

January 2006

The Marriage Protection Act: A Lesson in Congressional Over- Reaching

Sarah Kroll-Rosenbaum
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

 Part of the [Constitutional Law Commons](#), [Sexuality and the Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Sarah Kroll-Rosenbaum, *The Marriage Protection Act: A Lesson in Congressional Over-Reaching*, 50 N.Y.L. SCH. L. REV. (2005-2006).

This Note is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

THE MARRIAGE PROTECTION ACT:
A LESSON IN CONGRESSIONAL OVER-REACHING

SARAH KROLL-ROSENBAUM*

Q. Let's stop beating around the bush and get to the central question. The bald truth is this, isn't it, that the power to regulate jurisdiction is actually a power to regulate rights – rights to judicial process, whatever those are, and substantive rights generally? Why, that must be so. What can a court do if Congress says it has no jurisdiction, or only a restricted jurisdiction? It's helpless – helpless even to consider the validity of the limitation, let alone to do anything about it if it's invalid.

A. Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction!

Q. Will you please explain what's wrong with the logic?

A. What's wrong, for one thing, is that it violates a necessary postulate of constitutional government – that a court must always be available to pass on claims of constitutional right to judicial process, and to provide much process if the claim is sustained.

Q. Whose Constitution are you talking about – Utopia's or ours?

A. Ours. It's a perfectly good Constitution if we know how to interpret it.¹

I. INTRODUCTION

On July 22, 2004, the U. S. House of Representatives approved the Marriage Protection Act of 2004 (MPA).² The MPA would pro-

* Law Clerk, The Honorable Christopher F. Droney, U.S. District Court for the District of Connecticut, 2005-2006. J.D., New York Law School, 2005.

1. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371-72 (1953).

2. H.R. 3313, 108th Cong. (2004) (as referred to the S. Comm. on the Judiciary, Sept. 7, 2004).

hibit the lower federal courts from hearing any issue regarding the Defense of Marriage Act (DOMA),³ and would also prevent the Supreme Court from hearing any related cases on appeal from federal or state courts.⁴ Although the MPA never reached the Senate floor last session, it is still under consideration. An identical bill, this one with seventy sponsors, was introduced in the House in 2005.⁵

The jurisdiction-limiting provisions of the MPA come at a time when issues of same-sex marriage are controversial in both public and private fora. In 2004, eleven states amended their constitutions in various ways to deny legal recognition of gay and lesbian relationships.⁶ The rights of same-sex couples are being litigated and legislated across America in response to the legal issues that face all couples: taxes, adoption, child support, hospital visitation rights, and inheritance.⁷

3. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).

4. At the time of this writing, the Senate had not yet acted on the House's bill.

5. Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005).

6. See, e.g., Joel Achenbach, *A Victory for "Values," but Whose?*, WASH. POST, Nov. 4, 2004, at C01 ("[Eleven] states offered voters a chance to ban gay marriage, and in every state they did so."); Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in Ten States*, NY TIMES, Nov. 3, 2004, at P9 (noting that ballot initiatives passed in 10 of 11 states to amend the state constitution to define marriage as between only a man and a woman). See also Susan Wang, *Marriage Protection Act Reintroduced in the House*, CHRISTIAN POST, Mar. 5, 2005, <http://www.christianpost.com/article/society/1424/section/marriage.protection.act.reintroduced.in.house./1.htm> (noting that since the passage of the MPA last year by the House, 13 states have approved marriage amendments to their state constitutions). For more information about the 2004 ballot initiatives, see <http://www.hrc.org>.

7. See, e.g., Camille M. Quinn & Shawna S. Baker, *The Legislative Backlash to Advances in Rights for Same-Sex Couples: Essential Estate Planning for the Constitutionally Unrecognized Families in Oklahoma: Same-Sex Couples*, 40 TULSA L. REV. 479 (2005) (discussing the legal hardships facing same-sex couples in estate planning); Neal S. Schelberg & Carrie L. Mitnick, *Same-Sex Marriage: The Evolving Landscape for Employee Benefits*, 22 HOFSTRA LAB. & EMP. L.J. 65 (2004) (same for employee benefits); *Recent Case: Family Law – Unmarried Couples – Massachusetts Supreme Judicial Court Holds That a Former Domestic Partner Need Not Fulfill Promises To Support a Child After the Relationship has Resolved*: T.F. v. B.L., 118 HARV. L. REV. 1039 (2005) (highlighting a case in which the Massachusetts Supreme Court denied an unmarried, same-sex couple the ability to establish parenthood by contract alone and refused to order financial support for a child born after the couple's relationship had dissolved). For coverage of the myriad collateral legal issues for gay and lesbian couples, see *Lesbian/Gay Law Notes* (The Lesbian and Gay Law Ass'n of Greater New York, New York, N.Y.), <http://www.nyls.edu/pages/3876.asp> (last visited, Feb. 25, 2006).

By passing a bill that strips the federal courts of the authority to hear certain cases, Congress has invoked its constitutional authority over the judiciary. Congress has done so before, at other moments in American history when political tensions ran high, in a manner that some have criticized as a threat to separation of powers.⁸ The MPA raises questions about whether Congress would act within its constitutional authority by precluding gay and lesbian couples, and those affected by their marriages, from seeking review in the federal courts, and specifically, whether Congress may simultaneously restrict the original jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court. No prior piece of legislation has raised these issues, nor has the Court definitively determined whether Congress may simultaneously restrict original jurisdiction of the lower federal courts and appellate jurisdiction of the Supreme Court.⁹

This Note considers whether the MPA is a constitutional exercise of Congress's authority over the jurisdiction of the federal courts. Section II examines the MPA and also DOMA, the underlying statute that could not be challenged in federal court under the

8. See Anthony Lewis, *An Independent Judiciary*, 43 ST. LOUIS L.J. 285, 290-92 (1999) (arguing that the court stripping of the mid-1990s passed with little scrutiny from the Executive, and that such success in Congress may lead to its future use as a means of political reform). In 2004, for example, numerous bills were introduced by members of Congress that would restrict the original jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court over a variety of issues. See, e.g., Fairness in Immigration Litigation Act, H.R. 4406, 108th Cong. (as referred to the S. Comm. on the Judiciary, May 5, 2004); Pledge of Allegiance Protection Act (PPA), H.R. 2028, 108th Cong. (as received in the Senate, Sept. 27, 2004). Each term, many such bills are introduced. In the 1980s thirty bills stripping federal courts of jurisdiction were introduced in Congress. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984). See Lloyd C. Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417, 435 (2000) (noting that none of the jurisdiction stripping bills of the 1980s passed Congress). What is different now is that court stripping bills are passing. In 2004 two bills passed the house. The MPA of 2004 passed by a margin of 233-194. See 150 CONG. REC. H6612 (daily ed. Jul. 22, 2004). And the PPA passed by a margin of 247-173. See 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004).

9. See John Conyers, Jr., *Stealing Judicial Review: House Bill Stripping Federal Courts of Jurisdiction Over Gay Marriage Harms Constitution*, LEGAL TIMES, Aug. 30, 2004, at 38 ("If H.R. 3313 is passed by the Senate and signed by the president, it would constitute the first and only time that Congress has enacted legislation totally eliminating any federal court from considering federal legislation.").

MPA. Section II analyzes the language of the two statutes and explains why DOMA does not appear to add anything to existing law. It also contends that the MPA would probably not bar federal courts from hearing all marriage-related claims of same-sex couples. Section III argues that Congress does not have the constitutional authority to simultaneously strip both the original jurisdiction of the lower federal courts *and* the appellate jurisdiction of the Supreme Court over DOMA-related cases or controversies because constitutional rights are at stake. This Note concludes in Section IV that the MPA is unconstitutional because it precludes all federal courts from reviewing cases that raise constitutional questions.

II. UNDERSTANDING DOMA AND THE MPA

DOMA was passed by Congress in 1996 with overwhelming majorities in both houses.¹⁰ The statute expressed the intention of Congress that the Full Faith and Credit Clause should not prevent states from determining whether or not to recognize same-sex marriages from other states.¹¹ DOMA provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory,

10. DOMA passed the House of Representatives by a vote of 342-67. *See* 142 CONG. REC. H7505 (daily ed. Jul. 13, 1996). DOMA was approved by the Senate by a vote of 85-14. *See* 142 CONG. REC. S10129 (daily ed. Sept. 10, 1996).

11. Defense of Marriage Act, 28 U.S.C. § 1738C (2000). The implementing statute for the Full Faith and Credit Clause, 28 U.S.C. § 1738 (2000), states:

The records and judicial proceedings of any court of any such State . . . shall be proved or admitted in other courts within the United States . . . together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

DOMA also amended the federal code to define “marriage” for recognition under federal administrative and statutory law as exclusively being between people of opposite sexes. *See* 1 U.S.C. § 7 (2000).

possession, or tribe, or a right or claim arising from such relationship.¹²

Eight years later, the House of Representatives Committee on the Judiciary endorsed the MPA and sent it to the floor where it was passed by the House of Representatives. Some advocates called the passage of the MPA a right-wing backlash against the Senate's rejection of the Federal Marriage Amendment.¹³ While the passage of the MPA appears unlikely in early 2006, the constitutional implications are worth considering, if only to understand the implications for Congress's next attempt to restrict access to the courts. According to the Judiciary Committee report, the MPA stands for "the proposition that lifetime-appointed Federal judges must not be allowed to rewrite marriage policy for the states."¹⁴ The language of the MPA, as passed by the House of Representatives, provides that:

No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C [the Defense of Marriage Act] or this section.¹⁵

By preventing the federal judiciary from considering DOMA claims, Congress would prevent states from being forced to acknowledge any other state's recognition of same-sex marriage. The House Committee on the Judiciary stated that "Congress must preclude Federal courts from striking down the shield Congress gave the states before Federal courts strike down that protection and set ad-

12. 28 U.S.C. § 1738C (2000).

13. *Right-Wing's Discriminatory Electoral Strategy Takes New Tack*, <http://www.pfaw.org/pfaw/general/default.aspx?oid=16497> (last visited Feb. 26, 2006). The Federal Marriage Amendment would have amended the U.S. Constitution to state that:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

The Federal Marriage Amendment, S.J. RES. 40, 108th Cong. (2004). On July 14, 2004, by a vote of 48-50, the Senate narrowly defeated the proposed amendment. *Id.*

14. H.R. REP. NO. 108-614, at 2 (2004).

15. H.R. 3313, 108th Cong. (2004).

verse judicial precedents that have effects across multiple states and cannot be reversed.”¹⁶

In order to appreciate the arguments about the constitutionality of the MPA, it is necessary to understand what that law and DOMA do. This section first explains why DOMA adds little to existing law regarding the recognition of out-of-state same-sex marriages, and then examines why the MPA was proposed to insulate DOMA from review in the federal courts. Finally, the section contends that, despite the intentions of the MPA’s sponsors, the law would not be entirely preclusive of a federal court’s jurisdiction to hear all state and federal claims resulting from the state’s refusal to recognize a same-sex marriage.

A. *DOMA Adds Little to Existing Law Regarding the Recognition of Out-of-State Same-Sex Marriages*

Although DOMA conferred broad discretion on the states to determine when to recognize out-of-state, same-sex marriages, the legislation did not significantly change the legal landscape of the recognition of those marriages.¹⁷ As one commentator argued:

Marriage is a state-law matter. Its boundaries have always varied from state to state and thus reflect the varying policy choices of the states. The drive to allow same-sex marriage changes none of this, and efforts to invoke the Full Faith and Credit Clause or any other constitutional provision to create a de facto federal standard are simply unavailing.¹⁸

States have historically differed in their marriage laws and have therefore been faced with questions of when and how to recognize

16. H.R. REP. NO. 108-614, at 4 (2004).

17. See MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* 189 (1999) (stating that:

Those states “given” the option by DOMA to refuse to recognize same-sex marriages already have it and those states not having that option will not have suddenly acquired it through DOMA. Indeed, some interpret DOMA not to be changing current law and, instead, merely to be reaffirming the right of the domicile to refuse to recognize a marriage validly celebrated elsewhere.).

18. Patrick J. Borchers, *Interstate Recognition of Nontraditional Marriages*, in *MARRIAGES AND SAME-SEX UNIONS: A DEBATE* 338 (Lynn D. Wardle et al. eds., 2003).

out-of-state marriages.¹⁹ Now, as was true before DOMA was enacted, one state has no obligation to recognize a marriage from another state because marriage itself does not constitute a “judgment” for the purposes of full faith and credit.²⁰ Marriages, therefore, are not subject to recognition by other states’ courts and legislatures.²¹

An out-of-state marriage is typically recognized if the marriage is consistent with the policy of the recognizing state.²² For example, a same-sex couple with a valid Massachusetts marriage that moves to another state may face the likely scenario that its new state has a formal policy — by statute or state constitutional amendment — specifically barring recognition of other states’ same-sex marriages. Theoretically, “courts are free, absent some contrary direction from their state legislature, to recognize or not recognize nontraditional marriages celebrated in other states. DOMA, therefore, despite the furor over its enactment, is essentially a restatement of what the law would be without it.”²³

19. *Id.* at 336. As Professor Borchers suggests, “choice-of-law questions surrounding nontraditional marriages have been around for a long time and persist today.” *Id.* For examples of varied state marriage laws, see STRASSER, *supra* note 17, at 112-13.

20. See Borchers, *supra* note 18, at 335 (“A marriage license simply is not a ‘judgment’ for constitutional purposes, and the full-faith-and-credit principles regarding judgment recognition impose no obligation on states to recognize each other’s marriages.”).

21. Although marriage is not a judgment for purposes of full-faith-and-credit, complexity may nevertheless ensue with the collateral implications of marriage. Some scholars argue, for example, that divorce proceedings and decrees are judgments for full-faith-and-credit purposes. *Id.* at 334.

22. Borchers, *supra* note 18, at 335-36. See also STRASSER, *supra* note 17, at 113 (“[T]here is a generally accepted decision rule for determining which law to apply. The law of the place of celebration will apply unless the marriage violates an important public policy of the domicile, in which case the domicile’s law will apply and the marriage will be invalid.”). THE RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283 (1971), states in relevant part:

(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

23. Borchers, *supra* note 18, at 332.

B. *The MPA Responds to the Fear that the Federal Courts will Declare DOMA Unconstitutional*

The MPA is necessary, according to its drafters, to safeguard the rights of states to independently define marriage policy. The MPA sponsors were concerned that “[f]ederal judges are poised to overturn state marriage laws that rest on the principle that marriage is the union of one man and one woman.”²⁴ The evidence cited to support such an imminent threat to state marriage laws, however, is sparse. Nearly every state has some provision that defines marriage in opposite-sex terms.²⁵ The case law supporting a fundamental right to marry — as it relates to opposite sex couples — is routinely couched in terms of state supremacy in all matters involving marriage law. For example, Justice Marshall wrote in his majority opinion in *Zablocki v. Redhail*:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.²⁶

Despite federal deference to state marriage policy, proponents of the MPA felt it necessary to prevent any possibility that a federal court would unilaterally uproot the states’ prerogative over marriage policy. The House Committee on the Judiciary wrote:

Congress must exercise its constitutional authority to limit the jurisdiction of the Federal courts to ensure that the states, and not unelected Federal judges, have the final say on whether they must accept same-sex marriage licenses issued in other states. Congress must preclude Federal courts from striking down the shield Congress gave the states to use in rejecting same-sex marriage licenses granted in other states before Federal courts strike

24. H.R. REP. NO. 108-614, at 3 (2004).

25. See, e.g., ARK. CODE ANN. § 9-11-109 (2006); GA. CODE ANN. § 19-3-3.1 (2005); KAN. STAT. ANN. § 23-101 (2005); MICH. COMP. LAWS. § 551.1 (2005); OHIO REV. CODE ANN. § 3101.01 (2006); WIS. STAT. § 765.01 (2005).

26. 434 U.S. 374, 386 (1978).

down that protection and set adverse judicial precedents that have effects across multiple states and cannot be reversed.²⁷

This preclusion of federal judicial power does not, the drafters contend, violate the separation of powers: “Congress’s exercise of its authority to remove classes of cases from Federal court jurisdiction does not transfer power from the Federal judiciary to Congress. Rather, it transfers power from the Federal judiciary to the state judiciary.”²⁸ The MPA therefore simultaneously insulates federally-enacted DOMA and devolves decisionmaking power to the states.²⁹

C. *The MPA Would Not Bar Federal Courts From Hearing all Marriage-Related Claims of Same-Sex Couples*

The MPA would not preclude federal court review of all same-sex marriage challenges. In this respect, the MPA does not mirror the breadth of its legislative cousins in precluding federal judicial review of all issues related to a particular controversy. The MPA is limited to DOMA’s bar on full faith and credit considerations relating to state laws prohibiting same-sex marriage, and more importantly, to *interpretations of questions* relating to the Full Faith and Credit Clause and to the MPA, or to either statute’s federal constitutional validity. The MPA does not, for example, preclude the lower federal courts from hearing, or the Supreme Court from reviewing, cases or controversies relating to or arising from any state or federal definition of marriage or civil union recognizing same-

27. H.R. REP. NO. 108-614, at 4 (2004).

28. *Id.* at 18.

29. Congress may be trying to have the best of two worlds. As one commentator has suggested, “A federal statute defining marriage as including or excluding same-sex couples for all purposes nationwide would clearly be at odds with the limited national legislative power feature of the federal component of ‘our’ system of government and, for that reason, would likely be unconstitutional.” Kevin J. Worthen, *Who Decides and What Difference Does it Make?: Defining Marriage in “Our Democratic, Federal Republic”*, 18 BYU J. PUB. L. 273, 290 (2004).

sex relationships.³⁰ The MPA, therefore, would not preclude federal court review of all same-sex marriage challenges.³¹

The DOMA provision restricting full faith and credit for same-sex marriages granted in other states would likely be invoked by a state as a defense; it would be raised in response to a same-sex couple's petition to have their out-of-state marriage recognized.³² Federal courts, precluded by the MPA, would not be able to consider the state's DOMA defenses, but would nevertheless be able to reach a plaintiff's non-DOMA claims, as well as challenges to the MPA itself. Consider, for example, the scenario of a legally married lesbian couple from Massachusetts who moves to Arizona and wants to continue to enjoy the benefits of marriage.³³ Arizona law specifically prohibits the legal recognition of marriages between people of the same sex, and has a statute barring the recognition of same-sex marriages from other jurisdictions.³⁴ Under the language of the MPA, the couple could bring a claim in federal court challenging Arizona's policy of recognizing only opposite-sex marriages, argu-

30. The choice of language may well have been an attempt to maintain facial neutrality in the face of subsequent constitutional scrutiny.

31. This assumes that a state would argue for the court to construe DOMA as it relates to the situation. Obviously, if DOMA is never raised as an argument against the same-sex couple's marriage claim, the MPA would never bar the litigation in federal court.

32. See Vikram David Amar, *The Marriage Protection Act Bill Passed by the House of Representatives: Trying to Make Sense of the Nonsensical*, Aug. 6, 2004, <http://www.yuricareport.com/Law%20&%20Legal/AmarOnMarriageProtectionBill.html> (calling the MPA "utterly silly" because the language of the bill will not accomplish what the drafters intend).

33. These states were not selected arbitrarily. Massachusetts is the only state that legally recognizes marriages between people of the same sex. Arizona is one of many that bans recognition of same-sex marriages and has no other law or policy for the recognition of any other same-sex relationship.

34. See ARIZ. REV. STAT. § 25-101(c) (2006), which provides that "[m]arriage between persons of the same sex is void and prohibited," and ARIZ. REV. STAT. § 25-112 (2006), which provides:

A. Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by section 25-101.

B. Marriages solemnized in another state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, except marriages that are void and prohibited by section 25-101.

C. Parties residing in this state may not evade the laws of this state relating to marriage by going to another state or country for solemnization of the marriage.

ing that it violates the due process and equal protection guarantees of the Fourteenth Amendment. The couple could also challenge DOMA's federal definition of marriage for the purposes of trying to obtain benefits they claim are owed to them, as a married couple, by the federal government. While the court would not be prevented from hearing the couple's Fourteenth Amendment claim — because the MPA does not bar federal courts from hearing such claims — Arizona may counter that the couple's second claim — that DOMA's definition of marriage is unconstitutional — *is* barred from review by the MPA. In addition, the federal court would be prevented by the MPA from hearing any question related to, or interpreting, DOMA. The plaintiffs could, however, contest what exactly is precluded by the MPA's language preventing the litigation of “*questions* pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section.”³⁵ As this example illustrates, the MPA, at least on its face, does not seek to preclude federal judicial review of the entire subject area of same-sex marriage, in contrast to prior court-stripping bills such as the Religious Freedom Restoration Action (RFRA).³⁶

Unlike the MPA, the RFRA precluded the federal district courts jurisdiction to “hear or determine any religious freedom-related case.”³⁷ The legislation defined religious freedom broadly as “any action in which any requirement, prohibition, or other provision relating to religious freedom that is contained in a State or Federal statute is at issue.”³⁸ By defining religious freedom so

35. H.R. 3313, 108th Cong. (2004) (emphasis added). Surely, the “questions” that potentially pertain to DOMA or the MPA would have to be identified by the court before they could be rejected for lack of jurisdiction. If, after those questions are dealt with, the court determines that it lacks jurisdiction to hear the second issue — whether DOMA does indeed preclude the right of the couple to receive federal benefits for married people — the court maintains jurisdiction to hear the direct challenge to Arizona's definition of marriage and its prohibition on recognition of same-sex marriages celebrated in other states. Therefore, as this hypothetical illustrates, despite the far-reaching language of the MPA, litigants may, in practice, have as much access to a federal forum as they would without the MPA. Challengers may, in fact, be encouraged to bring constitutional claims that they might not otherwise have tried.

36. Numerous bills received substantial attention in the 1980s for restricting federal court jurisdiction over hot-button issues such as school prayer and abortion. *See* sources cited *supra* note 8.

37. H.R. 1547, 108th Cong. (2004).

38. *Id.*

broadly, the RFRA in turn precluded federal court review of a broad category of cases.

Compared to the Pledge Protection Act (PPA), another court-stripping bill, the MPA calls for a somewhat broader restriction on federal judicial review. The PPA, which has a similar legislative structure to the MPA, would restrict the lower federal courts from hearing, and the Supreme Court from reviewing, questions and interpretations relating to the Pledge of Allegiance.³⁹ Like the MPA, the language of the PPA restricts review of the underlying Pledge statute, not the Pledge of Allegiance itself. Critically different, however, is that the PPA does not preclude review of itself; thus, a federal court could consider the constitutionality of the PPA, if not the Pledge. Unlike DOMA, the Pledge of Allegiance statute is purely definitional — it merely recites the Pledge — and does not prescribe a method of decisionmaking for questions that arise under the statute.⁴⁰ Litigants may therefore challenge the constitutionality of the PPA in federal court without reaching substantive questions about the Pledge of Allegiance. Under the MPA, federal courts would lack jurisdiction to determine whether they have jurisdiction to hear cases or controversies that arise under the MPA.⁴¹ The federal courts, therefore, would not only be precluded from

39. H.R. 2028, 108th Cong. (2004). The legislation states in relevant part:

No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation. The limitation in this section shall not apply to the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

Id. The Pledge of Allegiance statute, referenced in the above-quoted text of the PPA, provides the text of the pledge of allegiance along with protocol for its recitation. *See* 4 U.S.C. § 4 (2000), *amended by* Pub. L. No. 107-293, 116 Stat. 2057 (reaffirming the reference to “one Nation under God” in the Pledge of Allegiance).

40. 4 U.S.C. § 4 (2000), *amended by* Pub. L. No. 107-293, 116 Stat. 2057.

41. This oft-described scenario, allowing jurisdiction to determine whether the court has jurisdiction, provides breathing room for courts and litigants. For example, following passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 601(a), 110 Stat. 3009 (relevant provisions codified at 8 U.S.C. § 1252 (2000)), which posed vast restrictions on judicial review of questions of law, federal courts maintain the ability to consider some questions of law. *See* *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that there would be serious constitutional implications for a complete restriction of judicial review, and that without clear legislative language, the Court would not interpret IIRIRA to provide such a bar).

considering the constitutionality of DOMA, but would also be unable to assess the constitutionality of the MPA — the very statute that divests them of jurisdiction.

III. CONGRESS LACKS THE AUTHORITY TO SIMULTANEOUSLY STRIP
THE LOWER FEDERAL COURTS OF JURISDICTION AND THE
SUPREME COURT OF APPELLATE JURISDICTION
OVER DOMA CLAIMS

The MPA would expressly prohibit any federal court from hearing a challenge to a state's recognition (or, more likely, lack of recognition) of out-of-state, same-sex marriages under DOMA. In addition, the MPA provides that the Supreme Court does not have jurisdiction to review any such decision on appeal. This section addresses whether Congress may constitutionally strip the lower federal courts of jurisdiction over DOMA questions, strip the Supreme Court of appellate review, and do both simultaneously. An analysis of these questions reveals that Congress has the constitutional authority to remove DOMA questions from *either* the original jurisdiction of the lower federal courts *or* the appellate jurisdiction of the Supreme Court, but that it does not have the authority to do both at the same time. This section concludes that, in attempting to eliminate both at the same time through the MPA, Congress is overreaching its constitutional authority.

A. *Congress May Constitutionally Strip the Supreme Court of Appellate Jurisdiction*

In Section 2 of Article III, the Constitution defines the appellate jurisdiction of the Supreme Court. It provides that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make.”⁴² This clause has been interpreted as granting Congress broad authority to create exceptions to the Court's appellate jurisdiction.⁴³ The high-water mark of congressional authority

42. U.S. CONST. art. III, § 2, cl. 2.

43. *See, e.g.,* Felker v. Turpin, 518 U.S. 651 (1996) (upholding the Antiterrorism and Effective Death Penalty Act's restriction on habeas appeals to the Supreme Court from the circuit courts because petitioners could still file writs of habeas corpus directly under the Supreme Court's original jurisdiction); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810) (holding that after the Judiciary Act of 1789, appellate jurisdic-

to do so was expressed in *Ex Parte McCordle*, in which the Court upheld an act of Congress that repealed the recently expanded appellate jurisdiction of the Supreme Court to hear federal habeas corpus appeals after the Civil War.⁴⁴ Offering great deference to the congressional authority derived from Article III, Chief Justice Chase famously stated, “We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution.”⁴⁵ The Court was careful to note, however, that the petitioner had an alternative avenue for judicial review because the Court could still hear the petitioner’s claim under the 1789 Judiciary Act.⁴⁶ Compellingly, Professor Mickenberg argues that *McCordle* and other cases of its time “merely established Congress’s authority to impose procedural regulations on federal court jurisdiction,” but did not preclude the courts from hearing cases in controversial subjects.⁴⁷

Since *McCordle*, the Court has upheld Congress’s authority to restrict the appellate jurisdiction of the Supreme Court in a number of contexts. In *United States v. Klein*, the Court struck down a congressional statute that would require the Court to dismiss certain cases upon proof of a presidential pardon.⁴⁸ The Court found that “this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power We must think that Congress has inadvertently passed the limit which separates the legislative power from the judicial power.”⁴⁹ While *Klein*’s precedential value is debatable,⁵⁰ *Klein* rec-

tion of the Supreme Court must be expressly conferred by statute); *Wiscart v. D’Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796) (“If Congress has provided no rule to regulate our proceedings, we cannot exercise appellate jurisdiction; and if the rule is provided, we cannot depart from it.”).

44. 74 U.S. (7 Wall.) 506 (1868).

45. *Id.* at 514.

46. *Id.* at 515.

47. Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 499 (1983).

48. 80 U.S. (13 Wall.) 128 (1872).

49. *Id.* at 145-47.

50. See, e.g., Adam Cox, *Symposium on New Directions in Federalism: Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000) (discussing *Klein* in the context of *Printz v. United States*, which struck down provisions of the Brady Handgun Violence Prevention Act); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison and the Future of Antidiscrimination Law*, 2000

ognizes that although Congress has some power over the Supreme Court's appellate jurisdiction, Congress may not attempt to direct outcomes in certain cases because doing so usurps the judiciary's constitutional function of deciding cases and controversies.⁵¹

More recently, in *Felker v. Turpin*, the Court upheld the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which prohibited Supreme Court review of U.S. Courts of Appeals rulings on the writs of habeas corpus of state prisoners.⁵² The Court upheld this restriction because Congress did not unconstitutionally preclude state prisoners from bringing writs of habeas corpus directly to the Court under its original jurisdiction.⁵³ This case further demonstrates that Congress has the authority to restrict the Court's appellate jurisdiction.

These precedents provide ample support for the proposition that Congress may strip the Supreme Court of appellate jurisdiction over certain cases when an alternative forum for judicial review exists and when, in doing so, Congress does not infringe on the separation of powers.⁵⁴ In support of the MPA, the House Committee

SUP. CT. REV. 109, 127-29 (analyzing *Klein* in the context of the Religious Freedom Restoration Act); Lawrence Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998). Sager argues that:

This is how we should understand the first principle of *United States v. Klein*: The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community. The judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees.

Id. at 2529. Cf. Donald Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538-49 (disagreeing with Sager's analysis and arguing that "[m]uch that is said in the opinion is exaggerated if not dead wrong," and that the opinion should stand for the proposition that "whatever the breadth of Congress's power to regulate federal court jurisdiction, it may not exercise that power in a way that requires a federal court to act unconstitutionally").

51. *Klein*, 80 U.S. (13 Wall.) at 148.

52. 518 U.S. 651 (1996).

53. *Id.* at 661-62.

54. See *United States v. Bitty*, 208 U.S. 393, 400 (1908), holding that:

Except in cases affecting ambassadors and other public ministers and consuls and those in which a State shall be a party — in which cases this court may exercise original jurisdiction — we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make in the other cases to which by the Constitution the

on the Judiciary relied on this line of cases for its authority to impose statutory restrictions on the appellate jurisdiction of the Supreme Court.⁵⁵ Attempts by Congress to restrict the Court's appellate jurisdiction in the MPA do not reach the separation of powers concerns raised in *Klein* because Congress's restrictions are not outcome-determinative. The MPA would likely be upheld as a constitutional preclusion of appellate jurisdiction of the Supreme Court — especially if it is construed to preclude statutory and not solely constitutional challenges.⁵⁶

B. Congress May Constitutionally Strip the Lower Federal Courts of Original Jurisdiction

In Article III, Section 1, the Constitution provides that the “judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish.”⁵⁷ Congress's power to create the lower federal courts has been understood as implying the power to determine the jurisdiction of these courts.⁵⁸ The Supreme Court held in *Sheldon v. Sill* that Congress has the authority under Article III, Section 1 to define the jurisdiction of the lower federal courts.⁵⁹ In *Sheldon*, the Court upheld the provisions of the Judiciary Act of 1789 that restricted diversity jurisdiction in the lower federal

judicial power of the United States extends. What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution.

See also Mickenberg, *supra* note, 47 at 499 (citation omitted).

55. H.R. REP. NO. 108-614, at 14-16 (2004).

56. Although there are numerous constitutional claims that could be used to challenge the MPA.

57. U.S. CONST. art. III, § 2, cl. 1.

58. *See, e.g.*, *Lockerty v. Phillips*, 319 U.S. 182 (1943) (upholding provisions of the Emergency Price Control Act, which precluded the lower federal courts from hearing cases and conferred equity jurisdiction on the Emergency Court); *Lauf v. E.G. Shinner & Co.* 303 U.S. 323 (1938) (upholding provisions of the Norris-LaGuardia Act that, *inter alia*, prohibited the federal courts from issuing injunctions in certain labor disputes); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922) (upholding Congress's authority to enact the Anti-Injunction Act, which reaffirmed Congress's authority to confer and withdraw in whole or part the jurisdiction of inferior federal courts); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (upholding restrictions on diversity jurisdiction of the lower federal courts imposed by Congress in the Judiciary Act of 1789).

59. *Sheldon*, 49 U.S. (8 How.) at 449.

courts.⁶⁰ The Court broadly held that “Congress, having the power to establish the courts, must define their respective jurisdictions . . . [and] Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.”⁶¹ Since *Sheldon*, Congress’s authority to define the jurisdiction of the lower federal courts has repeatedly been affirmed. For example, in *Lockerty v. Phillips*, the Court upheld Congress’s restriction on district court jurisdiction over challenges to the Emergency Price Control Act 1942.⁶² There, the Court held that “[t]he Congressional power to ordain and establish inferior federal courts includes the power ‘of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.’”⁶³

There are numerous examples in which Congress has restricted the jurisdiction of the lower federal courts by precluding the original jurisdiction of the district courts for the most common forms of agency review. For example, the Hobbs Act, provides that petitions for judicial review of final agency actions shall go directly to the circuit courts of appeals, rather than first going to the federal district courts.⁶⁴ That Act applies to many federal agencies, including the Federal Communications Commission, the Department of Agriculture, and the Department of Transportation.⁶⁵

The MPA’s restriction on jurisdiction in the lower federal courts reflects the broad authority by which Congress can affect the original jurisdiction of the lower federal courts. Given the general premise that *some* forum for resolution of federal issues must exist,⁶⁶ litigants may still bring their claims in state courts, even if Congress strips the lower federal courts of jurisdiction over questions and interpretations of DOMA and the MPA. Therefore, as long as the Supreme Court’s appellate jurisdiction permits the Court’s re-

60. *Id.*

61. *Id.*

62. 319 U.S. 182 (1943).

63. *Id.* at 187 (citing *Cary v. Curtis* 44 U.S. 236, 245 (1845)).

64. 28 U.S.C. § 2342 (2000).

65. *See id.*

66. *See* cases discussed *supra* Section III.A.

view of state court rulings in such cases, the constitutional authority of Congress to preclude lower court jurisdiction would likely be upheld.⁶⁷

C. *Congress May Not Simultaneously Strip Both the Original Jurisdiction of the Lower Federal Courts and the Appellate Jurisdiction of the Supreme Court Over Constitutional Questions*

Congress's power to preclude all federal review of a category of cases in both the appellate jurisdiction of the Supreme Court and the original jurisdiction of the lower federal courts has never been exercised.⁶⁸ Its authority to do so remains a question. To date, this issue has played out primarily in theoretical interpretations of Article III. In *Martin v. Hunter's Lessee*, Justice Story analyzed Article III and identified two classes of cases — *cases* arising under federal law and *controversies* in which the United States is a party.⁶⁹ Justice Story argued that the constitution mandates a federal forum for all cases arising under federal law:

In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.⁷⁰

67. See *McCardle*, 74 U.S. at 515, stating that:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

68. See *supra* note 9.

69. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 333-34 (1816).

70. *Id.* at 334. See also, Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act Of 1789*, 138 U. PA. L. REV. 1499 (praising Justice Story and further explaining the two-tiered structure of Article III); cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 CHI. L. REV. 203 (1997) (taking issue with Amar's history and textual analysis of Article III and providing a textual criticism of the "mandatory" reading of the Extending Clause and Amar's division between mandatory and permissive tiers of jurisdictional categories).

According to Story's interpretation of Article III, therefore, cases arising under federal law require a federal forum⁷¹ and, accordingly, must be heard in either a lower federal court or the Supreme Court.

Other than analyses of Article III in dicta, the Court has avoided passing judgment on the constitutionality of Congressional legislation that precludes all federal court review of constitutional claims.⁷² The Supreme Court is not inclined to recognize the authority of Congress to strip federal courts of jurisdiction to hear constitutional claims, generally finding that although Article III authorizes Congress to be the gatekeepers to the federal courts, it does not authorize Congress to preclude review of the other provisions of the Constitution.⁷³

For example, in *Battaglia v. General Motors Corp.*, the Second Circuit considered a federal statute that precluded all judicial re-

71. This argument rests solely on the fundamental structure and language of Article III. It is consistent, however, with arguments that the state courts alone do not provide adequate judicial review of constitutional questions, such as those raised by the MPA. Federal judges, who typically bring prestige, experience and expertise in federal law to the bench, and who do not face the electoral pressures that many state court judges do, are in a better position to address questions of federal law and constitutional interpretation. For a sample of the nearly three decades of scholarship debating the parity of state and federal courts, see, for example, Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U.L. REV. 593 (1991); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMM. 599 (1999).

72. See, e.g., *St. Cyr*, 533 U.S. 289 (holding that there would be serious constitutional implications for a complete restriction of judicial review, and that without clear legislative language, the Court would not interpret IIRIRA to provide such a bar); *Webster v. Doe*, 486 U.S. 592 (1988) (finding that judicial review was available for claims brought by a CIA employee who alleged that he was fired because he was gay); *Johnson v. Robinson*, 415 U.S. 361 (1974) (interpreting the Veterans' Readjustment Benefits Act of 1966 as to not preclude review of Veteran Administration decisions that could raise equal protection challenges).

73. See *supra* note 72. This is a period in which this long-prevailing view will be tested. For example, on May 11, 2005, Congress enacted the Real ID Act, Pub. L. No. 109-13, 119 Stat. 302, which expressly precludes federal court review of all statutory and constitutional habeas corpus challenges. The Court has not yet ruled on whether these provisions violate the Constitution's Suspension Clause, and whether Congress has the authority to preclude review of the Constitutional claim to habeas corpus. See Gerald Neuman, *On the Adequacy of Direct Review after the Real ID Act of 2005*, 51 N.Y.L. SCH. L. REV. (forthcoming 2006).

view.⁷⁴ There, the court considered Congress's attempt through the Portal-to-Portal Act to prevent all courts — federal and state — from hearing claims against employers for retroactive back pay.⁷⁵ The court did not reach the constitutionality of jurisdiction limiting legislation that put constitutional rights at stake. On the merits of Battaglia's claim, the court found that the back-pay at issue in the case did not constitute a property interest under the Fifth Amendment's Due Process Clause. The court stated in dicta, however, that "the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment."⁷⁶ Although Congress has broad authority to restrict the jurisdiction of the federal courts, it may not, in doing so, violate the other provisions of the Constitution.

While *Battaglia* was a circuit court opinion, such reasoning is reflected in later Supreme Court cases. For example, in *Webster v. Doe* the Court found that Congress had the authority to strip federal courts of jurisdiction over statutory rights.⁷⁷ Congress must, however, provide clear intent to deprive review of constitutional claims.⁷⁸ *Doe* alleged that the CIA's termination of his employment violated section 706(2)(A) of the Administrative Procedure Act and deprived him of his constitutionally protected rights, including due process, equal protection, and privacy.⁷⁹ The Court wanted to avoid a "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."⁸⁰ The Court therefore did not construe the statute to preclude review of constitutional claims.⁸¹

More recently, in *INS v. St. Cyr*, the Supreme Court considered the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA),⁸² which denied immigrants the right to federal judicial

74. 169 F.2d. 254 (2d Cir. 1948).

75. *Id.* at 259.

76. *Id.* at 257.

77. 486 U.S. 592 (1988).

78. *Id.* at 603.

79. *Id.* at 596.

80. *Id.* at 603 (internal quotations omitted).

81. *Id.*

82. Pub. L. No. 104-208, 601(a), 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.). The relevant jurisdiction stripping provisions of IIRIRA are codified in 8 U.S.C. § 1252. For further discussion of the IIRIRA, see Lenni B. Benson, *Back*

review of adverse agency decisions.⁸³ The government argued that Congress acted within its authority by eliminating the federal courts' jurisdiction over habeas petitions seeking review of deportation proceedings.⁸⁴ Disagreeing, the Court held that

If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept [the government's argument]. But the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.⁸⁵

The MPA attempts to preclude all federal review of "any question pertaining to the interpretation of, or the validity under the Constitution of [DOMA] or [the MPA]."⁸⁶ The MPA expressly prevents gay people from exerting their right to seek review of what they deem to be a violation of their federal constitutional rights to due process and equal protection, with the practical implication that they, and those affected by their marriage, may not bring a constitutional challenge of a state's refusal to recognize their out-of-state marriages in federal court. Certainly both DOMA⁸⁷ and the MPA would be challenged on numerous constitutional grounds;

to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 CONN. L. REV. 1411 (1997). The perverse result of the 1996 IIRIRA court-stripping, combined with restrictive regulations in the Board of Immigration Appeals, was a 970% increase in the number of cases in the courts of appeals challenging orders of removal. See Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and The Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. (forthcoming 2006); John Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals*, 51 N.Y.L. SCH. L. REV. (forthcoming 2006).

83. *St. Cyr*, 533 U.S. at 292.

84. *Id.* at 298.

85. *Id.* at 314. It should be noted that unlike litigation under IIRIRA, challenges to DOMA could still take place in state courts, which have general jurisdiction to hear federal constitutional claims. The MPA, therefore, may not raise the extreme constitutional issue raised by a potential complete prohibition on *any* judicial review.

86. H.R. 3313, 108th Cong. (2004).

87. Of course, it is worth noting that if DOMA is struck down as unconstitutional, legislation preventing litigation under the statute in federal court would obviously be unnecessary.

due process and equal protection challenges appear to be the most immediate strategies. While the Court has never expressly held that Congress may not strip judicial review of constitutional rights, the cases discussed above indicate the Court's presumption against preclusions of judicial review of constitutional questions. Because the MPA precludes review of such challenges, it would not withstand constitutional scrutiny.

IV. CONCLUSION

Professor Tribe aptly assessed a prior era of congressional court-stripping attempts: "In truth, of course, no interest in the arcane of jurisdiction as such lies behind the proposed bills; their proponents have, without exception, fastened on jurisdiction only as a means to an end."⁸⁸ The MPA is no exception. The legislation is not projected to endure the scrutiny of the Senate Judiciary Committee, and its effectiveness is questionable. The MPA raises novel concerns about the authority of Congress to preclude all federal review of a constitutional question. By attempting to remove all federal court jurisdiction, both in the original jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court, the MPA pushes the limits of Article III. It does so, not with a procedural purpose, but with a substantive agenda that is discriminatory and jeopardizes the rights of gay and lesbian couples.⁸⁹ If

88. Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 130 (1981).

89. The Committee Report drafters expressed an intention that "H.R. 3313 is motivated by a desire to preserve for the states the authority to decide whether the shield Congress enacted to protect them from having to accept same-sex marriage licenses issued out of state will hold — not by any ill will or animus." H.R. REP. NO. 108-614, at 18 (2004). Here, the drafters are distinguishing the MPA from the Colorado statute in *Romer v. Evans*, 517 U.S. 620 (1995), which provided that sexual orientation should not be treated like race. The Supreme Court held that the statute was unconstitutional, finding no rational basis for treating homosexuals as a suspect class. *Id.* at 635. In *Romer*, the "sheer breadth [of the statute was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632. Drawing lines across classes of people rather than merely distinguishing between classes of cases certainly requires a judicial scrutiny that demands at least a rational basis of the legislature. *See id.* at 632-33 ("A law that disparately treats an affected class is presumptively constitutional and will be upheld if the classification rationally furthers a legitimate state interest."). Animus, however, is not a rational basis. *Id.* at 632. Although the drafters of the MPA purport to restrict federal judicial review over a class of cases (state

enacted, the MPA would be a significant overreaching of congressional authority that would profoundly disturb the separation of powers. MPA-opponent John Lewis was right when he said that, “As emotionally charged and politicized as the issue of same sex marriage has become, we should not use that controversy to damage permanently the courts, the Constitution, and the Congress.”⁹⁰

marriage policy), gay and lesbian couples would necessarily be disproportionately affected by the law. To suggest otherwise, is akin to suggesting that cases about pregnancy are not about women. *See Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that a rational basis test should apply to an equal protection analysis in a pregnancy discrimination employment case because the policy discriminated against pregnant people not women). In a floor statement, MPA-opponent, Representative Edward Markey proclaimed, “While every other American will continue to enjoy the checks and balances that come from three branches of government, the Republicans have decided that if you are gay, you should be able to get along with just two branches of government!” 150 Cong. Rec. H6567 (daily ed. July 22, 2004).

90. Conyers, *supra* note 9, at 38.

