Written by **Joe Wolverton, II, J.D.** on January 18, 2015

Supreme Court to Force 50 States to Follow Its Ruling on Same-sex Marriage

The Supreme Court announced Friday that it would render a ruling on the question of whether every state in the Union must allow same-sex marriages. The opinion will be handed down by late June or early July, the end of the high court's current term.

While the *New York Times* describes the issue as "one of the great civil rights questions in a generation," constitutionalists recognize it as another in a long line of questions of whether states will remain sovereign or continue their rapid devolution into mere administrative subunits of an all-powerful central government.

The cases accepted by the Supreme Court were filed by "15 same-sex couples in four states," according to the *Times* report.

Accepting the decision of the Supreme Court as the final say on an issue that has been already decided by the people and their elected state representatives in several states is not the action of a constitutionalist, regardless of one's own moral position on the matter.

Furthermore, all state legislators and other state officials (including attorneys general and governors) are duty-bound to refuse to enforce any 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.

Strangely, some still argue that when the Supreme Court rules on the constitutionality of an issue, there remains no recourse and the question is settled once and for all.

In light of recent decisions by "conservatives" on the Supreme Court in the ObamaCare case, it is no wonder that many Americans doubt that states have authority to establish their own public policy positions — outside those few powers explicitly delegated to the federal government by the Constitution — once the Supreme Court has put its federal foot down.

Thomas Jefferson had something to say in the matter. In 1804, he wrote that giving the Supreme Court power to declare unconstitutional acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

In this Mexican standoff of fundamental liberty, Supreme Court, and federal government, the last man

standing is the people acting in their collective political capacity as states.

Even Abraham Lincoln recognized the lack of constitutional authority for the Supreme Court's assumption of the role of ultimate arbiter of an act's conformity with the Constitution. Lincoln said that if the Supreme Court were afforded the power to declare whether an act of the federal government was constitutional, "the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal."

Renowned constitutional scholar Von Holtz explained the error in accepting the Supreme Court as the ultimate arbiter of constitutional fidelity. "Moreover, violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way," he wrote.

He continued, regarding this "aristocracy of the robe," "That our national government, in any branch of it, is beyond the reach of the people; or has any sort of 'supremacy' except a limited measure of power granted by the supreme people is an error."

How can anyone read these statements and honestly conclude that the founders and the Constitution they wrote ever intended state law to be voidable by the Supreme Court?

Every department of the federal government was created by the Constitution — therefore, by the states — and has no authority to overrule the will of the people as expressed through constitutional amendments or through laws passed by their state legislatures.

No branch can define its own authority. Such a thought is ridiculous and contrary to any theory of popular sovereignty ever proposed. If courts, Congress, or presidents had such power, it would make them judge, jury, and executioner in every issue that touches and concerns the lives of every American.

Beyond the aspect of federalism, some conservative observers wonder if the Supreme Court will base its anticipated mandate of the recognition of gay "marriage" in all 50 states on the Full Faith and Credit Clause of the Constitution.

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 same-sex unions entered into in another, but actually protects it from having to do so.

Regardless of how the Supreme Court rules on the issue of same-sex marriage, the states retain the authority to govern themselves and needn't be bound by actions of the federal government that exceed the boundaries placed by the Constitution around its very limited sphere of authority.

As Alexander Hamilton explained in *The Federalist*, No. 33, "But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such." (Emphasis in original.)

And, later 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."

Finally, 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.

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