Written by **Joe Wolverton, II, J.D.** on November 15, 2014

South Carolina Appeals Federal Court's Reversal of Same-sex Marriage Ban

South Carolinians are the latest Americans to be effectively disenfranchised by a federal judge.

On Wednesday, a federal district court declared South Carolina's ban on same-sex marriage unconstitutional.

Almost as soon as that ruling, a temporary stay of the decision was issued, giving the state time to appeal the decision to either the Fourth Circuit Court of Appeals or the Supreme Court.

In fact, South Carolina Attorney General Alan Wilson has already filed an appeal with the Fourth Circuit.

Wilson argued in a separate filing that marriage is not an issue within federal jurisdiction and that the states, therefore, should be free to legislate in that arena.

"Our state's laws on marriage are not identical to those in other states. Therefore, based on the time-honored tradition of federalism, this Office believes South Carolina's unique laws should have their day in court at the highest appropriate level," Wilson wrote in a statement accompanying the appeal.

The Fourth Circuit and District Court Judge Richard Mark Gergel disagreed, ruling that any attempt by South Carolina to deny residents the "right" to marry someone of the same gender would be unconstitutional.

In their decision, the judges of the Fourth Circuit held that "the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

According to Wednesday's ruling, the temporary stay will expire on November 20.

Another aspect of the potential impact of this ruling was addressed in Attorney General Wilson's pleading. He argued that an injunction is proper until a ruling is issued in the case of *Bradacs v. Haley* in which a homosexual couple from Washington, D.C. is seeking legal recognition of their marriage in South Carolina.

Judge Gergel ruled that the cases were so factually different that the ruling in one would have no bearing on the other.

However, in the wake of the so many federal court decisions striking down state laws upholding 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 well-intentioned observers warn that the homosexual lobby and their allies in the courts and Congress eventually will 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

Finally, the best and most historically and constitutionally sound defense of traditional marriage is nullification.

As I explained in a recent article, there is absolutely no reason that conservatives and people of faith committed to the protection of traditional marriage should hang on the words of black-robed oligarchs who have no constitutional authority to set at nought the will of the people of the various states as manifested through their elected representatives in the state legislatures.

Furthermore, all state legislators and other state officials (including attorneys general and governors) are duty-bound to refuse to enforce every act of the federal government that exceeds its constitutionally defined powers.

As James Madison explained in the Virginia Resolution of 1798:

> in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

His *Federalist Papers* co-author, Alexander Hamilton, added in *The 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."

Nullification recognizes that states retain the power to invalidate any federal measure that exceeds the few and defined powers allowed the federal government as enumerated in the U.S. Constitution.

States (and their legal subdivisions) act as arbiters of the constitutionality of federal acts because *they 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.

Despite criticism by those who advocate for a more powerful federal government, nullification would not lead to anarchy, as it is only unconstitutional federal acts that will be subject to state invalidation.

In other words, regardless of what this or that federal judge or court "rules," these decisions are devoid of any compelling constitutional authority and should be disregarded by states. Lawmakers and the people they represent should carry on in their unrepentant retrenchment of traditional marriage and of the right of the people to decide the laws that govern them.

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