



Marriage is Worth Constitutional Protection

By John R. Hendrickson

What was once an important debate over the nature, purpose, and legal status of marriage has emerged as a critical national issue, the resolution of which will shape the future of our society and the course of constitutional government in the United States.¹

- Dr. Matthew Spalding

In May the California State Supreme Court, in a 4-3 decision, overturned state law which designated marriage to be between one man and one woman and allowed same-sex couples to enter into marriages.² In Iowa the issue over preserving traditional marriage, that is, marriage between one man and one woman is a top concern for many. Twenty-seven states have approved constitutional amendments to define and protect traditional marriage, but the citizens of Iowa have not been able to vote on a marriage amendment because the amendment has been bottled up in the Legislature.

The aftershocks of the California ruling are being felt throughout America. The Ames Tribune headline read "California Ruling Reverberates in Iowa," and the Tribune reported that "gay couples in Iowa who have sued for the right to marry celebrated the ruling by California's high court..."³ In August of 2007, Iowa's Defense of Marriage Act was ruled unconstitutional by a Polk County District judge and the decision is on appeal to the Supreme Court of Iowa.⁴ Just as with California, Iowa needs to amend the state Constitution to constitutionally protect traditional marriage.

California's ruling is another sign of the need to constitutionally protect marriage, not only in Iowa, but on a national level, which means adopting the Federal Marriage Amendment (FMA). Advocates for same-sex marriage are trying to turn their crusade into the next civil rights movement. Although this author disagrees highly with that notion and believes that protecting traditional marriage is an absolute necessity it is also important to discuss the constitutional ramifications of amending the United States Constitution to protect marriage. The question posed is whether or not the FMA should be adopted and is it necessary?⁵

Traditionally social issues such as marriage have been regulated by the states under our constitutional system of federalism. However, government, constitutional interpretation, and federalism have changed significantly from the original intent of the Framers since the Progressive Era of the early twentieth century, but does judicial activism (as clearly demonstrated by courts in California, Iowa, and Massachusetts) warrant a Federal Marriage Amendment? Amending the Constitution should be taken seriously and only for needed purposes. Many conservatives are torn over the FMA because it appears to go against federalism.

Dale Carpenter, who is an Associate Professor of Law at the University of Minnesota School of Law, wrote a compelling argument against the Federal Marriage Amendment based on grounds that it would violate federalism. Carpenter argues that "a constitutional amendment defining marriage would be a radical intrusion on the nation's founding commitment to federalism in an area fundamentally reserved for state regulation, family law."⁶

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Edwin Meese, III, who served as Attorney General under President Ronald Reagan, argues the opposite. “In our system of law, the powers of government are divided between the federal and state government. The Framers rightly left marriage policy, as so many other things, with the states,” wrote General Meese.⁷ At the same time Meese argued that the “fundamental definition of marriage is no mere policy issue,” but the “meaning of one of the primary elements of civil society.”⁸

In addition, he argues that marriage is not “a matter for state-by-state experimentation.”⁹ Meese argues that the issue of marriage cannot be viewed as the same as issues of taxation. “Society is not harmed when high-tax states live side by side with low tax states. The market adjusts to the inconsistency. Not so with marriage,” noted Meese.¹⁰ Traditional marriage simply cannot be reduced to a state issue.

Marriage is a national issue with social and cultural implications. “A highly integrated society such as ours—with questions of property ownership, tax and economic liability, inheritance, and child custody crossing state lines—requires a uniform definition of marriage,” argued Meese.¹¹ If courts or even various legislatures are allowed to rewrite the definition of marriage it would cause not only further culture division, but also a further and unnecessary decline in culture and in constitutional government. A redefinition of marriage would have overflowing consequences in a number of areas including education, freedom of association, free speech, among others.¹²

The FMA would only constitutionally protect traditional marriage, while allowing federalism to work. As General Meese noted:

A constitutional amendment that defines marriage would protect the states’ capacity to regulate marriage by sustaining it as an institution. In order to guard the states’ liberty to determine marriage policy in accord with the principles of federalism, society as a whole must prevent the institution itself from being redefined out of existence or abolished altogether.¹³

“The question of homosexual marriage is going to be decided at the national level; either there will be a constitutional right to such marriages, created out of whole cloth by judges, or there will be an amendment to block that development,” wrote Judge Robert H. Bork in *Slouching Towards Gomorrah: Modern Liberalism and American Decline*.¹⁴

(Endnotes)

¹Matthew Spalding, “A Defining Moment: Marriage, the Courts, and the Constitution,” The Heritage Foundation, Backgrounder, No. 1759, May 17, 2004, p. 1.

²The Associated Press, “Gay marriage foes vow to fight ruling: Conservative group plans to ask California court to put its ruling on hold,” MS-NBC.com, May 16, 2008, <<http://www.msnbc.msn.com/id/24665965/print/1/displaymode/1098/> (May 16, 2008).

³Charlotte Eby, “California Ruling Reverberates in Iowa,” Ames, The Tribune, May 16, 2008, p. A1.

⁴Ibid.

⁵Readers who are interested in learning more about the social/cultural benefits of preserving traditional marriage should visit The Heritage Foundation website (www.heritage.org), familyfacts.org, and Family Research Council (www.frc.org).

⁶Dale Carpenter, “The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic,” CATO Institute, Policy Analysis, No. 570, June 1, 2006.

⁷Edwin Meese, III, “Marriage Amendment Protects Federalism,” The Heritage Foundation, WebMemo No. 531, July 12, 2004.

⁸Ibid.

⁹Ibid.

¹⁰Ibid.

¹¹Ibid.

¹²Spalding, 4-5.

¹³Meese.

¹⁴Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*, New York: Harper Collins, 2003, 376.

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