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Rule of Law / *By John Yoo*

Let States Decide

President Bush this week called on Congress to support a constitutional amendment to ban gay marriages by defining marriage as only between a man and a woman. "Some activist judges and local officials have made an aggressive attempt to redefine marriage," he said in justifying the need for this extraordinary step.

Election-year politics aside, surely the administration is correct that this revolutionary change in social norms is being unwisely engineered by a small set of officials: the Supreme Court, Massachusetts judges and legislators, and the mayor of San Francisco. A constitutional amendment would serve as a national plebiscite on the question of gay marriage. In demanding that the amendment define marriage as between a man and a woman, however, President Bush has adopted the wrong constitutional strategy.

The federalization of marriage will produce more instability.

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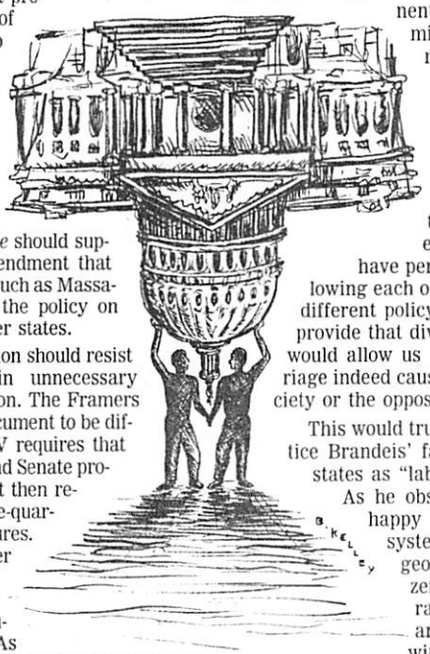
The purpose of a constitutional amendment should be to restore the status quo ante that existed *before* the activism of these officials upended the social order in Massachusetts and San Francisco. An amendment in keeping with our federal system would be one that preserved the definition of marriage to each state to decide for itself, just as our constitutional system permitted for the first two centuries of its existence. Conservatives who have criticized the Supreme Court's nationalization of abortion in *Roe v. Wade* should support a more modest amendment that would prevent one state, such as Massachusetts, from deciding the policy on gay marriage for all other states.



Barbara Kelley

The Bush administration should resist the urge to engage in unnecessary changes to the Constitution. The Framers designed the founding document to be difficult to amend. Article V requires that two-thirds of the House and Senate propose the text, which must then receive the approval of three-quarters of the state legislatures. (Another process, never used, allows for two-thirds of the state legislatures to call a constitutional convention). As James Madison explained in the Federalist No. 43, this process allows for the correction of errors in the Constitution without allowing it to become as flexible as an ordinary piece of legislation. "It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." In addition, wrote Madison, the amendment process worked a valuable role in maintaining the balance of powers between the federal and state governments. It "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."

It should not be surprising that this hurdle has led to relatively few amendments. Since 1791, when the Bill of Rights added the first 10 amendments to the Constitution, the nation has approved only 17 more over the course of the following 213 years. Many of these changes have focused on modernizing the workings of our democracy, such as expanding the electorate to include African-Americans, women and 18-year-olds, providing for the direct election of senators, limiting presidents to two terms, and specifying the order of presidential selection and succession. Almost all of the amendments have the purpose of either organizing or limiting the powers of the federal or state governments, such as the Equal Protection and Due Process Clauses requirement of equal and fair treatment by the government. The most notable effort to regulate purely private conduct—the 18th Amendment's establishment of Prohibition—failed miserably and led to the rise of organized crime.

An amendment that merely restored state control over marriage also would better allow democracy to function. Federalism is a decentralized decision-making system that allows states to compete for residents and businesses by offering different mixes of economic and social policies. As in a market, citizens can satisfy their preferences by deciding to live in states that provide the tax, education, welfare or family policies that they agree with. Some states, such as Massachusetts, can choose to permit gay marriage, while others such as California might choose to define marriage as between a man and woman, and Americans can choose to live in either state depending on what policy they support. The administration's current plans would prevent our states from allowing their own democratic systems to respond to their citizens in deciding this important question of family law.

A pro-federalism approach also makes sense as a matter of public policy. Advocates on both sides of this emotional debate are floating a variety of arguments about the effects of gay marriage. Supporters claim that it leads to the stability of relationships and extends the positive benefits of marriage to homosexual couples. Opponents argue that it undermines the institution of marriage and could lead to higher divorce and lower marriage rates.

All sides should admit that the sample size for making these judgments is far too small—there simply are not enough jurisdictions that have permitted gay marriage. Allowing each of the 50 states to choose a different policy on gay marriage would provide that diversity of experience that would allow us to see whether gay marriage indeed causes negative effects on society or the opposite.

This would truly take advantage of Justice Brandeis' famous description of the states as "laboratories of democracy." As he observed, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." The Bush administration's sweeping amendment would short-circuit the diversity and experimentation in policy that is one of the great benefits of our federal system.

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Finally, it is worth asking whether a federalization of marriage would produce more political instability than it would stop. Critics of *Roe v. Wade*, conservatives chief among them, have argued that the Supreme Court's decision to nationalize the regulation of abortion led to the intensification of political conflict over abortion. Rather than allowing the 50 states to decide abortion policy for themselves, we now have the spectacle of Supreme Court abortion decisions every few years, repeated efforts at congressional regulation, annual protests, and the emergence of abortion as a divisive issue in our national politics.

An effort to nationalize marriage could produce the same long-term negative effects, in which candidates of both parties must make pledges on gay marriage and the issue dominates our appointments to the federal courts. Perhaps the blame for this lies squarely with the Supreme Court, which chose in last year's sodomy case to provide constitutional protections for gay rights, but the answer is not to play the game of nationalization, but to respond by restoring our federal system's trust in the states.

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