It’s Not About Federalism #14: Gay Marriage

The first INAF Integrity Award goes to a man for whom, apparently, it is about federalism. Former Republican Congressman Bob Barr of Georgia—an opponent of same-sex marriage who authored the Defense of Marriage Act (DOMA)—has argued against a proposed constitutional amendment forbidding states from recognizing same-sex marriages, saying: “In the best conservative tradition, each state should make its own decision without federal government interference.”

Among current members of Congress, however, it’s the usual story, with conservative supporters of states-rights jurisprudence seeking to override states’ choices and liberals discovering the sanctity of state sovereignty. Consider the Senators of the Judiciary Committee, the chief antagonists in the fight over President Bush’s “federalist” nominees. At a subcommittee hearing on the proposed Federal Marriage Amendment (FMA), Sen. Feingold (D.-Wis.) said: “I do not believe that Congress should spend time on an issue that should be left to the states . . . .” Republican Sen. Cornyn of Texas, who convened the hearing, said: “It is rather extraordinary for some groups to suddenly assert the importance of states’ rights—the same groups who have opposed some of President Bush’s most exceptional judicial nominees precisely because of their support for states’ rights.” It is not clear whether Sen. Cornyn, who championed the Partial Birth Abortion Act and the Class Action Fairness Act to displace state law and take cases away from state courts, views himself as the pot or the kettle in this exchange.

Yesterday’s Massachusetts decision striking down a ban on same-sex marriage triggered urgent calls to pass the FMA. The Family Research Council typified social conservatives’ reaction, saying: “We must amend the Constitution if we are to stop a tyrannical judiciary from redefining marriage to the point of extinction.” The FMA already has more than 90 sponsors in the House, including Chip Pickering (R.-Miss.), son of embattled Bush judicial nominee Charles Pickering. Judging from reaction among nominally “federalist” politicians, we can expect the FMA to be introduced in the Senate before long. House Majority Leader DeLay (R-Tex.) said Republicans “are pushing a constitutional amendment banning gay marriage,” and Sen. Cornyn told the Houston Chronicle that he is now leaning more strongly toward supporting the FMA.

There is a plausible argument that requiring other states to recognize same-sex marriages solemnized in Massachusetts would violate those states’ sovereignty. But DOMA was passed precisely to preclude a same-sex marriage in one state from binding other states. Barr contends: “As any good federalist should recognize, this law leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.” The Massachusetts court appealed to states-rights principles in defending its decision: “We would not presume to dictate how another State should respond to today’s decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State’s Constitution has vitality specific to its own traditions . . . .”

“Federalist” defenses of the FMA have been more than a bit disingenuous. Sen. Cornyn warned his colleagues that courts are poised to “take the issue away from the states.” But the prominent same-sex marriage cases have involved state courts deciding whether statutes passed by state legislatures are valid under state constitutions. Surely, calibrating the relationship among
the branches of its own government is a core prerogative of a sovereign. And the states seem to be doing fine; Hawaiians and Alaskans responded to similar decisions by amending their state constitutions, while Vermonter chose to enact civil union legislation. The FMA would disempower state legislatures as well as courts by expressly precluding legislatures from passing laws giving same-sex couples “marital status or the legal incidents thereof.” It would sweep away Vermont’s legislatively adopted civil union law and dozens of local domestic partnership ordinances. Christian activist group Focus on the Family understands the objective perfectly: “The FMA protects marriage from redefinition by state legislatures and the courts.”

Sen. Cornyn invited Gregory Coleman, a private lawyer who clerked for noted “federalists” Judge Edith Jones of the Fifth Circuit and Justice Clarence Thomas of the Supreme Court before serving as Solicitor General of Texas under then-Governor Bush, to defend the FMA at his subcommittee hearing. Coleman claimed that the FMA “simply does not raise federalism concerns” because it would have to be ratified by three-quarters of the states. But as Minnesota Law School Professor Dale Carpenter testified, a national definition of marriage would trample on the sovereignty of the other one-quarter of states: “[T]he people of some states [would] order the people of other states not to experiment with their own state family law.”

For “federalists” who worry that Massachusetts will be able to force its own policy on other states, Carpenter’s argument ought to be decisive. As Barr puts it: “[N]o state can impose its view of marriage on any other state.”

**It’s not about federalism; it’s about second-class citizenship**

*with apologies to Chief Justice Margaret Marshall of Massachusetts

**On the Internet:**

The text of DOMA: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:h3396enr.txt.pdf

The proposed FMA: http://thomas.loc.gov/cgi-bin/query/z?c108:H.J.RES.56:

Links to witnesses’ testimony and members’ statements at the Cornyn subcommittee hearing: http://judiciary.senate.gov/hearing.cfm?id=906


“Marriage Protection Week” homepage, with links to sites of supporting organizations: http://www.marriageprotectionweek.com

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Lambda Legal’s Marriage Project resources page, with links to other organizations’ sites: http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=9&class=11