THE CONSTITUTION: IT AIN'T BROKEN ©)

by: David C. Indiano

The Founding Fathers were brilliant, but they were not gods. They had a unique historical perspective, but they were not prophets. They struggled to treat all men equal, but they left out half the population (women), slaves and the poor from their model of democracy. Yet spirited and scholarly debate, based on the experience of the failure of the Articles of Confederation, led to the drafting and adoption of the most lasting and comprehensive document in the defense of liberty in the history of the human race: the United States Constitution.

Because the founders recognized their own limitations, they provided for amending the Constitution, signed in 1787, in Article V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

This power has been used sparingly over the past two centuries; with good reason.

The Constitution is a compromise between the state and federal governments. While the founders wanted states to have the principal power to regulate social matters, history had taught them that the federal government had to have power concerning certain issues of national concern. National power was divided among three branches of government with checks and balances preventing any branch from becoming dominant.

Yet critical language of the Constitution fundamental to the American experience is found in the Tenth Amendment, which was adopted, along with the first nine amendments, in 1791 in what is traditionally referred to as the Bill of Rights. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Some have called this Amendment a truism stating that which is already clear from the body of the Constitution. To the extent that is true, it should be patently clear to all U.S. citizens

that issues such as properties rights, wills, contracts and family law are issues reserved to the States.

President Bush has proposed a Constitutional Amendment to prohibit gay marriages. While it is tempting to dismiss such a proposal as simply a political ploy in an election year, an historical and constitutional analysis is even more compelling and decisive in establishing that this is a fundamentally flawed policy: especially to those who call themselves conservatives in today's understanding of that label.

The historical side of the analysis forces us to examine the history of the relatively few constitutional amendments that have passed the rigorous process for incorporation into law. The Eleventh Amendment prevents certain suits against the States. The Twelfth Amendment deals with the Electoral College and the selection of the President. Not until after American blood covered the ground at Gettysburg did our nation pass the Thirteenth, Fourteen and Fifteen Amendments prohibiting slavery and leading to the incorporation of the Bill of Rights to all States.

It took the Sixteenth Amendment to implement a federal income tax. The Seventeenth Amendment allows for the direct election of Senators; a perceived flaw in the democratic structure of the Constitution as suffrage was extended. The Eighteenth Amendment is perhaps the best example of why social policy should not be part of the Constitution. This is the Prohibition Amendment, ratified in 1919, and repealed in 1933 in the Twenty First Amendment, after making Organized Crime a growth industry.

The Nineteenth Amendment granted women the right to vote upon its ratification in 1920. From a historical perspective, it is hard to imagine how half the population had to wait 130 years of American democracy to give them a vote when even the slaves, in theory, were enfranchised 55 years earlier.

The Twentieth Amendment was a rather technical amendment dealing with the commencement of terms of Congress and the President. The Twenty Second Amendment limits a President to two terms and was ratified in 1951 in reaction to President Franklin D. Roosevelt's four terms as President.

The Twenty Third Amendment granted U.S. citizens residing in the District of Columbia the right to vote for the President. The House Report on this Amended stated as follows:

> The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the

obligations of citizenship without the most fundamental of its privileges will be removed by the proposed constitutional amendment. . . .

Sound familiar, Puerto Rico?

Civil Rights moved forward through the Twenty Fourth Amendment, passed in 1962 by the Congress but not ratified until after the assassination of President Kennedy in1964. It eliminated poll taxes and cleared the way for full enfranchisement of African Americans, particularly in the South, where States sought to effectively stop them from voting since the days of Reconstruction. Belatedly, the U.S. Supreme Court struck down poll tax statutes in 1965.

President Kennedy's death in Dallas led to the passage of the Twenty Fifth Amendment, regarding Presidential succession.

Perhaps largely because the average age of those serving in Vietnam was 19, the country finally allowed 18 year olds to vote for the person who had the power to send them there under the Twenty Sixth Amendment, ratified in 1971.

The final Amendment, the Twenty Seventh, is an odd bird. The first State ratified it in 1789, but the decisive State to culminate the process did not do so until 1992. This 203 year ratification process produced an Amendment of little practical significance involving the timing of Congressional pay raises.

Breaking down these 27 Amendments helps illustrate how and why this process has been used in the Nation's first two and a quarter centuries. Ten Amendments, The Bill of Rights (1-10), were essentially contemporaneous with the Constitution itself. Thirteen others (12-15, 17,19-20,22-27) address enfranchisement, Congressional and Presidential terms, election, succession and compensation. One prevents certain suits against States (11). One provides for a national income tax (16) and two are related to failed social policy regarding Prohibition (18, 21).

That's it.

The word "marriage" does not appear in the Constitution nor in any of the Amendments. Family law is an area traditionally left to the States and the history of amending the Constitution suggests that it is best reserved for the weighty issues of democratic import like voting and the regulation of our elected federal officials. Even the women's right movement failed to complete the ratification process for the Equal Rights Amendment which sought to insert protection against gender discrimination into the Constitution.

Yet the current resident of 1600 Pennsylvania Avenue believes that the Constitution is a good place to advance the social agenda of his political base. There is no historical justification for raising this issue to the Constitutional level.

Nor is there a constitutional reason for this Modest Proposal in view of the Tenth Amendment and traditional notions of federalism to which currently self-denominated "conservatives" claim allegiance. While "States Rights" strikes fear into many a minority in view of the history of the South after the Civil War, the States, traditionally, do have a central role in deciding state law regarding "powers not delegated to the United States by the Constitution, nor prohibited by it to the States...," as the Tenth Amendment states. Marriage is such an area.

So is divorce. The argument of the neo-conservatives appears to be that gay marriage undercuts the traditional social view of "family." In essence, as the argument goes, gay marriage hurts "the family."

So does divorce. Over half all marriages end in divorce. Would not these "conservatives" better serve the concept of family preservation by passing a Constitutional Amendment banning divorce? Stones and glass houses may have some relevance to the silence on this front.

The buzz term by the President is "activist judges." The worst thing a judge can do, in the eyes of this President, is interpret the law. That is, of course, what judge are paid to do. This does not mean that they are always correct or even objective. The highest court of each State, however, is usually the end of the line for interpreting its own State law, unless it runs afoul of the Supreme Law of the Land, the Constitution.

What would be truly "activist" in this area, would be to amend a Constitution that has never successfully experienced an Amendment addressing a social issue of traditional State law. Prohibition is the poster child for failure in this regard. History and federalism are powerful reasons to resist such tampering, regardless of one's personal beliefs on gay marriages.

The move to amend the Constitution suggests something is fundamentally wrong with the very structure of American democracy, requiring major Constitutional surgery. True conservatives should be loathe to tinker with a document that has proven so flexible and enduring as a means of balancing individual freedoms and a necessary minimal level of governmental intrusion in our daily lives. Even today's so-called conservatives cannot be thrilled at the prospect of the federal government regulating traditional State functions. There is no historical precedence for such an amendment and no suggestion whatsoever that the Founding Fathers ever contemplated the Constitution as the place for such social policy.