The Marriage Amendment Is a Terrible Idea

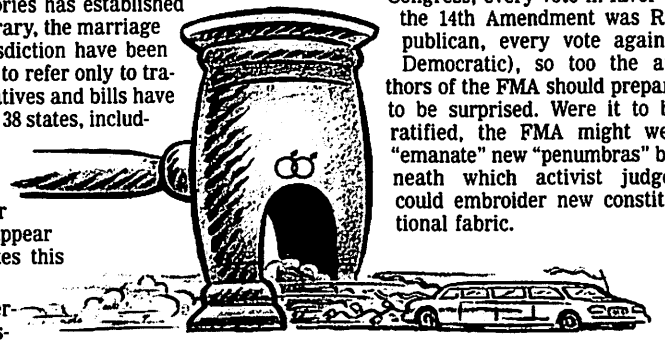
By Christopher Cox

The Massachusetts Supreme Judicial Court, in a display of judicial arrogance, has instructed that state's legislature to forthwith enact a law recognizing gay marriage. Its decision—an interpretation of the state constitution—cannot be appealed through the federal courts. Should Congress and the states enact a Federal Marriage Amendment to the U.S. Constitution in order to trump this activism by judges?

This week, the House will put the question to a vote. Like the Balanced Budget Amendment (thus far merely a cry of pain against the collective failure of will to control spending), the FMA is more symbol than substance, given the near-impossibility of a two-thirds vote. But unlike a requirement to balance the budget, the FMA would do more harm than good were it to be enshrined in our charter.

Judicial activism, not its instantiation as court-ordered gay marriage, is the more severe challenge to America. As a response to the disease of judicial activism, the FMA would be a cure far worse than the ailment, one that would give judges new, as-yet-undefined text with which to justify their proclivities. It would vastly expand the scope of judicial policy-making not only in family law, but related areas as well, inviting the very judicial activism its authors seek to derail.

To understand why requires a study of how proponents of gay marriage have gone about their objective. Nearly two-thirds of Americans oppose gay marriage. No legislature in any of the 56 states and territories has established it in statute. To the contrary, the marriage laws of every U.S. jurisdiction have been consistently understood to refer only to traditional marriage; initiatives and bills have recently been enacted in 38 states, including California, clarifying that this means the union of one man and one woman. Similar voter initiatives will appear on the ballot in 11 states this November.



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Faced with this overwhelming political resistance, gay marriage proponents pursued undemocratic means. They turned to the courts. In Hawaii in 1993, the state Supreme Court ruled in favor of same-sex marriage and ordered the issue back to the legislature. Courts in Alaska followed Hawaii's lead. In both states, however, the court decisions led to the adoption of constitutional amendments limiting marriage to heterosexual couples. And in California, after San Francisco began to issue unauthorized licenses for same-sex marriages in February of this year, the state supreme court stopped the practice. But the essence of forum-shopping is that eventually plaintiffs can find a sympathetic venue—and they found one in Massachusetts.

The Massachusetts justices' willingness to "discover" a right to same-sex marriage that appears nowhere in the law is breathtaking in its ambition. It has imposed on 6.5 million people the preference of a few individuals (in this case, four; three dissented) to such an extent as to nullify the meaning of law as a body of known rules to guide conduct. Predictably, the court's usurpation of legislative power was cloaked in the conceit of protecting minority rights.

Like all elaborate frauds, this one was built around a kernel of truth: It is true that our constitutions protect minority as well as majority rights. Obeying the will of the majority, therefore, is not what judges invariably ought to do. An example of this contra-majoritarian imperative is *Brown v. Board of Education*, written by a three-term Republican governor of California and 1948 GOP nominee for vice president, who knew how to read opinion polls and thus understood the firestorm he was creating in the South.

But this is not to assert that the most just decisions are those that overturn majority opinion and duly enacted laws. In order for judicial interpretation to be legitimate, it must be moored to the law's text and the intentions of its authors, lest law become merely a reflection of the prejudices of unelected judges.

> ***Why turn all our family law over to activist judges?***

The Massachusetts justices admitted that "the Legislature did not intend that same-sex couples be licensed to marry," and that state law "may not be construed to permit same-sex couples to marry." To move from this simple truth to the complex error of the court's conclusion required sophistry—including the obligatory allusion to the 14th Amendment, granting citizens equal protection of the law. Perhaps efforts such as these are due a grudging respect, if only for their audacity. After all, the sparse wording of the 14th Amendment has been examined for hidden meaning over a long period: one might think the possibilities have been nearly exhausted. But the judicial imagination continues to thrive.

Just as the Supreme Court's 1970 extension of the 14th Amendment to create a right to welfare benefits would have astonished its authors (in Congress, every vote in favor of the 14th Amendment was Republican, every vote against Democratic), so too the authors of the FMA should prepare to be surprised. Were it to be ratified, the FMA might well "emanate" new "penumbras" beneath which activist judges could embroider new constitutional fabric.

Although our checks and balances presume that each branch will seek to maximize its power at the expense of the others, the FMA would represent a choice by Congress to vastly expand the reach of the federal courts. Whereas even the Commerce Clause is not understood to permit federal regulation of marriage, divorce, and child custody, the FMA will effectively give the federal courts this power—and the ability to exercise it pre-emptively vis-a-vis both Congress and the states.

The Supreme Court has frequently opined that the regulation of domestic relations "has long been regarded as a virtually exclusive province of the states." That would change. Not only same-sex marriage and family law in general, but other areas could move into the federal judicial sphere. The law of marriage is directly related to adoption, agency, alimony, child custody and visitation rights, next-of-kin status for hospital visitation and medical decisions, separation, divorce, estate planning, insurance, real estate, taxation, immunity from testimony, crime-victim recovery benefits, and welfare benefits.

Notwithstanding the admirable aim of its sponsors to be concise and clear, the FMA would unleash a flood of litigation. It could not even be counted upon to settle the question of gay marriage. What, for example, are the "legal incidents" of marriage to which it refers? The amendment does not say, leaving it up to judges, who, by restrictively interpreting these words, could require states to extend to same-sex couples all benefits of marriage except the name. Indeed, the FMA expressly avoids pre-emption of state laws that might be written to do just that.

Nor is it difficult to imagine that the right to divorce might soon be deemed implicit in the now-federalized (and constitutionalized) definition of marriage. Other questions will rear up: When can wives serve as agents of their husbands? When are divorced spouses entitled to alimony? When can unmarried same-sex couples adopt? Under what circumstances can a written will by one spouse be challenged by the surviving spouse? The body of law of every state on these subjects might now be invalidated.

While it is impossible to predict what this federal family law will look like in two decades, it is easy to imagine that the courts will still be hard at work broadening the newly-minted rights and responsibilities of the children, couples, schools, agencies and hospitals swept within its compass. Whatever the outcome, ambitious lawyers and activist judges will try to bastardize the FMA.

In 1996, Congress took a better approach when it passed the Defense of Marriage Act. This Republican legislation, signed by President Clinton, unambiguously defines marriage for all federal purposes as "only a legal union between one man and one woman as husband and wife." It covers every area of federal law, including immigration, employee and health benefits, taxes, and Social Security, and prevents a state such as Massachusetts from exporting marriage law. For all other purposes, it wisely leaves family law, including the definition of marriage, to the states—and for good reason.

Family law cases can't be resolved as clinically as commercial disputes; they involve relationships that touch lives in important ways. Divorce courts, and the specialized institutions of the states, have worked out pragmatic solutions to meet the interests of spouses, children and property. Particularly because decisions such as custody and financial support can rarely be final, local supervision is to be preferred.

For Republicans, who believe in federalism, the FMA is an uncomfortable fit. Restraint in the allocation of governmental authority to the national government from the states is fundamental to our Constitution. While often invoked as a mere convenience, as in the trial lawyers' false federalism contrived to thwart tort reform, this principle must be observed if our system of government is to function properly.

Republicans have not shied from even the unpopular exercise of federal power over the states when it has been warranted. President Eisenhower dispatched troops to Little Rock to enforce school integration, and he did so over the vehement objections not only of Democratic Gov. Orval Faubus, but also Sens. Jack Kennedy and Lyndon Johnson. But when it is not warranted, neither should we succumb to the temptation to federalize what the states have handled well for centuries. There have been more than 130 amendments to the Constitution proposed in our history regarding marriage; not one has received a vote in the House or Senate until now.

The better solution to the problem presented by the Massachusetts Supreme Judicial Court is for the voters and legislators of the Commonwealth to amend their own constitution to retrieve the right of legislation from the bench, and hand it back to the State House. Happily, that effort is already well underway.

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