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A QUEER ALLIANCE: GAY MARRIAGE AND THE NEW FEDERALISM

Derek C. Araujo*

INTRODUCTION

May 17, 2004 was an odd day in American politics. Many will remember that Monday as the first date in United States history that the government of one state recognized the union of same-sex couples in marriage, initiating a nationwide proliferation of legal challenges to same-sex marriage restrictions in several other states.[1] This in itself is quite

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[1] In November 2003 the Supreme Judicial Court of Massachusetts (SJC) declared that excluding gays and lesbians from the protections, benefits, and obligations of civil marriage violates the Due Process and Equal Protection clauses of the Massachusetts Constitution. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). The SJC stayed its judgment until May 17, 2004 to allow the Massachusetts legislature to react to its opinion. On February 3, 2004, the SJC clarified its ruling in *Goodridge*, stating that only marriage for gays and lesbians, not mere civil unions, would pass muster under the Massachusetts Constitution; this effectively granted gays and lesbians the right to marry on May 17, 2004. Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). In the months following the *Goodridge* decision, numerous other jurisdictions across the country began issuing gay marriage licenses, including cities, towns, and counties in California, New Mexico, New York, and

remarkable, but it is not the noteworthy event I have in mind. Rather, May 17, 2004 stands out for a significant non-event: it is the first date of Congress's continuing failure to enact any legislation addressing the perceived cultural crisis instigated by the Massachusetts Supreme Judicial Court's ("SJC") recognition of gay marriage.

To be sure, social conservatives, including the President of the United States, were quick to condemn these developments and have endorsed proposed amendments to the United States Constitution that would ban gay marriage throughout the states.[2] Such an amendment would impose the first federal constitutional restriction of American citizens' intimate relationships. Perhaps because of the gravity of such a restriction, federal marriage amendments have failed in both houses of Congress.[3] It seems all but certain that with the

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Oregon. Tom Vanden Brook and Charisse Jones, *Oregon Gay Marriages Begin; New York Calls Vows Illegal*, USA TODAY ONLINE, Mar. 3, 2004, http://www.usatoday.com/news/nation/2004-03-03-ny-gay-marriage_x.htm (last visited July 24, 2006). While both the New York Court of Appeals and the Washington State Supreme Court recently rejected state constitutional challenges to legislative bans on gay marriage in their respective states, Hernandez v. Robles, 2006 N.Y. LEXIS 1836, (N.Y. July 6, 2006), Andersen v. King County, 138 P.3d 963 (Wash. 2006), the legal debate over gay marriage continues in numerous other states, including New Jersey and California. Stephanie Simon, *Flurry of Court Rulings, with More Ahead, on Gay Unions*, L.A. TIMES, July 23, 2006, at A18.

[2] Elisabeth Bumiller, *Same Sex Marriage: The President;Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

[3] On July 18, 2006 the House of Representatives rejected a proposed amendment, H.R.J. Res. 88, 109th Cong. (2006), by a vote of 236 to 187, well short of the two-thirds majority required to amend the Constitution. *See* Office of the Clerk, U.S. House of Representatives, *available at* http://clerk.house.gov/evs/2006/roll378.xml (last visited July 24, 2006). A House vote on a similar amendment before the 2004 elections was 227 to 186. *See* Office of the Clerk, U.S. House of Representatives, *available at* http://clerk.house.gov/evs/2004/roll484.xml (last visited July 24, 2006). The Senate rebuffed a similar ban on June 7, 2006 by voting 49 to 48 to close debate on a call to bring the amendment, S.J. Res. 1, 109th Cong. (2005), to the floor. *See* United States Senate, *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00163 (last visited July 24, 2006).

passage of time, other states will join Massachusetts in granting gays and lesbians full marriage equality.[4]

Support for gay marriage is strongest among young voters.[5] Yet to date, no member of Congress has offered any proposal, short of the empty gesture of hopeless proposed constitutional amendments, commanding or inducing the states to ban gay marriage.[6] What restraints have forced opponents of same-sex

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[4] Indeed on October 25, 2006, the New Jersey Supreme Court ruled that the state constitution's equal protection clause guarantees that same-sex couples and their families have the right to the same benefits and protections that other New Jersey families take for granted. The court ordered the New Jersey Legislature to extend same-sex couples equal benefits and protections—either through marriage or civil unions, by April 23, 2007. *See* Lewis v. Harris, 908 A. 2d 196 (N.J. 2006). Whether or not the New Jersey Legislature will heed the New Jersey Supreme Court's recommendation to amend the marriage statutes or enact a separate statutory structure, the decision lies squarely in the hands of the legislature, unlike in Massachusetts. *Accord Goodridge*, 798 N.E.2d 941 (Mass. 2003); *see also Lewis*, 908 A. 2d. at 224-31 (Poritz, C.J., concurring and dissenting) (arguing that denial of the right to same-sex marriage burdens one's liberty interests thereby violating the due process clause of the New Jersey Constitution).

[5] According to a Feb. 9, 2004 Annenberg poll, support for gay marriage is strongest among young voters, who favor full marriage equality by 50% to 43%. *See American Public Opposes Both Same-Sex Marriages and Constitutional Amendment to Prohibit Them, National Annenberg Election Survey Shows*, The Annenberg Pub. Policy Ctr. of U. Penn, Philadelphia, P.A., Feb. 9, 2004, *available at* http://www.annenbergpublicpolicycenter.org/naes/2004_03_gay-marriage-after-court_02-09_pr.pdf (last visited July 28, 2006).

[6] The lay public might suppose that Congress has indeed attempted to ban gay marriages throughout the states through enacting Defense of Marriage Act of 1996 (DOMA), 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006). To the contrary, DOMA does not prohibit gay marriage within the states. Rather, it accomplishes two comparatively modest goals. First, it declares that only a union between one man and one woman will be recognized as a marriage for federal purposes, e.g., filing of joint federal income tax returns as a married couple. 1 U.S.C. § 7. Second, DOMA alleges to allow any state to deny full faith and credit to any other state's act, record, or judicial proceeding that recognizes a gay marriage. 28 U.S.C. § 1738C. DOMA's supporters argue that Congress derives its authority to achieve the second goal under its regulatory powers under the Full Faith and Credit Clause. *See* U.S. CONST. art. IV, § 1, cl. 1, ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state.") Congress's regulatory powers are conferred by clause 2 of the same section: "And the Congress may by general Laws prescribe the

Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *See* U.S. CONST. art. IV, § 1, cl. 2.

DOMA therefore does not prevent any single state from recognizing marriages between same-sex couples. That said, it remains unclear whether Congress's regulatory powers under the Full Faith and Credit Clause are sufficiently broad to permit Congress to achieve its second goal under DOMA: to allow states to deny the existence of an out-of-state marriage. This is an open question of law that remains in contention to date. Some commentators argue that Congress acted within its powers in enacting DOMA. *See, e.g.*, Timothy Joseph Keefer, Note, *DOMA as a Defensible Exercise of Congressional Power under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635 (1997); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998). Several prominent legal theorists, however, contend that such a broad view of Congress's regulatory powers would essentially gut the Full Faith and Credit Clause. Laurence Tribe has argued that:

> Such purported authority to dismantle the nationally unifying shield of Article IV's Full Faith and Credit Clause, far from protecting states' rights, would destroy one of the Constitution's core guarantees that the United States of America will remain a union of equal sovereigns; that no law, not even one favored by a great majority of the States, can ever reduce any State's official acts, on any subject, to second-class status....

142 CONG. REC. S5932 (daily ed. June 6, 1996) (letter from Laurence Tribe to Sen. Edward Kennedy); *see also* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997).

It also remains unclear how the full faith and credit issue will arise in litigation. There are conceivable scenarios in which gays and lesbians would argue either for or against the extension of full faith and credit to an out-of-state gay marriage. For instance, a gay couple might argue for the extension of full faith and credit if they are first married in Massachusetts, but then move to Texas and desire access to the benefits and privileges of marriage within Texas. On the other hand, if the gay couple divorces and one spouse sues the other for alimony in a Texas court, the second gay spouse might argue against Texas' extension of full faith and credit to the Massachusetts marriage. Similarly, an individual might devise a will conditioning inheritance on a legatee's being married. Under such circumstances, a gay claimant may find himself arguing either for or against the extension of full faith and credit to his out-of-state gay marriage.

Finally, it should be noted that supporters of DOMA often argue that the Act safeguards states' rights. Under this view, forcing one state to recognize gay marriages from another state via the Full Faith and Credit Clause would constitute the tyranny of one state over others, in that a single state would be able to set a national policy regarding the recognition of gay marriage. For

marriage to forsake the legislative process for the stronger and more extraordinary medicine of constitutional amendment?

Many lawyers and legal scholars would be quick to point out a readily-apparent answer: that marriage is among those topics traditionally reserved to the states to regulate, and that both federal and state courts covetously guard against federal intrusion in domestic relations law. The purpose of this paper is to convince the reader that this response, while initially plausible and compelling, is a mere half-answer that evades or ignores deeper constitutional issues. A full treatment of the question reveals surprising insights: that absent relatively recent developments in constitutional law, Congress would have enjoyed relatively broad authority to regulate the states' treatment of gay marriage; that those who favor marriage equality are in the awkward position of owing the Rehnquist

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instance, California's recognition of any gay marriage would force a second state to recognize the gay marriage, regardless of the second state's view on the matter. During Congressional debate, DOMA supporter Senator Larry Craig of Idaho asserted that "DOMA actually reinforces States' rights. It prevents one State from imposing upon all others its own particular interpretation of the law." 142 CONG. REC. S10101 (daily ed. Sept. 10, 1996) (statement of Sen. Craig). DOMA sponsor Senator Orrin Hatch of Utah likewise stated that "[t]he Defense of Marriage Act ensures that each state can define for itself the concept of marriage and not be bound by decisions made by other States." The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary, 104th Cong. 1, 2 (1996).

However, the view that DOMA protects each state's right to determine its own policy with respect to gay marriage is questionable. The courts have recognized a "Public Policy" exception to the Full Faith and Credit Clause, giving the states the power to deny full faith and credit to acts, records, and judicial proceedings that contravene strong state public policy. *See generally* Kramer, *supra* (arguing that such an exception is unconstitutional). Indeed, in anticipation of the application of the Full Faith and Credit Clause to out-of-state gay marriages, numerous states have enacted "mini-DOMAs" declaring that gay marriages are against state public policy. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 1704 (West 1997); GA. CODE ANN. § 19-3-3.1 (1997); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1997); MICH. COMP. LAWS ANN. § 551.1 (West 1997); TENN. CODE ANN. § 36-3-113 (1996). Some legal scholars argue that a dilemma thus arises: either DOMA is redundant in that it gives states permission to do what is already within their power, or DOMA is unconstitutional because it purports to permit states to do what is beyond their constitutional power. *See* 142 CONG. REC. S10100, S10102 (daily ed. Sept. 10, 1996) (Sen. Kennedy citing Dean Kay of Boalt Hall, University of California at Berkeley Law School); 142 CONG. REC. H7270, H7277 (daily ed. July 11, 1996) (statement of Rep. Studds).

Court their thanks for foreclosing Congress from using ordinary legislative means to order or induce a nationwide gay marriage ban; or, from a mirror perspective, that social conservatives who normally champion states' rights ought to be careful of what they ask for.

While the constitutional doctrines of forty years ago allowed Congress several means by which it might regulate the states' definition of marriage, the Rehnquist Court's firm embrace of states' rights closed them off. Admittedly, the New Federalism is not a philosophy to which legislators and jurists have adhered with fidelity; social conservatives are often accused of employing New Federalist doctrines to defeat only the policies they find disagreeable.[7] Exact application of the New Federalism's principles, however, would thwart Congressional attempts to interfere, whether directly or indirectly, with any state's recognition of gay marriage. Unless social conservatives are willing to renounce one or more of the New Federalism's tenets, an increasingly unlikely constitutional amendment is the only conceivable means Congress can use to obstruct gay marriage.

This paper comprises seven parts. Part I provides an overview of Congress's treatment of marriage during the nineteenth century debate over Mormon polygamy, and the Supreme Court's blessing of Congress's numerous legislative efforts to inhibit, criminalize, and eradicate the practice of polygamous marriage within the states and territories. This illustrates Congress's readiness to pass legislation targeting perceived "threats" to the institution of marriage, when it is

[7] Several commentators have complained that social conservatives raise and lower the banner of the New Federalism as they please, in service of their own policy interests. Consider, for instance, Republicans' call for a blanket, federal statutory prohibition on certain abortion procedures, grounded in an expansive reading of the Commerce Clause. *See, e.g.*, Simon Lazarus, *Next on Abortion: Supreme Collision*, WASH. POST, Nov. 23, 2003, at B4. Others have made the same accusation regarding the far-right stance on gay marriage. *See, e.g.*, *Mass Appeal*, THE NEW REPUBLIC ONLINE, Nov. 20, 2003, *at* https://ssl.tnr.com/p/docsub.mhtml?i=20031201&s=editorial120103 (last visited July 24, 2006). Indeed, it is not difficult to view *Bush v. Gore*, 531 U.S. 98 (2000), as an example of the Rehnquist Court's own fair-weather Federalism. There, the Court abandoned its fundamental policy of leaving the interpretation of state law to the state courts, by interpreting Florida election law against the Florida Supreme Court's ruling and thereby putting an end to the 2000 Presidential Election controversy. *See id.*

provided with legal means for doing so. Parts II through VI explore the limitations created by the New Federalism on Congress's ability to obstruct gay marriage in the states. The discussion pays particular attention to possible legislation predicated on Congress's powers under the Interstate Commerce Clause, the Spending Clause, and section 5 of the Fourteenth Amendment. Part VII ends with the conclusion that any congressional interference with gay marriage is likely unconstitutional in light of the Rehnquist Court's New Federalism. Ironically, the New Federalist principles so long decried by liberals and progressives may hold the salvation of full equality for gay and lesbian citizens.

I. AN HISTORICAL EXAMPLE OF FEDERAL CONTROL OVER MARRIAGE: MORMONISM, POLYGAMY, AND CONGRESSIONAL REACTION IN THE NINETEENTH CENTURY

The immediate answer to the question, "What prevents Congress from passing legislation banning gay marriage?," is seductively simple and direct: the familiar and well-recognized maxim that only the states, not Congress, may exercise control over domestic relations law, prohibits Congress from meddling with the states' treatment of marriage. Both Congress and the courts recognize the traditional view that domestic relations law is reserved to the states.

First, Congress has exhibited a general reluctance to involve itself in the states' treatment of marriage. Historically, Congress has expressed doubt over its power to do so without amending the Constitution. An 1892 House Judiciary Committee report, for instance, found that congressional power over marriage would lead Congress to "legislate upon the main body of domestic and local interests of the people which have always belonged to and been exercised by the states."[8] By the mid-twentieth century, Congress had considered seventy constitutional amendments that would empower it to enact uniform marriage and divorce laws on the national level; none

[8] H.R. Rep. No. 1290, at 1 (1892).

of the amendments succeeded.[9] Their failure suggests that Congress is at the very least unsure of its authority to regulate marriage.[10]

Second, both the federal and the state courts have frequently declared family law to be a domain of law that Congress ought not to invade. As early as 1890, the Supreme Court declared that the "whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States".[11] In *United States v. Yazell*, the Supreme Court described family law as a "peculiarly state province."[12] And in 1981, William Rehnquist, then an Associate Justice of the Supreme Court, declared in a dissent that "both family law and property law have been recognized as matters of peculiarly local concern and therefore governed by state and not federal law."[13] The state courts appear to agree readily with him. In *Baehr v. Lewin*,[14] for instance, the Supreme Court of Hawaii declared that "[t]he power to regulate marriage is a sovereign function reserved exclusively to the respective states."[15] The Hawaii court cited cases from a number of federal

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[9] *See* Sherrer v. Sherrer, 334 U.S. 343 at 364-66 n.13 (1947) (Frankfurter, J., dissenting); *Proposed Amendments to the Constitution of the United States Introduced In Congress From December 4, 1889 – July 2, 1926* (U.S. Gov't Printing Office, 1926).

[10] *See generally* Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States*, 26 HASTING CONST. L.Q. 419, 439-440 (1999).

[11] *In Re* Burrus, 136 U.S. 586, 593-94 (1890) (holding that federal courts have no jurisdiction to issue writs of habeas corpus to the father of a child held by his grandparents).

[12] 382 U.S. 341, 353 (1966) (holding that state domestic relations law should determine whether a wife is liable for a Federal Small Business Administration loan taken out by her husband).

[13] McCarty v. McCarty, 453 U.S. 210, 237 (1981) (Rehnquist, J, dissenting) (citations omitted).

[14] 852 P.2d 44 (Haw. 1993) (holding that plaintiff gay marriage applicants were entitled to a hearing to determine whether Hawaii's marriage license law was narrowly tailored to furthered compelling state interests sufficient to avoid violating the Hawaii constitution's equal protection clause).

[15] *Id.* at 58.

district courts in support of this proposition.[16] It is therefore hardly a novel suggestion that marriage is a territory of law upon which Congress lacks the constitutional authority to tread.

Yet this simple response cannot hold the entire answer. Despite the general taboo against federal interference with domestic relations law, Congress has acted swiftly and boldly in the past to protect marriage from perceived dangers, with ready judicial approval. Congress's current failure to interfere with marriage in the states stands in sharp contrast to its willingness to assert itself during the nineteenth century debate over polygamy. As will become clear, the extent of Congress's interference with marriage during the struggle against polygamy was, by today's standards, breathtaking. Congress's decisive reaction against marriage's perceived imperilment shows its readiness to pass marriage legislation when given legal cover for doing so. Furthermore, the Supreme Court's unequivocal support for Congress's actions calls into question the received wisdom that Congress lacks all legal authority to mold marriage through legislation.

A word of caution is warranted at this point. It is not the purpose of this paper to draw a direct analogy between polygamy and gay marriage, or to imply that recognition of the latter necessitates acceptance of the former. Examining the legal treatment of gay marriage through the lens of polygamy inevitably raises the danger of inviting comparisons between the two; if such an examination were not so illuminating, I would shrink from undertaking it. The congressional response to polygamy is highly instructive, however, in that it provides the only example, aside from the 1996 Defense of Marriage Act,[17] of Congress's interference in the states' determination of who can marry whom.[18]

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[16] *Id*. (citing Salisbury v. List, 501 F. Supp. 105, 107-109 (D. Nev. 1980); O'Neill v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973)).

[17] DOMA does nothing to prevent the states from deciding the issue of gay marriage for themselves. *See supra* note 6.

[18] *See* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 53 ("Only twice in American history has Congress intervened to reject the determinations that states might make about who can marry. The first occasion was in the late Nineteenth Century when Congress enacted a series of statutes aimed at the Mormon Church, prohibiting polygamy in the Western territories and punishing the Church and those within it who

This is not to suggest that homosexuality and polygamy are analogous, or that Congress has no legal means at its disposal to oppose the practice of polygamy. Poorly-drawn analogies between gay marriage on the one hand and polygamy, incest, and bestiality on the other are little more than diversionary tactics employed by gay marriage's intractable opponents. Such analogies are the whistle on the anti-gay-marriage engine, not the steam that drives it.[19]

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entered into polygamous marriages. The more recent occasion was just last year. In the summer of 1996, Congress adopted the Defense of Marriage Act . . . .").

[19] Opponents of gay rights too often analogize gay marriage to every conceivable form of sexual aberration as a means of disparaging it. *See, e.g.*, 142 CONG. REC. H7441 at H7443, (daily ed. July 11, 1996) (statement of Rep. Largent in favor of the 1996 Defense of Marriage Act) ("What logical reason is there to keep us from stopping expansion of that definition to include three people or an adult and a child, or any other odd combination . . . ? There really is no logical reason why we could not also include polygamy or any other definition to say, as long as these are consenting human beings, and it does not even have to be limited to human beings, by the way. I mean it could be anything."). Unscrupulous social conservatives draw such analogies in the hope that tirades against polygamy, incest, and bestiality will elicit a particular fear in their listeners; that even the slightest relaxation of ancient biases surrounding the institution of marriage will lead ineluctably to social and moral degradation.

There are many reasons to question such analogies. The opponents of interracial marriage used the same rhetorical device during their battle against racial equality. *See, e.g.*, Perez v. Sharp, 198 P.2d 17, 20 (Cal. 1948) (Shenk, J., dissenting) ("The underlying factors that constitute justification for laws against miscegenation closely parallel those which sustain the validity of prohibitions against incest and incestuous marriages, and bigamy.") (internal citations omitted); *see also* Eggers v. Olson., 231 P. 483, 486 (Okla. 1924) ("The inhibition [against interracial marriage], like the incestuous marriage, is in the blood, and the reason for it is stronger still . . . . Civilized society has the power of self preservation, and, marriage being the foundation of such society, most of the states in which the negro forms an element of any note have enacted laws inhibiting intermarriage between the white and black races. . . .") (internal citations omitted). While many have asserted that gay marriage leads down a slippery slope to incestuous and bestial marriage, no one has ever demonstrated that legalizing gay marriage logically entails the recognition of a marriage among two men, three women, their siblings, a horse, and a brace of pelicans. Analogies between gay marriage on the one hand and polygamy, incest, and bestiality on the other are little more than attempts to divert attention from the merits of the argument for marriage equality. Congressman Barney Frank stated as much during debate over the Defense of Marriage Act on the House floor: "When

The history of Mormon polygamy is a long, complicated, and captivating one.[20] The Mormon Church (known officially as the Church of Jesus Christ of Latter-Day Saints) was founded in early Nineteenth Century upstate New York by Joseph Smith and a small group of followers.[21] By 1852, the Mormon Church leaders had formally declared polygamy to be a spiritual necessity ordained by God.[22] The Mormons' alien sexual

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people get off the subject, allowing Hawaii to have gay marriages without penalizing them federally, and on to something wholly unrelated, polygamy, and attack the unrelated one, it is because they cannot think of any arguments to attack the first one." 142 CONG. REC. H7480, H7483 (daily ed. July 12, 1996) (statement of Rep. Frank).

Furthermore, both the U.S. Supreme Court and the Massachusetts Supreme Judicial Court recognize that homosexuality and polygamy are legally distinguishable. Only the former is afforded some measure of legal protection. Limiting language in both courts' case law indicates as much. In *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the criminalization of consensual sex between two adults of the same sex violates Due Process liberty), six Supreme Court Justices refused to accept Justice Scalia's assertion that decriminalizing consensual sodomy between two adults of the same sex would make it impossible for states to criminalize, *inter alia*, bigamy and bestiality. *Id.* at 590 (Scalia, J., dissenting). The *Lawrence* majority limited its analysis to consensual sex between two adults of the same sex, stating that criminalization would further no legitimate state interest justifying intrusion into the personal and private life of the individual. *Id.* at 578. By contrast, states might identify a variety of legitimate state interests sufficient to prohibit polygamy, e.g., the eradication of misogyny, or economic concerns raised by the prospect of several people marrying one person for the purpose of accessing some marital benefit, for example, health insurance for themselves and their children. Six Supreme Court justices also refused to entertain Justice Scalia's analogy between homosexuality and polygamy in his *Romer v. Evans* dissent. 517 U.S. 620,634 (1996) (holding that a Colorado state constitutional amendment effectively repealing state and local provisions that barred discrimination on the basis of sexual orientation, violated the Equal Protection Clause of the Fourteenth Amendment). While Justice Scalia devoted a large portion of his dissent to attempting to analogize homosexuality and polygamy, *id.* at 644, 648-53 (Scalia, J., dissenting), the six-member majority disposed of the analogy in a single paragraph. *Id.* at 634. Likewise, in *Goodridge v. Dep't of Pub. Health*, the Massachusetts SJC was careful to note that the parties seeking recognition of same-sex marriages "[did] not attack the binary nature of marriage . . . or other gate-keeping provisions of the marriage licensing law." 798 N.E.2d 941, 965 (Mass. 2003).

[20] For a full treatment of this history, *see* Chambers, *supra* note 18.

[21] Chambers, *supra* note 18, at 61.

practice provoked immediate resistance and violence from non-Mormons. In response their leader, Brigham Young, led them on a cross-country migration that eventually ended in the Utah territory. The Mormons quickly became the dominant political force in Utah and installed Young as the territorial governor.[23]

Public outcry against the practice of polygamy, combined with mounting fear of the Mormons' growing political influence, led Congress to pass increasingly severe laws aimed at eradicating polygamy. This congressional reaction lasted over a period of three decades during the late nineteenth century.[24] In addition to conditioning Utah's admission to the Union on the incorporation of anti-polygamy provisions into the Utah Constitution,[25] Congress enacted a series of federal statutes targeting polygamy and those who practiced it. Though Congress premised the bulk of this legislation on its broad constitutional authority to regulate the United States Territories under the Territories Clause,[26] an examination of Congress's reaction is instructive for at least two reasons. First, it illustrates Congress's willingness to enact statutory legislation regulating marriage, when provided with constitutional cover for doing so. Second and more importantly, as will become clear, the Supreme Court later recognized Congress's ability to target the practice of polygamy among the states themselves, through enacting legislation premised on its powers under the

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[22] *Id*. at 63.

[23] *Id.*

[24] *Id.*

[25] *See* Utah Enabling Act, ch. 138, 28 Stat. 108 (1894); Romer v. Evans, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

[26] Congress is granted legislative power over the states in the Territories Clause: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV § 3, cl. 2. Congress's legislative power over the territories is considerable, though not plenary. *See generally* Sanford Levinson, *The Canon(s) of Constitutional Law: Why the Canon should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

Commerce Clause. The Supreme Court jurisprudence on this point could be read as suggesting that Congress also might regulate marriage under its other enumerated powers.

Congress's reaction to polygamy was swift and merciless. First, Congress enacted an outright ban of polygamy in the territories, declaring that:

> [E]very person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.[27]

Congress later predicated the territorial citizens' voting rights on swearing an oath against cohabitation with more than one woman.[28]

Congress also barred polygamists from jury service and political office.[29] Finally, Congress invalidated the incorporation of the Mormon Church, authorizing the escheat to the government of all church property not held for exclusively religious purposes.[30] Decades later, federal agents would arrest polygamists traveling across state lines for the purpose of cohabitating with a plural wife.[31] The federal agents claimed Congressional authorization to make such arrests under the Mann Act,[32] which criminalized the interstate transportation of

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[27] *See* Morill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862). Also note that in 1874, Congress passed the Poland Act, transferring cases from the Mormon-controlled probate courts to the non-Mormon federal system. Poland Act, ch. 469, 18 Stat. 253 (1874).

[28] *See* Edmunds-Tucker Act, ch. 397, §24, 24 Stat. 635, 639-40 (1887) (repealed 1978).

[29] *See id.* at 640; Edmunds Act, ch. 47, §§5, 8, 22 Stat. 30, 31-32 (1882) (repealed 1983).

[30] *See* Edmunds-Tucker Act, ch. 397, §17, 24 Stat. at 638.

[31] *See* Cleveland v. U.S., 329 U.S. 14 (1946).

women for the purpose of prostitution, debauchery, or "any other immoral purpose."[33]

In each instance, the Supreme Court upheld Congress's actions against constitutional challenge. In *Reynolds v. United States*,[34] Justice Waite upheld Congress's criminalization of bigamy against the Mormons' First Amendment Free Exercise challenge. In *Davis v. Beason*,[35] Justice Field rejected a similar challenge against an Idaho territorial law barring polygamists from voting or holding public office; in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,[36] Justice Bradley rejected a Free Exercise challenge against Congress's confiscation of Church property not held for purpose of worship. In each of these cases the Supreme Court's analysis focused not on Congress's authority to ban polygamy or punish polygamists throughout the territories, but on the Mormon challengers' argument for a religious exception to such laws, based on a purported Free Exercise right to practice polygamy,[37] a practice the Mormons viewed as essential to their faith.[38] In each case, the Supreme Court rejected the Mormons' claim by invoking the following *reductio ad absurdum:* if religious sects are to be excepted from the application of criminal statutes because their religious practice requires them to break the law, then a

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[32] *See* White-Slave Traffic (Mann) Act, ch. 395, §§ 1-8, 36 Stat. 825, at 825-827 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1994)).

[33] *Id.*

[34] 98 U.S. 145 (1878).

[35] 133 U.S. 333 (1890), *overruled by* Romer v. Evans, 517 U.S. 620, 634 (1996).

[36] 136 U.S. 1 (1890).

[37] For instance, the Court in *Reynolds* stated that "the inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong." 98 U.S. at 162.

[38] *See* Chambers, *supra* note 18.

religious cult advocating human sacrifice would be able to murder with impunity.[39]

The Supreme Court decided *Cleveland v. United States,*[40] another case involving Congress's treatment of polygamy, some fifty years after the aforementioned cases. *Cleveland* involved a challenge to Congress's enactment of the Mann Act,[41] which made it a criminal offense to travel across state lines for the purpose of cohabitating with a plural wife. The *Cleveland* Court directly confronted the argument that Congress had unconstitutionally interfered with the states' regulation of marriage, an area of law traditionally reserved to the states. Justice Douglas' majority opinion is striking for its decisive rejection of the argument:

> The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police power of the States. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed the immoral practices; and the fact that the means used may have 'the quality of police regulations' is not consequential.[42]

Justice Douglas' opinion rests on the conception that congressional power under the Interstate Commerce Clause[43] is exceptionally broad. As will become clear, it is perhaps this conception, more than any other, which the New Federalism calls into question.

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[39] *See* Reynolds, 98 U.S. at 166; Davis, 133 U.S. at 343; Church of Jesus Christ of Latter-Day Saints, 136 U.S. at 49-50.

[40] 329 U.S. 14 (1946).

[41] *Supra* note 32.

[42] *Cleveland*, 329 U.S. at 19.

[43] "The Congress shall have the power . . . to regulate Commerce . . . among the several States . . . ." U.S. CONST. art. IV, § 8, cl. 3.

II. CONGRESS'S UNRESPONSIVENESS TO GAY MARRIAGE

Congress's response to gay marriage today looks timid when compared to its harsh reaction to polygamous marriage in the nineteenth century. Yet the rhetoric employed by gay marriage's congressional opponents illustrates their view that gay marriage and polygamy pose equally substantial threats to "traditional" marriage.[44] There is certainly no lack of general political will to ban gay marriage. Recent polls indicate that a strong majority of Americans oppose legalizing gay marriage, while most also oppose civil unions.[45] Moreover, the President has joined conservative members of Congress in calling for a constitutional ban on gay marriage, a measure that would require far broader political support than traditional legislation.

Congress's only reaction to gay marriage – the proposed Constitutional amendments banning gay marriage throughout the states – looks increasingly doomed to failure. Both houses of Congress recently rejected President Bush's push for a constitutional amendment depriving gays and lesbians of the right to marry.[46] Far from unanimously embracing such an amendment, a good number of legislators opposing gay marriage have expressed wariness at the thought of altering the Constitution to achieve their goal.[47]

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[44] *See supra* note 19.

[45] A November 18, 2003 Pew Research Center poll found that by nearly two-to-one, more Americans oppose (59%) than favor (32%) legalizing gay marriage, while more than half oppose (51%) rather than favor (41%) allowing civil unions that would give many of the same rights as marriage. *Religious Beliefs Underpin Opposition to Homosexuality; Republicans Unified, Democrats Split on Gay Marriage*, Nov. 18, 2003, *available at* http://people-press.org/reports/display.php3?PageID=197 (last visited July 25, 2006). A more recent Pew study shows that while opposition to gay marriage is weakening, more than half of Americans (51%) remain opposed. *Less Opposition to Gay Marriage, Adoption and Military Service; Only 34% Favor South Dakota Abortion Ban*, Mar. 22, 2006, *available at* http://people-press.org/reports/display.php3?ReportID=273 (last visited July 25, 2006).

[46] *See supra* note 3.

[47] Carl Hulse, *Some G.O.P. Lawmakers Wary Over Bush's Call to Amend Constitution*, N.Y. TIMES, Feb. 26, 2004, at A22.

Given the broad public opposition to gay marriage and the virtual certainty that the proposed Federal Marriage Amendment will continue to fail, one would expect the staunchest opponents of gay marriage to push for some form of congressional legislation. Congress's reaction to Mormon polygamy belies the intuition that Congress lacks all authority to regulate marriage. Why, then, has Congress failed to respond to gay marriage as it did to polygamy in the nineteenth century?

It is hardly mysterious that Congress has failed to rely on *Reynolds* and *Beason* as authority to enact anti-gay marriage measures comparable to those targeting polygamy, e.g., an outright criminalization of gay marriage in the states or a denial of voting rights to spouses in a gay marriage. Congress's reaction to polygamy in the nineteenth century took the form of criminal statutes and morality-based legislation targeted at the United States Territories, over which Congress exercised sweeping legislative jurisdiction.[48] Congress cannot promulgate analogous legislation targeting gay marriage in the states for at least two reasons. First, Congress does not have ultimate and unconstrained legislative authority over the states; Congress's powers over the states are constrained by the strictures of the Tenth Amendment[49] and its surrounding jurisprudence. Second, morality-based legislation targeting homosexuality is either made suspect or is entirely prohibited by the Supreme Court's *Lawrence* and *Romer* decisions.[50] Congress therefore cannot enact sweeping anti-gay marriage legislation under the authority of *Reynolds* and *Beason*.

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[48] *See supra* note 26.

[49] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[50] *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (striking down state morality-based criminalization of same-sex sodomy: "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code" (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992))); Romer v. Evans, 517 U.S. 620, 634 (1996) (striking down state legislation targeting gay rights under the Equal Protection Clause because the legislation was improperly "born of animosity toward the class of persons affected").

At first blush, however, nothing would seem to prevent Congress from legislating against gay marriage via one of its enumerated powers, as exemplified by the exercise of its Commerce Clause[51] powers in *Cleveland*. Yet Congress has not managed to pass any legislation addressing gay marriage (excluding the Defense of Marriage Act of 1996 (DOMA),[52] which left each state free to regulate its own treatment of gay marriage).[53]

The only apparent reason for Congress's failure to enact legislation targeting "non-traditional" marriage under its enumerated powers, as in *Cleveland*, is that the Rehnquist Court's New Federalism jurisprudence has made it impossible for Congress to do so. The Court's recently-fashioned states' rights doctrines are the dominant force preventing Congress from acting in the marriage arena. While constitutional principles pre-dating the Rehnquist Court's New Federalist revolution would have afforded Congress numerous means to intervene in the gay marriage debate, the New Federalism effectively prevents Congress from doing so today.

III. POTENTIAL FOUNDATIONS FOR A FEDERAL LEGISLATIVE RESPONSE TO GAY MARRIAGE

The legal theories upon which Congress might rest an attempt to regulate domestic relations are several and not limitless in number. Traditionally, Congress may properly

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[51] Section 5 of the Fourteenth Amendment empowers Congress to enforce the substantive provisions of that amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Those substantive provisions are outlined in section 1 of the same amendment, including the requirements that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* at § 1.

[52] *Supra* note 6.

[53] DOMA is mild in comparison to the nineteenth century statutes aimed at polygamy. It does not criminalize gay marriage, restrict voting rights, or confiscate gay marriage partners' property; nor does it attempt to directly regulate the definition of marriage within the states. *See supra* note 6.

legislate an issue only when granted the express or implied authority to do so under the Constitution. Congress's explicit powers include the "enumerated powers" of Article I, section 8; its most notable implied powers are those granted under the Necessary and Proper Clause.[54]

Among the Constitution's grants of legislative powers to Congress, three[55] stand out as the most salient potential sources of authority to regulate gay marriage. First, Congress might attempt to legislate under its Interstate Commerce Clause[56] powers, on the theory that state recognition of gay marriage impacts commerce among the states in some way. Second, Congress might attempt to regulate gay marriage under authority granted by the Spending Clause[57] by withholding federal funds from states that recognize gay marriage. Finally, Congress might try to prohibit the states from granting marriage licenses to same-sex couples on the theory that gay marriage is harmful to children. If the states' recognition of gay marriage would inflict harm upon children in a way that violates their

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[54] U.S. CONST. art. I, § 8, cl. 18. "The Congress shall have the power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." *Id*.

[55] The most zealous opponents of gay marriage will likely exhibit inventiveness in constructing more elaborate and imaginative theories that would secure Congress's constitutional authority to regulate gay marriage. The engine of legal creativity is often driven by the fire of passion, especially when legislative matters of peculiar controversy are at stake. The three sources of authority outlined above, however, are the most apparent and likely means by which Congress might attempt to interfere with the states' recognition of gay marriage. This being the case, I will ignore more remote and fanciful possibilities, and restrict this discussion to the topics at hand.

[56] "The Congress shall have the power . . . to regulate Commerce . . . among the several States...." U.S. CONST. art. IV, § 8, cl. 3.

[57] The first enumerated power delegated to Congress in art. I, § 8 of the U.S. Constitution is that to tax and spend: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...." U.S. CONST. art. I, § 8, cl. 1. Today Congress has innovated to tie strings to its grants of moneys to the states, in order to induce the states to comply with policies that Congress could not otherwise impose on them. See discussion of Congress's powers under the Spending Clause, *infra*.

Fourteenth Amendment rights, Congress would be empowered to enact remedial legislation under section 5 of the Amendment.[58]

Unfortunately for opponents of gay marriage, Congress would face significant constitutional impediments should it attempt to regulate gay marriage on the basis of any of the three sources of authority identified above. Through its push to protect states' rights, the Rehnquist Court made it all but impossible to do so. The remainder of this paper will consider the doctrinal evolution that forged these impediments.

IV. CONGRESSIONAL AUTHORITY TO REGULATE INTERSTATE COMMERCE

Opponents of gay marriage might emphasize that gay marriage impacts commerce among the states; that because interstate commerce is affected by the states' recognition of gay marriage, Congress has some authority to regulate same-sex marriage under the Interstate Commerce Clause.[59] Take, for instance, Congress's criminalization of travel across state lines for the purpose of cohabitating with a plural wife. Congress passed this measure under the theory that it was empowered to regulate the channels and instrumentalities of interstate commerce,[60] a theory the Supreme Court upheld in *Cleveland v.*

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[58] Section 5 of the Fourteenth Amendment empowers Congress to enforce the substantive provisions of that amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Those substantive provisions are outlined in section 1 of the same amendment, including the requirements that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* at § 1.

[59] *See supra* note 56.

[60] *See supra* Part I discussing Cleveland v. United States, 329 U.S. 14 (1946) (upholding Congress's criminalization of traveling across state lines for purposes of cohabitating with a plural wife as a valid regulation of interstate commerce). While the Court seemed to approve of Congress's action on the basis of regulating the *instrumentalities* of interstate commerce, the Court likely meant to approve of the action as a valid regulation of the *use of the channels* of interstate commerce, at least under current nomenclature. The *Cleveland* Court

United States. Might Congress similarly attempt to interfere with the states' recognition of gay marriage under its Commerce Clause powers? Could Congress impose criminal sanctions on a married gay couple that traverses state lines for the purpose of cohabitating?

The answer turns on the extent of Congress's powers under the Interstate Commerce Clause. The scope and character of these powers have shifted and evolved over time. In the years following Franklin Roosevelt's New Deal, the Supreme Court interpreted Congress's Commerce Clause powers expansively, to the extent that the *Cleveland* Court described congressional authority over the instrumentalities of interstate commerce as "plenary."[61] In recent years, however, the Supreme Court has grown increasingly concerned with curtailing the federal government's power over the states. This has led the Court to sharply restrict Congress's Commerce Clause powers.

The Commerce Clause jurisprudence of the New Deal era is characterized by a strong willingness to uphold congressional regulation over intrastate activities, even when those activities'

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appeared to rest its holding on the statement that "[t]he power of Congress over the *instrumentalities* of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices." 329 U.S. at 19 (emphasis added). Regulation of the instrumentalities of interstate commerce, however, typically involves regulation of vessels used in interstate commerce. *See, e.g.*, Southern R. Co. v. United States, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); Perez v. United States, 402 U.S. 146, 150 (1971) ("For example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)"). No such instrumentality appears to have been at issue in *Cleveland*. The Court more likely meant to rest its holding on the authority of Congress to regulate the *channels* of interstate commerce rather than its instrumentalities. Much of the Court's discussion in *Cleveland* centers around *Caminetti v. United States*, 242 U.S. 470 (1917), holding that one who transports a woman in interstate commerce so that she should become his mistress or concubine was held to have transported her for an "immoral purpose" within the meaning of the Mann Act. *Caminetti* has been cited for the proposition that Congress's authority "to keep the *channels* of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." Heart of Atlanta Motel v. United States, 379 U.S. 241, 256 (1964) (citing *Caminetti*, 242 U.S. at 491) (emphasis added). It is therefore likely that the *Cleveland* Court meant to refer to uphold Congress's regulation of polygamous marriage on the basis of its powers over the channels of interstate commerce.

[61] 329 U.S. at 19.

connections to interstate commerce are attenuated. For instance, in *Wickard v. Filburn*,[62] the Supreme Court upheld the enforcement of federal wheat production quotas against an Ohio farmer on the ground that wheat production had a general impact on the interstate market. Challenging those quotas, the farmer argued that they were invalid under the Commerce Clause because his wheat was intended solely for consumption on his farm, not for sale in interstate commerce.[63] The farmer noted that the quota system was aimed not at the marketing of wheat, but at its production and consumption; that the effects of his farming were "local"; and that the effects of his farming on interstate commerce were, at most, "indirect."[64] The Supreme Court rejected these arguments by recognizing sweeping congressional authority over non-commercial activities impacting commerce among the states:

> Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material . . . [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[65]

For the *Wickard* Court, then, the Interstate Commerce Clause allowed Congress to penalize even one farmer's production of goods that were not sold on the interstate market. It was enough to satisfy the Court that the farmer's activities had a substantial effect on interstate commerce when aggregated with other farmers' activities: "control of total supply [of wheat],

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[62] 317 U.S. 111 (1942).

[63] *Id.* at 119.

[64] *Id.*

[65] 317 U.S. at 124-25.

upon which the whole statutory plan is based, depends upon control of individual supply."[66]

A second case illustrates a similar approach to the Commerce Clause. In *Maryland v. Wirtz*,[67] the Supreme Court upheld the application of federal wage and hour labor regulations to certain state employees. The Court's first blessing of such regulations appeared in the 1941 case *United States v. Darby*,[68] in which Justice Stone upheld the Fair Labor Standards Act's ("FLSA") prohibition of the interstate shipment of goods produced "under labor conditions . . . which fail to conform to [wage and hour] standards set up by the Act."[69] Justice Stone affirmed Congress's enactment of the FLSA on the theory that the Commerce Clause allows Congress to control wholly *intrastate* activities that impact interstate commerce.[70] Twenty-seven years later, the Court in *Wirtz* upheld an Act extending application of the FLSA to the employees of schools and hospitals run by states and their subdivisions.

In *Wirtz*, the State of Maryland contended that (1) Congress had overreached its powers under the Commerce Clause, and (2) extension of the FLSA to state schools and hospitals would interfere with Maryland's "sovereign state functions."[71] The Supreme Court rejected both contentions. The *Wirtz* opinion echoed *Darby*, citing Justice Stone's declaration that "[Congress may] by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce."[72] The *Wirtz* Court applied mere rational basis scrutiny to

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[66] *Id.* at 130.

[67] 392 U.S. 183 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976).

[68] 312 U.S. 100 (1941), *overruled in part by* Palotai v. Univ. of Md. College Park, 959 F. Supp. 714, 717 (D. Md. 1997) (holding that the commerce clause is no longer considered to be a source of authority pursuant to which Congress properly may abrogate the states' Eleventh Amendment immunity).

[69] *Id.* at 109.

[70] *Id.* at 122.

[71] *Wirtz*, 392 U.S. at 193.

[72] *Id.* at 189.

Congress's purported claim that the regulated activity at issue impacted interstate commerce:

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. There was obviously a 'rational basis' for the logical inference that the pay and hours of production employees affect a company's competitive position.[73]

The *Wirtz* Court therefore upheld Congress's broad powers to regulate interstate commerce while simultaneously downplaying arguments based upon states' rights. Justice Douglas registered a strenuous dissent against the *Wirtz* majority, stating that "what is done here is . . . a serious invasion of state sovereignty protected by the Tenth Amendment that is in my view not consistent with our constitutional federalism."[74]

The holdings in *Wirtz* and *Wickard* underscore two propositions at the core of the Supreme Court's post-New Deal Commerce Clause jurisprudence. The first is that Congress may regulate any activity having a substantial effect on interstate commerce, even if the subject of regulation is not commerce itself, and even if it does not transcend the boundaries of any state.[75] The second proposition is that Congress may regulate things which, if considered separately, would have only an insubstantial effect on commerce, so long as the aggregate effect is substantial.[76] Taken together, these two propositions prescribe a commerce power that is at once expansive in scope and difficult to demarcate.

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[73] *Id.* at 190 (internal citations omitted).

[74] *Id.* at 201 (Douglas, J., dissenting).

[75] *Id.* at 188-93 (majority opinon); *Wickard*, 317 U.S. at 124.

[76] *Wirtz*, 392 U.S. at 189-99; *Wickard*, 317 U.S. at 124-25.

Under such an expansive reading, the Commerce Clause would likely empower Congress to regulate or interfere with gay marriage on the basis of its interstate effects. Under such a reading, Congress might rest anti-gay legislation on homosexuality's aggregate effect on the demand for a variety of goods that move through interstate commerce. Prior to the Supreme Court's decision in *Lawrence v. Texas*,[77] constitutional scholar Stephen Clark noted that the New Deal era's expansive reading of the Commerce Clause posed a significant threat to the advancement of gay rights on the issue of sodomy laws. He saw potential for the same threat with respect to the states' grants of civil unions to gay couples:

> Congress might simply aggregate the effects of sexual activity on the demand for pornography, prophylactics, or lubricants—all of which move in interstate commerce and the sale of which comprises a portion of the gross domestic product. Obviously, local and discrete acts of sexual orientation discrimination may, in the aggregate, affect employment, housing, or other commercial markets . . . Congress could presumably regulate interstate commerce by voiding Vermont civil

[77] 539 U.S. 558 (2003) (holding that sodomy laws criminalizing consensual sex between two adults of the same sex violate Due Process rights). While *Lawrence* effectively put an end to sodomy laws, it arguably has little force as an argument for gay marriage. For instance, the Massachusetts SJC's opinion in *Goodridge*, *supra* note 1 (holding that denial of gay marriage licenses violates the Massachusetts Constitution's Due Process and Equal Protection clauses), squarely stated that the issue of gay marriage is "a question the United States Supreme Court left open as a matter of federal law in *Lawrence*, where it was not an issue." 798 N.E.2d at 948 (internal citations omitted). The majority opinion of *Lawrence* itself contains limiting language to this effect: the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. Justice O'Connor's concurrence also (arguing that sodomy laws should be struck down under Equal Protection analysis) notes that the state "cannot assert any legitimate state interest here, such as national security or *preserving the traditional institution of marriage*." *Id.* at 585 (O'Connor, J., concurring) (emphasis added). The dissenters in *Lawrence*, Chief Justice Rehnquist and Justices Scalia and Thomas, have exhibited hostility to arguments for equal rights for gays and lesbians. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636-53 (Scalia, J., dissenting, whom Thomas, J., and Rehnquist, C.J., join).

> unions, New York second-parent adoptions, or Minnesota transgender birth certificates.[78]

Likewise, an expansive Commerce Clause arguably would empower Congress to interfere with gay marriage in the same way it assailed polygamy, e.g., by criminalizing a married gay couple's traversal of state lines for the purpose of cohabitating.

Within the past two decades, however, the Supreme Court has sharply curtailed Congress's powers under the Interstate Commerce Clause through a revival of states' rights arguments grounded in its reading of the Tenth Amendment. This change in direction calls into serious question Congress's ability to regulate gay marriage under the Commerce Clause.

United States v. Lopez[79] signaled a sharp break from the Court's previous treatment of the Commerce Clause. Writing for the majority, Chief Justice Rehnquist held that Congress had acted unconstitutionally in passing the Gun-Free School Zones Act of 1990, which made it a federal offense for "any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that individual knows, or has reasonable cause to believe, is a school zone."[80] The trial court in *Lopez* had convicted Alfonso Lopez, a 12th grade student at Edison High School in San Antonio, Texas, of possessing a .38 caliber handgun and five bullets on school grounds.[81] Congress had passed the Act under its power to regulate interstate commerce; Lopez argued that in so doing, Congress had exceeded its constitutional authority.[82]

Chief Justice Rehnquist stressed two independent reasons underlying this holding: the activity targeted by the statute (1)

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[78] Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 729 (2003).

[79] 514 U.S. 549 (1995) (holding that section 922(q) of the Gun-Free School Zones Act of 1990 was unconstitutional because it targeted an activity that was not economic and that did not have substantial effects on interstate commerce, namely, the possession of a gun in a local school zone).

[80] 18 U.S.C. § 922(q)(2)(A) (1994).

[81] *Lopez*, 514 U.S. at 551-52.

[82] *Id.*

was not economic in nature, and (2) did not have substantial effects on interstate commerce. Gun possession in the vicinity of schools, Rehnquist wrote, "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[83] Rehnquist expressed his holding in states' rights language. He noted that when President George H. W. Bush signed the Act, the President stated his belief that the statute in question "inappropriately overrides legitimate state firearms laws with a new and unnecessary federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress."[84] Rehnquist further stated that "when Congress criminalizes conduct already denounced as criminal by the States, it effects change in the sensitive relation between federal and state criminal jurisdiction."[85]

Chief Justice Rehnquist limited the Commerce Clause's extent by enumerating an exclusive list of three facets of interstate commerce that the clause empowers Congress to regulate: first, Congress may regulate the use of "channels of interstate commerce";[86] second, Congress may regulate and protect the "instrumentalities of interstate commerce" or goods in interstate commerce;[87] finally, Congress may regulate activities which "substantially affect interstate commerce."[88] The Chief Justice found that the statute in question fell into none of these three categories, despite empirical evidence of a connection between the regulated activity and interstate commerce cited in Justice Breyer's dissent.[89]

Particularly noteworthy are the underlying fears driving the Court's analysis in *Lopez*. The Court expressed anxiety that an

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[83] *Id.* at 561.

[84] *Lopez*, 514 U.S. at 561, n. 3.

[85] *Id.* (internal citations omitted).

[86] *Id.* at 558.

[87] *Id.*

[88] *Id.* at 558-59.

[89] *Id.* at 619-23 (Breyer, J., dissenting).

overly-powerful Congress would exert control over particular activities that are best regulated by the states. The majority opinion stressed the following, particularly pressing concern: should the Court define Congress's powers under the Commerce Clause too broadly, marriage (as well as other areas of family law) would fall under Congress's regulatory control. Chief Justice Rehnquist wrote:

> [U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.[90]

Justices Kennedy and O'Connor's concurrence also took the position that the New Federalism prohibits Congress from using its Commerce Clause powers to impinge on "traditional" areas of state regulation, stressing that "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[91] As we have seen, marriage might be such an area traditionally reserved to state regulation.[92] Justice Thomas, too, filed a concurring opinion echoing Rehnquist's concern about marriage:

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[90] *Id.* at 564 (majority opinion).

[91] *Id.* at 577 (Kennedy, J., and O'Connor, J., concurring).

[92] *See supra* notes 8-15 (discussing both Congress and the Supreme Court's treatment of marriage and family law as issues outside the sphere of federal law).

> [T]he sweeping nature of our [New Deal era Commerce Clause] test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce.[93]

Notably, the exponents of the New Federalism were not alone in viewing marriage as an issue outside the sphere of congressional regulatory authority. The dissenters in *Lopez* stressed that holding the statute in question to be constitutional would not empower Congress to regulate marriage under the Commerce Clause.[94]

The *Lopez* case evinces a remarkable shift in the Court's Commerce Clause jurisprudence. Under the New Federalism's re-reading of the Commerce Clause, Congress may not regulate activities that are non-economic in nature. The Court tightened the requirement that any regulated activity bear a substantial relation to interstate commerce. Finally, the language of each of the opinions in *Lopez*—majority, concurrence, and dissent—strongly suggests that marriage is not a subject appropriate for congressional regulation under the Commerce Clause, regardless of its effect of interstate commerce.

The Supreme Court's 2000 opinion in *United States v. Morrison*[95] affirmed the *Lopez* approach, this time by striking down the Violence Against Women Act of 1994, which criminalized violent crimes motivated by animus towards the

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[93] *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

[94] *Id.* at 624 (Breyer, J., dissenting).

[95] 529 U.S. 598 (2000).

victim's gender.[96] Again writing for the Court, Chief Justice Rehnquist squarely stated that for Congress to base its regulation of intrastate activity on its substantial effects on interstate commerce, the activity must be "some sort of economic endeavor."[97] The Chief Justice continued: "With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[98]

In addition, the *Morrison* Court rejected congressional findings that gender-motivated violent crimes have a substantial impact on interstate commerce, choosing instead to substitute the Court's own judgment on the matter. The Chief Justice emphasized that:

> Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.[99]

The Court found that the connection between gender-motivated violent crimes and interstate commerce was too attenuated to count as a substantial effect.[100]

The Court again raised the specter of an overreaching Congress using unbridled authority to regulate domestic relations:

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[96] The Violence Against Women Act of 1994, § 40302, 42 U.S.C. § 13981 (2002). "Persons within the United States shall have the right to be free from crimes of violence motivated by gender." *Id.*

[97] *Morrison*, 529 U.S. at 611 (citing *Lopez*, 514 U.S. at 559-60).

[98] *Id.* at 613.

[99] *Id.* at 614.

[100] *Id.* at 615.

> Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant . . . Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.[101]

In the wake of the Rehnquist Court's New Federalist treatment of the Commerce Clause, as exemplified in *Lopez* and *Morrison*, it appears highly unlikely that today's Supreme Court would allow Congress to interfere with the states' recognition of gay marriage. Marriage clearly is not a "channel" of interstate commerce that Congress may regulate, such as a road or a river. Nor is it a good in interstate commerce or an "instrumentality" of interstate commerce, such as a truck or an aircraft.[102] Regulation of marriage under the Commerce Clause would have to fall under the third category of subjects that Congress may regulate, as defined in *Lopez*: activities having a substantial impact on interstate commerce. The New Federalism, however, requires that the activities Congress regulates under its Commerce Clause powers be economic in nature; further still, the Court will second-guess Congress's judgment that the economic activity has a "substantial" effect on interstate commerce.

Marriage is not properly an economic activity under the Supreme Court's analysis, the desires of entrepreneurial suitors notwithstanding.[103] *Lopez* and *Morrison* interpret "economic

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[101] *Id.* at 615-16 (internal citations omitted).

[102] The discussion of "instrumentalities" of interstate commerce in *Lopez* centers around regulation of vessels used in interstate commerce. *See generally supra* note 60 (As examples of regulations of instrumentalities, Rehnquist cites Southern R. Co. v. United States, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce), and *Perez*, 402 U.S. at 150 ("For example, the destruction of an aircraft (18 U.S.C. § 32), or... thefts from interstate shipments (18 U.S.C. § 659)"). *Lopez*, 514 U.S. at 558).

[103] Admittedly, marriage may have historically been precisely an economic activity. Still, it is difficult to imagine the current Supreme Court analyzing

activity" as the dealings of two or more economic actors. Although contemporary economic analysis fixates on the economic aspect of a broad range of activities, *Lopez* and *Morrison* interpreted "economic activity" in a literal and constrained manner, limiting the reach of the Commerce Clause to traditional economic actors – people involved in business and trade. Concededly, marriage has an economic dimension. When one spouse stays at home to watch the children, this undoubtedly has an impact on the economy. Under *Lopez* and *Morrison*, however, private actors engaged in conduct or relationships that are not traditionally viewed as commercial fall outside the reach of Commerce Clause regulation. Marriage is unlike the sale or trade of goods and services. Like the possession of guns and the gender-motivated violence at issue in *Lopez* and *Morrison*, marriage is in essence a non-economic activity that happens to bear economic incidents.

Even if marriage were an economic activity, its connection to interstate commerce seems no less attenuated than that of gender-motivated violence or gun possession in the vicinity of schools. Furthermore, the language of the *Lopez* and *Morrison* opinions indicates that the Court regards marriage in particular as an activity that Congress cannot regulate under the Interstate Commerce Clause, regardless of how strong an impact it has on interstate commerce.

Contrast this result with what would follow under a post-New Deal reading of the Commerce Clause. As long as Congress could rationally hypothesize some connection between gay marriage and the national economy, congressional regulation under the Commerce Clause presumably would pass constitutional muster. Any shift in some component of gross domestic product resulting from state recognition of gay marriage, from the sale of contraceptives to the purchase of new homes in the suburbs, would provide an opening through which Congress might regulate. Congress could override much of family law, since "the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[104] One need point no further than Justice Souter's

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marriage to be an "economic activity" for New Federalism purposes, for the reasons discussed *infra*.

[104] *Morrison*, 529 U.S. at 615-16.

dissent in *Morrison* to justify such regulation: the Commerce Clause should be constrained by "politics, not judicial review," since the "legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy."[105]

The rise of the New Federalism has therefore fashioned changes in the jurisprudential landscape, changes that have foreclosed Commerce Clause legislation bearing on the states' recognition of gay marriage. *Cleveland v. United States* arguably is no longer good law. In light of *Lopez* and *Morrison*, its threat against gay marriage is now empty.

V. CONGRESSIONAL AUTHORITY UNDER THE SPENDING CLAUSE

Direct meddling in state law is not the only approach Congress might take in pushing to federalize marriage. Instead, Congress might endeavor to affect the states' treatment of gay marriage through a kind of positive reinforcement. In particular, Congress might coax the states into adopting a federal, heterosexual definition of marriage by threatening to revoke some part of gay-friendly states' federal funds. Congress innovated this means of directing state law during the late twentieth century, citing the Spending Clause[106] as justification for its authority to do so. Might it be constitutionally acceptable for Congress to condition the states' U.S. Department of Health and Human Services funding upon the states' adherence to DOMA's restriction of marriage to a union between "one man and one woman?"[107]

Such an approach to influencing state law is relatively recent, but it is hardly unfamiliar. In several instances, the Supreme Court has upheld Congress's right to condition federal funding upon the states' conforming their law to Congress's wishes. In the 1987 case *South Dakota v. Dole*,[108] for instance, a seven-

[105] *Id.* at 647 (Souter, J., dissenting).

[106] *Supra* note 57.

[107] *See supra* note 6.

[108] 483 U.S. 203 (1987).

member majority upheld Congress's requirement that states raise their minimum drinking age to twenty-one in order to receive federal highway funds. The majority opinion was authored by none other than the key architect of the New Federalism, Chief Justice William Rehnquist.

In a seemingly odd move, Chief Justice Rehnquist dismissed arguments for states' rights in favor of Congress's power to bend the will of the states to its own. The Court rejected South Dakota's argument that in light of the Twenty-First Amendment, the regulation of liquor is the exclusive province of the state governments.[109] The Chief Justice also rejected the argument that such congressional action is an unconstitutional interference with state law under the Tenth Amendment: "[A]... Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."[110] Moreover, Chief Justice Rehnquist held that Congress acts entirely within its ambit when it pressures states to achieve objectives that Congress is constitutionally barred from achieving on its own:

> [Our precedent] establishes that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.[111]

Ironically, the same Chief Justice who would argue passionately in *Lopez* against Congress's use of the Commerce Clause to exercise powers beyond those enumerated in the Constitution[112] defended Congress's ability to do the very same under the Spending Clause.

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[109] *Id.* at 205.

[110] *Id.* at 210.

[111] *Dole*, 483 U.S. at 210.

[112] *See* discussion of *United States v. Lopez*, *supra* at Part IV.

Congress therefore may pursue aims that are not expressly authorized in its enumerated powers simply by attaching conditions to the states' receipt of federal money. Chief Justice Rehnquist reiterated this point for emphasis:

> [T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.[113]

This remains the settled law to date.[114]

In the wake of *Dole*, Congress has wielded its spending power to direct state policy on a number of issues. In 1998, Congress contemplated using its spending powers to forbid the city of San Francisco from enforcing an ordinance[115] requiring employers with city contracts to provide domestic partner benefits to their employees.[116] To date, every state except California has accepted federal funding under the condition that its public schools provide abstinence-only sex education,

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[113] *Dole*, 483 U.S. at 207 (internal citations omitted).

[114] *See* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 5 (2003). "*Lopez* and other New Federalism salvos notwithstanding, it remains settled law that Congress may spend money on projects and in pursuit of ends that are not authorized explicitly in Article I, and also may enthusiastically promote policy goals that might lie beyond the reach of its enumerated powers merely by attaching conditions to the money it spends." *Id.*

[115] SAN FRANCISCO, CAL. ADMIN. CODE § 12B.2(b) (1986).

[116] The House of Representatives had approved an appropriations rider stating that "[n]one of the funds appropriated by this Act may be used to implement section 12B.2(b) of the Administrative Code of San Francisco, California." 144 CONG. REC. H6578 (daily ed. July 29, 1998). The Senate rejected the rider and the appropriations bill was passed without it. *See* Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, 112 Stat. 2461 (1998) (omitting the rider).

instructing students to abstain from sexual intercourse until *heterosexual* marriage,[117] despite overwhelming evidence indicating that abstinence-only sex education, unlike safe sex education, is ineffective at preventing unwanted pregnancies and the spread of sexually transmitted diseases.[118] After *Dole*, no court may question Congress's direction of the public school curriculum's content on the ground that this is a function traditionally reserved to the states. As will become clear below, neither may any court second-guess Congress's assessment of which type of sex education promotes the "general welfare" for spending power purposes.

It would seem that Congress might assault gay marriage through use of its spending powers. Under the law as articulated in *Dole*, Congress might exert financial pressure on the states to force them to conform state law to DOMA's[119] definition of marriage. Such a move might be entirely constitutional under the Supreme Court's reading of the Spending Clause, even though Congress may not meddle with the states' treatment of marriage through its enumerated power under the Commerce Clause.

There remain, however, two potential difficulties with such a strategy. First, Congress would be forced to confront a particular exception to its spending powers, first outlined by Chief Justice Rehnquist in *Dole*. Second, allowing Congress to induce states to ban gay marriage through use of its spending

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[117] *See* Associated Press, *The Nation Report Says 'Abstinence-Only' Programs Met with Resistance*, L.A. TIMES, Apr. 24, 2002, at A16.

[118] *See Emerging Answers*, National Campaign to Prevent Teen Pregnancy, *available at* http://www.teenpregnancy.org/resources/research/reports.asp (last visited May 2001); John B. Jemmott III et al., *Abstinence and Safer Sex HIV Risk-Reduction Interventions for African American Adolescents*, 279 JAMA 1507, 1529 (1998). A recent preliminary report on a study commissioned by the Department of Health and Human Services to study abstinence-only programs found no proof that abstinence-only education programs decreased sexual activity, unwanted pregnancies, or sexually transmitted diseases among U.S. teens. *See* Barbara Devaney et al., *The Evaluation of Abstinence Education Programs Funded Under Title V Section 510: Interim Report*, Mathematica Policy Research, Inc., *available at* http://www.mathematica-mpr.com/publications/publications.aspx (last modified April 2002).

[119] *Supra* note 6.

powers runs contrary to the spirit of a long line of the Supreme Court's "New Federalist" cases.

The Chief Justice stipulated a qualification to the holding in *Dole*, noting that in some instances, Congress's use of spending powers to bend the states' will crosses the constitutional line: "[O]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[120] To reduce the risk that Congress will overstep its constitutional bounds, Rehnquist engineered the following formalistic constraints on Congress's spending powers: first, Congress may exert financial pressure through exercise of its spending power only in pursuit of the general welfare; second, Congress must state any condition on receipt of funds unambiguously; third, the condition must be related to the federal interest in the project funded and the objectives thereof; fourth, the condition must not compel the recipient state to violate the Constitution.[121]

In *Dole*, Chief Justice Rehnquist held that Congress's condition on the receipt of highway funds was constitutional under this test. In effect, he allowed Congress to state its own concept of the general welfare.[122] He also found that the condition was directly related to one of the main purposes of highway funding as articulated by Congress: ensuring safe interstate travel.[123] Finally, he noted that by refusing to raise its minimum drinking age to twenty-one, South Dakota would risk losing only five percent of the federal funds otherwise obtainable.[124] Accordingly, Congress's condition constituted not

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[120] *Dole*, 483 U.S. at 211 (citing Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

[121] *Dole*, 483 U.S. at 207-08.

[122] *Id.* at 208. "We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that 'the concept of welfare or the opposite is shaped by Congress....' " *Id.* (citing Helvering v. Davis, 301 U.S. 619, 645 (1937)).

[123] *Id.* at 208 (referring to 23 U.S.C. § 101(b)).

[124] *Id.* at 211.

compulsion of state law and policy, but mere "mild encouragement."[125]

Such a lenient test looks altogether frightening, not only to advocates of gay and lesbian citizens' equal right to marry, but also to anyone concerned that Congress might invoke its spending powers to circumvent the limits imposed on the exercise of its enumerated powers, including its commerce powers. If Congress is allowed to define its own concept of what constitutes the "general welfare," as well as to define the main purposes of the federal funding upon which it places conditions, Congress may seemingly compel the states to act as it pleases, so long as its conditions do not compel a violation of the Constitution.

Nonetheless, the conditions placed upon funding still must be related to the federal interest in the project funded and the objectives thereof. As applied to gay marriage, this "nexus" requirement might be difficult to meet. The relationship between a ban on gay marriage and the general purposes underlying most federal expenditures is not readily apparent. The Court might consider the issue of gay marriage sufficiently removed from the purpose of government spending, such that Congress cannot use its spending powers as a carrot to induce the states to prevent gay marriage.

That today's Supreme Court would so hold, however, is hardly guaranteed. There is some possibility that Congress could articulate a connection between gay marriage and federal funding disbursed to the states, such that establishing heterosexual marriage as a norm both relates to the expenditure's purpose and serves the interest of the "general welfare" as defined by Congress. For example, Congress might posit a nexus between gay marriage and federal money that the states may use to fund child and family support.

Even if the courts were to accept the existence of such a nexus, however, the New Federalist line of cases would raise other concerns about Congress's exercise of its spending powers in this way. If the New Federalism is to remain a part of our constitutional jurisprudence, Congress cannot have broad freedom to bend the states' will to its own.

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[125] *Id.*

To illustrate this point, consider Justice O'Connor's dissent in *Dole*. Justice O'Connor saw reason for alarm in Chief Justice Rehnquist's holding. In forceful language, she emphasized that:

> If the spending power is to be limited only by Congress's notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.[126]

Justice O'Connor concluded that "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent."[127] Her dissent foreshadowed a theme that Chief Justice Rehnquist would later articulate in his *Lopez* decision, that "[t]he immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers."[128]

Legal scholars, too, have noted the gross inconsistency between the New Federalism's strict limitations on congressional powers, on the one hand, and the Supreme Court's recognition of vast powers under the Spending Clause on the other. One scholar notes that "the Rehnquist Revolution thesis is weakened considerably by the fact that the Court has done nothing, and seems little inclined to do anything, to revise or even revisit its Spending Power and conditional-spending doctrines."[129] Another scholar notes that the "prevailing Spending Clause doctrine appears to vitiate much of the import

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[126] *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting) (citing United States v. Butler, 297 U.S. 1, 78 (1936)).

[127] *Id.* at 216 (O'Connor, J., dissenting).

[128] *Id.* at 218 (O'Connor, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

[129] Garnett, *supra* note 114, at 5.

of *Lopez* and any progeny it may have."[130] A third writes that "the Court is unlikely to succeed in radically transforming the relative roles of the national and the state governments unless it changes its doctrine regarding Congress's power to require that states accepting federal grants comply with federally prescribed requirements."[131]

A brief look at the major cases underpinning the New Federalism illustrates how oddly opposed the judicial philosophy is to a broad reading of Congress's spending powers. The harsh dissonance of *Dole*'s generous treatment of the Spending Clause compels the conclusion that either *Dole* must be reined in, or the New Federalism must fail.

In his majority opinion in *Lopez*,[132] Chief Justice Rehnquist enunciated what he saw as a foundational principle of constitutional law, namely, that the Constitution "creates a Federal Government of enumerated powers," powers that are vast, but also "'few and defined.'"[133] The Chief Justice continued: "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."[134] This language, written in 1995, contradicts Rehnquist's 1987 statement in *Dole* that "objectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[135] What use is it to

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[130] Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995).

[131] Mark Tushnet, *What Is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927, 936-37 (2000).

[132] *See Supra* note 79.

[133] United States v. Lopez, 514 U.S. 549, 552 (quoting THE FEDERALIST NO. 45 (James Madison)).

[134] *Id*. at 566 (quoting McCulloch v. Maryland, 17 U.S. 316, 405 (1819)); *see also* John C. Eastman, *Re-entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates*, 25 HARV. J.L. & PUB. POL'Y 931, 931 (2002) ("Overlooked for the better part of the last century, [the] principle [of enumerated powers] has undergone a renaissance of sorts since the Supreme Court's decision in *United States v. Lopez* . . . .").

[135] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

pronounce such a forceful limit on Congress's powers, only to allow Congress to circumvent this constraint through the Spending Clause?

The contradiction becomes all the more apparent in view of the fact that Congress may evade *Dole*'s qualifying language by providing its own definition of the "general welfare" and the "federal interest in the project funded and the objectives thereof" to which Congress's condition on funding must be related.[136] Constitutional scholar Richard W. Garnett summed up the current situation as follows: though "the Court tweaks the outer boundaries of federal power, Congress's ability to regulate broadly through conditional spending—i.e., its power to regulate via contract—is presumed, and serves perhaps to reassure those troubled by the Court's supposed anti-federal direction."[137]

New Federalist defenders of *Dole* would be quick to point out a theoretical basis upon which to harmonize the holdings in *Dole* and *Lopez*. A state that accepts federal funds to which Congress has attached conditions might be thought to offer its *consent* to congressional regulation. After all, the state retains the ability to make a political decision not to accept the funds. The tension between the Court's holding in *Dole* and its stress in *Lopez* on the enumeration of congressional powers might seem anomalous. The dissonance, however, does not dissipate after *Lopez*. Two cases addressing Congress's "commandeering" of state legislators and officials further call into question the notion that Congress may make free use of the Spending Clause to exert influence over the states.

In *New York v. United States*,[138] Justice O'Connor addressed Congress's power to offer the states financial incentives to develop repositories for the receipt of out-of-state radioactive waste. Under a federal statute, Congress allowed each state the option of taking title to and possession of radioactive waste generated within its borders; if the state refused, it would assume liability for damages suffered by waste generators.[139]

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[136] *Id.* at 207-08.

[137] Garnett, *supra* note 114, at 5.

[138] 505 U.S. 144 (1992).

[139] The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021(b) *et seq*.

The Court held the statute unconstitutional. Writing for the Court, Justice O'Connor contended that while the monetary incentives Congress provided the states to induce them to receive radioactive waste was a permissible exercise of congressional authority under the Spending Clause, the statute's "take title" clause exceeded the restrictions of the Tenth Amendment, because the take title incentive was not an exercise of congressional power enumerated in the Constitution.[140] "The take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution."[141] Justice O'Connor emphasized that Congress may not, consistently with the Federal Constitution's Tenth Amendment, "commandeer the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program."[142]

The weakness in O'Connor's opinion, of course, is that it relies on a formalistic distinction between "compelling" or "commandeering" states to act in a certain way and "encouraging" them to do the same with monetary incentives. The ethereal nature of this distinction is all the more apparent in light of Justice Scalia's opinion in *Printz v. United States*,[143] the second of the two "commandeering" cases.

At issue in *Printz* was the Brady Handgun Violence Prevention Act, a congressional statute obliging state law enforcement officials to conduct background checks on purchasers of handguns for an interim period.[144] Justice Scalia held that the Act violated the Constitution's system of separation of powers, as well as the dual sovereignty expressed by the Tenth Amendment. As in *New York*, the Court's worry was that Congress had exceeded its enumerated powers:

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[140] *New York*, 505 U.S. at 149.

[141] *Id.* at 150.

[142] *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1961)).

[143] 521 U.S. 898 (1997).

[144] 18 U.S.C. § 922 (1993).

> Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, [article] I, [section] 8, which implication was rendered express by the Tenth Amendment's assertion that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[145]

It was unimaginable to Justice Scalia that Congress should require the state police to enforce the law. Obliging local sheriffs to perform background searches on potential criminals on an interim basis was an act of tyranny against the states, an unthinkable and egregious error that ran afoul of the New Federalism. Justice Scalia accused Congress of having "dragooned" state officials and having reduced the states to mere "puppets of a ventriloquist Congress."[146] Such a state of affairs, he wrote, is not consistent with the "preservation of the States as independent and autonomous political entities."[147] At the oral argument in *Printz*, Justice Scalia colorfully depicted Congress as having coerced the states to "simply dance like marionettes on the fingers of the federal government."[148]

Yet Congress appears to do the very same when it exerts its Spending Clause powers under the ruling in *Dole*. It seems overly formalistic to worry on the one hand that Congress will "commandeer" or "dragoon" the states when it acts beyond its enumerated powers, yet to remain casually indifferent when Congress achieves the very same effect through its control of the national purse. The governments of the states, after all, have been made to dance like marionettes regarding choice of a minimum drinking age, the content of public school sex education curricula, and other issues; the only difference from

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[145] *Printz*, 521 U.S. at 919.

[146] *Id.* at 928 (internal citations omitted).

[147] *Id.* (internal citations omitted).

[148] Oral Argument at *38, Printz v. United States, 1996 WL 706933 (Nos. 95-1478, 95-1503) (1996).

Printz is that the marionettes' strings happen to be those attached to the public purse.

The underlying doctrines of the New Federalism are very difficult to square with a broad reading of Congress's spending powers. If the Spending Clause is to remain a conspicuous hole in the otherwise tightly woven New Federalist tapestry, none of the Rehnquist Court's carefully crafted jurisprudence, from *Lopez* and *Morrison* to *New York* and *Printz*, to its more recent holding in *Alden v. Maine*,[149] would seem to effect any significant change in the character of American constitutional law. The states certainly retain the ability to reject federal funds to which Congress has attached conditions that would shape and constrain state policy. Many states, however, face frequent budget crises. Refusing federal funds can require politically difficult and painful offsetting measures, including tax increases or cuts in spending on important state programs. It is altogether unsurprising that no state has refused federal education funds and rejected the dubious and potentially harmful policy of teaching abstinence-only sex education.[150]

In the rarified world of present-day Spending Clause jurisprudence, a congressional spending scheme's legitimacy is premised upon whether a state can reasonably consent to it, or whether its inducement is coercive. In practical terms, asking states to reject even small amounts of federal funding is often asking the impossible. To rescue the substance of the New Federalism from devolving into empty formalism, it will be necessary for the current Court to articulate new constraints on the Spending Clause. If the Court is to remain true to its New Federalist cause, we might expect it to tighten the nexus requirement in *Dole*'s limiting test. The Court might do so by following Justice O'Connor's approach in her dissent in *Dole*: by

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[149] 527 U.S. 706 (1999) (holding that the powers delegated to Congress under Article I of the Constitution do not include the power to subject non-consenting states to private suits for damages in state courts). Writing for the majority, Justice Kennedy grounded the holding in state Sovereign Immunity, as derived from a reading of the Eleventh Amendment in light of the entire body of the U.S. Constitution. *Id.* Consider what might happen to Sovereign Immunity if Congress were to use its spending powers to "encourage" the states to abrogate it.

[150] *See supra* notes 117 and 118.

concluding that the only strings Congress may attach to federal money are those assuring that the money is spent on the federally specified program Congress has decided to fund.[151]

* * *

Like the Commerce Clause, the Spending Clause is of questionable assistance to those who would sanction congressional interference with state recognition of gay marriage. The Spending Clause provides a viable means of federalizing marriage only if the Court is willing to sacrifice the substance of the New Federalism. The opponent of gay marriage cannot have both a federalized definition of marriage and a coherent New Federalist judicial philosophy protecting the states from federal encroachment; he must choose one or the other. Should he choose the former, the grand project of the New Federalism is lost.

This leaves a final, seemingly paradoxical legal theory upon which Congress might premise an attempted ban on gay marriage in the states: through exercising its enforcement powers under the Fourteenth Amendment.

VI. CONGRESSIONAL AUTHORITY TO ENFORCE THE FOURTEENTH AMENDMENT

At first blush, it would seem odd to suggest that Congress might exercise its enforcement powers under the Fourteenth Amendment to *ban* gay marriage. Congress is empowered to act under this amendment only to remedy state violations of citizens' constitutional liberties and equal protection, e.g., the states' treating one group of citizens differently than others, to that group's detriment.[152] If anything, it would seem that gays and lesbians would have a Fourteenth Amendment claim against the states' *denial* of gay marriage because the states treat them differently than heterosexuals. Whether such a claim is likely to prevail is not the subject of this paper. Rather, the

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[151] South Dakota v. Dole, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting) ("Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent.").

[152] *See supra* note 58.

question is whether there is any argument for inverting the Fourteenth Amendment to work contrary to the principals it is traditionally associated with, namely to be used against the states' recognition of gay marriage. What might such an argument look like?

One possibility is as follows: Congress might attempt to bar state officials from issuing marriage licenses to gay couples, out of a desire to protect children from the supposed "harms" that gay marriage inflicts upon them. The argument would be the inverse of that made by the *Goodridge* majority, i.e., that allowing gays and lesbians to marry is harmful rather than helpful to children's interests. [153] Such an argument might rest on one of two popular prejudices: (1) the claim that children generally are somehow made worse off by the presence and visibility of gay marriages in society; or (2) the claim that a particular group of children is made worse off than the rest of society, namely, those children who are reared by gay and lesbian parents.

The latter argument might come in numerous possible variations: as a claim that gay and lesbian parents, unlike their heterosexual counterparts, are incapable of rearing children in the proper or ideal fashion, or as a claim that gay or lesbian parents' sexual orientation might impact the sexual orientation of the children they rear (the underlying premise being that homosexuality in itself is undesirable). Under this reasoning, a state that grants gay marriage licenses would be contributing to the "harm" that children suffer by increasing the visibility of homosexuality in society, or by increasing the number of children who will be raised in gay households. Congress would be right to act, so the argument goes, to protect children from gay marriage. It may do so by enacting a nationwide ban under

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[153] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003).

> [T]he State provides a cornucopia of substantial benefits to married parents and their children . . . [Gays and lesbians constitute] an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.

Id.

the enforcement powers granted by section 5 of the Fourteenth Amendment.

The idea that homosexuality is harmful to children is a familiar one. It is fairly common not only in the press and in popular culture,[154] but also in the minds of some legal scholars[155] and judges.[156] Consider, for instance, the New Hampshire Supreme Court's 1987 *per curiam* opinion, *In re Opinion of the Justices*,[157] decided when Justice David Souter was sitting on that court. The New Hampshire Supreme Court

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[154] *See, e.g.*, Frank Bruni, *Vatican Exhorts Legislators to Reject Same-Sex Unions*, N.Y. TIMES Late Edition, Aug. 1, 2003, at A1; Bruce Fein, *The Case Against Same-Sex Marriage; Children Need Nurturing Only Traditional Family Can Provide*, FULTON COUNTY DAILY REP., June 19, 1996; *see also supra* note 6 (the legislative history underlying the Defense of Marriage Act of 1996). Senator Faircloth of North Carolina argued that "same-sex unions do not make strong families." 142 CONG. REC. S10117 (daily ed. Sept. 10, 1996) (statement of Sen. Faircloth). Senator Byrd of West Virginia stated, "if same-sex marriage is accepted . . . America will have said that children do not need a mother and a father, two mothers or two fathers will be just as good. This would be a catastrophe." *Id.* at S10111 (statement of Sen. Byrd).

[155] *See, e.g.*, Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 847 (1997). "Children raised by homosexual couples do not have both a father and a mother. If Heather is being raised by two mommies only, she is being deprived of the experience of being raised by a daddy. Both the common experience of humanity and recent research suggest that a daddy and a mommy together provide by far the best environment in which a child may be reared." *Id. See also* George W. Dent, *The Defense of Traditional Marriage*, 15 J.L. & POL. 581 (1999); Mary Ann Glendon, *For Better or for Worse? The federal marriage amendment would strike a blow for freedom*, WALL ST. J. Feb. 25, 2004, at A14.

[156] For instance, see the majority opinions of the Washington State and New York State high courts rejecting state constitutional challenges to prohibitions against gay marriage. In Hernandez v. Robles, No. 05239, 2006 WL 1835429 (N.Y. July 7, 2006), the New York Court of Appeals held that the New York legislature could rationally conclude on the common-sense premise that children will do best with a mother and father in the home, *id.* at 7-8, despite a showing that there "is no scientific evidence to support" this view, *id.* at 7. Likewise, the Washington State Supreme Court held in *Andersen v. King County*, that "the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive." 138 P.3d 963, 983 (Wash. 2006).

[157] 129 N.H. 290 (N.H. 1987) (*per curiam*).

upheld the constitutionality of a proposed state bill[158] banning gay and lesbian adoption and foster parentage. The court upheld the bans on the basis that they were rationally related to a purpose of the bill, "to provide appropriate role models for children."[159] The court grounded its reasoning in the "theory of learned sexual preference,"[160] i.e., the idea that a parent's sexual orientation might influence that of his or her children. The unspoken assumption, of course, is that homosexuality is an evil that the state has a legitimate interest in eradicating.

In reality, homosexuality's purported harm to children appears to be mythical. Substantial evidence demonstrates that gay parenting has no ill effects on children, and a parent's sexual orientation has no impact on that of his or her child.[161] Still,

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[158] New Hampshire's House Bill 70 was drafted to prohibit gays and lesbians from being foster parents, adoptive parents, or child care agency operators by amending relevant state statutes to "preclude homosexual persons from adopting any individual," and to "exclude from the category of appropriate adoptive families those foster families in which one or more of the adults is a homosexual." *In re Justices*, 129 N.H. at 294 (internal citations omitted). The court held that the statute passed constitutional muster with respect to its ban on gay adoption and foster parentage, but failed with respect to childcare agency operation. *Id.* at 296.

[159] *Id*. at 296.

[160] *Id.* at 297.

> [I]t is in those living situations approximating a familial or parent-child arrangement that the role model theory provides a rational basis on which to exclude homosexuals as defined by the resolution from participation therein, because it is in the familial context that the theory of learned sexual preference is most likely to be true.

Id.

[161] *See generally* Carlos A. Ball and Janice S. Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998). *See also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962-63 (Mass. 2003) (citing social science studies indicating that "[p]rotecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy"); *In re Justices*, 129 N.H. at 301 (Batchelder, J., dissenting) ("[T]he overwhelming weight of professional study on the subject concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children of homosexual parents."). *See also* Brad Sears and Alan Hirsch, *Straight-Out Truth on Gay Parents*, L.A. TIMES, Apr. 4, 2004, (citing several recent studies by the American Academy of

these facts may not suffice to undermine Congress's attempted ban of gay marriage under section 5 of the Fourteenth Amendment. First, the empirical facts might not convince Congress that the supposed "harms" of gay parenting are illusory. Proponents of DOMA, for example, frequently stated the bill was meant to protect children, since only heterosexual marriage establishes the "best environment" for children "to grow and learn."[162] It would be far from unimaginable for Congress to assault gay marriage under the guise of protecting children through its Fourteenth Amendment enforcement powers.

Second, should Congress make legislative findings that homosexuality does indeed harm children, it is unclear that the Supreme Court would dismiss these findings out of hand, even in the face of contrary evidence. While the Court has at times second-guessed Congress's legislative findings of Fourteenth Amendment violations by the states,[163] the Court has also stated that Congress's judgment regarding section 5 legislation is to be treated with some deference.[164] The Court might exhibit particular deference in the case of gay marriage's potential harm to children.[165] Chief Justice Rehnquist once compared homosexuality on college campuses to the spread of infectious

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Pediatrics confirming that children are not harmed when raised by same-sex couples).

[162] 142 CONG. REC. H7493 (daily ed. July 12, 1996) (statement of Rep. Weldon).

[163] *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 369-73 (2001) (questioning Congress's legislative finding of discrimination against the disabled in the context of the Americans with Disabilities Act of 1990).

[164] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997). "It is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* (quoting Katzenbach v. Morgan, 384 U.S. 641 (1966)).

[165] The high courts of New York State and Washington State recognized similar grounds for showing deference to their respective state legislatures in rejecting state constitutional challenges to prohibitions against gay marriage. *See supra* note 156.

disease,[166] opining that the "danger" of homosexuality's spreading may be particularly acute in the young.[167] Likewise, the current Supreme Court might err on the side of caution by deferring to Congress when young children's sexuality is at stake.

Third, the State Action doctrine will not present much of an obstacle for a section 5 ban on gay marriage. Though section 5 legislation is limited to remedying Fourteenth Amendment violations perpetrated by state rather than private actors,[168] Congress might fashion a bill barring state clerks from granting marriage licenses to gay couples. Finally, a lawyer defending

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[166] In 1978, the Supreme Court denied certiorari to an Eighth Circuit ruling in Gay Lib v. Univ. of Missouri, 558 F.2d 848, 857 (8th Cir. 1977) that the University of Missouri violated the First Amendment by curtailing the meeting of a gay student organization. Ratchford v. Gay Lib, 434 U.S. 1080 (1978) (denial of certiorari). Justices Rehnquist and Blackmun dissented from the Court's denial of certiorari, arguing that from the University's point of view, the question was not one of individual rights under the First Amendment, but a question of the State's police power to prevent homosexuality (and the then-illegal practice of same-sex sodomy) from spreading at the gay student club's meetings. *Id.* at 1082-84 (Rehnquist, J., dissenting, joined by Blackmun, J.). Justice Rehnquist wrote:

> From the point of view of the University, however, the question is more akin to whether those suffering from the measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.

Id. at 1084 (Rehnquist, J., dissenting).

[167] *See Ratchford*, 434 U.S. at 1083 (Rehnquist, J., dissenting). "[T]his danger may be particularly acute in the university setting where many students are still coping with sexual problems which accompany late adolescence and early adulthood." *Id.*

[168] United States v. Morrison, 529 U.S. 598, 626-27 (2000).

> [The statute in question] is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at [private] individuals . . . For these reasons, we conclude that Congress's power under § 5 does not extend to the enactment of [the statute].

Id.

Congress's right to enact such legislation under the Fourteenth Amendment might argue that some Supreme Court opinions seem to apply an implicit form of heightened scrutiny when children's rights are at stake, e.g., *Plyler v. Doe*.[169]

These considerations would appear to bode well for a congressional ban on gay marriage through section 5 legislation. Once again, however, the doctrines of the New Federalism present significant difficulties. A recent line of Supreme Court opinions has constrained Congress's powers to enforce the Fourteenth Amendment. The newly-fashioned limits on Congress's section 5 powers suggest that Congress may not employ these powers to ban gay marriage in an effort to protect children, whether that effort is honest and worthy or ill-conceived.

In short, the Rehnquist Court's jurisprudence placed two relevant obstacles in the path of section 5 legislation. First, the harm targeted by section 5 legislation must be of the type for which the Fourteenth Amendment contemplates legislative remedy.[170] The scope of the Fourteenth Amendment, moreover, may be defined only by Supreme Court jurisprudence, not by Congress. Second, any legislation purporting to remedy a Fourteenth Amendment violation must be congruent and proportional to the targeted harm.

Consider the first obstacle. The Court has stated clearly that Congress's Fourteenth Amendment powers are limited to *enforcing* the Amendment; it has no power to *define the substance* of the amendment's restrictions on the states. As Justice Kennedy stated in his 1997 plurality opinion in *City of Boerne v. Flores*,[171]

> there is no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment. Congress's power under

[169] 457 U.S. 202 (1981) (holding that the Texas legislature's denial of public education to the children of illegal aliens violated the Equal Protection Clause).

[170] *See supra* note 168 (Congress's § 5 power does not extend to private individuals).

[171] 521 U.S. 507 (1997).

> [section] 5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment . . . The design of the Amendment and the text of [section] 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.[172]

City of Boerne involved the Religious Freedom Restoration Act of 1993 (RFRA).[173] Congress had enacted RFRA in direct response to the Court's decision in *Employment Div. v. Smith*,[174] a First Amendment case that overruled a longstanding Free Exercise principle: that absent compelling state interests, facially neutral rules may not be applied to impose substantial burdens on the free exercise of religion.[175] RFRA's supporters claimed that Congress was authorized to enact the legislation under its section 5 powers to protect citizens' right to free exercise of religion. In effect, Congress hoped to effectively overrule *Smith* by reinstating the prior understanding of the Free Exercise Clause.[176] In response, the Supreme Court held that section 5 does not empower Congress to "enforce a constitutional right by changing what the right is;"[177] this power is reserved to the Supreme Court itself.[178] Congress therefore cannot remedy harms that are beyond the scope of settled Supreme Court interpretations of the Fourteenth Amendment's substance.

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[172] *Id.* at 519 (quoting United States v. Price, 383 U.S. 787, 789 (1966) (internal citations omitted)).

[173] 07 Stat. 1488, 42 U.S.C. § 2000(bb) *et seq.* (1993).

[174] 494 U.S. 872 (1990).

[175] *Id.* at 886-87.

[176] *City of Boerne*, 521 U.S. at 515-16 ("RFRA prohibits government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." (internal citations omitted)).

[177] *Id.* at 519.

[178] *Id.* at 529.

It is far from clear that the Supreme Court would find the "harm" gay couples inflict on children to be of a type for which the Fourteenth Amendment contemplates legislative remedy. Were Congress to ban gay marriage under the theory of protecting children's Fourteenth Amendment rights, the courts might view Congress as endeavoring to expand those rights beyond the limits set by the Supreme Court. The courts might be especially skeptical of attempted section 5 legislation because "family law (including marriage, divorce, and child custody)" is a matter of exclusive state concern and beyond federal regulation.[179] A ban on gay marriage to contain homosexuality's purported ill effects would seem to rest not on Congress's valid exercise of its section 5 powers, but on a desire to impinge on an area of law traditionally belonging to the states. A ban on gay marriage under section 5 legislation would therefore likely run afoul of the Court's pronouncement in *City of Boerne*: that Congress cannot remedy harms beyond the Court's reading of the Fourteenth Amendment's scope.[180]

Even if such a ban on gay marriage were to overcome this first jurisprudential obstacle, yet another lies in its path: any remedy of state violations under the Fourteenth Amendment must pass a "proportionality and congruence" test as stated in *City of Boerne*: "[t]here must be a proportionality and congruence between" Congress's enforcement measures and the underlying Fourteenth Amendment violation that Congress seeks to remedy.[181] The *City of Boerne* Court held that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."[182] Because the New Federalist limits on Congress's section 5

[179] United States v. Lopez, 514 U.S. 549 (1995). *See also supra* notes 8-16, discussing both Congress and the Supreme Court's treatment of issues of family law as issues outside the sphere of federal law.

[180] *See supra* note 172.

[181] *City of Boerne*, 521 U.S. at 520.

[182] *Id.* at 532.

enforcement powers remain the law to date,[183] any Congressional interference with gay marriage under section 5 for the purpose of protecting children must meet the proportionality and congruence requirement.

What exactly does it mean for legislative remedies to be "congruent and proportional" to the targeted Fourteenth Amendment violation? This question touches upon an evolving area of law. It is difficult today to discern any clear and coherent set of principles from the Supreme Court's treatment of the issue.[184] While the Supreme Court is still in the process of resolving this question, however, some patterns emerge from some of its recent opinions. First, it would seem that the Court is more likely to bless section 5 legislation when the Court has applied heightened scrutiny in cases involving the targeted Fourteenth Amendment violation. Second, Congress must show a pattern of widespread and unconstitutional abuse of Fourteenth Amendment rights by the states. Moreover, the Court's standard of review for legislative findings of such patterns is only superficially deferential.

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[183] Lest it be thought that the *per curiam* opinion in *City of Boerne* was a mere anomaly spurred by Congress's attempt to flout the Supreme Court's ruling in *Smith*, note that the Court reiterated the *City of Boerne* holding three years later in United States v. Morrison, 529 U.S. 598 (2000). The petitioners in *Morrison* claimed that Congress derived the authority to enact the Violence Against Women Act (*supra* note 96) not only under its Commerce Clause powers (discussed in Part IV, *supra*), but also under its section 5 enforcement powers. 529 U.S. at 619.

[184] *See, e.g.*, K. G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 646-47 (2002) (internal citations omitted):

> No congressional enforcement legislation that has come up for the Court's consideration since *City of Boerne* has survived the congruence and proportionality test. Instead of functioning as predicted, as a tool to aid the line-drawing, the test has become an impenetrable wall that separates Congress from the claimed province of the judiciary. The test is 'inherently vague' and is 'clothed with all the menace of an essentially arbitrary standard.' Even though the lethality of the test to the enforcement powers of Congress has been amply demonstrated, the Court has neither defined the precise meaning and parameters of the test nor cared to tell Congress the exact degree of congruence and proportionality that is constitutionally required to sustain an enforcement legislation.

Id.

To illustrate this first point, contrast the Court's holdings in two recent cases: *Nev. Dept. of Human Res. v. Hibbs*[185] and *Board of Trustees v. Garrett*.[186] *Hibbs* involved a suit against the Nevada Department of Human Resources under the Family and Medical Leave Act of 1993 (FMLA), a federal statute guaranteeing certain categories of employees twelve weeks of sick leave to care for family members' health.[187] William Hibbs, an employee of the Nevada Department of Human Resources, exhausted his twelve-week's sick leave to care for his ailing wife. He sued the Department after being fired for failing to return to work.[188] The FMLA's validity as an exercise of Congress's section 5 powers arose as an issue in litigation.[189] Hibbs argued that the FMLA was a proper exercise of those powers, since Congress enacted the legislation to remedy a particular Fourteenth Amendment harm: gender stereotypes about the allocation of family duties and the resulting gender discrimination in employers' leave policies.[190]

The Supreme Court, speaking through Chief Justice Rehnquist, held that the FMLA was a congruent and proportional response to the formerly state-sanctioned stereotype that only women were responsible for family care-giving. In so holding, the Court stressed that statutory classifications distinguishing males from females are subject to heightened scrutiny.[191] The Court emphasized that through enacting the FMLA, Congress sought to "minimize[ ] the

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[185] 538 U.S. 721 (2003).

[186] 531 U.S. 356 (2001).

[187] 29 U.S.C.S. § 2601 *et. seq.* (1993), entitling some private and public employees to unpaid leave of up to 12 workweeks per 12-month period to care for a family member who had a serious health condition (§ 2612(a)(1)(C)), and to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction" (§ 2617(a)(2)).

[188] *Hibbs*, 538 U.S. at 725.

[189] *Id.* The United States Government intervened in the case to defend Congress's authority to enact FMLA.

[190] *Id.* at 728-30.

[191] *Hibbs*, 538 U.S at 728 (citing Craig v. Boren, 429 U.S. 190 (1976)).

potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available . . . *on a gender-neutral basis*[,] and to promote the goal of equal employment opportunity *for women and men*."[192] Because gender distinctions are subject to heightened rather than rational basis scrutiny, it is easier for Congress to achieve proportionality and congruence in its Fourteenth Amendment remedial legislation.

Garrett, on the other hand, involved legislation aimed at discrimination on the basis of disability, a distinction subject only to rational basis scrutiny.[193] *Garrett* involved a suit against the University of Alabama for failure to comply with the Americans with Disabilities Act of 1990,[194] prohibiting employers from discriminating on the basis of disability.[195] The Supreme Court found that Congress's application of the ADA to the states under its section 5 powers failed to meet the requirement of proportionality and congruence.[196]

Writing for the majority, Chief Justice Rehnquist grounded this conclusion partly on the basis of the Court's rejection of heightened scrutiny for distinctions based upon disability. "States are not required by the Fourteenth Amendment to make special accommodations for the disabled," wrote the Chief Justice, "so long as their actions towards such individuals are rational."[197] This being the case, Congress must identify "a history and pattern of unconstitutional employment discrimination by the States against the disabled."[198] Even given such a finding, "the rights and remedies created by the ADA against the States would raise the same sort of concerns as

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[192] *Id.* at 728, n. 2 (quoting 29 U.S.C.S. §§ 2601(b)(4), (5)) (emphasis supplied by the Court).

[193] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001).

[194] 42 U.S.C.S. §§ 12111-12117 (1990).

[195] *Garrett*, 531 U.S. at 362.

[196] *Id.* at 374.

[197] *Id.* at 367.

[198] *Id.* at 368.

to congruence and proportionality as were found in *City of Boerne*."[199]

As *City of Boerne* and *Garrett* illustrate, the Supreme Court is less likely to uphold section 5 legislation when the Court has not previously applied heightened scrutiny to discrimination against the group Congress aims to protect. This does not bode well for a section 5 ban on gay marriage aimed at protecting children from the "harms" of homosexuality. Children are a group defined by their age.

The Court has stated clearly, however, that distinctions based upon age merit not heightened scrutiny, but rational scrutiny. Thus, in *Kimel v. Florida Board of Regents*,[200] the Supreme Court rejected Congress's attempted exercise of its section 5 enforcement powers to prevent employment discrimination on the basis of age. The petitioners in *Kimel* had filed suit against the state for age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA),[201] which prohibits employment discrimination on the basis of age against individuals age forty and over. Writing for the majority, Chief Justice Rehnquist held that the ADEA was an invalid exercise of Congress's section 5 powers.[202] Again the Chief Justice cited a lack of evidence of widespread and unconstitutional discrimination by the states.[203] He found a lack of proportionality and congruence because "age is not a suspect classification under the Equal Protection Clause."[204]

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[199] *Id.* at 372 (noting the following rational basis for the state's discrimination against the disabled: "[I]t would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities.").

[200] 528 U.S. 62 (2000).

[201] 29 U.S.C.S. § 621 *et. seq.* (making it unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age).

[202] *Kimel*, 528 U.S. at 83.

[203] *Id.* at 90-91.

[204] *Id.* at 83 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991), Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (*per curiam*), and Vance v. Bradley, 440 U.S. 93 (1979)).

The Court underscored this latter point in *Hibbs*, upholding a finding of proportionality and congruence in a case of gender discrimination violation on the ground that gender distinctions, unlike age or disability distinctions, are subject to heightened scrutiny: "In [*Garrett* and *Kimel*], the [section] 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard."[205]

One might object to the analysis above on the grounds that *Kimel* addressed age-based discrimination directed towards individuals over the age of forty.[206] The Court might easily distinguish *Kimel* by noting that the remedial legislation at issue targeted harms suffered by adults, not children. The Court very well may look differently upon state actions that violate children's Fourteenth Amendment rights. Were it to do so, it might apply a more relaxed test for proportionality and congruence to section 5 legislation banning gay marriage than it did to the legislation in *Kimel*.

The Court's proportionality and congruence jurisprudence is recent and still evolving.[207] That said, the aforementioned cases provide three important lessons about the likely direction of the Supreme Court's Fourteenth Amendment jurisprudence. First, the Court is harsher in its treatment of legislation involving classifications to which it has not already applied heightened scrutiny. Second, the *Kimel* Court made no distinction between age-based distinctions in section 5 legislation involving adults and distinctions involving children when it declared that "age is not a suspect classification."[208] Third, the Supreme Court has, of late, exhibited reluctance when asked to apply heightened scrutiny to additional categories.[209] Taken together, these

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[205] Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003).

[206] *Kimel*, 528 U.S. at 70.

[207] *See* Pillai, *supra* note 184.

[208] *Kimel*, 528 U.S. at 83.

[209] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (applying rational basis scrutiny to categorizations based upon homosexuality); City of Cleburne v.

indications weigh against the possibility that section 5 legislation protecting children from the "harm" of gay marriage will meet the Court's proportionality and congruence test.

Moreover, lack of heightened scrutiny for age-based distinctions is not the only factor weighing against a finding of congruence and proportionality for section 5 legislation targeting gay marriage. The Supreme Court has also indicated that the targeted Fourteenth Amendment violations must be part of a "pattern"[210] that is "widespread and persisting"[211] among the states. It seems that a Fourteenth Amendment violation by a single state will not do. In *Kimel*, for instance, the Court faulted Congress for failure to uncover a "significant pattern of unconstitutional discrimination"[212] on the basis of age. Indeed, Justice Scalia would go to the ultimate extreme of holding that *every* state to which prophylactic section 5 legislation applies must be a Fourteenth Amendment offender. Under his analysis, a Fourteenth Amendment offense by one, two, or even forty-nine states does not justify generally applicable section 5 legislation, since "[t]here is no guilt by association."[213]

Cleburne Living Center, 473 U.S. 472 (1985) (holding that the mentally handicapped are not a quasi-suspect class); *Kimel*, 528 U.S. 62 (2000) (rejecting heightened scrutiny for distinctions based upon age.)

[210] Fla. Prepaid Postsecondary Educ. Expense Bd. v. College. Sav. Bank, 527 U.S. 627 (1999) (striking down the Patent Remedy Act for failure to identify a "pattern of patent infringement by the States" or "widespread and persisting deprivation of constitutional rights.").

[211] City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[212] *Kimel*, 528 U.S. at 91.

[213] Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting) ("The constitutional violation that is a prerequisite to 'prophylactic' congressional action to 'enforce' the *Fourteenth Amendment* is a violation *by the State against which the enforcement action is taken.* There is no guilt by association, enabling the sovereignty of one State to be abridged under *§ 5 of the Fourteenth Amendment* because of violations by another State, or by most other States, or even by 49 other States. Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the *Voting Rights Act of 1965*—which we upheld in *City of Rome v. United States*, as a valid exercise of congressional power under *§ 2 of the Fifteenth Amendment*—were restricted to States 'with a demonstrable

Because there is no widespread or persisting pattern of gay marriage in the states, there can be no widespread or persisting violation of children's rights under the Fourteenth Amendment sufficient to justify section 5 legislation banning gay marriage. Massachusetts appears to be the only state presently prepared to recognize gay marriage,[214] while it remains doubtful that gay marriages officiated in Massachusetts will be recognized in other states.[215] Even if a number of localities among several states were to grant gay marriage licenses, this would appear to be of little relevance to an inquiry into the extent of the states' purported Fourteenth Amendment violations. The Rehnquist Court requires that Congress show widespread violations by the states, not their subdivisions. In *Garrett*, the Chief Justice discarded evidence of discrimination against the disabled by local governments or society in general, ultimately finding that only "half a dozen examples from the record that did involve States"[216] simply failed to establish "a pattern of irrational state discrimination in employment against the disabled."[217] There can be no widespread and persistent violation of children's rights through the recognition of gay marriage if Massachusetts is a "lone offender." A blanket ban on gay marriage under section 5 would therefore fail the proportionality and congruence test.

Furthermore, although the Court in *City of Boerne* stated that Congress's legislative findings of patterns of Fourteenth Amendment violations will be treated with deference,[218] such deference appears to be superficial at best. The Court in *Garrett* and *Kimel*, for instance, examined the legislative record carefully to determine whether there was a factual basis to

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history of intentional racial discrimination in voting.'") (internal citations omitted; emphasis in the original).

[214] *See supra* note 1; *but see supra* note 4 (discussing advent of New Jersey's ruling in *Lewis v. Harris*, 908 A. 2d 196 (N.J. 2006)).

[215] *See* discussion of DOMA and Full Faith and Credit, *supra* at Part II.

[216] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 369 (2001).

[217] *Id.* at 368.

[218] 521 U.S. at 536.

support Congress's remedial measures for purported violations of the Fourteenth Amendment. Finding none, the Court refused to uphold the remedial measures under the congruence and proportionality test.[219] The Court is therefore less likely to find that a section 5 ban on gay marriage meets the proportionality and congruence test, given the dubious nature of the evidence that gay marriage inflicts harm upon children.[220]

As a result of the New Federalism's limits on Congress's section 5 powers, any attempt to protect children from the "harm" of gay marriage through section 5 legislation seems condemned on two counts. First, such legislation might violate *City of Boerne* by targeting harms that possibly lie beyond the scope of the Fourteenth Amendment as defined in Supreme Court precedent. Second, such legislation runs afoul of the congruence and proportionality requirement outlined in *City of Boerne*, *Hibbs*, *Garrett*, and *Kimel*. The Court is unlikely to find a legislative remedy to be congruent and proportional to Fourteenth Amendment violations against children because (1) age-based distinctions are not subject to heightened scrutiny, and (2) there is an absence of widespread and significant "abuse" by the states if only one or a handful of states should recognize gay marriage. This last objection applies to legislation aimed at all states generally; admittedly, it might be inapplicable to section 5 legislation aimed at a single state or group of states that recognize gay marriage.[221] Any legislation of the latter sort, however, would remain open to each of the previous objections outlined above.

Lastly, it is important to note that the Supreme Court's willingness to provide greater protection for children exists in tension with the scrutiny it has increasingly applied to government-sponsored classifications based upon homosexuality. The Supreme Court's downplaying of First

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[219] *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[220] *See supra* note 161.

[221] *See* Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting) (hinting that section 5 legislation targeted only at offending states might pass muster under the congruence and proportionality test).

Amendment claims in the context of child pornography,[222] for example, is illustrative of the Court's special concern for reshaping the law to protect children. In recent years, however, the Court has also indicated greater willingness to protect the rights of gays and lesbians against targeted treatment by the government. Consider, for instance, the Court's decision in *Lawrence*, stating that the "Court's obligation is to define the liberty of all," [223] or its decision in *Romer*,[224] striking down state legislation targeting gay rights on Equal Protection grounds under a seemingly strong version of rational basis scrutiny, because the legislation was improperly "born of animosity toward the class of persons affected." It remains unclear how the Court will eventually resolve the apparent tension between its treatment of children and its treatment of gays and lesbians. Should this tension be resolved in favor of greater protection for gays and lesbians, Congress's power to target gay marriage under the Fourteenth Amendment might be constrained considerably. In other words, the extension of heightened scrutiny to classifications based on sexuality would likely have a spillover effect on Congress's power to regulate gay marriage under the Commerce and Spending Clauses.

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The evolution of the New Federalism's constraints on congressional powers has placed significant restrictions on Congress's ability to pass legislation banning gay marriage under section 5. Ironically, a more liberal reading of section 5 would have promoted the opposite result. Under Justice Breyer's reading of section 5 in his dissent in *Garrett*, remedial legislation is inappropriate only if it "has no tend[ency]" to remedy or prevent any Fourteenth Amendment violation, or is

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[222] *See, e.g.,* New York v. Ferber, 458 U.S. 747 (1982) (holding that the advertisement and sale of child pornography, even though not obscene, receives no First Amendment protection).

[223] Lawrence v. Texas, 539 U.S. 558, 559 (2003) ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code." (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 835 (1992))).

[224] Romer v. Evans, 517 U.S. 620, 634 (1996).

an "irrational way" to do so.[225] Under this reasoning, any legislation that has a rationally conceivable tendency to protect children from Fourteenth Amendment violations would pass muster under section 5, including legislation aimed at protecting children from the "harm" of gay marriage. From the standpoint of those who oppose the states' right to recognize gay marriage, it is of no small consequence that the Rehnquist Court aggressively circumscribed Congress's section 5 enforcement powers.

VII. CONCLUSION

The doctrinal shifts effected by the New Federalism have severely curtailed Congress's powers to regulate the states. Over the last two decades, the Rehnquist Court consciously whittled away congressional authority such that today it is all but impossible to enact statutory legislation interfering with the states' treatment of marriage. The era of *Cleveland v. Douglas*, with its broad potential authority for Congress to command the states' treatment of marriage through direct and indirect means, is over. Neither the Commerce Clause, nor the Spending Clause, nor section 5 of the Fourteenth Amendment affords Congress any recourse to prevent the states from recognizing gay and lesbian couples as legal equals to their married heterosexual peers. Only the severe and unusual method of constitutional amendment can impair a state's ability to recognize gay marriage. It is perhaps the ultimate irony that this state of affairs results from changes in constitutional jurisprudence brought about by the New Federalism, a philosophy most passionately advocated by opponents of gay and lesbian rights.[226]

Principle often yields to expediency and sadly for the supporters of gay and lesbian equality, this may be the case with the New Federalism. Congressman Barney Frank explained this point in partisan terms during the debate over DOMA: "I do not think there is any principle I have ever seen more frequently

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[225] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 376-77, 385-86 (2001) (Breyer, J., dissenting).

[226] *See supra* note 7.

enunciated and less frequently followed than states' rights from the Republicans. What they mean is that the states will do whatever they tell them to do."[227] Congressman Frank's assessment has turned out frequently to be correct. Neither legislators nor judges seem to practice strict obedience to the principles of the New Federalism. [228] There are indications, for instance, that the lower courts are ignoring the Supreme Court's strictures in *Lopez*.[229]

Whatever the case, one truth remains clear: if Congress is to frustrate gay marriage in the states, it may do so only by demolishing some part of the imposing and meticulously crafted edifice of the Rehnquist Court's New Federalism. Any court confronted with federal legislation purporting to meddle in the states' treatment of gay marriage must choose either to bend to Congress's will or to uphold the Constitution as interpreted in Supreme Court precedent. A choice to do the former might seem justified to those jurists predisposed to view the advent of gay rights as a harbinger of moral decline and social decay. Such a choice would come at a significant cost, however. An incident of the New Federalism's imposition of judicially-enforced limits on Congress's legislative powers is the expansion of the Court's power at Congress's expense. A choice to capitulate to Congress's will would strike a bargain that the Supreme Court is all too likely to regard as Faustian.

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[227] 142 CONG. REC. H7483 (daily ed. July 12, 1996) (statement by Congressman Frank during the debate on the Defense of Marriage Act of 1996).

[228] *See supra* note 7.

[229] *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003) ("There is evidence from the lower courts' opinions that they are still reluctant to take *Lopez* seriously[.]"); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 370 (2000) (In the courts of appeals, "the impact of *Lopez* has been limited, to say the least.").