

# The Washington Times

## A constitutional amendment on marriage

*No restrictions should be imposed on marital freedom*

By Laura W. Murphy and Robert A. Levy  
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All eyes are now on the Supreme Court after the Nov. 6 decision by the U.S. Court of Appeals in Cincinnati upholding same-sex marriage restrictions in four states. Because federal appellate courts in four other jurisdictions have overturned such bans, the Supreme Court is very likely to weigh in.

A few organizations and elected leaders, led by Texas Sen. Ted Cruz, would like to shortcircuit that process. They are calling for a constitutional amendment allowing states to bar same-sex couples from marrying. One way or another, we're approaching the final stage of a sweeping and historic social transformation that just 10 years ago seemed improbable at best.

We arrived at this moment through a combination of new state laws, successful referenda, and rulings by judges from across the political spectrum. While some opponents of marriage for homosexual couples have decried such rulings as acts of "judicial activism," marriage laws, although traditionally reserved to the states, must not be beyond the protections of our Constitution.

We've been down similar roads before. In 2004 and 2006, Congress held unsuccessful votes on the Federal Marriage Amendment, which was rightly opposed by many as an unprecedented, radical departure from our nation's traditions and history.

Amending the Constitution is an act of tremendous significance that should be undertaken only with the utmost caution. While the American Civil Liberties Union and the Cato Institute often approach issues through different perspectives, our organizations share a commitment to the preservation of the individual rights and liberties that the Constitution secures for everyone in this country.

Over the years, amendments to the Constitution were designed to expand, not restrict, our assurances of personal freedom. Any proposed amendment that would limit an essential aspect of such freedom — the right to choose a spouse and form a household — should be opposed.

That guidance applies to both liberals and conservatives. For example, in response to the Supreme Court's ruling in *Citizens United*, many on the left and within the Democratic Party

have called for a constitutional amendment that would open the door to significant limitations on political speech. Our organizations have stood in principled opposition to this effort.

Likewise, an amendment permitting state laws to exclude a class of persons from constitutional guarantees should also be seen as an unacceptable attack on individual liberty.

Mr. Cruz and other advocates of his proposed amendment will no doubt point out that it, unlike the Federal Marriage Amendment, would do nothing to prevent states from extending the freedom to marry to same-sex couples. This, however, is hardly the entire story. The amendment is intended to do an end run around a cornerstone of our system of checks and balances, judicial review. By shielding state marriage laws from judicial scrutiny, the amendment would prevent courts from safeguarding the rights of same-sex couples. Had such an amendment been passed in the wake of *Loving v. Virginia*, state bans on interracial marriage might still be in place today.

No law should be immune from judicial review and no group of citizens should be deprived of the Constitution's protections.

Our Framers created an incredible document that has served us well for two-and-a-quarter centuries. However, the original document was flawed in two major respects: It condoned discrimination against women and people of African descent. At great cost, we remedied those flaws — first by adopting the 14th Amendment to provide that "No State shall deny to any person within its jurisdiction the equal protection of the laws"; and second, by adding the 19th Amendment to provide that voting rights "shall not be denied or abridged by the United States or by any state on account of sex." Surely, we do not want to retrace those steps, nor compromise that principle, nor once again codify in our revered Constitution the offensive notion that we will, indeed must, tolerate unequal treatment.

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