Written by **Joe Wolverton, II, J.D.** on July 11, 2013

May the Federal Government Define Marriage?

In an article published on July 9, *USA Today* explained that in the wake of the Supreme Court's ruling overturning the Defense of Marriage Act (DOMA), "The legal battle over same-sex marriage has shifted from the Supreme Court to state capitals and lower courts as supporters seek to build on their recent victories and opponents hope to thwart that progress."

The piece reports that "lawyers representing same-sex couples filed a lawsuit in Pennsylvania on Tuesday and vowed to follow soon with others in North Carolina and Virginia. Those cases will be added to at least 11 pending from New Jersey to Hawaii."

Also following in the wake of the Supreme Court's 5-4 condemnation of traditional marriage, some observers worry that such will lead to the forced recognition of gay "marriage" in all 50 states because of the requirements of the Full Faith and Credit Clause of the Constitution.

Some legal scholars are questioning whether the homosexual lobby and their allies in the press and in Congress may now use the Full Faith and Credit Clause as a sword to force their will upon the entire country. However, for those who hold the Constitution sacred and wish to avoid any sort of unnecessary tinkering with it, the analysis described above is faulty and misrepresents the intent of the Constitution, particularly the Full Faith and Credit Clause.

Several years ago, this very issue was addressed in a decision handed down by the U.S. District Court in Tampa, Florida. In that ruling, U.S. District Judge James Moody, Jr. correctly held that "the Supreme Court has clearly established that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy. Florida is not required to recognize or apply Massachusetts' same-sex marriage law because it clearly conflicts with Florida's legitimate public policy of opposing same-sex marriage."

Judge Moody's opinion was correct and, more importantly, it was constitutionally sound.

Article IV, Section I of the Constitution reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

In this matter of fundamental constitutional importance, it is crucial to understand precisely what the Full Faith and Credit clause was and was not intended to do. First, as a matter of indisputable historical record, states have occasionally refused to acknowledge marriages legally entered into in other states. According to the Supreme Court's interpretation of the Full Faith and Credit Clause, states that have valid public policy exceptions to legal acts of other states do not have to recognize those acts. Some

argue that such exceptions would disrupt the smooth and unregulated movement of citizens.

There is an additional aspect of the Full Faith and Credit Clause that would protect states from being constitutionally forced to give legal effect to homosexual unions contracted in other states. The exact wording of the Full Faith and Credit Clause requires that states give "full faith and credit" to the "public acts, records, and judicial proceedings of every other state." Marriages, strictly speaking, are not judicial acts; they are licensed acts, and as such they do not fall under the Full Faith and Credit umbrella, any more than a license to practice law in one state guarantees that same right in a neighboring state. The Full Faith and Credit Clause, then, does not require one state to validate a same-sex unions entered into in another, but actually protects it from having to do so.

There is another argument thwarting the effort to use the Supreme Court's ruling in *United States v. Windsor* as a crowbar to force every state in the union to recognize same-sex "marriage": nullification.

Marriage is a word with a meaning. In every major religion in the world, marriage is a sacrament, a union endowed with spiritual significance and performed by clergy.

In Judaism and Christianity, for example, for millennia marriage has been defined as the union of a man and a woman, with the Lord as a witness.

Jesus Christ himself sanctified this particular sacrament, commanding, "What therefore God hath joined together, let not man put asunder." And, let's not forget that the Lord's first miracle was performed at a wedding ceremony.

With that understanding in mind, one turns to the lack of constitutional authority over such acts. There is not a single word in the Constitution that grants the federal government the power to define marriage.

As Representative Justin Amash (R-Mich.) explained in advance of the Supreme Court decision, "I don't want the government deciding who has a legitimate baptism, who has a legitimate communion, who's involved in other personal relationships we have. I want the government out of it."

The constitutionally consistent congressman went on to explain that "there is a growing segment of Americans who understand that having the federal government define it is a big problem, and would feel much more comfortable with having the states determine the issue."

Enter the 10th Amendment.

The 10th Amendment makes clear that if any power is "not delegated to the United States by the Constitution, nor prohibited by it to the states," that power is "reserved to the states respectively, or to the people."

The right of states to refuse to enforce unconstitutional federal acts is known as nullification.

Nullification is a concept of constitutional law recognizing the right of each state to nullify, or invalidate, any federal measure that exceeds the few and defined powers allowed the federal government as enumerated in the Constitution.

Nullification exists as a right of the states because the sovereign states formed the union, and as creators of the compact, they hold ultimate authority as to the limits of the power of the central government to enact laws that are applicable to the states and the citizens thereof.

Constitutionally speaking, then, whenever the federal government passes any measure not provided for in the limited roster of its enumerated powers, those acts are not awarded any sort of supremacy.

Instead, they are "merely acts of usurpation" and do not qualify as the supreme law of the land. In fact, acts of Congress are the supreme law of the land only if they are made in pursuance of its constitutional powers, not in defiance thereof.

Hamilton put an even finer point on the issue when he wrote in *Federalist*, No. 78, "There is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid."

Additionally, Representative Amash's statement quoted above, as well as the fundamentally religious nature of marriage, potentially presage the tumbling down of a constitutional slippery slope where the federal government presumes to have the power to redefine baptism, the Eucharist (the Lord's Supper), and other facets of faith.

One can foresee future "human rights" arguments laid out in federal lawsuits complaining, for example, that the exclusion of women from the priesthood is discriminatory and has the "effect to disparage and to injure" women, depriving them of their "personhood and dignity." In the wake of the Windsor ruling, this scenario is but a small step into the future of federal usurpation over faith.

For now, it is the proper application of the Full Faith and Credit Clause that is the focus of proponents of traditional marriage.

The Full Faith and Credit clause has generally worked smoothly and quietly without receiving the same level of judicial attention as more controversial provisions of the Constitution, such as the commerce clause, due process, equal protection, and the treaty-making power.

With the attention given to the same-sex union issue, such radical redefining of fundamental facets of faith will become the focus of more attention in the near future. Having accomplished the endowment of the federal government with the power to rule on matters of religion, advocates of homosexual unions, armed with the Windsor decision, will now misinterpret the Full Faith and Credit Clause in such a way that those who have purposely set about to remove the fetters of the Constitution from the federal government will find legal albeit unconstitutional means to achieve their insidious project of destroying the United States one family at a time.

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He can be reached at jwolverton@thenewamerican.com*