Under these circumstances, following the Court's Twenty-first Amendment model and

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virtue of this amendment to the ultimate rule of recognition, even though it could also be accurately said that the large C Constitution had not been validly amended according to its own terms.

Schauer, *supra* note 117, at 156–57.

<sup>121</sup> The Eighteenth Amendment is instructive on this point. Even as the law became increasingly disfavored as violating states' rights, discouraging temperance, and undermining the constitutional system, many anti-prohibitionists thought that the Amendment would be a permanent fixture of American life. No matter the extent of the public outcry against the Amendment, it would remain in the Constitution so long as prohibitionists had a certain amount of political clout in just over a quarter of the states. See KYVIG, *supra* note 42, at 201 (“[T]he history of prohibition repeal demonstrated the difficulty of overturning a constitutional provision and the massive, sustained effort required. . . .”); see also David E. Kyvig, *Arranging for Amendment: Unintended Outcomes of Constitutional Design*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 9, 10 (David E. Kyvig ed., 2000). The Depression, and the public perception that repeal would generate much-needed revenues, may well have been the variables that made repeal of the Eighteenth Amendment possible.

Certain state constitutional amendments prohibiting interracial marriage are also potentially illustrative of the difficulty of repeal. For example, despite presumably wide popular support for its repeal in recent years, Alabama did not repeal its constitutional ban on miscegenation until 2000. Elizabeth Becker et al., *The 2000 Elections: State-by-State: South*, N.Y. TIMES, Nov. 9, 2000, at B15. Similarly, South Carolina's ban was repealed in 1998. *South Carolina Removes Ban on Interracial Marriage*, CNN.COM, Nov. 3, 1998, <http://www.cnn.com/ALLPOLITICS/stories/1998/11/03/election/ballots/interracial.marriage/index.html>.

abandoning the statutory canon, a judge would not be “activist,” at least to the extent “activist” is defined as countermajoritarian; rather, by abandoning the canon of construction and nullifying the marriage amendment, the judge would be restoring to the constitution its rightful claim to authority as recognized by the ultimate rule of recognition. The judge would be doing what the formal amendment process may be impotent to accomplish, nominally laying to rest a marriage amendment that has for all intents and purposes already been amended out of the constitution by popular opinion.

#### CONCLUSION

When judges consider constitutional challenges to same-sex marriage bans (or challenges to the denial of marriage benefits), they have interpretive choices to make. In those cases in which there is a late and specific constitutional marriage amendment and an earlier and more general equal protection or privacy provision, judges might elect to decide those cases under the marriage amendment, following the traditional canon of construction that later and more specific provisions govern over earlier and more general provisions. And, as I have suggested, there are other legitimate interpretive moves as well.

There may be persuasive reasons for abandoning the canon of construction when considering the relationship between a marriage amendment and an equal protection or privacy provision. First, the Supreme Court, in its Twenty-first Amendment cases, advocated a balancing of constitutional interests rather than a mechanical application of the canon. And wrestling with the various constitutional interests at stake in its Twenty-first Amendment cases, the Court greatly restricted the operation of Section 2, the later and more specific provision dealing with the transportation and importation of liquor. Second, there are theoretical difficulties with locating certain kinds of constitutional provisions in time, thus calling into question the possibility of coherently applying the statutory canon in the marriage context.

Going forward, as both sexual norms and attitudes about lesbian and gay families change over time, courts may well be advised, in the interest of not undermining constitutional legitimacy, to balance the constitutional interests at stake rather than simply assuming that the canon of construction provides the exclusive avenue of interpretation. Whatever the interpretive outcome, however, we do well to recognize the range of available interpretive choices. Simply assuming, without any discussion at all, that marriage amendments remove the marriage question from the ambit of equal protection

and privacy provisions, makes too easy work of a far more complicated question. The mechanical application of the canon may provide the feeling of distance from the constitutional interests at stake, but as Justice Frankfurter recognized, ultimately, the “canons of construction [cannot] save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements.”<sup>122</sup>

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<sup>122</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947).