By simple majority vote, Congress could pass an act denying federal jurisdiction over social issues such as abortion, pornography, and homosexuality. This would leave the state legislatures free to enact (or re-enact) laws on those matters reflecting the moral consensus of their constituents.

AP/Wide World

Where the power resides: The Illinois State Capitol in Springfield, like its 49 counterparts across the nation, symbolizes the sovereign power of the people of the United States. It is to the states and the people thereof that our Constitution reserves most political power — including that necessary to protect marriage and our society's moral standards from the ongoing Gramscian revolutionary onslaught.

Congress had authorized McCardle's detention and prospective trial by military commission. After McCardle's appeal, Congress passed an act removing the matter from the appellate jurisdiction of the Supreme Court.

It's clear that the military imprisonment of McCardle violated the due process guarantees contained in the Bill of Rights. But the Supreme Court recognized that Congress, whatever its motives, had the power to act as it did in removing the issue from the Supreme Court's appellate jurisdiction. "We are not at liberty to inquire into the motives of the legislature," noted the ruling. "We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

The opinion took note of an earlier case, *Durousseau v. The United States*, in which the Court held that "while 'the appellate powers of this court are not given by the judicial act, but are given by the Constitution,' they are, nevertheless, 'limited and regulated by that act, and by such other acts as have been passed on the subject.' "

By simple majority vote, Congress could pass an act denying federal jurisdiction over social issues of any kind, such as abortion, pornography, and homosexuality. This would leave the state legislatures free to enact (or, in most cases, re-enact) laws on those matters reflecting the moral consensus of their constituents. This would leave the well-funded leftist network of legal agitators — the ACLU, et al. — without effective recourse, since they would have no access to their longtime allies in the federal judiciary. Rather than use the judicial system as a detour around representative government, the cultural left would have to contend, on equal terms, in state legislatures.

A Bad Remedy

Note that by exercising the power to limit the kinds of cases that can be heard by the federal courts, Congress would be exercising a critical constitutional function: It would be acting as a check on the increasingly lawless judiciary and protecting the powers reserved to the states. It's equally important to avoid so-called solutions to this problem that would actually undermine our federalist system, such as the proposed "Defense of Marriage Amendment" (DOMA). That amendment recently earned the support of Senate Majority Leader Bill Frist (R-Tenn.).

Supporters of the DOMA, which would define marriage within the United States as a union between one man and one woman, argue that it is needed to checkmate the insidious drive to legitimize homosexual marriage. But this supposed remedy is based on a bad diagnosis, namely, that the Constitution itself is somehow deficient. Furthermore, making Washington the custodian of marriage and family policy would undermine the constitutional mechanisms intended to protect those critical institutions from central government meddling.

As Dr. Alan Carlson of the Howard Center on the Family observes: "Family policy has historically been regarded as a Tenth Amendment issue, one that's within the purview of the states. When the U.S. Constitution was written, one of the powers specifically not delegated by the states to the federal government was control of family law and governance. In contrast to most European constitutions, our foundational document makes no direct mention of children, families, parenthood, marriage, or the family's relationship to the state. This omission reflected the keen interest in the family held by local communities and an unwillingness to subject such sensitive questions to uniform, national answers."

George Detweiler, former assistant attorney general for the state of Idaho, observed in the July 29, 2002 issue of THE NEW AMERICAN: "The definition of marriage as a covenant in which 'a man [shall] leave his father and his mother, and shall cleave unto his wife … and they shall be one flesh' (Genesis 2:24) has been repeated in various versions for centuries in the laws and practices of countries throughout the world. That definition has formed a part of the bodies of state laws and been widely recognized in American jurisprudence. Although the language in [the DOMA] reflects laudable concerns, it has no place in the U.S. Constitution and no place in federal law. Marriage should remain exclusively under state dominion, and those seeking to protect marriage should focus their efforts within that arena." ■