



Marriage Should Not Be Regulated by the Federal Government

By: JASON KUZNICKI - December 17, 2012

Of course gay marriage should be left to the states. Indeed, all marriage should be left to the states. Search the U.S. Constitution from start to finish, and you will find no reference whatsoever to marriage. You will, however, find the 10th Amendment, which reads as follows: "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."

Marriage is not commerce, war, or taxation. It is unrelated to money, the post office, the patent system, or any of the other enumerated powers of the federal government. Its regulation is neither necessary nor proper in pursuit of those powers.

At the drafting of the Constitution, the states all had marriage laws of one kind or another. There were wide disparities among them, both then and now, and such disparities have existed at all times in between.

The founders had no desire to settle such matters, and they did not wish a future Congress to do so either. The Constitution they wrote left only two choices: Either allow the states to regulate marriage (with, perhaps, federal consequences to follow)—or else return marriage to the people, to individuals, families, churches, and communities. Either approach would be consistent with the Constitution. The Defense of Marriage Act, however, is not.

Speaking personally for a moment, I am in a same-sex marriage. Some states recognize it, including my home state of Maryland. I am happy that they do, and I wish more of them would. But just as Congress can't prohibit same sex marriage, I must conclude that Congress can't establish it, either.

Whether the states must all recognize same sex marriages as a matter of civil rights law, unrelated to the 10th Amendment, is a question the Supreme Court may soon address. But I find it implausible that the Court would do so now. The Prop. 8 case by no means requires it. And it's still less plausible that the Court would make the sweeping judgment required to say yes. In the meantime, I am content both to support same sex marriage and to advocate for it on the state level, where public opinion is rapidly shifting in its favor, and where the good fight is still to be fought.