Written by **Warren Mass** on May 5, 2015

House Bill Introduced to Keep Marriage Cases Out of Federal Courts

As the Supreme Court considers how to rule on *Obergefell v. Hodges* — a case challenging marriage bans in Kentucky, Michigan, Ohio, and Tennessee, for which it heard oral arguments on April 28 — Representative Steve King (R-Iowa) has introduced legislation that would strip the High Court from deciding cases related to marriage.

The bill's description, embedded in its text, states: "To amend title 28, United States Code, to limit Federal court jurisdiction and funding over questions concerning the issue of marriage with respect to the Defense of Marriage Act and the Constitution, and for other purposes."

A press release posted on King's website on April 22, notes that the effect of the bill, the "Restrain the Judges on Marriage Act of 2015 (H.R. 1968)," "would prevent federal courts from hearing marriage cases, leaving the issue to the States where it properly belongs."

The release quotes from King's statement explaining his proposed legislation:

> For too long, federal courts have overstepped their constitutionally limited duty to interpret the Constitution. Rather, federal courts have perverted the Constitution to make law and create constitutional rights to things such as privacy, birth control, and abortion. These unenumerated, so-called constitutionally-protected rights were not envisioned by our Founding Fathers.
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> My bill strips Article III courts of jurisdiction, and the Supreme Court of appellate jurisdiction, "to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, any type of marriage." Second, my bill provides that 'no federal funds may be used for any litigation in, or enforcement of any order or judgment by, any court created by an Act of Congress."

King's reference to Article III courts indicates that he bases his bill's authority on the same principles cited by former Representative Ron Paul (R-Texas), who introduced a bill called the "We the People Act" in the 108th through 111th congresses. The stated purpose of the "We the People Act" was to prohibits "the Supreme Court and each Federal court from adjudicating any claim or relying on judicial decisions involving: (1) State or local laws, regulations, or policies concerning the free exercise or establishment of religion; (2) the right of privacy, including issues of sexual practices, orientation, or reproduction; or (3) the right to marry without regard to sex or sexual orientation where based upon equal protection of the laws."

The very beginning of the We the People Act stated important constitutional principles that King also

obviously relied on in drafting his bill:

> The Congress finds the following:
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> (1) Article III, section 1 of the Constitution of the United States vests the judicial power of the United States in "one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish".
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> (2) Article I, section 8 and article 3, section 1 of the Constitution of the United States give Congress the power to establish and limit the jurisdiction of the lower Federal courts.
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> (3) Article III, section 2 of the Constitution of the United States gives Congress the power to make "such exceptions, and under such regulations" as Congress finds necessary to Supreme Court jurisdiction.
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> (4) Congress has the authority to make exceptions to Supreme Court jurisdiction in the form of general rules and based upon policy and constitutional reasons other than the outcomes of a particular line of cases. (See *Federalist* No. 81; *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872)).
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> (5) Congress has constitutional authority to set broad limits on the jurisdiction of both the Supreme Court and the lower Federal courts in order to correct abuses of judicial power and continuing violations of the Constitution of the United States by Federal courts.

H.R. 1968 has been cosponsored by nine representatives and is currently in the House Judiciary Committee. Senator Ted Cruz (R-Texas) has introduced an identical bill in the Senate (S. 1080), which is in the Senate Judiciary Committee.

While limiting the jurisdiction of federal courts using the power delegated to Congress in Article III of the Constitution is an excellent way to restrain the federal courts and preserve states' rights, it is not the only way. Another viable tool is the nullification of unconstitutional federal edicts by the states.

This concept was explained in a 2010 article in *The New American*, "Nullificatiion in a Nutshell." Providing some historic background for how our Founders viewed this principle, the writer noted:

> [James] Madison, joined by Thomas Jefferson, [expanded] upon [the concept of nullifcation] in the famous Kentucky and Virginia Resolutions of 1798. The federal government had recently passed the blatantly unconstitutional and shameful Alien and Sedition Acts to silence and intimidate political enemies. Those despicable acts were instituted by advocates of unwritten constitutional power and a more robust central government. Both Jefferson and Madison argued that the states constitutionally had the right to refuse not only to comply with such unconstitutional actions of the federal government, but also to actively prevent the feds from enforcing them within their state boundaries….
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> Many states have in fact utilized state nullification to check the federal government throughout the history of our Republic. From the Fugitive Slave Act to unpopular tariffs, states did indeed nullify federal laws they found to be unconstitutional.

One of the best and most recent examples of state nullification in action (and one directly related to the current Supreme Court case) was described in an article in *The New American* posted on February 10, "Constitutional Crisis: Alabama Battles Feds to Protect Marriage."

The article related that in January, U.S. District Court Judge Callie Granade issued a ruling claiming to

expand the definition of marriage to include same-sex couples.

Following that ruling, Alabama Supreme Court Chief Justice Roy Moore sent a letter to Governor Robert Bentley, urging the governor and all state officials to uphold the state constitution, which had been amended following the approval of 80 percent of the state's voters to define marriage as a "sacred covenant, solemnized between a man and a woman." In his letter to the governor, Moore stated that the federal judge's ruling aimed at "destruction" of the institution of marriage under "specious pretexts" and was not valid.

On February 8, after the U.S. Supreme Court refused to intervene in Alabama's case and stay Judge Granade's ruling, Moore reiterated his position that homosexual "marriage" licenses must not be issued in the state by any state official in violation of state law.

Moore stated unequivocally that if any probate judge in Alabama should issue a marriage license to a same-sex couple, it would be Governor Bentley's responsibility to enforce Alabama law, which states that any purported "marriage" between homosexuals "is invalid in this state."

The nation awaits the Supreme Court's ruling in *Obergefell v. Hodges*, and many individuals who do not understand the constitutional separation of powers will claim that will be the end of the matter. However, that is not the case. Defenders of traditional marriage have two separate avenues available to them: the legislative route on which Representative King and Senator Cruz have begun, or the nullification route employed by Judge Moore in Alabama.

Related articles:

Constitutional Crisis: Alabama Battles Feds to Protect Marriage

State vs. Federal: The Nullification Movement

Nullification in a Nutshell

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