



Same-Sex Marriage: Commit It to the States

By Michael S. Greve

The question of same-sex marriage ought to be committed to the states—by means of a constitutional amendment. This Federalist Outlook urges an immediate recourse to that difficult and disfavored option because the courts have left no other choice.

The Same-Sex Marriage Dilemma

The U.S. Supreme Court and the Massachusetts Supreme Judicial Court have brought America to the brink of nationwide same-sex marriage—an institution that no representative political body has authorized and that the U.S. Congress and thirty-eight state legislatures have rejected by large majorities. The ensuing, panicky political debate has focused on two alternative responses. The first, endorsed by President George W. Bush, would impose a nationwide ban on same-sex marriage by constitutional amendment. The second invokes federalism. Its proponents would have us do nothing at the level of the federal Constitution and (they say) leave the matter to be resolved state-by-state, where issues of family and marriage law have always been decided.

Coming largely as it does from the same professors, pundits, and politicians who otherwise cheer the Supreme Court's every discovery of a new "fundamental right," this sudden enthusiasm for the states' prerogatives is a wee bit discordant. And in fact, their proffered alternative is a false one. As things stand, a sophisticated litigation campaign will produce court-imposed same-sex marriage, coast-to-coast, in a few years. So we seem to have a choice

Michael S. Greve (mgreve@aei.org) is AEI's John G. Searle Scholar and the director of its Federalism Project (www.federalismproject.org).

between two uniform policies: either no same-sex marriage ever or anywhere by constitutional amendment, or same-sex marriage soon and everywhere by judicial decree.

There has to be a way out. Same-sex marriage is precisely the sort of issue that should be approached state-by-state, with plenty of room for experimentation, observation, compromise, adaptation, and correction. But we cannot enter into this blessed state without a constitutional amendment of another kind—structural rather than moral, aimed at protecting state discretion by keeping the courts at bay and, in particular, by keeping one state's policies from being imported by litigants and judges into other states. The time to consider and enact such an amendment is now.

Federalism's Virtues

The proposed Musgrave Amendment to the Constitution (named after its sponsor, Colorado congresswoman Marilyn Musgrave) flatly declares that "marriage in the United States consists only of the union of a man and a woman." To ensure legal uniformity, the amendment would go so far as to prohibit *state* courts from finding a right to same-sex marriage in their *state* constitutions, and, moreover, prohibit state legislatures from authorizing same-sex marriage. But it is rarely a good idea to enact social policy in the Constitution,

and same-sex marriage is no exception. A decade or so hence, a majority of citizens may still disapprove, as they do now, of same-sex marriages. They may come to conclude nonetheless that the costs of prohibiting that institution greatly exceed the costs of tolerating it. The Constitution should not stand in the way of that collective judgment. Nor, on the other hand, should judges rush the nation into a controversial social experiment for which it is at this point manifestly unprepared.

Enter federalism. Same-sex marriage involves deeply held moral convictions on all sides and many uncertainties about practical consequences. In that context, the attractions of a properly structured state-by-state arrangement are particularly compelling.

First, an impending uniform policy—by Supreme Court edict or through the Musgrave amendment—inflames passions. *Everything* is at stake. Federalism diffuses the tension. When emotions run high on an intensely controversial issue, lowering the temperature is a considerable advantage.

Second, federalism accommodates widely varying preferences. Liberal Massachusetts has a higher tolerance for same-sex unions than, say, Texas. Relative to a uniform national rule, leaving same-sex marriage to the states means that more citizens will be able to act on their preferences.

Third, the stark alternative of “homosexual marriage—yea or nay” marks the extreme end points of a wide range of options. Civil unions are an obvious in-between option. It is impossible to know in the abstract which policy is best for any given state, let alone all of them. Similarly, it is unclear how same-sex unions would fit into the broader legal structure. Many citizens might well be prepared to tolerate same-sex marriages, provided that the partners do not then claim legally protected “family” status and sue their way into the local golf club.¹ The interplay between same-sex marriage and antidiscrimination laws is a vexing question, and there may be more than one way to skin the cat. Let states find a policy mix that suits them.

Fourth, federalism permits the gradual diffusion of social innovation and learning from mistakes. According to its advocates, same-sex marriage will do no harm to traditional marriage, or at least no harm that has not already been done by divorce and cohabitation. In fact, they say, same-sex marriage will strengthen the institution, because it will domesticate homosexual men. Perhaps so. But one can also envision adverse consequences. For instance,

existing rules of common property division raise husbands’ costs of exiting a marriage that has become inconvenient and, in the event of divorce, partially compensate ex-wives and mothers for years of lost earnings and career advancement. These rules make perfect sense against the background expectation of a traditional marriage, where the costs of childbearing and early childrearing fall chiefly on women. But that expectation and, hence, the rules of common property division seem odd in the context of same-sex marriage. Here, the better default rule seems to be that the partners’ proceeds from divorce should stand in proportion to their contributions to the marriage over time. But if a marriage is a marriage is a marriage, we must have a single rule. Same-sex marriages may effect a rather dramatic change in marriage rules across the board—in this instance, a change that may well make married or marrying women worse off.²

We have no idea how large that or any other effect of same-sex marriage may be. But that is just the point: when we (as a society) do not know what we are doing, it is best not to do it all at once. Let states experiment—and let us learn from what goes right or wrong.

Defense of Marriage

The suggestion of compartmentalizing the homosexual marriage question along state lines is hardly novel. Since 1996, it has been the stated policy of the United States.

In 1993, the Hawaii Supreme Court determined—in a decision that was later overruled through a popular referendum—that the state’s constitution enshrined a right to same-sex marriage. Immediately, fears arose that sister states might have to recognize Hawaii’s same-sex marriages under Article IV, Section 1, of the Constitution, which commands that “Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state.” The second sentence of that section authorizes Congress to prescribe by general laws the manner in which sister-state acts “shall be proved, and the Effect thereof.”

While the meaning of the Full Faith and Credit Clause is anything but clear, the historical practice concerning marriage has been relatively straightforward. As a general rule, states recognize marriages concluded in other states.³ In all states, however, courts have consistently recognized an exception for out-of-state marriages that violate the strong public policy of the forum state. For example, states will generally refuse to recognize a sister-state marriage

where the partners chose that state for the transparent purpose of evading the laws of the state in which they are domiciled. (The point of this rule is to protect against a “race to the bottom,” meaning Nevada.) Similarly, the public policy exception has traditionally covered cases of bigamy, polygamy, consanguinity, and, in an earlier age, miscegenation.

When the Hawaii Supreme Court legalized homosexual marriage, it seemed unclear whether the public policy exception would extend to such unions. To avert the possibility that the courts of a single state might drag the entire country into recognizing same-sex marriage, Congress in 1996 enacted the Defense of Marriage Act (DOMA), which provides that no state shall be required to give effect to same-sex marriages recognized in a sister state. (DOMA also provides that for purposes of federal law, “marriage” shall mean exclusively the union of one man and one woman.) The act was passed by overwhelming majorities in both houses and signed into law by President Clinton. Thirty-five states promptly responded by enacting “little DOMAs”—that is, statutes that affirmatively bar state courts from recognizing other states’ same-sex marriages.

The central, eminently sensible recognition behind DOMA was that federalism’s advantages—choice, diversification, and experimentation—presuppose that states make their own deliberate policy choices. A viable federalist solution therefore requires a reliable mechanism to prevent same-sex marriages migrating willy-nilly from one state into another. To be sure, the legislators who enacted DOMA probably lacked a fully developed theory of federalism. Many may have welcomed DOMA as a punt that would let them avoid a difficult vote on the merits. But so what? The desire to avoid a knock-down, drag-out, national fight over homosexual marriage very likely reflected the preferences of a vast majority of citizens—and, at some level, the prudential federalism considerations rehearsed above.

The attraction of the federalist solution has remained undiminished. Vice President Cheney articulated it in the 2000 presidential campaign. While Mr. Cheney has now seconded the president’s endorsement of the Musgrave amendment, leading politicians of both parties—including presidential aspirant John Kerry—have rushed to identify themselves with his earlier position. But the institutional context of that position has now changed, courtesy of the courts. States no longer have a defense against forced imports of same-sex marriages.

DOMA Is Dead

Some leading scholars of Conflicts of Law—the discipline that attempts to explain whether courts must apply their own or a sister state’s law in cases of conflict—continue to insist that all is in good order at the Full Faith and Credit front.⁴ Same-sex marriages, they say, fall squarely under the public policy exception, meaning that state courts can refuse to recognize them with or without DOMA, which merely codified the existing general arrangement.

The law reviews tell a different story. “Dumb and DOMA,” the title of one much-cited article, reflects the general tenor of an anti-DOMA tsunami. Yes, scholars explain, DOMA affirms the traditional public policy exception—but that exception is unconstitutional, and therefore so is DOMA. Others (prominently, Laurence Tribe) have argued that DOMA violates the Full Faith and Credit Clause. Congress, they say, may prescribe *what* effect state acts shall have in sister states. It may not put the clause out of operation by prescribing that certain public acts—same-sex marriages—shall have *no* effect in sister states.⁵ All this, mind you, was before the Supreme Court’s discovery, in last year’s *Lawrence v. Texas* decision, of a constitutional “liberty” that prohibits many forms of discrimination against homosexuals.

In short, the ground has been paved for DOMA’s judicial invalidation. The courts may hold that DOMA violates the liberty interest recognized in *Lawrence*. They may hold—more in keeping with the Massachusetts Supreme Judicial Court’s *Goodridge* decision and the U.S. Supreme Court’s 1996 ruling in *Romer v. Evans*⁶—that a statute that singles out same-sex marriages for non-recognition has no basis other than an impermissible animus against homosexuals, thereby violating equal protection. They may find that DOMA violates the Full Faith and Credit Clause or perhaps the Privileges and Immunities Clause (because it imposes a burden on same-sex couples’ right to interstate travel). One way or the other, DOMA is a dead letter. The same, of course, goes for the states’ little DOMAs.

Behind that certainty lurks the insidious prospect that DOMA will serve as a way station for the federal judicial enactment of same-sex marriages. In its appalling indirection and lack of candor, *Lawrence* reads like the European “Constitution”: just enough hemming and hawing to maintain plausible deniability with respect to imperious schemes, but more than enough drivel to put those schemes into practice when the time is ripe. *Lawrence* strongly suggests that the Supreme Court majority is

already looking for a next step toward enacting same-sex marriage without just yet explicitly declaring a constitutional right to it. DOMA fits the bill. Let the Court invalidate the statute, accompanied by some more burble about “liberty” and expressions of grave constitutional concern over state courts’ failure to recognize other states’ same-sex marriages: state courts and legislatures that have so far somehow missed the national program will surely get it then.

We should not give the Court that opportunity. We should repeal DOMA before the justices get their hands on it—and reenact it in a form that they will have to respect.

A “Constitutional DOMA”

To guard against the judicial imposition of same-sex marriage from sea to shining sea, a constitutional amendment must guard both against the invention of a federal constitutional right and against the undesired exportation of same-sex marriages from one state into another. Such an amendment might read as follows:

(1) *The United States Constitution shall not be construed to require the federal government, or any state or territory, to define marriage as anything except the union of one man and one woman.*⁷

(2) *The United States Constitution shall not be construed to require any state or territory to give effect to any public act, record, or judicial proceeding respecting a relationship between persons of the same sex that is treated as a marriage under the laws of another state or territory.*

This particular language may seem needlessly convoluted. Section (2) may seem superfluous, because it is already covered by section (1). Alternatively, Section (2)—which tracks the language of DOMA—may provide adequate (albeit implicit) protection against the judicial discovery of a constitutional right to same-sex marriage. If there were such a right, it could not be a matter of state choice, and state choice is precisely what Section (2) protects. Any amendment, however, will prompt no end of creative effort to evade its plain meaning, and that certain prospect justifies an excess of caution even at the price of some redundancy.

The balance between conciseness and loophole closing can and should be struck through a careful debate. Public deliberation would serve the useful purpose of clarifying

the essential purposes of amending the Constitution. The amendment should be aimed at courts, not legislatures. Instead of freezing social policy, it should allocate and circumscribe powers. That is what constitutions are for.

For reasons mentioned, a Constitutional DOMA must clarify that nothing in the Constitution compels state courts to recognize a sister state’s same-sex marriages. In other words, state courts *may* still do so. That opening may seem wide enough for a convoy of litigation trucks. Even so, an amendment to *bar* state courts from recognizing sister-state marriages (as one proposed amendment would have it) would be excessive and counterproductive.⁸

The Constitution reflects a robust respect for the states’ right to order their internal governance. Federal law either preempts state law and state courts altogether or else leaves them alone. Neither the Constitution nor federal statutes commandeer state courts.⁹ An interference with the *state* court disposition of *state* causes of action, in cases that will usually involve parties exclusively within that jurisdiction, would breach that general constitutional norm and practice.

Moreover, we should guard against legislative and judicial irresponsibility. Once it is clear that states may deny recognition to other states’ same-sex marriages, state legislatures may prohibit their courts from doing so (for example, by reenacting the now-suspect little DOMAs). A constitutional bar against state court recognition would liberate state legislators from having to make that decision. It would thereby encourage an already alarming legislative flight from accountability. When the Massachusetts Supreme Judicial Court, in its fantastic *Goodridge* decision, instructed the legislature to adjust the state’s domestic relations law to conform with more enlightened notions of marriage, the lawmakers recoiled—and crawled back to the same justices to humbly ask for an advisory opinion as to whether a civil union arrangement might satisfy them. (The predictable answer was “no.”) Judicial usurpation and legislative abdication are mutually reinforcing, and we should counteract both tendencies. Letting the lawmakers off the hook would impede rather than foster responsible democratic debate and decision.

Now or Never

To its considerable credit, Senator Orrin Hatch’s Judiciary Committee is actively considering a structural amendment. That effort is as timely as it is sensible.

Many pundits have said that a constitutional amendment is grossly premature. The predicted doomsday scenarios—a federal judicial recognition of same-sex marriages, invalidation of DOMA, sister-state recognition of Massachusetts marriages—may not materialize. If and when they do, there will be time enough to consider a constitutional remedy. This advice, however, rests on a complete misapprehension of the litigation market.

No one is seriously pursuing a rollback of homosexual rights protections. Gay rights groups have the market to themselves, meaning that the pressure runs only one way. Those highly sophisticated, well-supported advocacy groups know how to choose the most compelling case, the most favorable court, and the most inept or ambivalent opponents. For evidence, see *Lawrence* and *Goodridge*.

The trend and its outcome are foregone conclusions, both with respect to the creation of a federal right and the state-to-state spread of same-sex marriage mandates. A majority of the Supreme Court already believes that there is a constitutional same-sex marriage right. What stands in the way is not the Constitution but the country's collective readiness to accept the inevitable; and, nudged along by a proper sequence of cases, that mood may change very quickly.¹⁰

Likewise, even as we are being told that same-sex marriage cannot and will not migrate under traditional Conflicts of Law principles, a New York court has already ruled that New York must recognize Vermont's same-sex civil union, and New York's attorney general has publicly endorsed this position.¹¹ As well he should have: that precedent-setting ruling (which is currently on appeal) rests on a very impressive, scholarly judicial opinion, assisted by a superb brief from the Lambda Legal Defense Fund. In truth, Conflicts of Law is a jumble that many experts outside that "psychiatric ward of the legal profession" view as incoherent and unconstitutional in any application, never mind same-sex marriage.¹² The notion that this jurisprudential swamp should long detain an army of dedicated and exceptionally able litigators is highly improbable.

Once the verdicts roll in, the debate is over. Any attempt to reverse the results, we will hear, would be an unconscionable assault on the independent judiciary. That argument will carry great force with an electorate whose first preference is to make the entire awkward debate go away. If the advocates of judicially enacted same-sex marriage have their way, there will be no right time for a constitutional amendment. The only

way to keep the debate open is to protect the states' independent right to choose before it is cut off.

What Matters

A proposal to compartmentalize the same-sex marriage debate along state lines reflects a broad social and political consensus. It will be difficult, but not unmanageable, to persuade the politicians and the public that it will take a constitutional amendment to reify that result.

The White House was by all indications spooked into endorsing the already moribund Musgrave amendment. A Constitutional DOMA is an escape that, by good fortune, leads to the right policy. Religious and other conservative constituencies should not view this strategy as a sellout. Active, confident presidential leadership on an amendment that—for all its imperfections—stands a chance of success is preferable to diffident support for a futile proposal.

Without belittling the momentous social importance of same-sex marriage, moreover, the broader, more menacing problem is judicial usurpation. There are good reasons to be nervous about the institutionalization of same-sex marriage, but what truly grates is the notion of having it dictated by willful, contemptuous judges. In the noise and clatter of a contentious debate, that distinction is easily lost. With all respect to a president who was confronted with an impossible choice, nothing better illustrates the confusion than the incongruity between the president's heartfelt call for a civil debate¹³ and his concurrent endorsement of the Musgrave amendment. Once we permit the courts to force us into an all-or-nothing confrontation, civility is in peril.¹⁴ A Constitutional DOMA, in contrast, says that we will have a grown-up, sober debate about same-sex marriage—in good time, in the various states, with the seriousness and respect that the question deserves. But we must first, and urgently, protect our right to have that debate.

Notes

1. Civil union partners are already doing just that. See Ann Carns, "Gay Club Members Seek Spousal Rights," *Wall Street Journal*, February 20, 2004.

2. I owe this example to my colleague Doug Besharov.

3. In addition to the Full Faith and Credit Clause, powerful reasons of efficiency support that general policy. In a highly mobile country, neither of the alternatives (a general policy

against recognition, or case-by-case determinations) holds much attraction.

4. See, for example, Lea Brilmayer, "Full Faith and Credit," *Wall Street Journal*, March 9, 2004. See also Professor Brilmayer's testimony before the Senate Judiciary Subcommittee on the Constitution, March 3, 2004 (available at http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3071).

5. See respectively, Andrew Koppelman, "Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional," 83 *Iowa Law Review* 1 (1997); Larry Kramer, "Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception," 106 *Yale Law Journal* 1965 (1997); and Lawrence Tribe, *American Constitutional Law*, 3d ed. (New York: Foundation Press, 2000), 1247 n.49. See also Mark Strasser, "Marriage, Transsexuals, and the Meaning of Sex: on DOMA, Full Faith and Credit, and Statutory Interpretation," 3 *Houston Journal of Health Law & Policy* 301 (2003).

6. 517 U.S. 620 (1996). The Supreme Court held that a statewide referendum banning local jurisdictions from enacting homosexual rights ordinances violated the Equal Protection Clause because it was based on an irrational "animus" against gay citizens.

7. A similarly worded suggestion was recently put forward by Jonathan Rauch, one of the most thoughtful proponents of gay marriage. See Rauch, "On Same-Sex Marriage, Bush Failed the Public and Himself," *National Journal*, March 6, 2004.

8. See Michael Horowitz, "Wrong Idea, Wrong Time," *Tech Central Station*, November 24, 2003 (available at <http://www.techcentralstation.com/112403A.html>).

9. The exceedingly rare exceptions—a few "tort reform" statutes that instruct state judges on how they must handle evidence and certain motions in liability cases under state law—are quite probably unconstitutional. See Wendy

Parmet, "Stealth Preemption: The Proposed Tobacco Settlement and the Federalization of State Court Procedures," 44 *Villanova Law Review* 1 (1999).

10. I disagree with the widely held notion that judicial overreach would spark a backlash and a lasting social rift akin to the division generated by *Roe v. Wade*. There is no such thing as a "charming" abortion, and nobody celebrates an abortion with friends and family. The certainty that each abortion (40 million and counting) is an act of brutal aggression sustains the Right to Life movement. In contrast, even adamant opponents of same-sex marriage as an institution can think of a charming same-sex couple and of a union worth celebrating. And who precisely are the victims that command our compassion and protection? Movement-sustaining fervor at this front is hard to come by, and easily lost amid messy details and conflicting emotions.

11. The case is *Langan v. St. Vincent's Hospital of New York*, 765 N.Y.S. 2d 411 (2003). For Attorney General Eliot Spitzer's affirmation of the court's position see the opinion and accompanying press release (available at http://www.oag.state.ny.us/press/2004/mar/mar03a_04.html).

12. I have cited those scholars and echoed their views in an earlier *Outlook*. See Michael S. Greve, "Choice and the Constitution," *Federalist Outlook* no. 16 (March 2003) (available at http://www.aei.org/publications/filter.all,pubID.16024/pub_detail.asp). For the famous "psychiatric ward" characterization, see William L. Prosser, "Interstate Publications," *Michigan Law Review*, vol. 51, p. 959, 971 (1952–53); Perry Dane, "Conflicts of Laws," in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, p. 209 (1996).

13. See President Bush's remarks, February 24, 2004 (transcript available at <http://www.washingtonpost.com/wp-dyn/articles/A2078-2004Feb24.html>).

14. The case has been made persuasively by Jonathan Rauch. See footnote 7.